

Reconceptualising Specialist Environment Courts and Tribunals

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Abstract

Specialist environment courts and tribunals (SECs) are, in the main, reflective of highly dynamic forms of adjudication, mixing judicial forms with powers more traditionally found in the executive. However, despite their novel legal nature the literature on SECs is predominantly promotional and it fails to address the challenges to legitimacy and governance engendered by these institutions. Nor does it evince a robust theory of environmental adjudication. These omissions not only impoverish the discourse but practice unsupported by theory is creating an unstable edifice. To illustrate this point the difficulties experienced in New Zealand are examined. The argument is made that only by confronting the challenges created by SECs can we begin to lay the foundations for a new theoretical model capable of explaining and accommodating environmental adjudication.

[A] Introduction

Many nations create ‘species of adjudication’¹ that impact upon social ordering.

Specialised courts and tribunals have been created to adjudicate disputes

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ranging from employment, immigration, welfare-benefits and mental health to competition laws, and to manage anti-social behaviour such as drug or therapeutic courts.² A flourishing socio-legal approach to understanding these bodies has emerged³ but specialised forms of adjudication have had 'little impact on mainstream public law scholarship',⁴ and given their impact upon traditional conceptions of the law-state⁵ this is surprising.

¹ Peter Cane, *Administrative Tribunals and Adjudication* (Hart 2010), 47-48.

² For an overview see e.g. A Leggatt, *Tribunals for Users - One System, One Service* (Department for Constitutional Affairs, 2001) (UK); New Zealand Law Commission, *Delivering Justice for All* (NZLC Wellington, 2004); Administrative Review Council, *Better Decisions: Commonwealth Merits Review Tribunals* (Australian Government Publishing Service, 1995); Robin Creyke (ed) *Tribunals in the Common Law World* (The Federation Press 2008); Kimberly Y W Holst, 'A Good Score? Examining Twenty Years of Drug Courts in the United States and Abroad' (2010) 45 Va U L Rev 73

³ E.g. Hazel Genn, 'Tribunals and Informal Justice' (1993) 56 MLR 393; Michael Adler, 'Tribunal Reform: Proportionate Dispute Resolution and the Pursuit of Administrative Justice' (2006) 69 MLR 958; N Wikeley, 'Burying Bell: Managing the Judicialisation of Social Security Tribunals' (2000) 63 MLR 475; Robert Thomas, 'Evaluating Tribunal Adjudication: Administrative Justice and Asylum Appeals' (2005) 25 LS 462; J Peay, *Tribunals on Trial: A Study of Decision-making under the Mental Health Act 1983* (Clarendon 1989)

⁴ Genevra Richardson and Hazel Genn, 'Tribunals in Transition: Resolution or Adjudication?' [2007] PL 116, 118. Notable exceptions include Cane, *Administrative Tribunals and Adjudication*; Mark Elliot and Robert Thomas, 'Tribunal Justice and Proportionate Dispute Resolution' (2012) 71 CLJ 297; and the literature on Article I – Article III Courts in the US e.g. E Pfander, 'Article I

Environmental adjudication - the subject matter of this article - creates particularly acute challenges for legal theorists because of its inherent nature.⁶ As discussed further in the body of this article, environmental adjudicators are often required to address normative conflicts, make predictive decisions about the future as opposed to fact-finding in relation to the past, allocate risk-burdens, and undertake polycentric decision-making. They are concerned with a wide range of actors and those impacted upon, so transcending traditional bi-party litigation, and they often oversee participatory and consultative processes that have the effect of creating structures for construing the law while simultaneously giving substantive content to the law. Adjudicators may have to draw upon and adapt a mix of substantive public and private law doctrine, undertake 'legislative fact-finding', giving legal meaning to ecological and socio-cultural ontologies, and their interpretative role may impact upon and help to craft policy documents and planning frameworks. Clearly, the complexity of environmental adjudication in and of itself justifies close study, but the need is becoming more pressing.

Tribunals, Article III Courts and the Judicial Power of the United States' (2004) 118 Harv L Rev 645; Thomas E Baker, 'Federal Court Practice and Procedure: A Third Branch Bibliography' (1999) 30 Texas Tech L Rev 909, 1103-1114

⁵ Harry W Arthurs, *Without the Law: Administrative Justice and Legal Pluralism in Nineteenth-Century England* (University of Toronto Press 1985); Richard H Fallon, 'Of Legislative Courts, Administrative Agencies, and Article III' (1987-1988) [101] Harv L Rev 916

⁶ See text accompanying n182-218

Latterly, there has been a huge increase in the number of specialist environment courts and tribunals (SECs) around the world and by corollary, references in the associated literature.⁷ This body of literature notes that SECs are unusual and highly complex legal institutions, representative of modern, dynamic forms of adjudication, and they often have powers that we might not expect to find in courts. Many mix judicial forms and functions with powers more traditionally found in the executive branch of government, having the authority to prospectively review proposed activities and governing environmental issues by permitting the use, despoliation or, alternatively, providing for the conservation of natural resources.⁸ Researchers suggest that SECs might be seen as the ultimate ‘modern courts’⁹ - attempting to determine public benefits while managing impacts on individual rights – and they describe how these bodies are charged with adjudicating disputes that collectively have huge importance for the economic, socio-cultural and environmental well-being

⁷ n 18-38 below

⁸ George Pring and Catherine Pring, *Greening Justice: Creating and Improving Environmental Courts and Tribunals* (World Resources Institute 2009)

⁹ Judith Resnik, ‘Reinventing Courts as Democratic Institutions’ (2014) 143 *Daedalus* 9, 9-10; George Pring and Catherine Pring, ‘Twenty-first century environmental dispute resolution - is there an ‘ECT’ in your future?’ (2015) 33 *J Energy Nat Resources & Envtl L* 10

of nations.¹⁰ As this article explains, one could perceive of SECs as new sites of disaggregated power and governance in the constitutional matrix. But the existing scholarship on SECs fails to address how their novel legal nature and relative power might impact upon wider structures of governance and, in turn, raise difficult issues of legitimacy.¹¹

While environmental adjudication might appear to be a discrete issue with little that could interest the generalist reader, the challenges presented by specialist courts and tribunals are not confined to the environmental sphere. Accordingly, this paper makes two suggestions of more general applicability. The first is that there is a need to make *legal sense* of specialised adjudicatory bodies, creating theories that are fit-for-purpose, and so fostering legal integrity and normative legitimacy. Failing to do so will create problems, as this article demonstrates: there is a clear need to take adjudicative theory seriously. How we do that is, in part, addressed by methodology. Scholars have noted the problem of legitimacy created by adjudicatory pluralism,¹² but they also

¹⁰ E.g. TCPA Appeal Board (forerunner to the NZEnvC) was concerned with matters having 'far reaching effects' greatly exceeding the 'run-of-the-mill business that occupied the Supreme Court day by day', 375 NZPD 3589.

¹¹ Elizabeth Fisher, 'Unpacking the Toolbox: Or Why the Public/Private Divide Is Important in EC Environmental Law' in J B Auby and M Freedland (eds), *The Public Law/Private Law Divide: une entente assez cordiale* (L G D J Diffuseur 2004), 240

¹² Ranging from WA Robson, *Justice and Administrative Law* (2nd edn, Stevens 1947), 328, to Harry W Arthurs, 'Rethinking Administrative Law: A Slightly Dicey Business' (1979) 17 Osgoode Hall L J 1, 42, and Cane, *Administrative Tribunals and Adjudication*, 21

acknowledge the difficulties that hinder the creation of meta-theories or universally constructive critiques caused by the sheer diversity in form, functions and purpose of specialist courts and tribunals.¹³ One solution to this problem – and the second generalist point made by this article - is to focus on subsets of adjudicatory bodies established for specific purposes,¹⁴ paying careful attention to ‘pre-theory building’,¹⁵ an ungainly term but one that accurately captures the necessary process.

In the context of adjudicative theory, pre-theory building scrutinises the *nature* of the specific adjudication undertaken and it evaluates whether there are any inherent features or characteristics of that adjudication that have implications for the form, functions and powers of the adjudicatory body. It assesses existing frames or models that are being employed to make theoretical sense of that adjudication - identifying the internal content of those frames -

¹³ JA Farmer, *Tribunals and Government* (Weidenfeld and Nicolson 1974), 189; Genn, ‘Tribunals and Informal Justice’, 394; RE Wraith and PG Hutchesson, *Administrative Tribunals* (Allen and Unwin 1973), 15; New Zealand Law Commission, *Tribunals in New Zealand* (NZLC Wellington, 2008), 32 ; for the difficulties the whole of the administrative state creates for meta-theorising see Cass Sunstein and Adrian Vermeule, ‘Libertarian Administrative Law’ (2015) 82 U Chi L Rev 393, 471

¹⁴ Cane, *Administrative Tribunals and Adjudication*, 2-3

¹⁵ David Lawrence, ‘The Need for EIA Theory Building’ (1997) 17 Environmental Impact Assessment Review 79, 83

and, if they are failing in their task of ‘simplifying reality’¹⁶ and illuminating our understanding,¹⁷ it analyses where the disjunct lies. Only once that process has been undertaken can we begin to reconceptualise specialist forms of adjudication. Certainly, in the context of adjudicatory pluralism – a phenomenon that without careful attention suggests a messy and inchoate ‘legal’ landscape – the requirement to understand the specific, before we can hope to expand the thinking outwards towards more general analytical jurisprudence is perhaps inevitable.

This article is an exercise in pre-theory building. It begins by mapping the field: traversing the international research on SECs; noting the unusual admix between form and function; providing illustrations of SECs’ dynamic nature; and considering the way in which they have been assessed and critiqued to date. In doing so, it highlights the present theoretical omissions and argues that failing to address the challenges presented by these bodies has led not only to an impoverished discourse but has created real practical difficulties. To illustrate the point, part two explains the problems experienced in one jurisdiction: New Zealand. It introduces the idea that contributors to the debate about the New Zealand Environment Court (‘NZEnvC’) are constructing theories of normative legitimacy attempting to capture, constitute and constrain the legal nature of the Court, and that three main conceptual frames are being used. Part three explores

¹⁶ National Research Council, *Models in Environmental Regulatory Decision Making* (National Academies Press, Washington DC, 2007), 31

¹⁷ Elizabeth Fisher, Pasky Pascual and Wendy Wagner, ‘Understanding Environmental Models in Their Legal and Regulatory Context’ (2010) 22 JEL 251, 266

the first frame, one that views the Court as part of the administrative justice landscape and as evidence of adjudicatory pluralism. The second frame, premised upon generic instrumentalism, is considered in part four. The final frame concerns the separation of powers, which is addressed in part five. By exploring the nature of environmental adjudication, this article suggests that critics are analysing the NZEnvC using conceptual frames that appear ill-suited to the task, and that this approach has threatened the continued existence of the Court and continues to provide a basis for undermining its functions. But it also argues that none of the frames either alone or in conjunction with the others prove adequate for capturing, constituting and appropriately constraining the legal nature of the NZEnvC while preserving its ability to adjudicate environmental disputes.

Fundamentally, the purpose of this article is two-fold. It highlights the challenges created by SECs - challenges that should be taken seriously by nations developing new or expanding the jurisdictional remit of existing SECs - and it argues that we can only begin the ambitious task of developing a new theory for environmental adjudication, one that makes legal sense of these bodies, if we confront the failure of existing frames and conceptions. In concluding, it suggests that any valid theory must acknowledge the necessary relationship and embrace the interaction between the nature of environmental adjudication and the form, functions and powers of environmental adjudicators.

