

The effectiveness of the law in providing access to environmental justice: an introduction

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Part A: Introduction

Environmental justice includes at least three concepts: distributive justice, procedural justice and justice as recognition.¹ The law can help or hinder access to justice in these three senses.

Distributive justice is concerned with the distribution of environmental goods (or benefits) and environmental bads (or burdens). Access to distributive justice is promoted by the law giving substantive rights to members of the community of justice to share in environmental benefits (such as clean air, water and land, green space and a healthful ecology) and to prevent, mitigate, remediate or be compensated for environmental burdens (such as air, water, land and noise pollution, and loss of greenspace, biological diversity and ecological integrity).

Claims about distributive justice require the addressing of three questions: who are the members of the community of justice to whom distributive justice is to be given?; what are the environmental benefits and burdens to be distributed?; and what are the principles or criteria to be applied in distribution to and between members of the community of justice?

However, just arrangements are to be assessed not only in simple distributive terms, but also in how these distributions of environmental benefits and burdens affect the capabilities of members of the community of justice to achieve valuable functionings (in terms of both activities and states of existence or being).

¹ Gordon Walker, *Environmental Justice: Concepts, Evidence and Politics* (Routledge, 2012) 10, 42-51.

Procedural justice is concerned with the ways in which decisions, including regarding distribution of environmental benefits and burdens, are made, and who is involved and who has influence in those decisions. Access to procedural justice is promoted by the law giving procedural rights to members of the community of justice to have access to environmental information, be entitled to participate in environmental decision-making, and have access to review procedures before a court or tribunal to challenge decision-making or impairment of substantive or procedural rights. Access to procedural justice is important for achieving distributional justice. Broad, inclusive and democratic decision-making procedures are a precondition for achieving distributional justice.

Justice as recognition is concerned with who is given respect and who is and is not valued. Access to justice as recognition is promoted by the law not only giving substantive and procedural rights but also by affording recognition of different social groups and communities, and of the natural environment and components of it.

This paper highlights aspects in which the law is helping or hindering access to environmental justice in these senses.

B. Distributive justice

The concept outlined

Distributive justice is central to environmental justice concerns. It involves substantive justice in the sense that it is concerned with the environmental benefits and burdens that are received by members of the community of justice. The law is critical in establishing the framework within which distribution of environmental benefits and burdens occur. Natural resources laws provide for the allocation of entitlements to access and use natural resources, including water, minerals, timber and other components of biological diversity. Planning laws provide for the spatial distribution and designation of land and its resources (by zoning), the opportunities to use them (by development control), and allocation of entitlements to use land and its resources (land use permits). Pollution laws regulate environmental externalities, including by allocating entitlements to cause environmental externalities, such as

pollution of air, water and land. Such laws regulate the distribution of environmental benefits, but also of environmental burdens.

The extent to which laws enable the achievement of distributive justice will depend on, first, the community of justice (the recipients of distributive justice) recognised by the laws, secondly, the environmental benefits and burdens distributed by the laws, and thirdly, the criteria governing the distribution of environmental benefits and burdens under the laws. Achieving distributive justice is also not only about ensuring distributions of primary goods that are just in themselves, but also ensuring that such distributions enable members of the community of justice to lead fully functioning and flourishing lives.

Achievement of distributive justice is, however, not only a product of the laws' content and terms, but also how the laws are applied in practice. Distributive injustice is not only caused by laws that provide for inequitable distribution of environmental benefits and burdens, but also by inequitable application or non-application of laws that provide for equitable distribution.

The community of justice

The community of justice is comprised of the entities entitled to be recipients of justice. For distributive justice, they are the claimants for and the recipients of distributions of environmental benefits and burdens. For procedural justice, they are the entities entitled to have access to environmental information, to participate in environmental policymaking and decision-making, and to have access to justice through the courts. For justice as recognition, they are the entities entitled to recognition in the social and political realms.

In relation to distributive justice, the laws regulating or effecting a distribution of environmental benefits and burdens affect the community of justice in two ways: first, the laws confine membership of the community of justice and, secondly, the laws affect who within or without that membership receives environmental benefits or burdens. I will commence with the second way then address the first way.

The laws skew distribution of environmental benefits to consuming uses but environmental burdens to non-consuming uses for at least four reasons. First, environmental laws are inherently biased towards consuming uses instead of non-consuming uses of the environment. This results in a loaded distributive system. Environmental laws typically prohibit or restrict the use or exploitation of the environment, including the consumption of natural resources, but then enable that prohibition or restriction to be lifted by a person applying for and a regulatory authority granting some form of approval to use or exploit the environment.² Hence, natural resource laws prohibit but then enable the consumption of natural resources, such as mining of coal or metalliferous reserves, logging of forest for timber, and extraction of ground or surface water, by the granting of a mining, timber or water licence. Native vegetation and wildlife laws prohibit but then enable the clearing of native vegetation or the picking of plants or the harming of animals of threatened species, populations or ecological communities and their habitat by the granting of a clearing approval or a threatened species licence. Planning laws restrict but then enable the carrying out of development such as the use of land and its resources by the granting of a development consent. Pollution laws restrict but then enable the pollution of public resources – the commons – such as the air, rivers, harbours and seashores by the grant of a pollution licence.

Only persons who wish to consume or exploit these natural resources, land or public resources can apply under these laws for statutory approval to do so. The laws do not enable persons who do not wish to consume or exploit these resources to apply for an approval to conserve them. Persons who wish to leave coal reserves in the ground, in order to avoid global warming by the burning of those reserves,³ cannot apply under the mining laws to do just that; they can only apply to explore and extract the coal reserves. Persons who wish to preserve native vegetation or the habitat of threatened species or populations of plants and animals, or endangered ecological communities, cannot apply under wildlife laws for an approval to preserve that native vegetation or those habitats in perpetuity; they can only apply to clear or damage them. Persons who wish to conserve and keep free from pollution the

² See also R J Fowler, 'Environmental Law and its Administration in Australia' (1984) 1 EPLJ 10, 18-33 (discussing negative components of environmental law).

³ As recently recommended by the Climate Commission: see Climate Commission, *The Critical Decade 2013 – Climate science, risks and responses* (Commonwealth of Australia, 2011).

commons – the air, rivers, harbours and seashores – cannot apply for an approval to do so; they can only apply to discharge pollutants into or to exploit the commons.

It may be possible for persons who wish to preserve native vegetation or habitat of threatened species, populations or ecological communities on their land to enter into a conservation agreement under an environmental statute recording that commitment.⁴ However, such a conservation agreement does not give approval to preserve the natural environment concerned. No approval is needed because non-use and non-exploitation of that natural environment accords with the statutory prohibition or restriction. Nevertheless, conservation agreements foreclose future options to use or exploit the natural environment concerned whilst the conservation agreements are in force.

The consequence is that environmental laws inherently skew the distribution of environmental benefits to consuming users and of environmental burdens to non-consuming users.

Secondly, the effect of environmental laws is to impose the burden of proof on those persons seeking to preserve the environment (non-consuming users) rather than on those persons wishing to consume or exploit the environment (consuming users). This again skews distribution of environmental benefits in favour of consuming users to the detriment of non-consuming users.

There are a number of reasons why this occurs. The laws allowing consuming users to apply for statutory approval to consume or exploit the environment do not impose a legal burden of proof on consuming users to establish that the distribution for which they have applied is just and equitable. They do not, for instance, need to establish an absence of any particular type of environment harm (such as a significant impact on threatened species, populations or ecological communities), or that the proposed activity will have some acceptable environmental outcome or standard (such as

⁴ See, eg, National Parks and Wildlife Act 1974 (NSW), pt 4 div 12 and Environment Protection and Biodiversity Conservation Act 1999 (Cth), ss 305-307. See also Elisabeth Peden, 'Conservation Agreements – Contracts or not?' (2008) 25 EPLJ 136, 136.

achieving ecologically sustainable development (ESD)), or that the economic or social benefits of the proposed activity will outweigh the environmental costs.

In practice, especially for larger and more significant activities, there seems to be a presumption by the regulator and the applicant that permission to consume or exploit the environment is to be granted unless good reason is demonstrated to the contrary. This presumption effects a transfer of the burden to those opposing an activity to prove that the permission should not be granted in the particular circumstances of the case.

In any environmental impact assessment of a proposed activity and in the determination of an application to carry out a proposed activity, undue attention and weight are given to quantifiable data, to the detriment of unquantifiable data.⁵ This also affects the burden of proof. Consuming uses of the environment yield quantifiable benefits – the desired products of consumption or exploitation of the environment (such as the minerals extracted) have quantifiable market value, as do the costs of production, resulting in net quantifiable benefits of consumption. However, the environmental externalities (the environmental burdens or costs caused by the consuming use) usually do not have market value. It might be possible, to some limited extent, for some types of environmental burdens or costs to be given quantitative value, perhaps by means of surrogates in the market. Yet, all environmental burdens or costs will not be quantified to the full extent. The outcome is that, in purely quantitative terms, the market-quantified net environmental benefits of consumption almost always outweigh the non-market environmental burdens or costs of consumption. This quantitative outweighing of the benefits over the costs in economic analyses usually results in the consuming use being approved. The burden of establishing that the environmental costs are in fact greater than have been quantified and outweigh the benefits of consumption and exploitation of the environment falls on persons wishing to preserve the environment.

⁵ Laurence H Tribe, 'Ways not to think about plastic trees: new foundations for environmental law' (1974) 83 Yale LJ 1315, 1317.

Conventional economic analyses, such as cost benefit analysis, also do not consider issues of distributive justice; they are concerned only with the aggregation of costs and benefits, not how or why these are distributed.⁶

The burden of proof issue arises in another way. The loaded system in favour of consuming users also results in allocation of the burden of proof to non-consuming users in any legal action to restrain consumption or exploitation of natural resources. Consuming users, by exercising their demands (consumption and exploitation of the environment), foreclose non-consuming users from exercising theirs (preservation of the environment), but the contrary does not hold true. Even in a system of laws regulating the use and exploitation of the environment, the leverage inherent in consuming users of the environment means that they can continue until they are sued and restrained by court order. Consuming users will, therefore, be defendants and non-consuming users or persons wishing to preserve the environment will be plaintiffs. In our legal system, plaintiffs bear the burden of proving that the defendant's conduct is in breach of the law. In cases of doubt, the plaintiff will not succeed and use or exploitation of the environment will prevail.⁷

Thirdly, following on from the previous two points, environmental laws do not enable holistic determination of competing claims for distribution of environmental benefits and burdens. As noted above, the laws only ever permit an application for approval of consumption or exploitation of the environment, not its preservation. In this sense, there cannot be a resolution of competing applications for approval of consumption versus preservation of the environment.

