

ENVIRONMENTAL ADJUDICATION: MAPPING THE SPECTRUM AND IDENTIFYING THE FULCRUM

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I. INTRODUCTION

Environmental adjudication is becoming increasingly pluralistic, reflecting that the resolution of environmental disputes falls within a complex administrative state. No longer the sole preserve of the ‘ordinary’ courts, adjudicating the ‘problems of modernity’¹ takes place at multiple points, within and between social groups and peoples, and occurs in different institutional forms, employing different problem-solving mechanisms.² Problems generated or controlled by the administrative state - including environmental problems - may be resolved by generic or specialist courts, tribunals, departmental officials, ministers, ad hoc bodies, or through various forms of alternate dispute resolution, and initial adjudicative decisions may be checked or supervised in a multitude of fora using different legal tests.

In an attempt to make structural sense of this plurality, Michael Asimow reports that most administrative systems have three phrases of ‘adjudication’: an initial administrative decision; a first-stage challenge to that decision (either by the same institution or an external body); and then some form of judicial review or appeal.³ But he also notes that adjudicatory resources – i.e. the use of resources that best facilitate substantive accuracy and procedural fairness – tend to be invested in one phase only.⁴ The effect of this intense focus is to create an adjudicatory fulcrum, around which a symbiotic process swirls: the state prioritizing resources at this level and the commensurate response of private actors involved in the dispute, who are more likely to instruct ‘legal counsel’, in turn resulting in greater ‘adjudicatory structures’ and ‘procedural safeguards’.⁵

Environmental problems present particular challenges for adjudication and nations have responded in different ways to managing disputes about the environment. A multitude of different problem-solving institutions are employed, operating in different organisational and regulatory

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¹ Edward L Rubin, ‘From Coherence to Effectiveness: A Legal Methodology for the Modern World’ in Rob Van Gestel, Hans Micklitz and Edward L Rubin (eds), *Rethinking Legal Scholarship: A Transatlantic Dialogue* (CUP 2017), 322.

² George Pring and Catherine Pring, *Greening Justice: Creating and Improving Environmental Courts and Tribunals* (World Resources Institute 2009).

³ Michael Asimow, ‘Five Models of Administrative Adjudication’ (2015) 63 Am J Comp L 3, 5-6.

⁴ Michael Asimow, ‘Five Models of Administrative Adjudication’ (2015) 63 Am J Comp L 3, 13.

⁵ Michael Asimow, ‘Five Models of Administrative Adjudication’ (2015) 63 Am J Comp L 3, 19-20.

contexts. In this paper, we apply Asimow's frame to environmental adjudication in two jurisdictions – England and Wales, and New Zealand. Our aim is twofold. Firstly we map adjudicatory pluralism in those nations in order to see if the spectrum appears coherent and the allocation of roles justified. In Asimow's schematic (utilising US parlance),⁶ 'adjudication' covers initial disputes before administrative bodies and appellate decisions,⁷ and we adopt this wide typology. To clarify, we confine our analysis to state-sponsored adjudicatory bodies (excluding dispute resolution mechanisms ordinarily governed by contractual agreements and other private law mechanisms). Secondly, we consider whether an adjudicative 'fulcrum' exists within that spectrum, and if so what might be the relevance of that focus. We selected these particular jurisdictions for a number of reasons: there are similarities in the legal cultures of both nations; they have similar albeit not identical constitutional arrangements that are important for our exercise, for example there is no clear constitutional prohibition against 'adjudication' or 'judicial functions' being undertaken by bodies outside the 'ordinary' courts; and in both jurisdictions a plurality of bodies exists at each stage of the adjudicatory process. Our wider rationale is not necessarily to identify and learn lessons from one legal culture in order to apply in the other; rather we are using the lens of comparison to show the complexity of environmental adjudication.