[A] Specialist environment courts and tribunals in the literature

[B] SECs: a taxonomy

The need to address the legitimacy-challenges presented by SECs becomes apparent when one considers their remarkable growth globally in the last decade.¹⁸ There are now approximately 800 SECs in over 42 jurisdictions, which is a two-fold increase in five years.¹⁹ Accordingly many are at a relatively early stage of development. Some of the oldest SECs are found in Australasia:²⁰ some of the newest in India²¹ and China.²² Within other jurisdictions - including the UK - the jurisdiction of relatively embryonic SECs is being expanded iteratively.²³

¹⁸ Nicholas Robinson 'Ensuring Access to Justice Through Environmental Courts' (2012) 29 *Pace Env'tl L Rev* 363, 381

¹⁹ Pring and Pring, 'Twenty-first century environmental dispute resolution - is there an 'ECT' in your future?', 10

²⁰ E.g. Queensland Planning and Environment Court was established in 1965; New South Wales Land and Environment Court (NSWLEC) became a superior court of record in 1979; NZEnvC has existed in a similar form since 1953.

²¹ Gitanjali Nain Gill, 'Environmental Justice in India: The National Green Tribunal and Expert Members' (2016) 5 *TEL* 175

²² Alex L Wang and Jie Gao, 'Environmental Courts and the Development of Environmental Public Interest Litigation in China' (2010) 3 *J Ct Innovation* 37

²³ Richard Macrory, 'The Long and Winding Road—Towards an Environmental Court in England and Wales' (2013) 25 *JEL* 371

Researchers, charting the rise in SECs, have described them as ‘judicial or administrative bodies of government empowered to specialize in resolving environmental, natural resources, land use [planning] development, and related disputes’.²⁴ They exclude from their purview generalist courts that review executive actions for legality or hear appeals on a point of law, employing generic doctrine and operating within ordinary boundaries of civil and common law systems of procedure and evidence. They also exclude policy-making bodies situated within the executive that are solely concerned with rule formation as opposed to dispute resolution. But the remaining spectrum ranges from ‘green chambers’ situated within existing courts (that have been given powers to develop responsive adjudicatory procedures, for example with regards to standing, costs and rules of evidence) to adjudicatory bodies situated within the executive, such as environmental protection authorities. Accordingly, SECs constitute a diverse range of bodies: their modes of creation differ,²⁵ they take varying forms, and they have may have a multiplicity of functions. Critically, their ‘legal nature’ varies. In the present context, legal nature is a three-dimensional concept: it encompasses *what* the Court is (its constitution, powers,

²⁴ Pring and Pring, *Greening Justice: Creating and Improving Environmental Courts and Tribunals*,

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²⁵ They may be created by the Constitution (e.g. Constitution of Kenya Art art 162(2)(b) (2010)), or by special legislation (e.g. Land and Environment Court Act 1979 (NSW)) or by Supreme Courts (e.g. Administrative Order Re: Designation of Special Courts to Hear, Try and Decide Environmental Cases, S.C., No23-2003 (2008) (Phil))

duties, functions and procedures), *why* it was created (its purpose and value) and what its *limits* are (the limits to its powers and jurisdiction).

Clearly it is important to understand the discrete legal culture and legislative regimes that individual SECs work within to capture fully their legal nature. However surveys of SECS across jurisdictions show a clear, dominant trend that is important in two ways. First, the growth of adjudicatory bodies external to and independent from government departments appears to be increasingly popular internationally.²⁶ This phenomenon may be linked to conceptions of impartiality. Noting that environmental disputes often involve the impact of executive actions upon individual rights, commentators argue that impartiality will best be facilitated by independence from government²⁷ or, of equal importance, the public perception of impartiality will be fostered by institutional separation.²⁸ These independent bodies may be described as

²⁶ Pring and Pring, *Greening Justice: Creating and Improving Environmental Courts and Tribunals*, 21-22

²⁷ New Zealand Department of Justice, *The Citizen and Power: Administrative Tribunals* (Government Printer, Wellington, 1965), 10; Brian J Preston, 'Characteristics of Successful Environmental Courts and Tribunals' (2014) 26 JEL 365, 369-372; Sheila Abed de Zavala and others, 'An Institute for Enhancing Effective Environmental Adjudication' (2010) 3 J Ct Innovation 1, 6-8

²⁸ *Gillies (AP) v Secretary of State for Work and Pensions (Scotland)* [2006] 2, [38]; see also Verena Madner, 'The Austrian Environmental Senate' (2010) 3 J Ct Innovation 23, 26; Peter Cane, 'Merits Review and Judicial Review - The ATT as Trojan Horse' (2000) 28 Fed L Rev 213, 218; c.f. *R*

'courts' or 'tribunals' but they take judicial or quasi-judicial forms and are chaired by judges or legally trained members (that may or may not sit with expert lay members).²⁹

Second, many SECs have a comprehensive jurisdiction - for example, they may combine civil powers (deciding ex post facto compensatory disputes) and a criminal jurisdiction with administrative review³⁰ - but an increasing number have the ability to make or review substantive decisions concerning proposed projects, on the merits.³¹ They may take the role of primary decision-makers, permitting or licensing activities, and so using ex ante mechanisms to control environmental harm or regulate access to and the rate of exploitation of natural resources.³² Alternatively, SECs may act as appellate bodies that conduct

(Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions
[2001] UKHL 23

²⁹ E.g. NSWLEC; NZEnvC; Umweltsenat (Austria); Vaasa Administrative Court (Finland); Mark- och miljödomstolar (Sweden); National Green Tribunal (India)

³⁰ Pring and Pring, *Greening Justice: Creating and Improving Environmental Courts and Tribunals*, 85

³¹ n 36-37 below

³² Pring and Pring, *Greening Justice: Creating and Improving Environmental Courts and Tribunals*, 26; Brian J Preston, 'Benefits of Judicial Specialization in Environmental Law: The Land and Environment Court of New South Wales as a Case Study' (2011-2012) 29 *Pace Env'tl L Rev* 396, 401-402

substantive merits review (i.e. having the power to remake the original merits decision in various ways) or undertake de novo appeals.³³ In prospectively reviewing and permitting projects, SECs adopt different adjudicatory approaches to the ordinary courts (for example, in respect to evidence) and may require a wider discretion, enabling 'more creative 'problem solving' processes to balance the social, economic, and environmental impacts of proposed developments and programs'.³⁴ Both public and private entities may be party to these pre-emptive disputes, with the SEC acting at the essential third in the 'triadic relationship': a role that Shapiro has described as the 'root concept of courtness'.³⁵

A number of well-established SECS have comprehensive functions that include prospective review³⁶ and newer SECs are being developed with a wide jurisdictional reach,³⁷ in part because the literature describes this model as constituting 'best practice' in promoting access to justice and resolving

³³ Elizabeth Fisher, 'Administrative Law, Pluralism and Legal Construction of Merits Review in Australian Courts and Tribunals' in Linda Pearson, Carol Harlow and Michael Taggart (eds), *Administrative Law in a Changing State: Essays in Honour of Mark Aronson* (Hart 2008)

³⁴ Pring and Pring, *Greening Justice: Creating and Improving Environmental Courts and Tribunals*, 27

³⁵ Martin Shapiro, *Courts: A Comparative and Political Analysis* (University of Chicago Press 1981), 1

³⁶ E.g. NSWLEC; NZEnvC; Mark-och miljödomstolar (Sweden)

³⁷ E.g. Environment and Land Court (Kenya)

environmental disputes efficiently³⁸ but also because the very nature of environmental adjudication lends itself to these adjudicatory forms, which is a point explored below. It is this 'ex ante-ex post facto' combination involving the assessment of public benefit and (potential) impact on private rights that makes specialised adjudication so interesting and this unusual admix of institutional form and function that creates the challenge for theorists. Accordingly, this article is concerned with these multi-functional adjudicatory bodies and environmental adjudication that encompasses predictive decision-making, and it should be read with these points in mind.

[B] SECs as dynamic adjudicatory forms

Despite the relative 'newness' of many SECs, there is a large international literature on the subject. Much is promotional in that it addresses the advantages of SECs. For example it considers how SECs promote access to justice by facilitating distributive justice, procedural justice and justice as recognition,³⁹fosters judicial specialization and environmental literacy,⁴⁰ or

³⁸ Preston, 'Characteristics of Successful Environmental Courts and Tribunals', 372-377

³⁹ Brian J Preston, 'The effectiveness of the law in providing access to environmental justice: an introduction' (11th IUCN Academy of Environmental Law Colloquium, Hamilton New Zealand, June 2013); Gordon Walker, *Environmental Justice: Concepts, Evidence and Politics* (Routledge 2012)

⁴⁰ Harry Woolf, 'Are the Judiciary Environmentally Myopic?' (1992) 4 JEL 1; Patrick McAuslan, 'The Role of Courts and Other Judicial Type Bodies in Environmental Management' (1991) 3 JEL

contributes to the development of environmental jurisprudence.⁴¹ SECs are seen as having an important ethical dimension, acting as ‘a powerful catalyst of societal movement in the direction of an environmental ethic’.⁴² In the Chinese context, Zhang suggests that they ‘effectively determine not only the legal aspects of disputes but also the non-legal aspects of a dispute’ including enhancing environmental awareness.⁴³ In the Philippines, judicial members of SECs are seen by the wider populace to have a particular understanding of ‘the philosophy of environmentalism and ecologism’.⁴⁴

Of interest, much writing lauds the dynamic, innovative nature of SECs. The judiciary is seen as the important partner to other branches of government

195; Preston, ‘Benefits of Judicial Specialization in Environmental Law: The Land and Environment Court of New South Wales as a Case Study’

⁴¹ Ceri Warnock and Maree Baker-Galloway, *Focus on Resource Management Law* (LexisNexis 2015), ch 3; Brian J Preston, ‘The Role of the Judiciary in Promoting Sustainable Development: The Experience of Asia and the Pacific’ (2005-2006) 9 *Asia Pacific Journal of Environmental Law* 109

⁴² Scott Fulton ‘The Rule of Law and Environmental Adjudication’ (International Symposium on Environmental Courts and Tribunals, Pace Law School New York, April 1 2011)

⁴³ Zhang Minchun and Zhang Bao ‘Specialised Environmental Courts in China: Status Quo, Challenges and Responses’ (2012) 30 *J En Nat Res L* 361, 368

⁴⁴ Hilario G Davide Jr and Sara Vinson, ‘Green Courts Initiative in the Philippines’ (2010) 3 *J Ct Innovation* 121, 130

in creating responses to environmental problems and SECs are viewed as crucial in 'promoting environmental governance, upholding the rule of law and in ensuring a fair balance between environmental, social and developmental considerations'.⁴⁵ The (now retired) presiding judge of the Environmental Court of Appeal in Sweden has described the Swedish Environment Courts as having a deliberate role in 'weighing' different interests and determining 'the correct balance point' between economic benefits and environmental harm.⁴⁶ The National Green Tribunal of India has developed suo motu jurisdiction in order to better provide for 'environmental protection and human welfare'.⁴⁷ To this extent, SECs are seen as norm-creating bodies. The creation of statutory regimes premised upon or with the explicit purpose of sustainable development in all its guises – a concept that contains competing values of undefined scope⁴⁸ - may also serve to increase the normative discretion of SECs.⁴⁹

⁴⁵ Preston, 'Benefits of Judicial Specialization in Environmental Law: The Land and Environment Court of New South Wales as a Case Study', 397-398

⁴⁶ Ulf Bjallas 'Experiences of Sweden's Environmental Courts' (2010) 3 J Ct Innovation 177, 183