The laws also are structured as to only deal with individual applications for particular consuming uses under the particular law concerned. There is no capacity to deal with applications for consuming uses under other laws, or applications that have not

⁶ *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure and Warkworth Mining Ltd* [2013] NSWLEC 48 [485].

⁷ J E Krier, 'Environmental Litigation and the Burden of Proof' in M F Baldwin and J K Page (eds), *Law and the Environment* (Walker & Co 1970); B J Preston, 'Third Party Appeals in Environmental Law Matters in New South Wales' (1986) 60 *Australian Law Journal* 215, 221; Brian J Preston, 'Internalising ecocentrism in environment law' (3rd Wild Law Conference: Earth Jurisprudence – Building Theory and Practice, Brisbane, 16 September 2011) 8 available at <http://www.lec.lawlink.nsw.gov.au/agdbasev7wr/_assets/lec/m4203011721754/preston_internalising%20ecocentrism%20in%20environmental%20law.pdf> accessed 18 June 2013.

yet been made under the particular law. There is also usually no capacity to consider the cumulative impacts of other pending applications under the particular law. This is especially a problem in environmental decision-making because of the tyranny of small decisions – decisions with small environmental impacts collectively manifest themselves as significantly adverse to the environment when accumulated at a larger scale, both over space and time.⁸ This isolated and reductionist decision-making approach does not allow for a holistic assessment of issues of distribution of environmental benefits and burdens. The result is a failure to address and appreciate the full environmental costs of consuming uses. An undervaluing of environmental costs skews the cost benefit analysis in favour of consuming uses. The laws result, therefore, in distribution of environmental benefits to consuming users and environmental burdens to non-consuming users.

Fourthly, the laws are inadequate in the types of distributive decisions that are able to be made. The approval under the laws of a consuming or exploitative use of the environment usually will not mandate the full internalisation of the environmental burdens or costs. There usually will be a partial internalisation – conditions of approval may require the avoidance, mitigation or offsetting of certain environmental impacts to a certain degree, but there still will be some externality. The fossil fuel power station will still emit greenhouse gases, the open cut quarry or mine will still emit air or noise pollution, the logging operation will still cause impacts on biological diversity and ecological integrity. The recipients of these environmental externalities often will have no legal right to seek any further abatement or mitigation of, or compensation for, the burdens that are imposed lawfully under the approval. The statutory permission authorises the imposition of these burdens. The only legal right that arises is where the actual burdens of an activity exceed those burdens that are imposed lawfully under the approval. The result is to continue distribution of environmental benefits to consuming users and of environmental burdens to non-consuming users.

⁸ Guy J Dwyer and Mark P Taylor, 'Moving from consideration to application: the update of principles of ecologically sustainable development in environmental decision-making in New South Wales' (2013) 30 EPLJ 185, 186-187.

The second way laws affect the community of justice is by confining the membership of the community of justice. As a general rule, the entities who are entitled to be the recipients of distributive justice under the laws are limited to the present generation of humans. Future generations of humans are excluded, as are present and future generations of non-human nature.

Environmental justice requires intergenerational equity. Intergenerational equity involves three principles: first, the conservation of options principle requires each generation to conserve the diversity of the natural and cultural resource base in order to ensure that options are available to future generations for solving their problems and satisfying their needs; second, the conservation of quality principle requires that the present generation leave the quality of the natural and cultural environments in at least the same condition as they were received; and third, the conservation of access principle requires that the present generation should have reasonable and equitable access to the natural and cultural resources of the earth and should conserve this right of access for future generations.⁹ These principles establish distributive justice, focussing on the distribution, and right to claim for distribution, to the present generation of humans, whilst not compromising the ability to distribute environmental goods to future generations.¹⁰

Environmental laws usually fail to mandate the implementation of these principles of intergenerational equity in three respects. First, the laws do not accommodate the non-distribution of environmental goods to the present generation in order to enable distribution of environmental goods to future generations. As noted earlier, the laws only accommodate claims for current consumption or exploitation of the environment, not for the conservation of the environment. No application can, therefore, be made under the laws, on behalf of future generations, for statutory approval for non-distribution of natural environmental resources to the present generation, so as to conserve the option for future generations to apply for approval to consume those resources.

⁹ Edith Brown Weiss, 'Intergenerational equity: a legal framework for global environmental change' in Edith Brown Weiss (ed), *Environmental Change and International Law: New challenges and dimensions* (UN University Press 1992) 401-405.

¹⁰ David Schlosberg, *Defining environmental justice: theories, movements and nature* (OUP 2007) 112-113.

Secondly, the laws only inadequately permit consideration of intergenerational equity. Some laws might include intergenerational equity as a statutory object (either directly or indirectly as part of the principles of ESD or as a relevant matter to be considered within the exercise of discretionary statutory powers (either directly or as part of another matter such as ESD or the public interest). However, the laws tend not to impose absolute rules structuring the exercise of discretionary powers under the laws, such as that a power must be exercised to promote or be consistent with the object of intergenerational equity.¹¹ For example, the laws do not require that a statutory approval to carry out an activity to consume or exploit the environment can only be granted if to do so will implement the principles of intergenerational equity.

Thirdly, instead of discretionary powers, the laws do not impose duties on public authorities to achieve or not compromise some specified outcome or standard, such as intergenerational equity.¹²

Non-human nature, both present and future generations, are also not included in the community of justice by the laws and hence cannot claim for distributive justice in the distribution of environmental benefits and burdens. A case can be made that non-human nature should be included in the community of justice, at least to the extent of being recipients of the distribution of environmental benefits.¹³ In this way, non-human nature would be required to be considered in human deliberations of distributive justice.

Members of non-human nature to be included in the community of justice may include sentient animals but also can include non-sentient organisms as well as groups of organisms of the same species (populations) and assemblages of organisms of different species occupying particular areas (ecological communities and ecosystems).¹⁴ Different arguments are made for recognising different components of non-human nature within the community of justice. They include our

¹¹ See generally D E Fisher, 'Sustainability – the Principle, its Implementation and its Enforcement' (2001) 18 EPLJ 361, 364-368.

¹² Preston, 'Internalising ecocentrism in environmental law' (n 7) 9.

¹³ Brian Baxter, *A theory of ecological justice* (Routledge 2005) 75-151.

¹⁴ Schlosberg (n 10) 119.

shared community with nature;¹⁵ moral extensionism by recognising particular similarities between humans and non-humans such as sentience,¹⁶ similar basic needs¹⁷ or interests,¹⁸ or expression of agency of environmental imbalance;¹⁹ respect for the bodily integrity of both humans and non-human nature, its autonomy and resilience, and its capacity for autopoiesis (capacity to be self-directing, self-regulating or self-correcting).²⁰

The extension of the community of justice to non-human nature would enable all members of the extended community of justice to make claims against other members. The deliberative task would be to determine the level of environmental resources that various natural organisms, groups and systems need to survive and flourish and are entitled to claim against humans and one another.²¹

To the extent that non-human nature can be recipients of human deliberations of distributive justice, non-human nature is usually distributed environmental burdens not environmental benefits. The point made earlier concerning the inability to apply under laws regulating the use and exploitation of the environment for the preservation of the environment is relevant here. Allocation of environmental resources to non-human nature usually involves preservation of the environmental status quo. The old growth forest is left unlogged, the native vegetation not cleared, the natural wetland not drained or filled, the wild river not dammed or diverted. In so doing, the environmental resources on which the organisms, groups, ecological communities and ecosystems depend to survive and flourish are retained. However, preservation of the environmental status quo involves non-distribution – there is no consuming use or exploitation of the environmental resources. No application can be made under the laws for statutory approval for non-distribution.

¹⁵ Aldo Leopold, *A Sand County Almanac* (OUP 1949).

¹⁶ Peter Singer, *Animal Liberation* (Random House 1975) and Christopher D Stone, 'Should trees have standing? Towards legal rights for natural objects' (1972) 45 S Cal L Rev 450.

¹⁷ Ted Benton, *Natural relations: Ecology, animals rights and social justice* (Verso 1993) 203-210.

¹⁸ Baxter (n 13) 82-83, 99-101.

¹⁹ John Dryzek, *Deliberative democracy and beyond: Liberals, critics and contestation* (OUP 2000) 148-150.

²⁰ See Schlosberg (n 10) 136-138.

²¹ Baxter (n 13) chapter 9; Schlosberg (n 10) 120, 132.

It is true that statutory approval of an application for use or exploitation of the environment might be able to be conditioned on the protection of some part of the area of the environment to be impacted by the activity (an on-site offset), or of another area of the environment as an offset to compensate for the impacted area (an off-site offset). However, such a condition of approval falls short of achieving distributive justice for the non-human nature within the impacted area. First, it does not involve a resolution of competing claims by members of the community of justice; but rather a resolution only of a claim by a member to consume the environment needed by a non-member to survive and flourish. Secondly, it does not involve a distribution of environmental benefits to non-human nature, but rather only a protection (which may not be permanent) from distribution of the environmental resources within the protected area.

Thirdly, there is always a loss of the environmental resources. The loss of the organisms, populations, ecological communities or ecosystems within that part of the area impacted by the activity is not offset by protection of other organisms, populations, ecological communities or ecosystems within an on-site offset on another part of the impact site or an off-site offset. This is because the need for environmental resources of the organisms, populations, ecological communities or ecosystems that occur in the on-site offset or the off-site offset are already being satisfied by the environmental resources at those sites. There is no transfer of environmental resources from the impact site to the sites of the on-site offset or off-site offset. There is merely a loss of the environmental resources at the impact site and a maintenance of the existing environmental resources at the on-site offset and off-site offset. Hence, there is no distribution of environmental benefits to the organisms, populations, ecological communities or ecosystems within the on-site offset or off-site offset.

Conversely, environmental laws enable the distribution of environmental burdens to non-human nature. The environmental externalities of use and exploitation of the environment are borne by non-human nature.

The upshot is that environmental laws involve distributive injustice to non-human nature.

Goods and bads to be distributed

The second question that needs to be addressed in determining claims about distributive justice is: what is to be distributed? Environmental justice involves both environmental benefits and burdens. Particular environmental features, materials or activities can be viewed as both benefits or burdens depending on the claimant and the context of the claim. For example, energy consumption can be viewed as a benefit in providing essential energy services and a burden in contributing to carbon emissions and climate change.²² Flooding can be a benefit for agriculture (by replenishing water storages and renewing soil fertility by alluvium disposition) and non-human nature (such as for wetlands and riparian areas) and a burden (by damage to public infrastructure and private property, interruption of business activity, and loss of life).