The paper has the following structure. In part 2 we briefly consider the main characteristics of environmental adjudication, highlighting its challenging nature. Part 3 sets out the regulatory and institutional landscape in England and Wales and part 4 undertakes the same exercise with respect to New Zealand. Our mapping exercise shows that New Zealand has responded to the challenges of environmental dispute-resolution quite deliberately with discrete regulatory and complementary institutional design, whereas England and Wales have not. In England and Wales there is a clear lack of coherence that manifests itself in a complex and diverse approach to environmental adjudication, both in terms of institutional frameworks and substantive matters of adjudication. Surprisingly, we discover that forms of adjudication mired in legal formalism are not necessarily correlative with certainty, equality, and coherence in environmental disputes, particularly when compared to adjudicatory structures that have been created to more readily respond to the nature of the problems that they address.

This analysis creates implications for both policy-development and scholarly research. The need for a dedicated environment court has been debated for many years in the UK, but is an issue that may arise again post-Brexit with the loss of the supervisory function of the European Commission and the European Court of Justice.⁸ Our analysis suggests that if the UK Government wants to foster certainty, equality, and coherence in environmental dispute-resolution, the development of a specialist environment court may need re-visiting. In terms of scholarly endeavours, this mapping exercise fills a gap in the existing literature but it also raises an important question that has deeper resonance: can

⁶ Peter Cane, *Controlling Administrative Power: An Historical Comparison* (Cambridge 2016), 283

⁷ Michael Asimow, 'Five Models of Administrative Adjudication' (2015) 63 Am J Comp L 3.

⁸ With thanks to an anonymous referee for this observation.

Asimow's thesis be extended to demonstrate that a clear adjudicatory focus - or lack of focus - impacts upon the role that adjudication plays in the development of environmental norms? Critically, therefore we highlight the need and lay the basis for scholarship to explore the links between adjudicatory forms and structures and the development of environmental norms.

II. CHARACTERISTICS OF ENVIRONMENTAL ADJUDICATION

A wide range of environmental disputes may be determined through adjudication, from access to environmental information and environmental impact assessments, the take and use of natural resources (including bio-diversity), land-use planning, pollution discharges, regulatory approvals for dangerous or controversial activities (such as releasing genetically modified organisms), to sanctions and enforcement. Our focus is deliberately on administrative and regulatory regimes specifically introduced to manage the use of environmental resources (land, air, water and biodiversity) and environmental problems such as pollution (while not encompassing common law actions such as nuisance that might impact environmental media). We take this narrow approach in the attempt to establish the degree to which coherence emerges in the adjudicatory systems that are expressly set up to deal with environmental law disputes.⁹

Many of these environmental disputes have characteristics that create challenges for adjudication.¹⁰ Uppermost, is normative contestability¹¹ - as the Chief Justice of New Zealand has written, 'environmental decisions by their very nature must be political.'¹² For example, decisions sanctioning particular activities may impose risks on people and communities, and this reality has implications for adjudication. Decision-makers may have to make predictive decisions about the future as opposed to fact-finding in relation to the past; allocate risk-burdens and benefits; determine what degree of harm is acceptable;¹³ and they may be concerned with a wide range of actors and those impacted upon that transcend traditional party decisions, so undertaking polycentric decision-making. But environmental impacts may also be complex and multi-scalar (both in geographical and temporal terms), uncertain or unknown, and dispute-resolution can be expert-opinion heavy. In the UK, disputes will often concern whether an administrative body has adequately assessed or taken certain risks into account. For example in *R. v Secretary of State for Environment and Ministry of Agriculture Fisheries*

⁹ For a more general overview see Bell et al, *Environmental Law* 9th ed. (OUP 2017) chapter 10 forthcoming.

¹⁰ Ceri Warnock, 'Reconceptualising Specialist Environment Courts and Tribunals' (2017) 37 *Legal Studies* (in press).

¹¹ Ceri Warnock, 'Reconceptualising Specialist Environment Courts and Tribunals' (2017) 37 *Legal Studies* (in press).

¹² James Hill, 'The Politics of Environmental Law' (1985) 64 *Mich. B. J.* 164, cited in Gerald Rosenberg, *The Hollow Hope* 2nd ed (University of Chicago Press 2008), 283.