⁴⁷ Gill, 'Environmental Justice in India: The National Green Tribunal and Expert Members', 198

⁴⁸ S Glen Sigurdson, 'Courts and Tribunals Through a Sustainability Lens: Questions and New Expectations' in Shi-Ling Hsu and Patrick Molinari (eds), *Sustainable Development and the Law: People - Environment - Culture* (Canadian Institute for the Administration of Justice 2008), 40

⁴⁹ E.g. Resource Management Act 1991 (NZ) ('RMA'), s 5; Sustainable Planning Act 2009 (Queensland) s 3 and Environmental Protection Act 1994 (Queensland) s 3; Environmental

SECs also have a role in filling in the interstices in environmental regulation and '[w]here environmental laws and values are undeveloped ... can add flesh to the skeletal form of those existing laws and values'.⁵⁰ A good example is provided by the 'planning principles' created by the Land and Environment Court of New South Wales which, as the Chief Judge describes, constitute 'rule making by adjudication' that provide 'guidance for other decision-makers, predictability for those who might apply for review, and ... internal consistency in decision-making'.⁵¹ In some instances, SECs have widened the meaning of 'law', going beyond positivist state law by recognizing indigenous customary law in appropriate cases, thereby drawing upon an expanded range of 'legal' principles.⁵² Given their expert nature, higher courts may adopt a deferential approach to jurisprudence created by SECs.⁵³

Planning and Assessment Act 1979 (NSW), s 5; Milojobalk [Environmental Code] 1999 (Sweden) pt 1, ch 1, s 1; Environment and Land Court Act 2011 (Kenya) s 18

⁵⁰ Preston, 'Characteristics of Successful Environmental Courts and Tribunals', 391; Leslie A Stein *Principles of Planning Law* (OUP 2008), ch 5; Linda Pearson, 'Policy, Principles and Guidance: Tribunal rule-making' (2012) 3 PLR 16, 16

⁵¹ Preston, 'Characteristics of Successful Environmental Courts and Tribunals', 391

⁵² Abed de Zavala and others, 'An Institute for Enhancing Effective Environmental Adjudication', 9-10

⁵³ *Stark v Auckland Regional Council* [1994] 3 NZLR 614 (HC), 617; see also Law Commission, *Delivering Justice for All*, 221

In order to fulfill this partnership role, SECs have created novel practices, procedures and remedies that respond more accurately to the challenges of environmental dispute resolution.⁵⁴ Examples include adopting a wide approach to locus standi⁵⁵ and creating special processes for accessing environmental experts.⁵⁶ New approaches to evaluating evidence have been developed,⁵⁷ traditional burdens of proof displaced,⁵⁸ and novel forms of risk management have been created by SECs such as ‘adaptive management’ processes⁵⁹ and the writ of continuing mandamus.⁶⁰ Various types of responsive enforcement and

⁵⁴ Davide Jr and Vinson, ‘Green Courts Initiative in the Philippines’, 127-129

⁵⁵ Domenico Amirante, ‘Environmental Courts in Comparative Perspective: Preliminary Reflections on the National Green Tribunal of India’ (2012) 29 Pace Envtl L Rev 441, 459

⁵⁶ Milijoministeriet ‘Decision-making Processes in Denmark’ (1998-2011) para 4.1.3 <http://www2.mst.dk/udgiv/publications/1995/87-7944-324-9/html/4.htm> (accessed 10 May 2015)

⁵⁷ *Shirley Primary School v Christchurch City Council* [1999] NZRMA 66 (NZEnvC)

⁵⁸ Ibid; *Gray v Minister of Planning and Others* (2006) 152 LGERA 258 (LECNSW); *Relator Mon. Villa Boas Cueva AgRg RE No 206748/SP* (21 February 2013) (Supremo Tribunal de Justica (Brazil)); *Narmada Bachao Andolan v Union of India* (2000) 10 SCC 664 (Supreme Court of India)

⁵⁹ *Sustain Our Sounds Inc v New Zealand King Salmon Company Ltd* [2014] NZSC 40

⁶⁰ *Metropolitan Manila Development Authority v Concerned Residents of Manila Bay* G.R. Nos. 171947-48 (S.C. Dec 18, 2008) (Philippines)

compliance mechanisms have evolved, including restorative justice⁶¹ and mandatory environmental education.⁶² A number of SECs have developed an approach to dispute management that utilizes 'different adjudication pathways, Alternate Dispute Resolution and other social services' - termed a 'multidoor courthouse' - to achieve different pathways to justice.⁶³ Thus, many of these bodies are moving from imposing solutions to facilitating compromise within communities.

Because of their perceived advantages in facilitating access to environmental justice, pressure to create these specialist courts comes at times from the existing judiciary⁶⁴ and there are examples of Supreme Courts actually designating courts as SECs where this is within their jurisdiction to do so.⁶⁵ Several commentators note that these forms of innovation have occurred in

⁶¹ FWM McElrea 'The Role of Restorative Justice in RMA Prosecutions' (2004) 12(3) Resource Management Journal 1

⁶² George Pring and Catherine Pring, 'Increase in Environmental Courts and Tribunals Prompts New Global Institute' (2010) 3 J Ct Innovation 11, 19

⁶³ Ibid, 20; Michael Rackemann, 'Environmental decision-making, the rule of law and environmental justice' [2011] Resource Management Theory and Practice 37, 64-67.

⁶⁴ *Andhra Pradesh Pollution Control Board v M.V. Naidu* (1999) 2 SCC 718; *Andhra Pradesh Pollution Control Board II v M.V. Naidu* (2001) 2 SCC 62 (India)

⁶⁵ Davide Jr and Vinson, 'Green Courts Initiative in the Philippines', 123 - 124

China in the absence of ‘central level laws, regulations or policies’ and even though the ‘legal authority for these courts is uncertain and the innovative rules appear to conflict with existing law’.⁶⁶

Given the foregoing, there can be little doubt that SECs are hugely innovative bodies, creatively responding to the demands of environmental conflict resolution and illustrative of new, dynamic forms of adjudication. One could perceive of these bodies as important sites for environmental governance. Clearly, commentators in different jurisdictions will view these bodies as being welcomed or problematic depending upon the wider legal culture,⁶⁷ but concerns in Australia over merits review-tribunals led to a public inquiry and the New Zealand Law Commission noted that these adjudicatory bodies ‘do not always sit well’ within countries that have adopted ‘the Westminster system’.⁶⁸ In some jurisdictions, commentators have aligned these innovations with ‘fundamental

⁶⁶ Alex L Wang and Jie Gao ‘Environmental Courts and the Development of Environmental Public Interest Litigation in China’ (2010) 3 J Ct Innovation 37, 44; cf: Zhang Minchun and Zhang Bao ‘Specialised Environmental Courts in China: Status Quo, Challenges and Responses’ (2012) 30 J En Nat Res L 361, 376; Jingjing Liu ‘Environmental Justice with Chinese Characteristics: Recent Developments in Using Environmental Public Interest Litigation to Strengthen Environmental Justice’ (2012) 7 Flor A M L R 225, 254-258

⁶⁷ JO Freedman, *Crisis and Legitimacy* (CUP 1978) c.f. Pete Cane, ‘Review of Executive Action’ in Mark Tushnet and Peter Cane (eds), *The Oxford Handbook of Legal Studies* (OUP 2005), 150-151

⁶⁸ New Zealand Law Commission, *Tribunals in New Zealand: An Issues Paper* (NZLC IP6 Wellington, 2007), 35

constitutional, statutory and human rights' norms and to that extent justified them by reference to external legitimising frames.⁶⁹ However, this approach is rare and to date SECs have seldom been viewed through different analytical frames in the literature and the deeper theoretical legitimacy and resonance of their wide functions are often ignored.

This omission is problematic because it leads not only to an impoverished discourse (environmental law-research is often criticised as a-theoretical and some have suggested that it is marginalised from mainstream legal scholarship)⁷⁰ but it has created real practical difficulties. To illustrate this latter point, the rest of the article explains the challenges created by the novel legal nature of the New Zealand Environment Court ('NZEnvC'). It briefly describes the form and powers of the Court, reports upon the *actual* debates taking place, and it explains how commentators – struggling to make sense of the Court - are adopting and constructing theoretical frames in order to analyse the normative legitimacy of the Court and so argue for the refinement of its legal nature. Using this real life scenario enables us to scrutinise those frames in turn: to see how they are constructed, what their internal criteria are, and to analyse how each falls short of making legal sense of both the NZEnvC and environmental

⁶⁹ Preston, 'Characteristics of Successful Environmental Courts and Tribunals', 383; Erkki J Hollo, Pekka Vihervuori and Kari Kuusiniemi, 'Environmental Law and Administrative Courts in Finland' (2010) 3 J Ct Innovation 51, 59

⁷⁰ Elizabeth Fisher and others, 'Maturity and Methodology: Starting a Debate about Environmental Law' (2009) 21 JEL 213

adjudication more generally. But it also draws on the use of the frames, identifying why and how each frame is being used in order to suggest aspects of normative legitimacy that must inform any new theory for environmental adjudication.

[A] Making legal sense of the New Zealand Environment Court

[B] Criticisms of the legal nature of the Court

Many of the creative features found in SECs and discussed above are practiced by or present within the NZEnvC, and in that sense it is not an atypical SEC. In fact, it is seen as a role model for the development of SECs around the world.⁷¹ The Court hears disputes concerning resource management, that in the New Zealand context encompasses both environmental and town planning-type disputes. Of particular importance is the fact that the NZEnvC has powers to license activities (granting individual resource consents) and to determine

⁷¹ Pring and Pring, *Greening Justice: Creating and Improving Environmental Courts and Tribunals*, 110; Malcolm Grant, *Environmental Court Project: Final Report* (DETR, 2000); Donald W Kaniaru, 'Environmental Courts and Tribunals: The Case of Kenya' (2012) 29 *Pace Env'tl L Rev* 566, 580; Amirante, 'Environmental Courts in Comparative Perspective: Preliminary Reflections on the National Green Tribunal of India', 451

disputes concerning local authority plans - so crafting their final form -⁷² a function that has been consistently present since the inception of the very first Town-planning board in New Zealand in 1926.⁷³ These planning instruments have the status of regulations in the legislative scheme and the NZEnvC is the *only* court in New Zealand that can alter regulations on the substantive merits rather than reviewing for legality.