The concepts of benefits and burdens are also relative both as concepts and with respect to any particular group of potential resource users.²³ There are also issues in defining what is to be distributed²⁴ and concerning the evidence needed to make evaluative decisions.²⁵ Naming and giving meaning to any particular benefit or burden is a social process, and is therefore particular rather than universal.²⁶

Environmental laws tend not to allow multiple contexts or viewpoints. Each law, by its nature, scope and purpose, fixes the claims that can be made and the context for viewing environmental resources, features and activities and hence for characterisation of them as benefits or burdens. Natural resources laws view the particular resources the subject of the laws as the benefit to be consumed or exploited; non-human nature dependent on those resources is a burden – it has the potential to prevent or restrict the consumption or exploitation of the resources. As I have noted, environmental laws do not generally permit a holistic evaluation of the distributive question but rather confine evaluation according to the law concerned.

²² Walker (n 1) 43.

²³ Richard Schroder, Kevin St Martin, Bradley Wilson and Debarati Sen, 'Third World Environmental Justice' (2008) 21 *Society and Natural Resources* 547, 550.

²⁴ Walker (n 1) 43.

²⁵ *ibid* 44.

²⁶ *ibid* 45.

The principles of distribution

The third question to be addressed in determining claims about distributive justice is: what are the principles of distribution? Many different criteria have been suggested by jurisprudential theorists for achieving distributive justice. As a general rule, the criteria can be grouped as goal based, rights based or duty based. Goal based criteria take some goal, like improving the general welfare, as fundamental; rights based criteria take some right, like the right to liberty, as fundamental; and duty based criteria take some duty, like the duty to obey some commandment or moral quality, as fundamental.²⁷

Goal based criteria for distribution

Goal based criteria for distribution are concerned with the welfare of any member of the community of justice only insofar as this contributes to some state of affairs stipulated as good quite apart from the member's choice of that state of affairs. Goal based theories include the various forms of utilitarianism, such as Bentham's hedonistic utilitarianism, bio-happiness utilitarianism, economic utilitarianism and social utilitarianism.

The first, and probably best known, goal based approach is Benthamite utilitarianism. Bentham advocated a form of utilitarianism that was individualistic and hedonistic. Bentham's utilitarianism involves act consequentialism. This is the claim that an act is morally right if and only if the total amount of good for all minus the total amount of bad for all is greater than the net amount for any incompatible act available to the person on that occasion. Hedonism claims that pleasure is the only intrinsic good and pain is the only intrinsic bad. Together, hedonist act consequentialism holds that an act is morally right if and only if the act causes the greatest happiness for the greatest number.²⁸ Used as a criterion for distributive justice, distribution of environmental benefits and burdens are evaluated for their consequence of causing the greatest happiness for the greatest number.

²⁷ Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1978) 171.

²⁸ See G E Moore, *Ethics* (Thornton Butterworth 1912) chapters 1 and 2 on utilitarianism.

There are numerous difficulties with Benthamite utilitarianism. I will deal with but six. First, it treats individual humans as means rather than ends in themselves. Individuals are the channels or location where what is of value is to be found. Their value lies not as persons but as experiencers of pleasure or happiness.²⁹

Secondly, utilitarianism uses pleasure and its converse pain as the only intrinsic good and bad in the calculus. It is debatable as to whether this good (pleasure) and bad (pain) are appropriate at all. Why should we seek to satisfy individual person's desires? Certain desires may also be unworthy of satisfaction (eg the sadist who takes pleasure in torturing animals).³⁰

Thirdly, utilitarianism lacks a method for calculating the consequences of an act on the total happiness of a population. It offers no reliable technique for measuring change in the level of happiness of one person relative to a change in the level of happiness of another, or for comparing one person's happiness with another's.³¹

Fourthly, utilitarianism offers no method on how to balance one person's happiness against another person's pain. In terms of distribution of environmental benefits and burdens, how can a decision-maker, when faced with multiple distributive choices, realistically and rationally weigh the majority's happiness against the minority's misery?³²

Fifthly, utilitarianism is blind to issues of distribution. It does not matter how justly individual satisfactions are distributed; it only matters that the sum of individual satisfactions is maximised.³³

Sixthly, utilitarianism traditionally focuses on human pleasure or pain; non-human nature is left out of moral consideration. Singer argues that all sentient beings who feel pain deserve equal moral consideration. Singer would extend utilitarianism to

²⁹ H L A Hart, *Essays in jurisprudence and philosophy* (Clarendon Press 1983) 200-202.

³⁰ Raymond Wacks, *Jurisprudence* (2nd ed, Blackstone Press 1990) 162.

³¹ M D A Freeman, *Lloyd's Introduction to Jurisprudence* (7th ed, Thomson Sweet & Maxwell 2001) 557.

³² Wacks (n 30) 162.

³³ John Rawls, *A Theory of Justice* (Harvard University Press 1971) 26.

include such sentient beings.³⁴ However, even Singer's extension of utilitarianism leaves most biota out of the moral equation. Most organisms are unable to experience pleasure or pain and according to hedonistic utilitarianism would therefore be denied moral status. The moral value of organisms that do not experience pleasure or pain, or habitats such as a river and its banks, could only lie in the benefit they provide to sentient beings. Utilitarianism would not place any intrinsic value on components of biodiversity itself.

A variation on traditional hedonistic utilitarianism involves use of bio-happiness as the goal to be maximised. Robinson adopts and develops Swaminathan's goal of bio-happiness³⁵ which embraces concepts of social wellbeing or contentment. Humans' bio-happiness is affected by the quality of their environment and the extent to which they are part of a balanced and wholesome ecology.³⁶ This broader notion of happiness, including environmental quality, echoes that used by Bhutan in its Gross National Happiness Index.³⁷ This variation on hedonistic utilitarianism is certainly more environmentally embracing but still does not free itself from many of the drawbacks of traditional hedonistic utilitarianism, including methodological problems in calculating and aggregating the bio-happiness and unhappiness of individuals, distributional blindness, and human speciesism.

The problem in measuring net satisfaction is addressed by economic theorists of justice by using the concepts of value and wealth. The best known of these theorists, Posner, advocated, as a criterion of justice, maximisation of society's total wealth. An act of injustice is an act that reduces the wealth of society. Rectification of wrongful acts by the wrongdoer compensating the injured party prevents reduction in the wealth of society. Corrective justice is consistent with wealth maximisation.³⁸

³⁴ Singer (n 16) and Peter Singer, *Practical Ethics* (2nd ed, CUP 1993).

³⁵ M S Swaminathan, *In Search of Bio-happiness – Biodiversity & Food, Health and Livelihood Security* (World Scientific Publishing Co 2011).

³⁶ Nicholas A Robinson, 'Environmental Principles & Norms Amidst the Anthropocene' (11th Annual Colloquium of the IUCN Academy of Environmental Law, Hamilton, 26 June 2013) 7-8, 25-26. See also V R Krishna Iyer, 'Nature-Friendly Planning of Humanity's Future: Dialectics and Dynamics of Development Management' (1996) 31 *Economic and Political Weekly* 2297.

³⁷ See Karma Ura, Sabina Alkire, Tshoki Zangmo and Karma Wangdi, *A Short Guide to Gross National Happiness Index* (The Centre for Bhutan Studies, Thimpu, 2012) <<http://www.grossnationalhappiness.com/wp-content/uploads/2012/04/Short-GNH-Index-edited.pdf>> accessed 26 June 2013.

³⁸ Richard A Posner, *The Economics of Justice* (Harvard University Press 1981) 73-74.

Posner argues that exclusive property rights in all resources, except resources so plentiful that everybody can consume as much of the resources as they want without reducing consumption by anybody else (a caveat inapplicable to most environmental resources today) should be allocated to whomever is likely to value the rights the most (so as to minimise transaction costs).³⁹ Justice occurs when there is allocative efficiency: all gains from trade in rights in resources have been exhausted and society's wealth is maximised.

Again, there are a number of problems with equating justice with wealth maximisation. I will only touch on four. First, the theory assumes that wealth is a value (in itself and instrumentally) that a society would regard as worth trading off against justice. Yet, increasing social wealth does not in itself make society better.⁴⁰

Secondly, the theory reflects a particular ideological preference. It reinforces and advances the capitalist, free market system.⁴¹

Thirdly, allocative efficiency depends on the initial distribution of wealth upon which the market transactions are based. This initial distribution of wealth may be wholly unjust. Efficiency would therefore become a means of rationalising and sustaining existing inequalities. Allocative efficiency is not capable of generating any social welfare function. Any particular allocatively efficient outcome may or may not be ethically attractive.⁴²

Fourthly, market transactions leading to allocative efficiency depend upon what people are willing to pay but this depends upon what they are capable of paying. This means that the more wealth one has, the more one is likely to increase it. Pursuing efficiency leads to further inequalities.⁴³ This criticism is particularly applicable to environmental resources. There is great disparity in capability to pay and hence willingness to pay for allocations of environmental resources. The environment itself is a loser in this regard. As a general rule, governments are

³⁹ Posner (n 38) 71. See also Richard A Posner, *Economic Analysis of Law* (7th ed, Wolters Kluwer 2007) chapter 3.

⁴⁰ Ronald Dworkin, *Laws Empire* (Belknap Press 1986) 288 and Wacks (n 30) 165.

⁴¹ Freeman (n 31) 560 and Wacks (n 30) 166.

⁴² Freeman (n 31) 560 and Wacks (n 30) 166.

⁴³ Freeman (n 31) 560, 561.

reluctant to allocate the full funds necessary to ensure ecologically adequate allocations for the environment are made, such as for sustainable environmental waterflows or protection of representative samples of ecosystems.

Jhering criticised the individualistic utilitarianism of Bentham and his followers and instead proposed a form of social utilitarianism. This emphasises social purposes and the valuation of individual purposes in terms of social purposes. Methods of reward or incentive, by enabling economic wants to be satisfied, and methods of coercion or punishment, by the law, are to be used to control individual purposes and shape them to be more consistent with social purposes.⁴⁴ Jhering sought to reconcile the goals of maximising wealth and at the same time protecting human autonomy by means of legal institutions and safeguarding the interests of society and future generations.⁴⁵ Jhering's social utilitarianism influenced later jurists such as Pound⁴⁶ and Stone⁴⁷ and provides an explanation of modern legislation and particularly legislation of a social welfare nature such as environmental legislation.⁴⁸

The concept of ESD might be considered to be a social purpose to be secured and protected by methods of reward (such as economic incentives) and methods of coercion (by the law). Fisher has suggested⁴⁹ that ESD is beginning to emerge as a fundamental norm of the environmental legal system, invoking Kelsen's *Grundnorm* concept.⁵⁰ ESD could, therefore, be a goal of distributive justice in determining the rightness of allocations of environmental resources.

Rights based criteria for distribution

Instead of goal based criteria for achieving distributive justice, the criteria for distribution of environmental resources could be rights based. Rights based criteria

⁴⁴ D M Walker, *The Oxford Companion to Law* (Clarendon Press 1980) 1269.

⁴⁵ J L M Elders, 'Rudolph Von Jhering, (1818-92) and the economics of justice' in Jürgen G Backhaus, *The Elgar Companion to Law and Economics* (2nd ed, Edward Elgar 2005) 575.