¹³ Ole W Pedersen, 'Modest Pragmatic Lessons for a Diverse and Incoherent Environmental Law' (2013) 33 *OJLS* 103.

and Food, the UK claimant sought to challenge the consent granted to the planting of genetically modified (GMO) maize in proximity to his own fields partly on grounds that the regulatory authority failed to appropriately assess the risks.¹⁴ Challenges against GMOs licenses in New Zealand have also centred on the validity of risk-assessment.¹⁵

An additional complicating factor is that environmental adjudication occurs against a fast-changing backdrop.¹⁶ Ecological conditions, scientific knowledge, policy and legal instruments can undergo rapid change.¹⁷ This creates problems for those engaged in decision-making and adjudication, requiring them to stay abreast of legal doctrine and regulatory initiatives, but it also creates the risk of policy contradictions or vacuums emerging. In the case of *McMorn*, the plaintiff found himself caught in an inter-agency policy-dispute concerning applications to kill listed birds that were threatening his game-keeping business, and (although the Court did not explicitly engage with the underlying policy considerations) it ultimately fell to the UK High Court to fill the vacuum.¹⁸ In the UK, the scope for the courts to become entangled in questions of legality of environmental decision-making is, moreover, likely to increase as a result of Brexit in light of the UK Government's view that any supervision previously conducted by e.g. the EU Commission or the Court of Justice will fall to the UK courts. In reaching decisions, adjudicators may be operating against a statutory background that is vague and open-ended when it comes to specific objectives¹⁹ and they may have to draw upon and adapt a mix of substantive public and private law doctrine to resolve disputes. Further, statutory interpretation in environmental law can at times be more akin to 'legislative fact-finding'²⁰ and adjudicators may be required to giving legal meaning to complex ecological and socio-cultural ontologies which, as one of us has written elsewhere, creates difficulties for retaining a strict division between law and facts, or fact and values.²¹

The multiplicity of considerations at play is further compounded by the fact that the statutory system of environmental law often is made up by overlapping structures of regulation and law, emanating from different legislative and institutional sources. In England and Wales, a great deal of environmental law (albeit far from all) has in the past 40 years been driven by EU law in the form of

¹⁴ [1999] Env. L.R. 310.

¹⁵ *Bleakley v Environmental Risk Management Authority* [2001] 3 NZLR 213 (HC); *Mothers Against Genetic Engineering Inc v Minister for the Environment* HC Auckland CIV-2003-404-673, 7 July 2003; *AgResearch Ltd v GE Free NZ in Food and Environment Inc* [2010] NZCA 89.

¹⁶ Elizabeth Fisher and others, 'Maturity and Methodology: Starting a Debate about Environmental Law' (2009) 21 JEL 213.

¹⁷ In England and Wales the Environmental Permitting Regulations were amended 15 times from 2010-2016.

¹⁸ [2015] EWHC 3297 (Admin). An important point of contention was the fact that the claimant had been denied permission to cull certain listed bird species but was given permission to cull other species theoretically benefitting from the same level of protection.

¹⁹ See e.g. *R (OSS Group Ltd) v Environment Agency* [2007] EWCA Civ 611.

²⁰ Kenneth C Davis, 'An Approach to the Problems of Evidence in the Administrative Process' (1952) 55 Harv L Rev 402.

²¹ Ceri Warnock, 'Reconceptualising Specialist Environment Courts and Tribunals' (2017) 37 Legal Studies (in press).

secondary legislation drawn up to give force to environmental objectives of the EU treaties.²² Further, the various processes of law-making - implementation and interpretation - are significantly shaped by non-binding, yet persuasive, policy guidance, frameworks and environmental law 'principles'.²³ Often, a reviewing institution will have to grapple with considerations that are not necessarily given force through traditional means of law or regulation but instead drawn up by means of technocratic processes in an attempt to give legal meaning and effect to these principles and concepts,²⁴ and an adjudicator's interpretative role may impact upon and help to craft secondary instruments including policy documents and planning frameworks.