In accordance with its statutory objective the Court must promote the 'sustainable management' of natural and physical resources in all its decisions, in order to enable 'people and communities to provide for their social, economic, and cultural well-being'.⁷⁴ In doing so, it attempts to make predictive decisions about the future as opposed to fact-finding in relation to the past, adopting a precautionary approach where relevant.⁷⁵ Jurisprudence provides that an 'overall judgment' should be taken by the Court and the relative weight to be placed upon, for example, economic wellbeing as opposed to environmental protection will depend upon the particular facts of the case.⁷⁶ And so, like many SECs, the NZEnvC addresses normative conflicts and allocates risk-burdens.⁷⁷

⁷² RMA, ss 290, 293

⁷³ KA Palmer, *Planning and Development Law in New Zealand* (Law Book Company 1984), 9

⁷⁴ RMA, s 5(2)

⁷⁵ *Wilson v Selwyn DC* [2005] NZRMA 76 at [71]]; RMA, s 3

⁷⁶ *New Zealand Rail Ltd v Marlborough District Council* [1994] NZRMA 70 (HC) (adjusted partially by *Environmental Defence Society Incorporated v Marlborough District Council* [2014] NZSC 38)

All of these features serve to place the NZEnvC in a particularly powerful position. The NZEnvC is one of the oldest SEC's in the world⁷⁸ but over time its creativity and responsiveness has created tension, and as a result the national discussion has moved from a promotional one to a much harsher, more exacting debate. Some criticisms are premised on generic instrumentalism with commentators arguing that decision-making by the Court should be faster and cheaper.⁷⁹ But others argue that as a 'court' the NZEnvC should not determine values or policy⁸⁰ or have what they describe as 'legislative powers'⁸¹ (i.e. power to amend local authority-created resource management planning documents); nor, they say, should the Court be permitted to decide so-called 'political questions'⁸² (i.e. the ability to decide what constitutes sustainable management

⁷⁷ *Shirley Primary School v Christchurch City Council*

⁷⁸ n 20 above

⁷⁹ See text accompanying n 163

⁸⁰ Ministry for the Environment, *Improving our Resource Management System: A Discussion Document* (Wellington, 2013), 13

⁸¹ Ministry for the Environment, *Report of the Minister for the Environment's Technical Advisory Group* (Wellington, 2009), 10

⁸² Stephen Rivers-McCombs, 'Planning in Wonderland: The RMA, Local Democracy and the Rule of Law' (2011) 9 NZJPIL 43, 56

of natural resources in any given case). Note, there is no constitutional classification of ‘courts’ in New Zealand and we use these classificatory terms – ‘(inferior) courts’, ‘tribunals’ and ‘specialised courts’ - in arbitrary ways in New Zealand; arguably it is better to see them collectively in terms of a ‘species of adjudication’⁸³ focusing on their specific adjudicative nature rather than trying to marshal them into pre-formed categories that correlate with set positions on a spectrum. Nevertheless, the metonym ‘court’ does appear to prompt a binary response: ‘courts should do X not Y’.⁸⁴ A Technical Advisory Group to government expressed particular concern that the Court had the power to both amend plans and to determine applications for resource-use against the policy framework set by those plans.⁸⁵ On ‘constitutional grounds alone’, it opined, there was much to be said for abolishing those powers.⁸⁶

[B] Normative legitimacy and analytical frames

Like many other SECs, the NZEnvC was created by statute and has wide powers deliberately granted by parliament. It is, accordingly, a form of ‘state

⁸³ Cane, *Administrative Tribunals and Adjudication*, 47-48

⁸⁴ Thanks to Professor John Burrows for stimulating this observation.

⁸⁵ Environment, *Report of the Minister for the Environment’s Technical Advisory Group*, 10

⁸⁶ Ibid

sponsored legal pluralism'⁸⁷ and has democratic legitimacy in a positivist or 'rational-legal' way.⁸⁸ But critics of the NZEnvC are looking beyond notions of parliamentary sovereignty in an attempt to refine the legal nature of the Court, arguing that certain powers are legitimate while others are illegitimate. This approach is extremely interesting because they are attempting to specify and limit the legal nature of the Court by drawing upon *deeper* conceptions of legitimacy. Legitimacy in this context appears therefore to be a nuanced and complex matter, accurately reflecting Beetham's conception of legitimacy as a multidimensional concept.⁸⁹

In *The Legitimation of Power*, Beetham suggests that power can be said to be legitimate to the extent that it meets three core conjunctive criteria. First, power must be 'acquired and exercised in accordance with prevailing rules'⁹⁰ (i.e. it must have 'legal validity', as Beetham categorises this aspect); second, those rules are well grounded in normative beliefs shared by both dominant and subordinate groups in the power matrix (so termed 'normative justifiability'); and third, actions of the subordinate group acknowledge and serve to confirm

⁸⁷ Elizabeth Fisher, 'Jurisdictional Facts and Hot Facts: Legal Formalism, Legal Pluralism and the Nature of Australian Administrative Law' (2015) 38 MULR 968, 973

⁸⁸ Max Weber, 'The Three Types of Legitimate Rule' (1958) 4 Berkeley Publications in Society and Institutions 1

⁸⁹ David Beetham, *The Legitimation of Power* (2nd edn, Political Analysis 2013)

⁹⁰ *Ibid*, xii

the power-holders' authority. The NZEnvC clearly has so-called 'legal validity': it is constituted and empowered by the RMA.⁹¹ Further, although certain individuals may resent and oppose particular decisions of the Court, or restrictions on their activities per se in the name of environmental protection,⁹² in general there is widespread acceptance of the authority of the Court.⁹³ The debate surrounding the NZEnvC is concerned therefore with the second aspect of Beetham's conception – 'normative justifiability'. Beetham predicted that normative justifiability might form 'the core of legitimacy', most likely to prove contentious, with 'legality serving as a pre-condition and aspects of recognition as a mode of reinforcement'.⁹⁴ This prediction is borne out in the New Zealand discourse: that is, the pre-condition of legality (bestowed by parliament) exists and must be accepted by commentators,⁹⁵ but the normative justifiability of the

⁹¹ RMA, pt 11

⁹² E.g. *Conway v R* [2013] NZCA 438

⁹³ Kenneth A Palmer, 'Environment Court Reform – More than the Court under Threat?' RMLA, 25 June 2013 <rmla.org.nz/obiter/view/id/27> accessed 8 May 2014; Marie McNicholas, 'Uncertainty Lingers After Court Downgrade Retreat' FW Plus, June 2013 <<http://agrihq.co.nz/article/uncertainty-lingers-after-court-downgrade-retreat?p=?p=46%3E>> accessed 8 May 2014

⁹⁴ Beetham, *The Legitimation of Power*, 293

⁹⁵ C.f. constitutional debates in USA scenario: Fallon, 'Of Legislative Courts, Administrative Agencies, and Article III'

Court's legal nature is proving contentious. At this point it is also worth considering the use of analytical frames to construct legitimate forms of legal nature in a little more detail.

How the Court is perceived and, to an extent, all three dimensions of legal nature (the *what*, the *why*, and the *limits*) are impacted upon by the discourses that we are engaged in and – as the critics demonstrate - the paradigms of governance that we draw upon.⁹⁶ Put more simply, we make legal sense of the Court by using frames of reference and these frames create models of legitimacy: that is, 'a worthiness to be recognised'.⁹⁷

Inevitably, frames of reference and the models they create are 'simplifications of reality'⁹⁸ that enable 'better questioning, exploration, handling and manipulation' of complex areas of social ordering that are otherwise difficult to conceptualise.⁹⁹ Framing is 'by its nature also an instrument of exclusion'¹⁰⁰

⁹⁶ John S Dryzek, 'Paradigms and Discourses' in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (OUP 2008), 46; Brad Jessup and Kim Rubenstein, 'Introduction: Using discourse theory to untangle public and international environmental law' in Brad Jessup and Kim Rubenstein (eds), *Environmental Discourses in Public and International Law* (CUP 2012), 5; Isaiah Berlin, 'Does political theory still exist?' in P Laslett and WG Runciman (eds), *Philosophy, Politics and Society (2nd series)* (Oxford Blackwell 1962), 19

⁹⁷ Jurgen Habermas, *Communication and the Evolution of Society* (Heinemann 1979), 178-179

⁹⁸ Council, *Models in Environmental Regulatory Decision Making*, 31

⁹⁹ Fisher, Pascual and Wagner, 'Understanding Environmental Models in Their Legal and Regulatory Context', 266

and models are 'constructed for a purpose or set of purposes'.¹⁰¹ Accordingly, frames and models are not necessarily the 'truth': they do not constitute unassailable doctrine, nor are they wholly comprehensive or irreplaceable.¹⁰² These caveats are important. It is not the focus of this article to explore them further but the essential point is that to address the normative legitimacy of the Court, we are drawn into sketching frames. If the analysis is to be extended to other SECs (that may be subject to alternate arguments of normative legitimacy, depending upon the relevant legal culture) this point is foundational.

Contributors to the debate about the NZEnvC are drawing on different collective understandings of the legal world to create frames through which to analyse the Court, and they privilege certain understandings at the expense of others. Importantly, the use of each frame leads to a different emphasis in terms of normative legitimacy: the three frames used each create different perceptions as to the 'appropriate' legal nature of the Court, and privilege different powers and functions as 'legitimate', rejecting others as 'illegitimate'. However, a difficulty with using these frames to analyse the Court is that none individually or in conjunction with the others is capable of capturing, constituting and appropriately constraining the legal nature of the NZEnvC while preserving its

¹⁰⁰ D Winickoff and et al, 'Adjudicating the GM Food Wars: Science, Risk, and Democracy in World Trade Law' (2005) 30 Yale J Int'l Law 81, 94

¹⁰¹ Fisher, Pascual and Wagner, 'Understanding Environmental Models in Their Legal and Regulatory Context', 266

¹⁰² E Goffman, *Frame Analysis: An Essay on the Organization of Experience* (Northeastern 1974)

ability to adjudicate environmental disputes. The next part of the article considers each frame in turn to demonstrate this point.

[A] The ‘administrative landscape-adjudicative pluralism’ frame

The first analytical frame used in the New Zealand debate views the Court as part of the administrative justice landscape and as evidence of adjudicatory pluralism. It is a legitimising frame constructed on historical foundations, strengthened by embedded tradition,¹⁰³ and evincing a form of legitimacy ‘built up over time through processes of struggle and compromise’.¹⁰⁴ Within this frame, environmental law is considered part of the law of administration¹⁰⁵ and the associated institutional architecture part of the administrative justice landscape. This frame views administrative justice as a necessary part of a complex state; fluid and flexible;¹⁰⁶ its decision-making ‘inherently

¹⁰³ Weber, ‘The Three Types of Legitimate Rule’ Max Weber, *From Max Weber: Essays in Sociology* (Hans H Gerth and C Wright Mills eds, OUP 1946), 78-79

¹⁰⁴ Beetham, *The Legitimation of Power*, 35

¹⁰⁵ Sian Elias, ‘Righting Environmental Justice’ (The Salmon Lecture, Auckland, 25 July 2013), 2

¹⁰⁶ F Frankfurter, ‘The Task of Administrative Law’ (1926) 75 U Pa L Rev 614, 619

discretionary’;¹⁰⁷ and somewhat redolent of, or favouring, Frug’s ‘expertise model’ of institutional governance.¹⁰⁸ Seen as a pragmatic adjunct to parliamentary decision-making,¹⁰⁹ this administrative apparatus has been described as inevitable and advantageous because of ‘pressure on parliamentary time, technicality of subject matter, difficulty in foreseeing all contingencies, allowing for constant adaptation and flexibility, permitting experimentation, [and] coping with emergencies’.¹¹⁰ Adjudication is integral to *this frame* and regarded as a deliberate part of administrative governance,¹¹¹ with Chayes’ conception of public law adjudication providing the internal criteria. The essential components are that,

the scope of the lawsuit is not exogenously given but is shaped primarily

¹⁰⁷ Lord Cooke of Thorndon, ‘The Discretionary Heart of Administrative Law’ in Christopher Forsyth and Ivan Hare (eds), *The Golden Metwand and the Crooked Cord: Essays in Honour of Sir William Wade QC* (OUP 1998), 220

¹⁰⁸ Gerald Frug, ‘The Ideology of Bureacracy in American Law’ (1983-1984) 97 Harv L Rev 1276, 1318

¹⁰⁹ Robson, *Justice and Administrative Law*, 331; Committee Donoughmore, *Committee on Ministers’ Powers* (Cmd 4060, 1932), 84; Janet McLean, *Searching for the State in British Legal Thought: Competing Conceptions of the Public Sphere* (CUP 2012), 46

¹¹⁰ Michael Taggart, ‘From ‘Parliamentary Powers’ to Privatization: The Chequered History of Delegated Legislation in the Twentieth Century’ (2005) 55 U Toronto L J 575, 608

¹¹¹ C.f. Frug, ‘The Ideology of Bureacracy in American Law’, 1336 ft 199

by the court and parties; the party structure is not rigidly bilateral but sprawling and amorphous; the fact inquiry is not historical and adjudicative but predictive and legislative

Further, Chayes notes that relief is flexible; the administration of the decree may require 'the continuing participation of the court' and may have 'important consequences for many persons including absentees'; and importantly, the judge is actively responsible for 'organizing and shaping the litigation to ensure a just and viable outcome'.¹¹² Chayes says that none of this is particularly revolutionary - it looks like equity.¹¹³

This frame reflects the reality of much modern governance in New Zealand (and other countries), governance practices that were originally inherited from Britain but were developed and became embedded in the national legal culture. Examining the historical evolution in Britain of a legal landscape that was transferred to but then adapted within New Zealand helps us to understand how we have ended up with the NZEnvC (and potentially other SECs) and in doing so it addresses 'the why' in our tripartite of legal nature.