⁴⁶ See, eg, Roscoe Pound, *The Spirit of the Common Law* (Transaction Publishers 1999) 203-205.

⁴⁷ See, eg, Julius Stone, *Legal System and Lawyers' Reasonings* (Maitland Publications Pty Ltd 1964) 224-229.

⁴⁸ Walker (n 44) 1269.

⁴⁹ D E Fisher, *Australian Environmental Law, Norms, Principles and Rules* (2nd ed, Thomson Reuters 2010) vii.

⁵⁰ Hans Kelsen's concept of *Grundnorm* is of a basic norm generally accepted and the validity of which cannot be derived from any higher one: Walker (n 44) 37, 699.

are concerned only with particular rights and interests of individuals and not how the welfare of each individual contributes to some desired state of affairs, including the interests of society. Rights based theories include those propounded by Rawls and Dworkin.

Rawls proposed two principles of justice. First, each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all.⁵¹ Rawls later revised this principle to be: each person has the same inalienable claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all.⁵²

Secondly, social and economic inequalities are to be arranged so that they are both: (a) to the greatest benefit of the least advantaged, consistent with the just savings principle (the difference principle) and (b) attached to offices and positions open to all under conditions of fair equality of opportunity.⁵³ Again, Rawls made a stylistic revision of the second principle, including reversing the order of sub principles (a) and (b).⁵⁴

Rawls had rules of priority. The first principle is prior to the second and, in the second principle, fair equality of opportunity is prior to the difference principle.⁵⁵ Rawls also posited a general conception: all social primary goods such as liberty and opportunity, income and wealth, and the bases of self respect, are to be distributed equally unless an unequal distribution of any or all of these goods is to the advantage of the least favoured.⁵⁶

Rawls extended his difference principle to extend justice to future generations by suggesting a savings principle: "Saving is achieved by accepting as a political judgment those policies designed to improve the standard of life of later generations

⁵¹ Rawls (n 33) 302.

⁵² John Rawls, *Justice as fairness: a restatement* (Harvard University Press 2001) 42.

⁵³ Rawls (n 33) 302.

⁵⁴ Rawls (n 52) 42-43.

⁵⁵ Rawls (n 33) 302-303 and Rawls (n 52) 43.

⁵⁶ Rawls (n 33) 303.

of the least advantaged, thereby abstaining from the immediate gains which are available”.⁵⁷

Rawls proposed his principles of justice not only to judge the justice of the basic structure of society and its institutions and social policies, but also to enable citizens, individually or in association with others, to pursue their conception of the good.⁵⁸

As with all theories of justice, Rawls’ theory and principles of justice have attracted criticism.⁵⁹ Of critical relevance to environmental issues is the concern that Rawls prioritises individual liberties over all else, including social goods; unlike Jhering, there is no deference to social interest. The critical environmental problems faced today are to a large extent a product of prioritising individual interests over broader social interests.

Dworkin’s theory of justice openly insists on the pre-eminence of individual rights: “individual rights are political trumps held by individuals”.⁶⁰ Justice involves taking rights seriously; conversely, to make a mistake about legal rights or to invade or deny rights is to cause injustice.⁶¹ Dworkin readily concedes that the institution of rights makes the government’s job of securing the general benefit more difficult and more expensive.⁶² Hence, in the environmental context, Dworkin would assert, if a person had some right to damage the environment, it would be wrong for the government to act in violation of that right, even if the government believed (correctly) that the community as a whole would be better off if it did.⁶³

One of the great difficulties of a rights’ based moral theory, such as propounded by Dworkin, is identifying where the rights come from. Dworkin suggests that there must be at least prima facie moral grounds for assertions for the existence of legal rights and duties. But as Hart points out, laws can be morally good or bad, just or

⁵⁷ *ibid* 292-293.

⁵⁸ Rawls (n 52) 45.

⁵⁹ See the summary of criticism in Freeman (n 31) 528-534.

⁶⁰ Dworkin (n 27) xi.

⁶¹ *ibid* 130, 199.

⁶² *ibid* 198.

⁶³ Freeman (n 31) 541.

unjust. Rights and duties in the law operate independently of the moral merits of the law.⁶⁴

Other theorists have also suggested rights' based principles or criteria for distribution of environmental benefits and burdens. Bell identified three principles: first, a "principle of equality", which requires the distribution of benefits and burdens to be on the basis of some criteria such as spatial area or per capita; second, a "principle of equality plus a guaranteed standard", which requires not only the removal of inequality but also ensuring a standard of environmental quality for all (such as a basic standard of air quality or right to clean water); and third, "a guaranteed minimum with variation above that minimum according to personal income and spending choices", in which, beyond an ensured minimum, people can reasonably express their preferences in different ways.⁶⁵

Duty based criteria for distribution

Duty based theories are concerned with the moral quality of the acts of individuals, which fail to meet certain standards of behaviour. Kant's categorical imperatives are a duty based theory.⁶⁶ Duty based theories use codes of conduct which set the morally accepted standards of behaviour. These codes of conduct may be set by society for the individual or by the individual for himself. The individual at the centre must conform to the code or be punished or corrupted if the individual does not do so.⁶⁷

Duty based criteria might be seen in Leopold's land ethic: "a thing is right when it tends to preserve the integrity, stability, and beauty of the biotic community. It is wrong when it tends otherwise",⁶⁸ or in Baxter's principle: "we must do right by other life forms, but in a precise kind of way, namely by recognising their claim to a fair share of the environmental resources which all life forms need to survive and

⁶⁴ H L A Hart, *The Concept of Law* (2nd ed, OUP 1994) 269.

⁶⁵ Derek Bell, 'Environmental Justice and Rawls' difference principle' (2004) 26 *Environmental Ethics* 287, 294-295.

⁶⁶ Dworkin (n 27) 172.

⁶⁷ *ibid* 172.

⁶⁸ Leopold (n 15) 262.

flourish”;⁶⁹ or in Wissenberg’s duty of restraint: “whenever there is a choice between destroying a good, thus depriving others of personal future options to realise legitimate plans, or merely using it without limiting other peoples’ options, we have a duty to do the latter”.⁷⁰

It is also possible that some of the principles of ESD incorporate duty based criteria. The principle of intergenerational equity that the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations; the polluter pays principle that those who generate pollution and waste should bear the cost of containment, avoidance or abatement, pronounce duties that can be used in distributive choices; and the user pays principle that the users of goods and services should pay prices based on the full life cycle of costs of providing goods and services, including the use of natural resources and assets and the ultimate disposal of any waste.⁷¹

Criteria if community of justice expanded

An expansion of the community of justice to include non-human nature could also change the criteria for environmental benefits and burdens. Goal based criteria could be expanded to include desired environmental quality goals. For example, Hillman has suggested, as one of six distributive principles for determining a fair distribution of resources and responsibilities for stream rehabilitation, the principle of utilitarian equality, where the goal is to maximise overall catchment health, balancing costs and benefits in the allocation of resources.⁷² Rights based criteria could be expanded to consider the needs,⁷³ vulnerability,⁷⁴ interests⁷⁵ or integrity⁷⁶ of non-

⁶⁹ Baxter (n 13) 4.

⁷⁰ Marcel Wissenberg, *Green liberalism: the free and green society* (UCL Press 1988) 124.

⁷¹ See, eg, Protection of the Environment Administration Act 1991 (NSW), s 6(2).

⁷² Mick Hillman, ‘The Importance of environmental justice in stream rehabilitation’ (2004) 7 *Ethics place and environment* 19, 30.

⁷³ Benton (n 17) 187-193.

⁷⁴ Walker (n 1) 46.

⁷⁵ Baxter (n 13) 115-125.

⁷⁶ Schlosberg (n 10) 136-138. The concept of ecological integrity has been recognised in environmental soft law instruments, including the World Charter for Nature 1982 (cl I(4)), and in the principle of ESD of conservation of biological diversity and ecological integrity.

human nature. Duty based criteria could be expanded to consider land ethics⁷⁷ and causal responsibility (such as the polluter pays principle).⁷⁸

Capabilities approach for distribution

Achieving distributive justice is not simply a matter of ensuring distributions of primary environmental goods that are just in themselves, but also of ensuring that such distributions enable individuals and communities to lead fully functioning and flourishing lives. Distributive justice is not solely concerned with the amount of primary goods distributed, but also with what those goods do for individuals and communities.⁷⁹ This is the capabilities approach of Sen and Nussbaum.⁸⁰ The capabilities approach is concerned with what is needed to transform primary goods (if they are available) into a fully functioning life and what it is that interrupts that process.⁸¹

The central feature of wellbeing is the ability to achieve valuable functionings. Functionings refer to various activities and states of existence or being. The capabilities approach concentrates on the opportunity to be able to have combinations of functions. The individual is free to make use of this opportunity or not. A capability reflects the alternative combinations of functionings from which an individual can choose one combination.⁸² The central measure of justice is not just how much primary goods individuals might have, but whether they have what is necessary to enable a fully functioning life.⁸³

The focus of distributive justice under a capabilities approach is on the distribution and access to capabilities of functioning. This distribution may be by the state.⁸⁴ Sen's capabilities are rather broad and vague, dealing with basic concepts and

⁷⁷ See, eg, Leopold (n 15) 237-261.

⁷⁸ Hillman (n 72) 31; Walker (n 1) 45-47.

⁷⁹ Schlosberg (n 10) 30.

⁸⁰ Martha Nussbaum and Amartya Sen (eds), *The Quality of Life* (Clarendon Press 1993); Martha Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Harvard University Press 2006); Amartya Sen, *The Idea of Justice* (Allen & Lane 2009).

⁸¹ Schlosberg (n 10) 4.

⁸² Amartya Sen, 'Human Rights and Capabilities' (2006) 6 *Journal of Human Development* 151, 154.

⁸³ Schlosberg (n 10) 30.

⁸⁴ *ibid* 31.

freedoms that help advance the general capability of people (being political freedoms, economic facilities, social opportunities, transparency guarantees and protective security).⁸⁵ Indeed, Sen resists defining a list of capabilities. Nussbaum's capability set is more detailed and includes life, bodily health, bodily integrity, relations with other species, and control over one's environment.⁸⁶

The capabilities approach can be applied to an extended community of justice that includes non-human nature. Schlosberg argues that the capabilities approach can be applied to what is needed for the flourishing of individual organisms of different species, and of populations of organisms of the same species, as well as of ecological communities and ecosystems. The focus would be on the capabilities necessary for the organisms, populations, ecological communities or ecosystems to fully function.⁸⁷ Schlosberg extends his argument to include the broader environment, as part of the capability set required for individual organisms to flourish. The environment includes the ecological systems, relations and functioning. The focus on capabilities would include the larger systems which contribute to individual capabilities. Furthermore, systems can be viewed as agents for the work they do in providing the various capabilities for their parts to function, such as purifying water, providing nutrition and sustaining temperature.⁸⁸ In this case, the central issue of ecological justice would be the interruption of the capabilities and functioning of a larger living system (which contributes to individual capabilities) – what keeps the system from transforming primary goods into capabilities, functionings and the flourishing of the whole system.⁸⁹

Schlosberg gives the example of a river system. Water, a primary good, is increasingly taken from the river for agricultural and urban use. The effect is a serious impingement on the functionings of the river, to support fish and other animal species and native flora, or to supply silt to floodplains that support other wildlife. Schlosberg notes that the problem could be addressed in a purely distributive way such as by adding water to the river from the bottom of a dam upstream. This would

⁸⁵ Amartya Sen, *Development as freedom* (OUP 1999) 10. See also Schlosberg (n 10) 31.