A further layer of complexity is added by contributory participation in decision-making. Public participation is formative to much modern environmental law, and facilitated through specific legal regimes that address rights of access to environmental information, public participation in decision-making and access to review mechanisms.²⁵ Adjudicators may be required to oversee participatory and consultative processes that have the effect of creating structures for construing the law while simultaneously giving substantive content to the law. Supervisory bodies are often requested to examine and invalidate administrative decisions for failing to adhere to the requirements of public participation. Recent examples in the UK include *Walton v Scottish Ministers*²⁶ before the Supreme Court, questioning the validity of the decision-making in the absence of adherence to public participation requirements and *R. (Greenpeace Ltd) v Secretary of State for Trade and Industry*,²⁷ requiring the Administrative Court to assess government undertakings on consultation processes against nuclear energy policy. Many similar examples are found in the New Zealand context. The first environmental law case to be heard by the (then newly created) Supreme Court concerned appropriate levels of participation.²⁸

For all these reasons and more, environmental dispute-resolution is deeply complex and multi-faceted. As a phenomenon it appears to beautifully illustrate Rubin's exhortion that the 'problems of modernity ... require new rules and particularised remedies, and deliberately designed agencies'.²⁹ And in mapping the adjudicative spectrum in England and Wales and New Zealand, we carry Rubin's thought forward into our analysis. The next part of the paper considers environmental adjudication in

²² E.g. Art. 191 TFEU.

²³ Eloise Scotford and Nicholas Robinson, 'UK Environmental Legislation and Its Administration in 2013 – Achievements, Challenges and Prospects' (2015) 25 JEL 383.

²⁴ *R. v Secretary of State for Trade and Industry Ex p. Duddridge* [1996] Env. L.R. 325 (relating to the legal status of precautionary principle).

²⁵ Aarhus Convention on Access to Informational, Public Participation in Decision-Making and Access to Justice in Environmental Matters, given force through EU and domestic legislation, remains a primary example.

²⁶ [2012] UKSC 44.

²⁷ [2007] EWHC 311 (Admin).

²⁸ E.g. *Westfield New Zealand Ltd v North Shore City Council* [2005] NZSC 17

²⁹ Edward L Rubin, 'From Coherence to Effectiveness: A Legal Methodology for the Modern World' in Rob Van Gestel, Hans Micklitz and Edward L Rubin (eds), *Rethinking Legal Scholarship: A Transatlantic Dialogue* (CUP 2017), 322.

England and Wales, sketching the regulatory landscape and mapping the adjudicative institutions sited within it.

III. ENVIRONMENTAL ADJUDICATION IN ENGLAND AND WALES

A. *Regulatory Landscape*

In the context of environmental regulation and adjudication in England and Wales, three important trends stand out. First, towards the end of the 20th century we see increasing centralisation and integration. As environmental harms and risks (and the understanding thereof) grow more complex, the response has been for greater regulatory integration and institutional centralisation, with the commensurate development of state bureaucracy. Partly as a result of capacity and costs-implications and partly as a result of the need for in-depth knowledge and expertise, environmental regulatory capability has increasingly been centralised in few large regulatory agencies.³⁰ Control of significant pollution activities became ‘integrated’ in both a regulatory and institutional sense, subject to technocratic permitting processes, administered by one regulator - the Environment Agency.³¹ One notable exception to this centralisation is the planning system where authority for development control remains vested in local planning authorities (though with significant central control).

Second, the impact of EU law is (at this point still) important, and serves to further enhance and support the trends of integration and centralisation. The imposition of supranational environmental norms in the form of EU Directives necessarily places a responsibility on the state when it comes to implementing the rules and norms; this is best done centrally or, at least, through means of centrally prescribed regulations.³²

Nevertheless, this integration is far from comprehensive. The third point is that in contrast to the picture in New Zealand, the UK still has a huge array of environmental statutes and regulations. From earnest beginnings in 19th century common law controls, a haphazard suite of statutory initiatives aimed at minimizing environmental risks took hold in the mid-1800s in the form conventional regulatory techniques such as licensing and permitting. These methods have increasingly been supplemented and sometimes replaced by a wide range of reflexive mechanisms, including economic and other ‘non-command and control’ regulatory tools and private law mechanisms, that have significantly expanded the regulatory choices available to government. One striking example is the development of participation and information-based instruments not previously found in the ‘toolbox’

³⁰ C.f. the localism agenda (although note much of this has focused on funding and project-development for flooding).