[B] Adjudication 'less-ordinary'

For centuries, adjudicatory pluralism was the norm in Britain and this correlated to the fact that the nation has a long history of decentralised and

¹¹² Abram Chayes, 'The Role of the Judge in Public Law Litigation' (1975) 89 Harv L Rev 1281, 1302.

¹¹³ Ibid.

dispersed (as opposed to delegated) state power.¹¹⁴ Importantly for the present argument, local dispute-resolution bodies emerged organically, as a necessary response to local concerns and the form they took - their legal nature - was responsive to the forms of conflict that they were concerned with. Many were hybrid bodies that had adjudicative, administrative and regulatory functions:¹¹⁵ as Maitland commented in the 1880s, in England 'the [administrative and the judicial] have for ages been inextricably blended'¹¹⁶ and in fact, state-sponsored adjudication 'began as a mode of administration'.¹¹⁷

A well-known example of adjudicatory pluralism concerns commercial dispute resolution bodies. The commercial community always managed, to a large extent, to maintain its own legal system and developed various responsive forms of dispute resolution.¹¹⁸ However, a lesser-known example, and one that

¹¹⁴ McLean, *Searching for the State in British Legal Thought: Competing Conceptions of the Public Sphere* 23, 305 and ch 6

¹¹⁵ Wraith and Hutchesson, *Administrative Tribunals*, 17-22; William S Holdsworth, *A History of English Law Volume 1* (7 edn, Methuen 1956), 478; R M Jackson *The Machinery of Justice in England* (CUP 1967) 351

¹¹⁶ Frederic William Maitland, 'The Shallows and Silences of Real Life' in H A L Fisher (ed), *The Collected Papers of Frederic William Maitland: Downing Professor of the Laws of England*, vol 1 (CUP 1911), 478

¹¹⁷ Peter Cane, 'Public Law in The Concept of Law' (2013) 33 OJLS 649, 660-661

¹¹⁸ Wraith and Hutchesson, *Administrative Tribunals*, 19; Arthurs, *Without the Law: Administrative Justice and Legal Pluralism in Nineteenth-Century England*, 50-53

shows environment adjudication has always taken a novel form, concerns the ancient Forest Courts of England and Wales, or 'Swanimotes'.

Swanimotes were established in Crown forests throughout England and Wales to help maintain 'a delicate balance of rights and restrictions for both the Crown and the inhabitants' that accorded both with custom and the laws of the Forest Charter 1217,¹¹⁹ although their lineage is much more ancient than the Magna Carta.¹²⁰ Swanimotes conducted both administrative and adjudicative business: they regulated communal-use rights by warrants and grants, collected any payments due¹²¹ and some issued by-laws and ordinances.¹²² Given their *communitas* decision-making,¹²³ Swanimotes could be seen (while undoubtedly a

¹¹⁹ Peter Large, 'From swanimote to disafforestation: Feckenham Forest in the early seventeenth century' in Richard Hoyle (ed), *The Estates of the English Crown 1550 - 1640* (CUP 1992), 389, 393; Graham Jones, 'Swanimotes, Woodmotes, and Courts of "Free Miners"' in John Langton and Graham Jones (eds), *Forests and Chases of England and Wales c1500-c1850* (St John's College Research Centre 2005), 42

¹²⁰ Jones, 'Swanimotes, Woodmotes, and Courts of "Free Miners"', 43-44

¹²¹ Forest Charter 1217, cl 8

¹²² Large, 'From swanimote to disafforestation: Feckenham Forest in the early seventeenth century', 395

¹²³ John Manwood, *Manwood's treatise of the forest laws* (William Nelson ed, 5th edn, London 1741), 339 - 340

forum protecting Crown property) as ‘a forum in which local social regulation was achieved’.¹²⁴ Remarkably they still exist in the New Forest and the Forest of Dean¹²⁵ and although their role is now placed on a statutory footing,¹²⁶ their powers and functions remain surprisingly unchanged from centuries before.¹²⁷

Swanimotes were however just one example of the prevalent pluralism. Although there was perceived to be some drawing back of adjudicatory pluralism in nineteenth-century Britain, this was reversed by the development of the great socially reforming regulation¹²⁸ beginning with the Factories Act 1833 and growing to encompass Health and Housing Acts and the Town and Country Planning regimes that were the precursors to modern environmental planning

¹²⁴ Jones, ‘Swanimotes, Woodmotes, and Courts of ‘Free Miners’’, 43

¹²⁵ See <http://www.verderers.org.uk/court.html> and <http://www.deanverderers.org.uk> (last accessed 4 June 2015); Cyril E Hart, *The Verderers and the Forest Laws of Dean* (Lightmoor Press 2005).

¹²⁶ New Forest Acts of 1838, 1877, 1949 (UK); Regulations Of The Verderers Of The New Forest Relating To The Courts Of Swainmote For The Dispatch Of Administrative And Judicial Business As Provided For In Section 24 Of The New Forest Act 1877 As Amended.

¹²⁷ Ibid Regulations, regs 14, 17

¹²⁸ Arthurs, *Without the Law: Administrative Justice and Legal Pluralism in Nineteenth-Century England*; Chantal Stebbings, *Legal Foundations of Tribunals in Nineteenth Century England* (CUP 2006)

legislation.¹²⁹ These regimes required novel compliance mechanisms and administrators developed more flexible forms of adjudication such as ‘investigation, report, negotiation and rule-making’¹³⁰ in order to address shared collective risks.¹³¹ Reference to the ‘ordinary courts’ was only one tool in the toolbox and often taken as a last resort, predominantly because of their incapacity to respond to socially reforming legislation or the wider public interest. Where legislation was intended to interfere with common law property rights, to rely upon the ordinary courts was, Jennings argued, inherently flawed.¹³² Certainly cases such as *Ryder v Mills*,¹³³ *Cooper v Wandsworth Board of Works*¹³⁴ and *Attorney General v Birmingham Corporation*¹³⁵ supported his

¹²⁹ Richard Macrory, ‘Environmental Courts and Tribunals in England and Wales - A Tentative New Dawn’ (2010) 3 J Ct Innovation 61, 62

¹³⁰ Arthurs, *Without the Law: Administrative Justice and Legal Pluralism in Nineteenth-Century England*, 117

¹³¹ Cass Sunstein, *The Partial Constitution* (Harvard University Press 1993), 320

¹³² W Ivor Jennings, ‘Courts and Administrative Law - The Experience of English Housing Legislation’ (1935-1936) 49 Harv L Rev 426, 435-437; see also E Taborsky, ‘A Case for Administrative Tribunals’ (1943-1944) 7 MLR 209

¹³³ *Ryder v Mills* (1850) 19 LJMC (pt 2) 82 (Exch)

¹³⁴ *Cooper v Wandsworth Board of Works* (1863) 143 ER 414

¹³⁵ *Attorney General v Birmingham Corporation* (1858) 4 K&J 528

contention. As Robson noted, it was ‘the failure of the judicature to endow the general public with an enforceable interest in matters where a regard for the social good is of the first moment that led to the development of the administrative tribunals’.¹³⁶

In the early twentieth century, alternate forms of adjudication became a phenomenon that was consciously theorised by Robson, Jennings, Laski and Willis to name but a few – thus adding a normative legitimacy actively deliberated upon to the ‘traditional legitimacy’ manifest in these bodies - and this was the ethos that domestic tribunals grew out of.¹³⁷ Planning and environmental law, where the wider interests of the public may take precedence over ‘narrow 19th century preoccupations with property rights’¹³⁸ is often seen as a prime example of socially reforming legislation that requires different forms of dispute-resolution to accommodate not only the ‘delicate balance’ between private rights and public wellbeing but also the inevitable merging of law and

¹³⁶ W A Robson *Justice and Administrative Law* (2nd edn Stevens 1947), 69

¹³⁷ McLean, *Searching for the State in British Legal Thought: Competing Conceptions of the Public Sphere*, 16, 113; see also Martin Loughlin, *Foundations of Public Law* (OUP 2010), 442-443; Robson, *Justice and Administrative Law*, 31; Robert S Summers, ‘Pragmatic Instrumentalism in Twentieth Century American Legal Thought - A Synthesis and Critique of our Dominant General Theory about Law and its Use’ (1980-1981) 66 *Cornell L Rev* 861

¹³⁸ *Falkner v Gisborne District Council* [1995] NZLR 622 (HC), 630

policy.¹³⁹ In fact everything about the traditional courts suggested that they were the wrong bodies to be dealing with environmental adjudication. The ordinary courts approach to evidence was (and is) heavily constricted,¹⁴⁰ which is unhelpful with an evaluative role that is predictive. And the judicial method of statutory interpretation - attuned as it is 'to the [common law] accents of the forgotten past'¹⁴¹ - is inappropriate in circumstances better suited to a process akin to 'legislative fact-finding'¹⁴² (a process explored further below). Rather, as the New Zealand Supreme Court has recognised, appropriate interpretation in this context often constitutes

a practical question involving an exercise of informed judgment. There must be an adequate understanding of contemporary standards and aspirations and the decision must be made in terms of the real world as it actually is today.¹⁴³

¹³⁹ Robson, *Justice and Administrative Law*, 334; J A G Griffith, 'Tribunals and Inquiries' (1959) 22 MLR 125, 129

¹⁴⁰ Ernest Gellhorn, 'Rules of Evidence and Official Notice in Formal Administrative Hearings' [1971] Duke L J 1; Kenneth C Davis, 'An Approach to the Problems of Evidence in the Administrative Process' (1952) 55 Harv L Rev 402

¹⁴¹ John Willis, *The Parliamentary Powers of English Government Departments* (Harvard University Press 1933), 51 quoted by Taggart, 589.

¹⁴² Davis, 'An Approach to the Problems of Evidence in the Administrative Process'

¹⁴³ *Robson v Hicks Smiths and Sons Ltd* [1965] NZLR 113 (SC), 1124. See also *Stark v Auckland Regional Council*, 617

Specialist courts and tribunals were perceived to have a greater facility for this attuned judgment.¹⁴⁴

All of this suggests – historically at least - a legal landscape characterised by adjudicative pluralism: this was not initially the result of any conscious master plan, rather this ‘bottom-up’ dispute resolution reflected necessity and manifested iteratively, with developments responding to the adjudicative context. The governance practices that developed in Britain were inherited by New Zealand and today administrative complexity and adjudicative pluralism is a dominant feature of the state architecture in both the UK and New Zealand. The NZEnvC is one of many specialist courts and tribunals in New Zealand,¹⁴⁵ working alongside other quasi-independent regulatory bodies that merge investigatory, regulatory and adjudicatory functions.¹⁴⁶ For the purposes of the present debate this embedded tradition, followed by the deliberate evolution of the administrative state and the continuing prevalence of multifunctional adjudicative bodies provides a form of normative legitimacy. But there are problems with using this frame to analyse the legal nature of the NZEnvC, certainly in isolation, and this weakness reflects a wider difficulty in

¹⁴⁴ See 299 NZPD 689, 799

¹⁴⁵ Law Commission, *Tribunals in New Zealand*. Other notable examples include the Maori Land Court and Maori Appellate Court, Employment Court, Family and Youth Court.