⁸⁶ Nussbaum (n 80) 76-78, 392-401.

⁸⁷ Schlosberg (n 10) 153-157.

⁸⁸ *ibid* 148.

⁸⁹ *ibid* 148-149.

deliver a primary good, water, but it would not necessarily assist the river system (or the flora and fauna within it or that depend on it) in its capability to function. The water may be too cold or come at the wrong time of year. It may assist in some functioning, for example, supporting non-native trout, but not in others, like supporting native fish species. To bring back the capability of the river system to fully function, it is necessary to address those factors that inhibit those capabilities. These include the tendency to understand a river as a power source or as an agricultural aqueduct, and the need to understand the impacts of dams, and recognise water as something that supports more than agriculture and thirsty cities. Applying Nussbaum's capabilities set, some of the most salient issues would be in regard to health, integrity, affiliation, relation with other species, and control over the subject's environment.⁹⁰

Application of the capabilities approach to non-human nature is not without difficulties. One is determining the different capability sets for different organisms, populations, ecological communities and ecosystems, or even larger living systems. Another is that there will be different, and often competing, capabilities between humans and non-human nature and, within non-human nature, between different organisms, populations, ecological communities and ecosystems. The capabilities approach does not provide criteria for resolving competing claims for distribution of environmental benefits and burdens. Nevertheless, the capabilities approach does draw needed attention to the essential question of what environmental resources and other capabilities are needed for all of non-human nature to lead fully functioning and flourishing lives.

Environmental laws inadequately set criteria for distribution

In general, environmental laws are deficient in setting criteria to be used for the distribution of environmental benefits and burdens.

Goal based criteria are rarely specified or required to be applied in distribution of environmental benefits and burdens. Modern statutes usually contain an objects

⁹⁰ Schlosberg (n 10) 149.

clause stating the objects of the statute.⁹¹ However, the objects clause is usually unhelpful for a number of reasons: it may merely be a form of recital or a historical explanation of the background to the enactment of the statute; even if it is a statement of the purpose of the statute, its use may be limited to being an interpretive tool to resolve uncertainty and ambiguity in the meaning of the substantive provisions of the statute – an objects clause does not control clear statutory language in substantive provisions of the statute or command a particular outcome of exercise of discretionary power under the statute; it may be drafted at a high level of generality, and be hortatory and aspirational; or it may contain objects that are potentially conflicting, such as encouraging both economic development and environmental protection.⁹² Such objects clauses do not set meaningful goals to be applied in distributional decision-making.

Statutes also often provide the relevant matters to be considered in the exercise of discretionary powers under the statute, including to distribute or effect the distribution of environmental resources. Again, however, the specification of the relevant matters to be considered may not be helpful in providing goal based criteria for distributional decision-making: the relevant matters may not contain any goals at all, but rather only topics or subject matters to be considered; the relevant matters may not involve all relevant goals, in particular environmental goals such as any particular environmental outcome or standard to be achieved; the relevant matters may be expressed at a high level of generality thereby embracing a broad spectrum of goals; and there may be conflict between the different relevant matters and their goals.⁹³

Environmental statutes usually prescribe conditional, not absolute, rules of what can and cannot be used or exploited in the environment. For example, statutes rarely state that an approval to use or exploit the environment cannot be granted unless some environmental outcome or standard is achieved or not compromised.⁹⁴

⁹¹ See generally Jan Rohde, 'The Objects Clause in Environmental Legislation – The Nature Conservation Act 1992 (Qld) Exemplified' (1995) 12 EPLJ 80; Charmian Barton, 'Aiming at the Target: Achieving the Objects of Sustainable Development in Agency Decision-Making' (2001) 13 Geo Int'l Evtl L Rev 837.

⁹² Preston, 'Internalising ecocentrism in environmental law' (n 7) 2-3; Gerry Bates, *Environmental Law in Australia* (7th ed, LexisNexis 2010) 211-216.

⁹³ Preston, 'Internalising ecocentrism in environmental law' (n 7) 6.

⁹⁴ Fisher (n 11) 364-368.

Similarly, the statutes are replete with discretionary powers but rarely burdened with duties or obligations.⁹⁵ There is rarely a duty on a regulatory authority either of a positive nature to achieve some environmental outcome or standard, or of a negative nature to ensure that some environmental outcome or standard is not compromised.⁹⁶

In summary, environmental statutes set no meaningful, goal based criteria to be used for distribution of environmental benefits or burdens. The statutes do not mandate just distributions according to set goals. Instead, distributional decisions are only loosely bounded by the statute, leaving considerable discretion to the regulatory authority administering the statute. The distributional decisions made will often turn on what the individual decision-maker's perceptions of justice are and how he or she chooses to exercise the discretion conferred by the statute.⁹⁷ Because environmental statutes do not set meaningful environmental goals, distributional decisions tend to favour consumption not conservation of environmental resources.⁹⁸

Rights based criteria are more commonly specified or required to be applied in the distribution of environmental benefits or burdens. Where statutes do employ rights based criteria, they usually prioritise the rights of human consuming users. Planning statutes uphold existing (or non-conforming) use rights – the right to continue, and to enlarge, expand or intensify with consent, an existing use of land that has become prohibited, usually because of its environmental incompatibility.⁹⁹ Resource guarantee statutes guarantee allocation of natural resources, such as timber from native forests, to the relevant resource industry.¹⁰⁰ These distributions are based on the statutorily accepted rights or entitlements of current or future consuming users.

⁹⁵ Emma Bullen, 'Legislative limits on environmental decision-making: The application of the administrative law doctrines of jurisdictional fact and ultra vires' (2006) 23 EPLJ 265, 265.

⁹⁶ Preston, 'Internalising ecocentrism in environmental law' (n 7) 9.

⁹⁷ Dwyer and Taylor (n 8) 209.

⁹⁸ Bates (n 92) 215-216.

⁹⁹ See, eg, Environmental Planning and Assessment Act 1979 (NSW), pt 4 div 10.

¹⁰⁰ See, eg, Forestry and National Parks Estate Act 1998 (NSW) as discussed in Aidan Ricketts and Nicole Rogers, 'Third Party Rights in NSW Environmental Legislation: the Backlash' (1999) 16 EPLJ 157, 161. See also Plantations and Reafforestation Act 1999 (NSW), pt 2.

Occasionally, the interests, needs or vulnerabilities of non-human nature are required by a statute to be considered in the exercise of discretionary powers under the statute.

For example, in determining whether to grant or refuse a licence under s 91 of the *Threatened Species Conservation Act 1995* (NSW) to harm an animal or pick a plant that is, or is part of, a listed threatened species, population or ecological community, the Director General is required under s 97 to take into account a range of factors regarding the interests, needs, vulnerability and integrity of the threatened species, population or ecological community.¹⁰¹ However, the Director General must also consider the likely social and economic consequences of refusing or granting the licence.¹⁰² Such a provision falls short of requiring priority to be given to the disadvantaged threatened species, population or ecological community, as compared to the licensed applicant, or requiring that the outcome of the determination address the vulnerability, needs or interests of the threatened species, population or ecological community.

The Water Management Act 2000 (NSW) goes further in setting water management principles which include principles regarding the interests, needs and integrity of water sources, flood plains and dependent ecosystems (including groundwater and wetlands), and habitats, animals and plants that benefit from water;¹⁰³ requiring a state water management outcomes plan to promote the water management principles;¹⁰⁴ and requiring management plans to commit water as planned environmental water and to identify, establish and maintain planned environmental water (that is water that is committed for fundamental ecosystem health or other specified environmental purposes).¹⁰⁵ These provisions provide rights based criteria for allocation of water to the environment.

Duty based criteria are rarer in environmental statutes. Insofar as certain principles of ESD could be seen to involve duties, a statute which requires regulatory

¹⁰¹ *Threatened Species Conservation Act 1995* (NSW), s 97(1).

¹⁰² *Threatened Species Conservation Act 1995* (NSW), s 97(2).

¹⁰³ *Water Management Act 2000* (NSW), s 5.

¹⁰⁴ *Water Management Act 2000* (NSW), s 6(2)(b).

¹⁰⁵ *Water Management Act 2000* (NSW), ss 8(1), 2(A) and (2).

authorities exercising powers under the statute to apply the principles of ESD might be thought to involve application of duty based criteria.¹⁰⁶ However, most environmental statutes neither include duty based criteria nor require consideration or application of such criteria in exercising powers and duties that distribute, or effect distribution of, environmental benefits and burdens.

C. Procedural justice

The concept outlined

Procedural justice is widely accepted as a necessary concept of environmental justice additional to distributive justice. Procedural justice is concerned with ways in which decisions are made, including distributive decisions, and who is involved and who has influence. Procedural justice is linked to distributive justice: procedural injustice can be a cause of distributive injustice. But it is also an element of justice in itself. Justice involves not only fair or just distributive outcomes but also fair or just procedures or processes by which those distributive outcomes are reached.¹⁰⁷ The importance of procedural fairness is evidenced by its centrality in public law for administrative and judicial decision-making.

Procedural justice involves at least three elements: access to environmental information, entitlement to participate in environmental decision-making, and access to review procedures before a court or tribunal to challenge decision-making or impairment of substantive or procedural rights.

Access to information

The availability of and access to environmental information is an essential condition of effective participation in environmental decision-making. Principle 10 of the Rio Declaration on Environment and Development provides, in part, that:

¹⁰⁶ Examples include ss 2A(2), (3) of the National Parks and Wildlife Act 1974 (NSW) (but see Basten JA in *Country Energy v Williams* [2005] NSWCA 318; (2005) 141 LGERA 426 [65] that it is possible to read too much into the obligation to give effect to the objects of the Act by applying the principles of ESD) and s 5 of the Environmental Protection Act 1994 (Qld). See also Preston, 'Internalising ecocentrism in environmental law' (n 7) 4.

¹⁰⁷ Walker (n 1) 47-48.

Environmental issues are best handled with participation of all concerned citizens at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available.