³¹ David Robinson, ‘Regulatory Evolution in Pollution Control’ in Tim Jewell and Jenny Steele (eds), *Law in Environmental Decision-Making* (Clarendon, Oxford, 1998) 29-72.

³² E.g. the Environmental Permitting Regulations 2016 implementing EU Directives addressing waste, industrial emissions and water quality etc.

of the administrative state (though mechanisms for public participation have historically played an important role in land-use decision-making).³³ Within environmental regulation, access to environmental information and public participation in decision-making is facilitated through a combination of EU Directives³⁴ and international legal instruments, all to varying degrees afforded statutory endorsement in domestic law.³⁵ The move towards participation and transparency is compelling: it arguably leads to better decision-making and enhances legitimacy. It may, however, also have had an impact on the extent to which the courts are called to scrutinise administrative decisions. Prior to the introduction of participatory regimes, ‘environmental regulation was an essentially private process concerning the regulator and the regulated alone. The new arrangements [...] have opened up the process to outside scrutiny [providing] the foundation on which a legal challenge can be based.’³⁶ Added to this is the likelihood that as more individuals and NGOs have been involved in and taken part in a decision-making process, the more likely they are to feel aggrieved when a decision goes against them, encouraging further recourse to the courts.³⁷ In light of this complex regulatory landscape, it is relevant to consider the adjudicatory spectrum in England and Wales.

B. Pluralism and the push towards judicialisation

In England and Wales, initial decisions concerning environmental disputes take place across a wide and complex spectrum of statutory regimes and fora. ‘External’ actors undertake supervision of primary decisions and the law provides little scope for internal review of administrative decisions. Consequently a strong emphasis is maintained on the role afforded to judicial and ‘court-like’ institutions, and it is within the traditional courts or court-like bodies that the adjudicatory focus appears to rest. For example, the Planning Inspectorate, the First Tier Tribunal, the inferior and superior courts, and a special planning chamber within the Administrative Court all play significant roles in supervising planning and environmental law decisions.³⁸ This supervision is effected through a mixture of rights of statutory appeals – both on the merits and on points of law – and common-law judicial review, with the latter playing a significant role as discussed below. It is difficult to trace any coherence in the applicability of different routes, forms and standards of supervision. As one commentator puts it in the context of statutory appeals: the system for regulatory appeals ‘lacks common procedure and intelligibility [and]

³³ E.g. Elizabeth Fisher, ‘Unpacking the Toolbox: Or Why the Public/Private Divide is Important in EC Environmental Law’ in Mark Freedland and Jean-Bernard Auby (eds), *The Public Law/Private Law Debate* (Hart, Oxford, 2006) 215-242; Colin Reid, ‘The Privatisation of Biodiversity? Possible New Approaches to Nature Conservation Law in the UK’ (2011) 23 JEL 203-231.

³⁴ Directive 30/313/EEC OJ L 158, 23/06/1990, 56-58; Directive 2003/4/EC OJ L 41, 14/2/2003, 26–32; Directive 2003/35/EC OJ L 156, 25/6/2003, 17–25.

³⁵ Environmental Information Regulations 2004 SI 2004 no. 3391; Town and Country Planning (Environmental Impact Assessment) Regulations 2011 SI 2011 no 1824.

³⁶ Colin Reid, ‘Judicial Review and the Environment’ in Brigid Hadfield (ed), *Judicial Review: A Thematic Approach* (Gill & Macmillan, 1995) 34-66, 41.

³⁷ *Ibid.*, 39.

³⁸ S. 288 Town and Country Planning Act (‘TCPA’); s. 113 Planning and Compulsory Purchase Act 2004; Mr Justice Lindblom, ‘The Planning Court: One Year on’ (2015) JPEL 13.

there is little in the way of underlying principle[s]'.³⁹ That is, the system for environmental adjudication in England and Wales lacks the complete and thorough systematised approach seen in other jurisdictions. These developments are best highlighted by considering that in relation Asimow's 'first-stage' challenge, Macrory's work highlights nearly 50 different types and routes of appeal to a myriad of different bodies.⁴⁰ To provide a snapshot of this complexity, statutory appeals to the 'ordinary courts' are made: to the Magistrates Court under the Ozone-Depleting Substances Regulations 2015⁴¹ and the Fluorinated Greenhouse Gases Regulations 2009;⁴² the County Courts under the Environmental Protection Act 1990 Part IIA, relating to specific charging notices;⁴³ and to the High Court under the Offshore Combustion Installations (Pollution Prevention and Control) Regulations 2013⁴⁴ and REACH Enforcement Regulations 2008⁴⁵ among others.