¹⁴⁶ Electricity Commission, Environmental Protection Authority, Commerce Commission and Financial Markets Authority etc.

accommodating the whole ‘adjudicative spectrum’¹⁴⁷ within existing conceptual frames.

[B] An incomplete frame?

In general the un-codified British and New Zealand constitutions ‘try to keep law and politics apart’ but specialist courts, administrative tribunals and other multifunctional adjudicatory forms ‘inhabit a twilight world where the two intermingle; they are in the sense the orphaned child of both’.¹⁴⁸ SECs in particular are institutions that stand on ‘the frontiers between law and administration’,¹⁴⁹ and given their wide discretionary powers they may be seen – as the criticisms of the NZEnvC suggests – to be too far from ‘democratic legitimacy’.¹⁵⁰ Reflecting more general concerns, the Chief Justice of New Zealand has stated the need for more effective mapping and theorising of the New Zealand constitution and, in particular, the need ‘to take account of the way in which public power is now distributed through bodies that are not part of the executive’.¹⁵¹ Even the enthusiasm of the original advocates for administrative

¹⁴⁷ Cane, *Administrative Tribunals and Adjudication*, 47-48

¹⁴⁸ Wraith and Hutchesson, *Administrative Tribunals*, 17

¹⁴⁹ Law Commission, *Tribunals in New Zealand: An Issues Paper*, 34

¹⁵⁰ See Loughlin, *Foundations of Public Law*, 448-449

¹⁵¹ Sian Elias, ‘Mapping the Constitutional’ [2014] *New Zealand Law Review* 1, 8

tribunals became muted when greater thought was given to their constitutional place,¹⁵² although the troublesome position was alleviated somewhat by the extension of judicial review to these bodies, the crystallisation of public law principles,¹⁵³ and alternative theoretical perspectives that helped to support their legitimacy (particularly the scholarship on delegated powers).¹⁵⁴ However, the possible application of judicial review¹⁵⁵ does little to answer the critics of the NZEnvC given the deliberately wide powers granted to the Court,¹⁵⁶ concerns that are heightened by the significant impact that its substantive merits decisions have on national economic, socio-cultural and environmental wellbeing.¹⁵⁷ All of these observations suggest an important flaw with using the

¹⁵² Robson, *Justice and Administrative Law*, 328

¹⁵³ Loughlin, *Foundations of Public Law*, 444-445; TRS Allan, 'The Constitutional Foundations of Judicial Review: Conceptual Conundrum or Interpretative Inquiry?' (2002) 61 CLJ 87.

¹⁵⁴ See Taggart, 'From 'Parliamentary Powers' to Privatization: The Chequered History of Delegated Legislation in the Twentieth Century'

¹⁵⁵ Or in the specific context, appeals on a point of law, RMA s 299

¹⁵⁶ Especially given High Court deference to expert institutions: Law Commission, *Delivering Justice for All*, 221; *Stark v Auckland Regional Council*; see also Elliot and Thomas, 'Tribunal Justice and Proportionate Dispute Resolution'

¹⁵⁷ See general criticism of the 'judicial review model' in Frug, 'The Ideology of Bureaucracy in American Law', 1352

‘administrative justice-adjudicative pluralism’ frame to analyse the NZEnvC in isolation: the frame itself cannot be used to establish clear and justifiable limits, restraining the wide discretionary powers of the Court; rather, it is a frame that privileges institutional flexibility in decision-making.

In terms of our tri-partite test of legal nature – the what, why and the limits – the ‘administrative justice-adjudicatory pluralism’ frame superbly addresses the first two issues. It is a good frame for explaining both why New Zealand has an Environment Court and for capturing its legal nature in part and in that sense, providing a legitimising frame for the Court. Using this frame one can chart a disaggregation of power achieved by deliberate delegation but arguably necessary in the context of environmental conflict resolution: the NZEnvC is seen to be creating a bridge between the political and formal law and is part of governance in a positive sense, facilitating social policy.¹⁵⁸ But there is a need to take this adjudicative role seriously. A Feyerabend ‘anything goes’ type situation is unacceptable and as the debate surrounding the NZEnvC has shown, will soon become intolerable: law - and legal institutions - must have limits.¹⁵⁹

In sum, the administrative justice frame is a little blurry and out of focus - - its lines ‘cannot be drawn with a ruler’-¹⁶⁰ reflecting a normative contestability

¹⁵⁸ Resnik, ‘Reinventing Courts as Democratic Institutions’, 10

¹⁵⁹ See Joseph Raz, ‘The Institutional Nature of Law’ (1975) 38 MLR 489, 499

¹⁶⁰ Louis Jaffe, *Judicial Control of Administrative Action* (Little and Brown 1965), 324

or uncertainty that administrative lawyers know all too well.¹⁶¹ Certainly, it does not help to delineate boundaries for the Court - for that we need to look elsewhere (and the challenges for creating greater legislative strictures are explored below). But considering this frame does help suggest what a theory for environmental adjudication would have to address, and that includes acknowledging the failings of the 'ordinary courts' in this sphere. In particular, the very nature of environmental adjudication needs to be scrutinised, and consideration given to how the form, functions and powers of any adjudicatory body might best respond to that nature: the 'what' and the 'why' need to infuse a new frame. If we fail to embrace this interaction we will end up with a theoretical misfit that is so far from reality it does nothing to illuminate our understanding.

[A] The 'generic instrumentalism' frame

The second analytical frame is premised upon generic instrumentalism and tends to dominate the policy discourse in New Zealand. Although generally dismissed by lawyers, the use of this frame *does* impact upon the legal nature of the Court, but its use in the New Zealand context also highlights its weaknesses.

As a general concept, instrumentalism views law as a practical tool for serving specific goals. Rather than containing a set of general legal axioms, law is seen as simply a means to an end: 'a means to achieve external goals that are derived from sources outside the law, including the dictates of democratic

¹⁶¹ Carol Harlow and Richard Rawlings, *Law and Administration* (3rd edn, CUP 2009), 1

processes and the “policy sciences” and for the instrumentalist, ‘uses of law can be justified only by reference to whatever values they fulfill’.¹⁶² *Generic* features of an instrumentalist approach to dispute resolution might address issues concerning access to justice, speed and cost, malleability etc. The predominant focus of the policy agenda in New Zealand is to ‘simplify and streamline’ environmental adjudication processes, making them quicker and cheaper and the present Government has produced or commissioned over 19 reports directly linked to this imperative over the last six years.¹⁶³ In fact, the title of the first set of amendments to the Act brought in by that Government is the Resource Management (Simplifying and Streamlining) Amendment Act 2009.

Generic instrumentalism, certainly as it is used in the New Zealand policy context, is however a highly exclusionary frame. It is concerned with ‘output’ legitimacy that is quantifiable and ‘results-focused’ rather than troubling with the ‘integrity of the decision-making’.¹⁶⁴ Nor does it take into account the contribution of the NZEnvC to developing environmental jurisprudence and ‘filling in the gaps’ of highly interstitial legislation. Other difficulties with the use

¹⁶²Summers, ‘Pragmatic Instrumentalism in Twentieth Century American Legal Thought - A Synthesis and Critique of our Dominant General Theory about Law and its Use’, 863

¹⁶³ See Ministry for the Environment (NZ) ‘Publication Search’ at [http://www.mfe.govt.nz/publication-search?search_api_views_fulltext=&f\[0\]=field_section_topic%3A170](http://www.mfe.govt.nz/publication-search?search_api_views_fulltext=&f[0]=field_section_topic%3A170) (last accessed 17 July 2015)

¹⁶⁴ For explanation of these concepts see Elizabeth Fisher, ‘The European Union in the Age of Accountability’ (2004) 24 OJLS 495, 508

of this frame accurately reflect Tamanaha's description that instrumentalism has no inherent integrity. Rather, it implies the need for 'compromise or contest between group interests within the democratic process' and the '[s]poils go to the winners'.¹⁶⁵ Accordingly, the instrumentalist 'law-as-politics-approach' is very much susceptible to ideological forces: a factor that led, in part, to instrumentalism being discredited in much US academic thought.¹⁶⁶

We can see how these concerns play out in New Zealand by using one particular example. In an attempt to speed-up final decisions, recent legislative amendments removed the statutory presumption in favour of public notification for resource-consent¹⁶⁷ applications, thus reducing the ability of the public to make submissions that would feed into decision-making.¹⁶⁸ This change impacts upon the legal nature of the Court by limiting its 'subject-community'. Although speed of decision is often conflated with promoting access to justice in general, this is not the case in the New Zealand context. Rather the frame is – as Tamanaha suggested – being used to advance a particular ideological agenda. Resource consents are applied for in order to develop, pollute or take natural resources, not to preserve or conserve them: developers are Tamanaha's

¹⁶⁵ Brian Tamanaha, *On the Rule of Law: History, Politics, Theory* (CUP 2004), 79

¹⁶⁶ *Ibid*, 79-80

¹⁶⁷ Akin to permitting and / or planning permission.

¹⁶⁸ Resource Management (Simplifying and Streamlining) Amendment Act 2009 (NZ), ss 95A, 87C-I.

‘winners’, getting faster decisions by having less public input. Other recent changes (including increases in court fees)¹⁶⁹ also militate against access to environmental justice for the wider community. In an attempt to deflect criticisms based upon generic instrumentalism, the judiciary have found themselves having to defend hearings in the Environment Court as against other adjudicatory models,¹⁷⁰ explaining the Court’s own innovations to cut costs whilst emphasising the importance of access to justice and fairness, particularly for self-represented litigants.¹⁷¹

In summary, the generic instrumentalist frame is useful for focusing *in part* on what we might want the Court to do, but clearly it is not able to account fully for the Court’s legitimacy, to set limits or explain its legal nature. The risk is that a frame premised upon generic instrumentalism allows environmental adjudication to be buffeted and formed by incidental currents, and in the New Zealand context it has drawn the judicial members of the Court into a cost-

¹⁶⁹ Resource Management (Forms, Fees, and Procedure) Amendment Regulations 2014 (NZ), sch 2

¹⁷⁰ L J Newhook, ‘Current and Recent-Past Practice of the Environment Court Concerning Appeals on Proposed Plans and Policy Statements’ [2012] Resource Management Journal 13; L J Newhook, *Comparative costs of different NZ Resource Management hearing models: a discussion paper* (Environment Court of New Zealand, 2015); New Zealand Environment Court, *Annual Review by Members of the Court* (Environment Court, Wellington, 2014)

¹⁷¹ L J Newhook, ‘Justice without Barriers: Technology for greater access to justice’ (Australasian Institute of Judicial Administration, Brisbane, 21-22 May 2015)

benefit debate that they should not be required to address. However, the fact that this frame is used at all - and how it has been constructed in New Zealand at least - has important lessons for the development of any future theory: efficiency in environmental adjudication is important. But rather than accepting an impoverished and ideological driven frame, theoretical responses must consider how best to foster normative legitimacy by embracing wider solutions: exploring how conceptual clarity, responsive procedures, and tailored principles will help facilitate both efficiency and equal access to justice.