The United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention) implements Principle 10 of the Rio Declaration by providing a right of the public to access environmental information held by public authorities. This includes information on the state of the environment, on policies or measures taken, and on the state of human health and safety where this can be affected by the state of the environment. Applicants applying for access to information are entitled to receive this information within a month of the request and without having to give reasons why they request it. Public authorities are also obliged to actively disseminate environmental information in their possession.¹⁰⁸

The UNEP Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters (UNEP Guidelines) recommend norms and principles for facilitating access to information. First, the public should have affordable, effective and timely access to environmental information held by public authorities upon request, without having to prove a legal or other interest.¹⁰⁹ The grounds on which a public authority can refuse access to environmental information should be limited. Specific grounds on which a request for environmental information can be refused should be clearly defined in the national laws and the grounds for refusal should be interpreted narrowly, taking into account the public interest served by disclosure.¹¹⁰

Secondly, environmental information in the public domain should include “information about environmental quality, environmental impacts on health and factors that

¹⁰⁸ See *Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters*, opened for signature 25 June 1998, 2161 UNTS 447 (entered into force 30 October 2001) art 1, 4 and 5 (Aarhus Convention).

¹⁰⁹ Guideline 1 of the UNEP Guidelines.

¹¹⁰ Guideline 3 of the UNEP Guidelines.

influence them, in addition to information about legislation and policy, and advice about how to obtain information”.¹¹¹

Thirdly, environmental information should be kept up to date. Public authorities “should regularly collect and update relevant environmental information, including information on environmental performance and compliance by operators of activities potentially affecting the environment”.¹¹² To this end, governments “should establish relevant systems to ensure an adequate flow of information about proposed and existing activities that may significantly affect the environment.”¹¹³

Fourthly, there should be regular state of the environment reports. Governments “should periodically prepare and disseminate at reasonable intervals up-to-date information on the state of the environment, including information on its quality and on pressures on the environment”.¹¹⁴

Fifthly, there should be specific warnings of imminent environmental threats. In the event of an imminent threat to human health or the environment, governments “should ensure that all information that would enable the public to take measures to prevent such harm is disseminated immediately”.¹¹⁵

Sixthly, the available information should include meta-information, that is to say, information about the rights of the public to access environmental information, to participate in environmental decision-making and to seek review before a court, and about the processes for exercising those rights. Governments “should provide means for and encourage effective capacity-building, both among public authorities and the public, to facilitate effective access to environmental information”.¹¹⁶

Jurisdictions vary in the extent to which their laws facilitate access to environmental information in these ways. First, many environmental laws themselves may provide for access to environmental information about exercises of functions and those laws.

¹¹¹ Guideline 2 of the UNEP Guidelines.

¹¹² Guideline 4 of the UNEP Guidelines.

¹¹³ *ibid.*

¹¹⁴ Guideline 5 of the UNEP Guidelines.

¹¹⁵ Guideline 6 of the UNEP Guidelines.

¹¹⁶ Guideline 7 of the UNEP Guidelines.

Environmental laws which provide for public participation, in response to public notice and exhibition of proposed strategic policies or plans or applications for approval of specific projects, will usually make available, and provide for public access to, information on those proposed policies, plans or projects and require the publication, such as by a public register, of the adopted policies, plans and approvals.¹¹⁷

Secondly, a number of jurisdictions have right to know laws. These can take different forms. Commonly, public authorities are obliged by various environmental statutes to maintain and make available public registers of environmental information. The public registers may be of land use permits (such as development consents), environmental permits (such as pollution licences), contaminated land sites, water licences, mining licences, forestry licences and wildlife licences.¹¹⁸

Thirdly, a number of jurisdictions have laws that require the government or public authorities to produce periodically state of the environment reports.¹¹⁹

Fourthly, individual public authorities may also be required to produce an annual report on their operations.¹²⁰

Fifthly, environmental laws may require persons who use or exploit the environment to report and disclose information about their activities and in particular on activities that cause or threaten harm to the environment. Pollution laws commonly impose notification requirements.¹²¹ Conditions of land use or resource permits may also

¹¹⁷ See, eg, Environmental Planning and Assessment Act 1979 (NSW).

¹¹⁸ See, eg, NSW Environment Protection Authority, 'Public registers' (24 June 2010) <<http://www.epa.nsw.gov.au/publicregister/index.htm>> accessed 25 June 2013 and the UK Environment Agency, 'What do the Public Registers Cover? – A legal explanation' (7 December 2012) <<http://epr.environment-agency.gov.uk/ePRInternet/Info.aspx>> accessed 25 June 2013.

¹¹⁹ For example, s 10 of the Protection of the Environment Administration Act 1991 (NSW) requires the Environment Protection Authority to produce a report on the state of the environment every 3 years and s 516B of the Environment Protection and Biodiversity Conservation Act 1999 (Cth) requires the Minister administering that Act to prepare a report on the Australian jurisdiction every five years.

¹²⁰ For example, the National Parks and Wildlife Service is required by s 144B of the National Parks and Wildlife Act 1974 (NSW) to produce an annual report under the Annual Reports (Departments) Act 1985 (NSW).

¹²¹ See, eg, s 148 of the Protection of the Environment Operations Act 1997 (NSW). See also Zada Lipman and Melissa Farrugia, "Obligation to report and manage pollution incidents" (2013) 18 LGLJ 18.

require monitoring and report generally, and notification of incidents causing or threatening environmental harm particularly.

Sixthly, most jurisdictions have freedom of information laws. The current NSW version is the *Government Information (Public Access) Act 2009* (NSW) and the Australian federal version is the *Freedom of Information Act 1982* (Cth). Freedom of information laws are based on a philosophy which promotes transparency as a device for enhancing political accountability and increasing public participation in the processes of government.¹²² It is also valuable as a means of gaining access to government information prior to seeking review of government action in courts or tribunals.¹²³

Seventhly, a number of jurisdictions have laws which entitle a person to request a public authority to require reasons for its decision affecting the person. For example, at the Australian federal level, a person who is entitled to apply to the Federal Court for an order to judicially review an administrative decision may make a written request to the decision-maker to furnish a statement of reasons for the decision.¹²⁴ The decision-maker is then required to furnish a statement in writing setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based, and giving reasons for the decision.¹²⁵ Similarly, a person who is entitled to apply to the Administrative Appeals Tribunal to review on the merits an administrative decision may request, and the decision-maker must furnish, a statement of reasons setting out the same matters.¹²⁶

Public participation

The second element for achieving procedural justice is public participation in environmental decision-making. Principle 10 of the Rio Declaration emphasises the need for public participation in environmental decision-making processes. The Aarhus Convention implements Principle 10 by providing a right to participate in

¹²² *Halsbury's Laws of Australia*, para 10-400 (service 348).

¹²³ *ibid.*

¹²⁴ Administrative Decisions (Judicial Review) Act 1977 (Cth), s 13(1).

¹²⁵ Administrative Decisions (Judicial Review) Act 1977 (Cth), s 13(2).

¹²⁶ Administrative Appeals Tribunal Act 1975 (Cth), s 28(1).

environmental decision-making. Public authorities are required to: make arrangements to enable the public affected and environmental non-governmental organisations to comment on proposed activities affecting the environment, or plans, programmes, and policies relating to the environment, or executive regulations and other applicable legally binding rules that may have a significant effect on the environment; take these comments into due account in decision-making; and provide information on the final decisions and the reasons for the decisions.¹²⁷

The UNEP Guidelines recommend norms and practices to achieve effective public participation. First, public participation should be early in the process. Governments should “ensure opportunities for early and effective public participation in decision-making related to the environment. To that end, members of the public concerned should be informed of their opportunities to participate at an early stage in the decision-making process.”¹²⁸

Secondly, there should be proactive public participation. Governments “should, as far as possible, make efforts to seek proactively public participation in a transparent and consultative manner, including efforts to ensure that members of the public concerned are given an adequate opportunity to express their views.”¹²⁹

Thirdly, all information relevant for decision-making related to the environment should be made available, in an objective, understandable, timely and effective manner, to the members of the public concerned.¹³⁰

Fourthly, the public’s participation should be meaningful. Governments “should ensure that due account is taken of the comments of the public in the decision-making process and that the decisions are made public”.¹³¹ Meaningful involvement, according to the US Environmental Protection Agency, requires that:

(1) potentially affected community residents have an appropriate opportunity to participate in decisions about a proposed activity that will affect their environment and/or health; (2) the

¹²⁷ See Aarhus Convention, art 1, 6, 7 and 8.

¹²⁸ Guideline 8 of the UNEP Guidelines.

¹²⁹ Guideline 9 of the UNEP Guidelines.

¹³⁰ Guideline 10 of the UNEP Guidelines.

¹³¹ Guideline 11 of the UNEP Guidelines.

public contribution can influence the regulatory agency's decision; (3) the concerns of all participants involved will be considered in the decision-making process; and (4) the decision-makers seek out and facilitate the involvement of those potentially affected.¹³²

Meaningful involvement, therefore, raises both procedural and substantive goals: participation in decision-making (procedural) and influencing decisions (substantive).¹³³

Fifthly, the public should have an opportunity to participate in review processes. Governments "should ensure that when a review process is carried out where previously unconsidered environmentally significant issues or circumstances have arisen, the public should be able to participate in any such review process to the extent that circumstances permit".¹³⁴

Sixthly, there should be public participation in strategic policy making and rule making. Governments "should consider appropriate ways of ensuring, at an appropriate stage, public input into the preparation of legally binding rules that might have a significant effect on the environment and into the preparation of policies, plans and programmes relating to the environment".¹³⁵

Seventhly, there needs to be education and capacity building of the public's rights to participate. Governments "should provide means for capacity building, including environmental education and awareness raising, to promote public participation in decision-making related to the environment."¹³⁶ In addition to education, there needs to be adequate resources provided to the public to enable them to participate effectively.¹³⁷ Resources include financial resources to pay for expert and legal advice to be able to participate effectively.

¹³² See US Environment Protection Authority, 'Definitions of the Most Commonly used Public Stakeholder Involvement Terms' (15 January 2013) <<http://www.epa.gov/publicinvolvement/definit.htm>> accessed 25 June 2013. See also Carine Nadal, 'Pursuing Substantive Environmental Justice: The Aarhus Convention as a 'Pillar' of Empowerment' (2008) 10 Env L Rev 28, 36; Patrick McAuslan, 'Towards a Just Planning System: The Contribution of Law' [2013] JPL 145, 150.

¹³³ Nadal (n 132) and Stephen Davies, 'In Name or Nature? Implementing International Environmental Procedural Rights in the Post-Aarhus Environment: A Finnish Example' (2007) 9 Env L Rev 190, 192.

¹³⁴ Guideline 12 of the UNEP Guidelines.

¹³⁵ Guideline 13 of the UNEP Guidelines.

¹³⁶ Guideline 14 of the UNEP Guidelines. See also Felicity Millner, 'Access to Environmental Justice' (2011) 16 Deakin LR 189, 199.

¹³⁷ Walker (n 1) 48.

Although most jurisdictions would meet some of these recommendations, few would meet all of these recommendations to the full extent. Public participation is most commonly found in procedures for environmental impact assessment and project approval.¹³⁸ A review of Australian laws dealing with public participation procedures in environmental impact assessment found that they, with some exceptions, satisfy the minimum requirements of public participation in Article 6 of the Aarhus Convention.¹³⁹

What is evident, however, is that environmental laws currently restrict the community of justice entitled to procedural justice to only the present generation of humans. Future generations of humans and non-human nature, both present and future, have no entitlement to participation under the laws. Procedural justice is based in participatory parity – the capability of participating on par with the rest of society.¹⁴⁰ Those entities who are excluded from participation suffer participatory, and hence procedural, injustice. The solution is to afford full status to those who have been excluded to participate in environmental policy making and decision-making and have their viewpoints and interests included in deliberative and discursive decision-making.

As I have observed in the earlier section on distributive justice, a case can be made for extending the community of justice to include non-human nature, including recognising our shared community with nature, recognising similarities between humans and non-human nature, recognising the integrity of natural organisms, groups and systems, recognising status injuries, and adapting a capabilities approach.¹⁴¹

The next question that needs to be addressed is how might non-human nature be able to participate? Various suggestions have been made. Obviously there needs to be human agency – humans need to act as agents on behalf of non-human nature.

¹³⁸ Bates (n 92) 302.

¹³⁹ Victoria Lambropoulos, 'What can Australia learn from the Europeans about public participation, Article 6 of the Aarhus Convention and Environmental Impact Statements' (2010) 27 EPLJ 272.

¹⁴⁰ Schlosberg (n 10) 157.

¹⁴¹ *ibid* 131-157.

Dryzek suggests that we need to enlarge our conception of communication. Nature can communicate non-verbally through signals: “Recognition of agency in nature therefore means that we should listen to signals emanating from the natural world with the same sort of respect we accord communication emanating from human subjects, and as requiring equally careful interpretation”.¹⁴² Dryzek notes that there is much human communication beyond speech, such as body language, facial displays etc, and hence listening to non-verbal communication from nature is a very rationale process not unlike listening to other people. He calls on humans to simply “hear” the signals from nature, and in learning to hear and communicate them, become ecological citizens as well as social beings.¹⁴³

The signals emanating from the natural world could include disruptions to the physical integrity of nature, such as climate change or species extension. Each disruption is communicated to humans through a variety of signals. Schlosberg explains this point using the example of climate change. Climate change is demonstrated in not only atmospheric studies but by individual signals such as migratory birds returning earlier, species expanding or contracting their range, insect eggs hatching earlier, glaciers melting, oceans warming, and weather related issues such as increased rainfall in some areas and drought in others. All of these individual global warnings add up to global climate change.¹⁴⁴

Baxter suggests that interests of the “inarticulate” can be articulated through proxies.¹⁴⁵ Proxies represent those who cannot represent themselves in instances where non-participants are impacted.¹⁴⁶ Non-participants include future generations of humans and non-human nature. Their participation can be enabled through proxy.

Eckersley uses the concept of “political trusteeship: persons and groups within the polity speaking on behalf of the interests of those living outside the polity, for future

¹⁴² Dryzek (n 19) 149.

¹⁴³ Schlosberg (n 10) 191.

¹⁴⁴ *ibid* 192.

¹⁴⁵ Brian H Baxter, ‘Ecological justice and justice as impartiality’ (2000) 9 *Environmental Politics* 43, 54-56.

¹⁴⁶ Schlosberg (n 10) 193.

generations and for nonhuman species”.¹⁴⁷ Through this means, those outside the polity are able to be represented and their interests are able to be considered in environmental policy making and decision-making. Eckersley suggests a variety of ways that proxy knowledge could enhance environmental decision-making: including environmental monitoring, environmental reporting and environmental impact assessment. Eckersley also suggests that there could be proxy representation through independent Environmental Defender’s Offices.¹⁴⁸

Stone argues that natural objects, such as rivers, forests and trees, should have legal rights to make claims to protect against damage or to seek compensation and reparation for damage. He explains that natural objects could vocalise their claims through appointed legal spokespersons.¹⁴⁹

Needless to say, most jurisdictions’ environmental laws have yet to embrace these suggestions. There are only a few examples where non-human nature has been recognised by the law. One example is in the Constitution of Ecuador¹⁵⁰ and the second is the recognition of the Whanganui River.¹⁵¹

Access to justice

The third element of procedural justice is access to justice through review procedures before a court or tribunal to challenge decision-making or impairment of substantive or procedural rights. Principle 10 of the Rio Declaration requires effective access to judicial and administrative proceedings, including redress and remedy, to be provided. The Aarhus Convention implements Principle 10 by providing the right to review procedures to challenge public decisions that have been made without respecting the right of access to environmental information or the right

¹⁴⁷ Robyn Eckersley, *The Green State: Rethinking democracy and sovereignty* (MIT Press 2004) 114.

¹⁴⁸ *ibid* 135.

¹⁴⁹ See Stone (n 16); Christopher D Stone, ‘Should Trees Have Standing? Revisited: How far will law and morals reach? A pluralist perspective’ (1985) 59 S Cal L Rev 1; Christopher D Stone, *Earth and Other Ethics – A Case for Moral Pluralism* (Harper & Rowe 1987); Christopher D Stone, ‘Response to commentators’ (2012) 3 Journal of Human Rights and the Environment 100.

¹⁵⁰ Article 71 of Ecuador’s revised Constitution of 2008. See also Claire Williams, ‘Wild Law in Australia: Practice and Possibilities’ (2013) 30 EPLJ 259, 268.

¹⁵¹ See Christopher Finlayson, ‘Whanganui River Agreement signed’ (30 August 2012) <<http://www.beehive.govt.nz/release/whanganui-river-agreement-signed>> accessed 25 June 2013. See also Williams (n 150) 270.

to public participation in environmental decision-making.¹⁵² The UNEP Guidelines suggest norms and practices for facilitating access to justice.

First, the public should be able to challenge decisions in a court. The law should ensure that the public have access to “a court of law or other independent and impartial body” to challenge any decision, act or omission by public authorities relating to requests for access to environmental information or to public participation in decision-making in environmental matters, or to challenge any decision, act or omission by public authorities or private actors that affects the environment or allegedly violates the substantive or procedural legal norms of the state related to the environment.¹⁵³

Secondly, there should be liberal rules for standing to bring proceedings. There should be “broad interpretation of standing in proceedings concerned with environmental matters with a view to achieving effective access to justice”.¹⁵⁴

Thirdly, review by courts should be timely. There should be “effective procedures for timely review by courts of law or other independent and impartial bodies, or administrative procedures, of issues relating to the implementation and enforcement of laws and decisions pertaining to the environment”.¹⁵⁵ Proceedings should also be “fair, open, transparent and equitable”.¹⁵⁶

Fourthly, review procedures should be affordable. Governments “should ensure that the access of members of the public concerned to review procedures relating to the environment is not prohibitively expensive and should consider the establishment of appropriate assistance mechanisms to review or reduce financial and other barriers to access to justice”.¹⁵⁷

Fifthly, there should be redressability. There should be “a framework for prompt, adequate and effective remedies in cases relating to the environment, such as

¹⁵² See Aarhus Convention, art 1 and 9.

¹⁵³ Guidelines 15, 16 and 17 of the UNEP Guidelines.

¹⁵⁴ Guideline 18 of the UNEP Guidelines.

¹⁵⁵ Guideline 19 of the UNEP Guidelines.

¹⁵⁶ *ibid.*

¹⁵⁷ Guideline 20 of the UNEP Guidelines.

interim and final injunctive relief.”¹⁵⁸ Remedies should include “the use of compensation and restitution and other appropriate measures.”¹⁵⁹

Sixthly, court and administrative decisions and orders should be enforceable. Governments “should ensure the timely and effective enforcement of decisions in environmental matters taken by courts of law, and by administrative and other relevant bodies.”¹⁶⁰

Seventhly, there should be adequate information about the availability of and procedures for a court review. Governments “should provide adequate information to the public about the procedures operated by courts of law and other relevant bodies in relation to environmental issues”.¹⁶¹

Eighthly, court decisions should be publicly available and accessible.¹⁶²

Ninthly, judicial officers and other legal professionals should have up to date knowledge of environmental law. Governments “should, on a regular basis, promote appropriate capacity-building programmes in environmental law for judicial officers, other legal professionals and other relevant stakeholders”.¹⁶³

Tenthly, alternative dispute resolution mechanisms should be available and utilised where these are appropriate.¹⁶⁴

Jurisdictions around the world vary in the degree to which these access to justice principles are being satisfied in their laws and by their governments. I have elsewhere suggested that there are at least a dozen conditions that need to be satisfied for environmental public interest litigation to be successful.¹⁶⁵ These

¹⁵⁸ Guideline 21 of the UNEP Guidelines.

¹⁵⁹ *ibid.*

¹⁶⁰ Guideline 22 of the UNEP Guidelines.

¹⁶¹ Guideline 23 of the UNEP Guidelines.

¹⁶² Guideline 24 of the UNEP Guidelines.

¹⁶³ Guideline 25 of the UNEP Guidelines.

¹⁶⁴ Guideline 26 of the UNEP Guidelines.

¹⁶⁵ Brian J Preston, ‘Environmental public interest litigation: conditions for success’ (Towards an Effective Guarantee of the Green Access: Japan’s Achievements and Critical Points, from a Global Perspective, 30 March 2013, Awaji Island, Japan) available at

conditions provide insight into what is needed to provide access to justice through review by the courts. The conditions are:

- adequate environmental laws: the laws must provide a foundation for and enable a right of action in relation to the aspect of the environment that is sought to be protected;¹⁶⁶
- a justiciable legal action: the legal action must be justiciable by the courts – if a legal action is not justiciable, the court has no jurisdiction to hear and determine it and it would need to be dismissed at the outset;¹⁶⁷
- a willing and able plaintiff: there must be citizens or citizen groups willing and able to bring the legal action;¹⁶⁸
- knowledgeable, experienced and willing lawyers: the prospects of success of the legal action are improved by obtaining the assistance, advice and advocacy of lawyers who are knowledgeable and experienced in litigation of the type and subject matter of the legal action;¹⁶⁹
- funding of the litigation: plaintiffs need to have access to financial resources to fund the legal action, including the costs of lawyers and experts, and to pay for any adverse costs orders if the legal action is unsuccessful;¹⁷⁰
- standing to sue: the plaintiff must have the right at law to institute the particular legal action, either under the common law or according to any applicable statutory standing test;¹⁷¹
- evidence to prove the case: the plaintiff needs to have access to evidence, both factual and expert opinion evidence, to prove its case;¹⁷²

<http://www.legislation.nsw.gov.au/agdbasev7wr/_assets/lec/m4203011721754/preston_environmental%20public%20interest%20litigation.pdf> accessed 18 June 2013.