[A] The ‘separation of powers’ frame

Lawyers may be uncomfortable with the two frames explored above but the final frame will prove familiar. As a normative meta-theory, the separation of powers provides the main legitimising frame for institutions of government in New Zealand and many other nations, and it constitutes a powerful idea. Even so, it is perhaps surprising that it dominates the legal discourse concerning the NZEnvC – but it manifestly does: the critics referred to in part three above make direct reference to Montesquieu and his theory on the separation of powers to attack the normative legitimacy of the Court.¹⁷² The next part reflects upon why this frame is being used and what its advocates conceive to be its internal criteria. In particular, the nature of environmental adjudication is considered

¹⁷² E.g. Environment, *Report of the Minister for the Environment’s Technical Advisory Group*, 10

more closely in order to explain why a 'separation of powers' frame struggles to accommodate it.

[B] A 'pure' approach to the separation of powers

In conceiving of the separation of powers in the 1748 *Spirit of Laws* Montesquieu's concern was the 'avoidance of tyranny'.¹⁷³ His observation was that the English constitution avoided excessive concentrations of power in one person, group or agency - and thus avoided dictatorship - by ensuring that 'the three great departments of power' were 'separate and distinct'.¹⁷⁴ But it is important to appreciate the subtleties of the concept because there are different ways to perceive of the separation of powers: a fact that complicates the present debate. Marshall identifies within the phrase a cluster of overlapping and at times contradictory ideas - including 'the differentiation of the concepts 'legislative', 'executive', and 'judicial' ... the isolation, immunity, or independence of one branch of government from the actions or interference of another ...[and by contrast, suggesting a necessary inter-relationship] the checking or balancing of one branch of government by the action of another' - and he notes that '[r]eferences to the separation of powers may be references to any one or to any

¹⁷³ Charles de Secondat Baron de Montesquieu, *The Spirit of Laws*, vol XI (Thomas Nugent tr, Batoche Books 2001), 173-174

¹⁷⁴ James Madison, 'Number XLVII' in E H Scott (ed), *The Federalist and other constitutional papers* (Chicago 1898), 266

combination of these ideas'.¹⁷⁵ However, contributors to the NZEnvC debate appear to be using the separation of powers in a *pure* sense: as Cane observed, 'only with a pure form of separation of powers are specialist adjudicative bodies seen as problematic'.¹⁷⁶

Essentially, a pure theory privileges a *qualitative* separation of the different functions of government.¹⁷⁷ The conceptual frame is seen as 'hard and shiny' and its internal criteria are established by the idea that:

there are three intrinsically distinct functions of government; the legislative, the executive, and the judicial: these distinct functions ought to be exercised respectively by three separately manned departments of government; ... [and] the legislative may not delegate its powers.¹⁷⁸

Critics of the NZEnvC¹⁷⁹ adopt a pure approach and they need to do so in order to make the separation of powers 'work' as a frame, to draw clear limits of legitimacy for the Court - to argue, for example, that the Court should not have a role in determining disputes over policy and planning documents thus crafting

¹⁷⁵ Geoffrey Marshall, *Constitutional Theory* (Clarendon 1980), 100

¹⁷⁶ Cane, *Administrative Tribunals and Adjudication*, 32

¹⁷⁷ Jeremy Waldron, 'Separation of Powers in Thought and Practice' (2013) 54 BCL Rev 433, 433-434

¹⁷⁸ Marshall, *Constitutional Theory*, 100

¹⁷⁹ E.g. Rivers-McCombs, 'Planning in Wonderland: The RMA, Local Democracy and the Rule of Law'; Environment, *Report of the Minister for the Environment's Technical Advisory Group*

the final regulatory regimes for localities.

But closer attention shows that there are certain dangers in privileging a frame based upon a pure conception of the separation of powers, not least the fact that it has oft been maligned as ‘an antique and rickety’ frame:¹⁸⁰ it is contestable and contested, theoretically and in practice, historically and at present.¹⁸¹ I do not intend to add to the debate or argue that a metaphor based upon a pure form is unhelpful – that is not the purpose of this article – but I do suggest that the rigidity of the frame that is being used to analyse the legal nature of the Court and environmental adjudication appears ill-equipped for the task. Environmental adjudication takes a particular form because of the *very nature* of environmental disputes. My fundamental argument is that there is too much blurring of the traditional delineations that a pure approach to the

¹⁸⁰ Robson, *Justice and Administrative Law*, 14. Robson’s discrete metaphor is vehicular: ‘an antique and rickety chariot ... for the conveyance of fallacious ideas’. See also Ivor Jennings, *The Law and the Constitution* (5 edn, University of London Press 1969), 7-28 and Appendix I; Marshall, *Constitutional Theory*, ch 5

¹⁸¹ E.G. Earl Halsbury and Viscount Halisham, *Halsbury’s Laws of England*, vol 6 (2 edn, Butterworth 1931), 385; Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (3rd edn, Macmillan 1889), 309, 322; Madison, ‘Number XLVII’, 268; Maitland, ‘The Shallows and Silences of Real Life’, 478; Henry Lord Viscount St John Bolingbroke, *The Works of the Late Right Honourable Henry St John Lord Viscount Bolingbroke*, vol 2 (Oliver Goldsmith ed, J Johnson 1809), 190-191; Paul Craig, ‘Public law, political theory and legal theory’ [2000] PL 211, 218-219; Lawrence Claus, ‘Montesquieu’s Mistakes and the True Meaning of Separation’ (2005) 25 OJLS 419; Cane, *Administrative Tribunals and Adjudication*, 28; Edward L Rubin, *Beyond Camelot: Rethinking Politics and Law for the Modern State* (Princeton University Press 2005)

separation of powers relies upon – between law, policy and fact, and between qualitatively different types of decision (the legal and the political) and forms of decision-making - to construct stable frames for legitimacy using this conception, or to set clear and justifiable limits on the powers of environmental adjudicatory bodies. Environmental adjudication may not be sui generis in this respect, but this legal-form admixture is an inherent and immutable feature of environmental dispute resolution.

[B] The nature of environmental adjudication: an ill fit with the separation of powers?

A cursory look at the various types of environmental disputes hints at the necessary complexity of environmental adjudication, allows us to begin to explore the fundamental nature of environmental adjudication, and demonstrates the 'blurring' of boundaries.¹⁸² As Fisher notes,

[e]nvironmental problems are inherently messy and thus not easily managed by engineered solutions. The non-linear processes of ecosystems, the unpredictability of human behaviour and the problems of scientific uncertainty all make the process of assessing environmental harm an intricate and often intractable business.¹⁸³

¹⁸² Ole Pedersen, 'Modest Pragmatic Lessons for a Diverse and Incoherent Environmental Law' (2013) 33 OJLS 103, 107

¹⁸³ Fisher, 'Unpacking the Toolbox: Or Why the Public/Private Divide Is Important in EC Environmental Law', 231

Consequently, there are many types of environmental dispute that will not yield to simple problem solving or syllogistic reasoning. This difficulty becomes more pronounced with prospective review, planning or permitting decisions when courts may be faced with uncertainty or asked to evaluate risk. In addition, normative conflicts abound.¹⁸⁴ Decisions may permit the destruction or pollution of part of an ecosystem or insist upon its protection; they may restrict access to public resources for private gain; prevent individuals using their property as they wish; and determine whether to permit particular developments at all or only in one area or another. Decision-makers may be imposing risks and restrictions on people inhabiting particular environments that could impact upon their psychological and physiological health, socio-cultural and economic wellbeing, and upon their children and future generations.¹⁸⁵ And decisions may impact upon individual rights.¹⁸⁶ Environmental law is a subject of great legal complexity, but 'socio-political conflict ...[is] part of the operational

¹⁸⁴ E.g. *Falkner v Gisborne District Council* (coastal defences v private property); *Royal Forest and Bird Society of New Zealand Inc v Buller District Council* [2006] NZRMA 193 (HC) (endangered fauna v coal); *Bleakley v Environmental Risk Management Authority* [2001] 3 NZLR 213 (HC) (Maori cultural beliefs v genetic modification)

¹⁸⁵ Ceri Warnock, 'Understanding the Objective: Psychological Effects in Environmental Decision-Making' (2011) 24 *New Zealand Universities Law Review* 574

¹⁸⁶ Particularly property rights, see *Falkner v Gisborne District Council*

reality',¹⁸⁷ and as the Chief Justice of New Zealand observes, environmental law is 'always a flash point. It is always politically contentious'.¹⁸⁸

Often there is very little consensus about the 'right decision' in disputes concerning the use or conservation of the environment: it is not an area of law susceptible to being 'worked out like mathematics from some general axioms of conduct'.¹⁸⁹ On the contrary, 'there is often considerable disagreement' about the risks inherent in any course of action because

there will be divergent socio-political conceptions of what is the cause and what is at stake. These are due to the complexities, uncertainties and the different social values placed on environmental protection. Conflicts over values will also translate into different understandings of how communities should act collectively.¹⁹⁰

This reality has ramifications for the appropriate regulatory architecture. In terms of managing environmental conflicts, centralised government may lack the requisite scientific and technical expertise in the particular area; there may be uncertainty and gaps in knowledge; scenarios change rapidly; the scope of activities and their relative impacts on specific environments can vary

¹⁸⁷ Elizabeth Fisher, 'Environmental Law as 'Hot' Law' (2013) 25 JEL 347, 351; see also Todd Aagaard, 'Environmental Law as a Legal Field: An Inquiry in Legal Taxonomy' (2010) 95 Cornell L Rev 221, 256-257

¹⁸⁸ Elias, 'Righting Environmental Justice', 1

¹⁸⁹ Oliver Wendell Holmes, 'The Path of the Law' (1897) 10 Harv L Rev 457, 465

¹⁹⁰ Fisher, 'Unpacking the Toolbox: Or Why the Public/Private Divide Is Important in EC Environmental Law', 232

enormously; localised solutions may be preferred; and there is often a desire to facilitate compromise and to allow those being regulated and impacted upon to participate in the formation of norms.¹⁹¹

The use of language in modern environmental statutes that is vague and unformed reflects this complexity. For example, as stated above, the statutory purpose of the RMA is to promote the sustainability of natural and physical resources. Dryzek comments that sustainable development is ‘a discourse, not a concept, and still less a scientific concept’¹⁹² and this helps in part to explain why in the New Zealand context (and in many other jurisdictions) the main environmental statute constitutes a framework, delegating various roles and responsibilities to other bodies and providing them with flexible powers to craft solutions in respect of environmental conflicts. In many regulatory-complex areas, but especially in environmental law, ‘solutions must be attempted, but they often cannot be anything but tentative working hypotheses subject to continual reconsideration’¹⁹³ and to expect comprehensive perfection from environmental management plans and the professionals who draft them is to ask too much. Rather, policy and planning instruments are ‘living’ constitutions for the environment that have to be tested in and against real-life scenarios and

¹⁹¹ Arthurs, *Without the Law: Administrative Justice and Legal Pluralism in Nineteenth-Century England*, 204

¹⁹² Dryzek, ‘Paradigms and Discourses’, 56

¹⁹³ Farmer, *Tribunals and Government*, 198

tweaked accordingly. There is, therefore, a need for a discrete and responsive mechanism to mediate between various normative stances.¹⁹⁴ All these features of environmental problem-solving help to explain why the legislature may be challenged in setting clear limits for SECS or tightly drawing-in their discretion.

Much modern environmental adjudication is concerned with 'grievance[s] about the operation of public policy'¹⁹⁵ and, using Chayes' conception,

permits ad hoc applications of broad national policy in situations of limited scope. The solutions can be tailored to the needs of the particular situation and flexibly administered or modified as experience develops with the regime established in the particular case.¹⁹⁶

This explanation reflects to some extent the idea expressed in the literature that SECs play a deliberate role in governance.¹⁹⁷ In such a system, the enforcement and application of law is a necessary 'implementation of regulatory policy and litigation inevitably becomes an explicitly political forum and the court a visible arm of the political process.'¹⁹⁸ Some argue that to undertake environmental adjudication, SECs inevitably become 'political institutions' because they help 'to

¹⁹⁴ RJ Bollard, 'The Important Role of Town and Country Planning Appeal Boards' [1973] *New Zealand Law Journal* 233, 234

¹⁹⁵ Chayes, 'The Role of the Judge in Public Law Litigation'

¹⁹⁶ *Ibid*, 1307

¹⁹⁷ See text accompanying n s 45 - 53

¹⁹⁸ Chayes, 'The Role of the Judge in Public Law Litigation', 1304

create, to express, and to realise ... public purposes'¹⁹⁹ – and do so by employing integrative processes²⁰⁰ - and this impacts upon the possibility of preserving a law-policy divide. As TRS Allan notes, in regulatory scenarios where parliament confers jurisdiction 'not to determine rights and duties already given, but to determine some facet of the public interest or administer a scheme, where executive 'discretion' (or choice) is an integral component of each decision',²⁰¹ 'a fundamental distinction between administrative policy and legal right' just does not exist.²⁰² It certainly makes for an unstable premise in environmental law where it is often impossible to determine where policy ends and law begins or indeed where law ends and facts begin.²⁰³

In terms of the law-policy interface, Scotford and Robinson have observed that in the UK the 'close legal interaction between environmental legislation and policy shows that there is no clean constitutional separation of environmental

¹⁹⁹ Elizabeth Fisher, *Risk Regulation and Administrative Constitutionalism* (Hart 2007), 30 citing B Cook, *Bureaucracy and Self Government: Reconsidering the Role of Public Administration in American Government* (John Hopkins University Press 1996), 16

²⁰⁰ James March and Johan Olsen, *Rediscovering Institutions: The Organisational Basis of Politics* (Free Press 1989), 124-129

²⁰¹ Trevor R S Allan, *Law, Liberty and Justice: The Legal Foundations of British Constitutionalism* (Clarendon 1994), 57

²⁰² Ibid, 53; see also Robson, *Justice and Administrative Law*, 333-336

²⁰³ Cane, 'Merits Review and Judicial Review - The ATT as Trojan Horse', 220

policy from the scope of environmental law'; there is no clear definition of policy in environmental law and it may be 'legislatively constructed and constrained', created by a myriad of different bodies and pervasive.²⁰⁴ This conclusion is equally apt in the New Zealand context. Within environmental law, policy may have more direct legal force than statutory clauses as *Environmental Defence Society Inc v Marlborough District Council* demonstrates beautifully.²⁰⁵ In that case, the Supreme Court of New Zealand described the 'sustainable management' statutory purpose of the RMA as setting a 'policy' direction that was not suitable for close statutory interpretation. In contrast, the majority of the Court did subject the wording in the relevant policy document to careful judicial scrutiny, applying a literal approach to its interpretation, and this approach proved determinative for the substantive decision.²⁰⁶

The distinction between law and facts in environmental law is also particularly porous. Tension arises from trying to make sense of terms that may be both ecologically and legally constructed, resulting in 'competing understandings'.²⁰⁷ Recall, for example, the difficulties in trying to define 'waste'

²⁰⁴ Eloise Scotford and Jonathan Robinson, 'UK Environmental Legislation and Its Administration in 2013 - Achievements, Challenges and Prospects' (2013) 25 JEL, 397-399

²⁰⁵ *Environmental Defence Society Incorporated v Marlborough District Council*; Ceri Warnock, 'Reconceptualising the Role of the New Zealand Environment Court' (2014) 26 JEL 507

²⁰⁶ *Environmental Defence Society Incorporated v Marlborough District Council*, [127]

²⁰⁷ Elizabeth Fisher, Bettina Lange and Eloise Scotford, *Environmental Law: text, cases and materials* (OUP 2013), 670

for the purposes of the EC Waste Directive and the ensuing vast body case law.²⁰⁸ Such difficulties are exacerbated by the common practice of creating principles-based statutes for environmental management, best illustrated by an example from the New Zealand context. Part 2 of New Zealand's Resource Management Act is entitled 'Purpose and Principles'. It explains the sustainable management purpose of the Act and (amongst other things) requires all decision-makers to:

recognise and provide for... the protection of outstanding natural features and landscapes ... [and] the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga.²⁰⁹

Value-laden concepts such as 'landscapes' and 'waahi tapu' (akin to sacred sites) will not yield to a simple process of statutory interpretation, nor are they capable of being proven by witnesses as a matter of primary fact. Rather, an understanding and application of these so-called 'legislative facts'²¹⁰ requires judgment mixed with facts, 'policy ideas, opinion, discretion, or philosophical

²⁰⁸ Eloise Scotford, 'Trash or Treasure: Policy Tensions in EC Waste Regulation' (2007) 19 JEL 367; Hazel Ann Nash, 'The Revised Directive on Waste: Resolving Legislative Tensions in Waste Management?' (2009) 21 JEL 139

²⁰⁹ RMA, s 6 (b)-(e)

²¹⁰ Davis, 'An Approach to the Problems of Evidence in the Administrative Process'; Royden Somerville, *Submissions on: Striking the Balance – Appeal Processes – The Specialist Environment Court* (A Review of the New Zealand Court System, New Zealand Law Commission, Wellington, 2002), 24

preferences'.²¹¹ There are 'numerous examples of the NZEnvC attempting to craft environmental or ecological phenomena into concepts that can be used in legal contexts, and translating Māori cultural ontologies into a common language'²¹² and the Court has done so by facilitating the interaction between evidence, policy and law. For example, after hearing one heavily contested case the Court acknowledged the difficulty in attributing a clear legal meaning to such an ecologically complex term as 'landscape': in fact, it could not give a categorical definition. At best it could provide a framework for managing fact finding in future adjudication that took into account the wording and structure of the Act and relevant case law, incorporated policy directives, and marshalled evidence, so managing the interchange between law, policy and fact. The resulting methodology took into account not just romantic-pastoral perceptions of aesthetic quality (considerations reflected in the policy framework), and the scientific evidence of expert witnesses, but also called for evidence to include the historical associations of the land and its importance in Māori lore - crafting a meaning to 'landscape' that reflected the identity of the New Zealanders' that inhabited it.²¹³ This approach merged the strands of sustainability (the statutory imperative), whilst also reflecting that 'finding facts is only partly a matter of

²¹¹ *Comptroller of Customs v Gordon & Gotch (NZ) Limited* [1987] 2 NZLR 80 (HC), 93

²¹² Warnock, 'Reconceptualising the Role of the New Zealand Environment Court', 510; *Winstone Aggregates Ltd v Franklin District Council* (NZEnvC Auckland A080/02, 17 April 2002)

²¹³ *Wakatipu Environmental Society Inc v Queenstown Lakes District Council* [2000] NZRMA 59 (NZEnvC)

discovery, observation and description of data about the world: it is also a matter of analysis, classification and interpretation',²¹⁴ or to borrow from Jasanoff, legislative facts are 'socially constructed'.²¹⁵ Chayes notes that the 'continuous and intricate interplay between factual and legal elements' in public law disputes justifies a court having a greater control over the evidence.²¹⁶ But this factor also helps to explain the specialist nature of many SECs, including the NZEnvC. This reality has been acknowledged by the Higher Courts in New Zealand, explaining that the NZEnvC has to call upon 'the whole range of its collective experience' in reaching decisions,²¹⁷ and stating that 'by the very nature of their work' members of specialist adjudicatory bodies 'must acquire opinions about the type of questions that they deal with'.²¹⁸

For all these reasons and more, attempting to make environmental adjudication fit within a pure separation of powers frame might appear futile.

²¹⁴ Cane, *Administrative Tribunals and Adjudication* 12-13, referring to Jerome Franks' description.

²¹⁵ Sheila Jasanoff, *The Fifth Branch: Science Advisers as Policy Makers* (Harvard University Press 1990), 12

²¹⁶ Chayes, 'The Role of the Judge in Public Law Litigation', 1297

²¹⁷ *Electricity Corporation of New Zealand Ltd v Manawatu-Wanganui Regional Council* (unreported) W70/90, 29 October 1990 (PT) [95]

²¹⁸ *Turner v Allison* [1971] NZLR 833 (CA), 843; for acknowledgment in different context see *Jones (By Caldwell) v First Tier Tribunal* [2013] UKSC 19, [2013] 2 AC 48

While the separation of powers is a good frame for setting limits for legal institutions in general, it struggles to do so in the context of environmental adjudication and repeated as a mantra, it risks turning into ‘a suffocating straitjacket’²¹⁹ that might serve to undermine the functionality of the Court. This frame fails because it splices the *raison d’etre* for SECs from normative legitimacy, and it ignores the particular nature of environmental adjudication. But its pervasiveness provides an important lesson for pre-theory building. In order to foster normative legitimacy, environmental adjudication has to be referable back to some conceptual limits and this is a challenge that any theory for environmental adjudication would have to address.

[A] Conclusion

Without doubt, SECs raise complex issues of governance and power and foster differing conceptions of legitimacy. These issues tend to be ignored in the literature but this article has called for an honest discussion of the potential challenges that SECs raise. Using the NZEnvC as a case study, the article has explained that we may view SECs through competing frames of reference. These frames can act to legitimise or alternately, render illegitimate various functions and powers of SECs and in turn constitute and limit legal nature. However, this article also argues that the three frames being used within the New Zealand

²¹⁹ Berlin, ‘Does political theory still exist?’, 19

debate all appear inadequate for the tasks of analysing the NZEnvC in particular and environmental adjudication more generally.

In an attempt to make the theoretical divergence constructive, this article concludes with a question, albeit a question that has been relatively ignored: do we need a new theoretical model, one that explains and more properly accommodates environmental adjudication? A model for environmental adjudication might surmount the present divisions and foster a more reflective dialogue about SECs. It might enable us to take environmental adjudication seriously, allowing us to draw the limits properly, whilst also acknowledging the significance of these important bodies in many nations' constitutional arrangements. Such a frame might help tease out the adjudicatory nature of the NZEnvC and other SECs rather than conflating their legal nature within a separation of the powers discourse or simply subsuming them within the messy administrative justice landscape. And it might enable environmental adjudication to become properly 'subject to law'.

Undertaking pre-theory building and exploring existing frames that are being used to make sense of environmental adjudication enables us to see what a theory would need to address. In order to foster normative legitimacy some conceptual limits must be established but any valid theory must also acknowledge the relationship and embrace the interaction between the nature of environmental adjudication and the form, functions and powers of environmental adjudicators. These considerations suggest the need to adopt a pragmatic but principled approach to theory building, one premised upon the importance of considering four factors as indivisible parts of the whole: the distinct characteristics of environmental disputes; commensurate challenges for

dispute resolution; the resulting development of environmental law principles; and pragmatic and justified procedural responses. Adopting this approach would help to explain the complexity of environmental dispute resolution, show how SECs have in the past and might in the future respond to those complexities in a way that has legal integrity, and begin to provide the basis for a normative model of environmental adjudication.