¹⁶⁶ ibid 1-2.

¹⁶⁷ ibid 3-7.

¹⁶⁸ ibid 7-8.

¹⁶⁹ ibid 8.

¹⁷⁰ ibid 8-13.

¹⁷¹ ibid 13-16.

- simple and affordable procedures for commencing litigation: commencing litigation should not be technical or complicated or demand legal expertise, and court fees should be affordable;¹⁷³
- court practice and procedure not be barriers to access to justice: the court's rules of practice and procedure should facilitate, not impede, access to justice, such as in public interest litigation, not requiring an undertaking for damages as a prerequisite for granting interlocutory injunctive relief, not requiring the giving of security for costs of the proceedings, and not ordering an unsuccessful public interest plaintiff to pay the defendant's costs of the proceedings;¹⁷⁴
- no delay in hearing and determining the litigation: environmental litigation should be heard and determined without delay, by using such means as allocation to environmentally specialised judicial bodies; efficient case management; and prompt, efficient and effective dealing with interlocutory applications;¹⁷⁵
- independent, impartial and competent court: the court hearing and determining environmental litigation needs to be independent and impartial, as well as competent in the applicable law, both substantive and procedural, and environmentally literate;¹⁷⁶ and
- adequate remedies: adequate remedies and redress must be both available and ordinarily granted by the court – if rights cannot be upheld, duties cannot be enforced or wrongs cannot be remedied, justice is left undone.¹⁷⁷

D. Justice as recognition

Environmental justice involves not only distributive justice and procedural justice, but also the concept of recognition. Issues of recognition are distinct from but closely connected to issues of distribution and procedure. Lack of recognition, in the social and political realms, demonstrated by various forms of insults, degradation and

¹⁷² *ibid* 16-20.

¹⁷³ *ibid* 20-21.

¹⁷⁴ *ibid* 21-27.

¹⁷⁵ *ibid* 27-30.

¹⁷⁶ *ibid* 30.

¹⁷⁷ *ibid* 31-32.

devaluation, inflicts damage and constrains individuals and communities and leads to inhibited or ineffective participation in the polity (procedural injustice) and to inequalities in the distribution of environmental goods and bads (distributional injustice).¹⁷⁸

At the core of misrecognition are institutional and cultural processes of disrespect which devalue some individuals, groups or communities in comparison to others, meaning that there are unequal patterns of recognition across social groups. Institutions of the state can explicitly or implicitly give unequal recognition to different social groups, but there is also a wider cultural basis of misrecognition such that “the conception of justice occupies social and cultural space beyond the bounds of the state”.¹⁷⁹

Fraser argues that misrecognition is an injury to the institutional or social status of individuals or communities and is not merely psychological damage.¹⁸⁰ Fraser identifies three processes of misrecognition which lead to status injury: first, a general practice of cultural domination and oppression; second, a pattern of nonrecognition, which is the equivalent of being rendered invisible; and third, disrespect or being routinely maligned or disparaged in stereotypical public and cultural representations.¹⁸¹

Misrecognition in these three ways is evident with respect to indigenous peoples and cultural minorities. Decisions concerning locating waste, for example, have worked injustice in recognition of indigenous groups and poor communities. Walker gives two case studies: first, the decision to locate all of Taiwan’s nuclear waste in a remote indigenous community on Orchid Island worked injustice by treating the Yami as peripheral to the Taiwanese mainstream, as a weak and backward indigenous group, and by not respecting their distinct cultural and spiritual values and, second, the decision to locate a commercial hazardous industrial waste landfill in a poor,

¹⁷⁸ Schlosberg (n 10) 14.

¹⁷⁹ *ibid* 16.

¹⁸⁰ *ibid* 18.

¹⁸¹ Nancy Fraser, ‘Social Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation’ in Grethe B Peterson (ed), *The Tanner Lectures on Human Values* (Vol 19, University of Utah Press 1998) 3, 7.

black community in North Carolina involved racist targeting of location and an assumption that the poor, black community would not object.¹⁸²

Injustice by misrecognition is also evident of individuals and groups advocating environmental causes. They are routinely described in pejorative terms such as busybodies, greenies, NIMBYs,¹⁸³ BANANAs,¹⁸⁴ LULUs,¹⁸⁵ or FRUITs.¹⁸⁶ Such labelling is part of a pattern of misrecognition in the form of insults, stigmatisation and devaluation of these individuals and groups and of their concerns. The cultural domination, nonrecognition and disrespect of these individuals and groups injures their social status, constrains their participation in executive and judicial decision-making, and occasions unequal distribution of environmental burdens to them.

Schlosberg develops Fraser's status injury approach to examine how non-human nature is maligned and disrespected in human culture in all three of these ways.¹⁸⁷ As Schlosberg notes, Fraser's insistence on the status of the misrecognised individual or group makes the application of recognition as an element of ecological justice much easier:

The status model is not aimed at valorizing individual or group identity or at recognising the psychological plight of individual victims, but instead at overcoming subordination. In this, we can dismiss the criticism that recognition of, for example, the agency or integrity of the natural world necessitates an anthropomorphizing or a psychological need for recognition in the non-human world. We can see nature injured, its interests ignored, autonomy dismissed, or its integrity damaged without resorting to such psychological language or conceptions.¹⁸⁸

¹⁸² Walker (n 1) 78-83.

¹⁸³ A pejorative term for residents who oppose new development because it is close to them and say it should be: "Not In My Back Yard" (NIMBY), see Carissa Shively, 'Understanding the NIMBY and LULU Phenomena: Reassessing Our Knowledge Base and Informing Future Research' (2007) 21 *Journal of Planning Literature* 255.

¹⁸⁴ The negative term used to criticise the ongoing opposition of advocacy groups to land development anywhere: "Build Absolutely Nothing Anywhere Near Anyone" (BANANA), see Shively (n 183).

¹⁸⁵ The negative term used to characterise local opposition to unwanted land uses: "Locally Unwanted Land Uses" (LULU), see Shively (n 183).

¹⁸⁶ The negative term, used in a development industry article in Vancouver, to refer to allegedly irrational local opponents (fruit cakes or fruit loops) of urban redevelopments: "Fear of Revitalisation, Urban-Infill and Towers" (FRUIT), see Florin Mureşanu and Monica Mureşanu, 'Cannibal Architecture Hates BANANAs: Post-Communist Rebranding of Historical Sites' in Stephan Sonnenburg and Laura Baker (eds), *Branded Spaces: Experience Enactments and Entanglements* (Springer 2013) 229, 235.

¹⁸⁷ Schlosberg (n 10) 19, 138-142.

¹⁸⁸ *ibid* 139.

An advantage of the status injury approach is that it “moves beyond the atomistic language of liberal rights and justice and into the realm of the recognition of nature’s potential, integrity, and being on a much larger scale”.¹⁸⁹

Schlosberg gives as an illustration of how nature is maligned and disrespected the causes of, and discussions surrounding, global climate change: “we see all forms of status-injurious misrecognition – the domination of nature by extractive industries, the invisibility of nature in political planning (even with warnings beginning decades ago), and the disparaging of the natural world in discussions of the mitigation of impacts on human communities at the expense of nature.”¹⁹⁰

If the community of justice is extended, the status injury approach could be applied not only to individual organisms and groups of organisms (populations) but also systems such as ecological communities and ecosystems.¹⁹¹

Institutions of the state can address misrecognition of non-human nature by enabling non-human nature to have meaningful involvement in environmental policy making and decision-making and to be the recipients of distributions of environmental benefits and burdens that have regard to the needs, interests, vulnerabilities and integrity of non-human nature. The means by which non-human nature can be afforded such recognition include those referred to earlier, such as use of proxies, trustees, guardians or legal spokespersons.

It should be noted, however, that misrecognition is but one way in which injustice as recognition can occur. Misrecognition is a failure to give the recognition that is warranted to individuals or groups. Another distinct, yet related, form of injustice is malrecognition. Malrecognition involves giving recognition but of a malignant kind. An example may be where action is taken against individuals or groups, who are recognised as having exercised democratic rights (such as public participation or protest), to prevent them from continuing to exercise such rights at all or in an effective manner. This is well reflected, for example, by the phenomena of strategic

¹⁸⁹ *ibid* 140.

¹⁹⁰ *ibid*.

¹⁹¹ *ibid* 148-149.

litigation against public participation, or SLAPP suits.¹⁹² SLAPP suits serve to stifle humans from exercising their rights or to punish them for having done so.¹⁹³ People who are engaged in a SLAPP suit will often pay a “price” for their participation in such litigation, ranging from lost financial and temporal resources to emotional stress.¹⁹⁴ In order to eliminate or at least reduce levels of malrecognition, environmental laws should afford protection to entities that are vulnerable to such malrecognition.¹⁹⁵ The courts also have a role to play in devising, implementing and following practices and procedures aimed at eliminating or reducing the presence of malrecognition which, in turn, will enhance the ability of such institutions to facilitate environmental justice.¹⁹⁶

E. Conclusion

Achieving access to environmental justice requires a holistic and comprehensive approach, tackling the institutional, political, social, economic and legal factors that impede equal justice for all. Restrictions on membership of, and impartial treatment between members of, the community of justice need to be addressed. Misrecognition of individuals and groups, both in human society and in non-human nature, needs to be overcome. Participatory parity needs to be extended to all members of the community of justice including future generations and non-human nature. Fair and just distributions of environmental benefits and burdens to members of the community of justice need to be effected. Only by achieving justice as recognition, procedural justice and distributional justice can access to environmental justice be achieved.

¹⁹² See, eg, George W Pring and Penelope Canan, *SLAPPs: Getting Sued for Speaking Out* (Temple University Press, 1996); George W Pring, “SLAPPs”: Strategic Lawsuits Against Public Participation’ (1989) 7 Pace Envtl L Rev 1; Judith Preston, ‘Participation from the Deep Freeze: “Chilling” by SLAPP Suits’ (Towards an Effective Guarantee of the Green Access: Japan’s Achievements and Critical Points, from a Global Perspective, 31 March 2013, Awaji Island, Japan) available at <http://greenaccess.law.osaka-u.ac.jp/wp-content/uploads/2013/04/18en_preston.pdf> accessed 18 June 2013.

¹⁹³ Pring (n 192) 5-6.

¹⁹⁴ *ibid.*

¹⁹⁵ Preston (n 192) 27.

¹⁹⁶ See also George (Rock) Pring and Catherine (Kitty) Pring, *Greening Justice: Creating and Improving Environmental Courts and Tribunals* (The Access Initiative 2009) 53.