One of the more significant avenues of statutory appeal in environmental law is the right of appeal found in the Town and Country Planning Act 1990 available to developers wishing to appeal the refusal for an application or the imposition of a planning condition. First-stage appeals against local planning authority decisions are made on the merits to the minister but in practice are delegated to the Planning Inspectorate for determination.⁴⁶ While the Planning Inspectorate is not classified as a judicial organ⁴⁷ – it is an executive agency, embedded in a Department of State – the Inspectorate often ends up taking a 'court-like' approach when hearing appeals and its decisions are authoritative sources of interpretation without formally creating legal precedents.⁴⁸ Similarly, parties often come to rely on legal counsel when appearing before the Inspectorate (whether appeals are conducted on the papers, at a hearing, or a public local inquiry) and an Inspector is required to notify parties of his/her decision in writing and to provide reasons.⁴⁹ In addition to hearing statutory appeals in planning law, the Planning Inspectorate also hears appeals for legality under a range of other statutory regimes, including the pollution control and waste management systems found in the Environmental Permitting Regulations 2016.⁵⁰ Often these appeals concern enforcement notices, revocation notices or other significant

³⁹ Richard Macrory, 'Consistency and Effectiveness – Strengthening the New Environment Tribunal' (Centre for Law and the Environment, UCL, 2011) 5.

⁴⁰ Richard Macrory and Michael Woods, 'Modernising Environmental Justice: Regulation and the Role of an Environmental Tribunal' (Centre for Law and the Environment, UCL, 2003).

⁴¹ SI 2015/168.

⁴² SI 2009/261.

⁴³ S 78P Environmental Protection Act 1990.

⁴⁴ SI 2013/971.

⁴⁵ SI 2008/2852.

⁴⁶ TCPA s 78.

⁴⁷ *Report of the Committee on Administrative Tribunals and Enquiries* (Cmnd, 218, 1957).

⁴⁸ Carol Harlow and Richard Rawlings, *Law and Administration* 3rd ed (2009) 583 and 588.

⁴⁹ Rule 18(1) Town and Country Planning (Inquiries Procedure) (England) Rules 2000, SI 200/1624.

⁵⁰ SI 2010/675.

enforcement actions that impact significantly on the livelihood of businesses. In the vast majority of cases the appeal is dismissed.⁵¹

A relatively recent development – again highlighting the argument that the adjudicatory focus is upon formalism - was the creation in 2010 of an environmental tribunal within the General Regulatory Chamber of the First-tier Tribunal.⁵² In one sense, the Tribunal is arguably a manifestation of the trend alluded to above in respect to proliferation of routes and systems of appeals in British environmental law. It hears merits appeals under a number of administrative environmental regimes, including appeals against enforcement notices taken in pursuance of the Waste (England and Wales) Regulations 2011, transposing EU waste law,⁵³ appeals against decisions taken under the environmental civil sanctions orders,⁵⁴ and appeals against notices issued under the Marine and Coastal Access Act 2009.⁵⁵ But from a relatively low base point, the Tribunal has witnessed an iterative increase in the number of administrative regimes from which it hears appeals.⁵⁶ Tellingly, however, the Tribunal was created by way of administrative reorganisation of the General Regulatory Chamber and not by legislative means. This serves to highlight the somewhat ambivalent nature towards the Tribunal and marks a significant departure from the considered and deliberate creation of so-called ‘one stop shop’⁵⁷ environment courts and tribunals in other jurisdictions, including New Zealand. While the Tribunal is very much conceptualised as part of the judiciary (as envisaged by the Franks Report and as with the tribunal system in Britain more generally) as opposed to forming part of the administrative apparatus, the main driver behind the creation of the Tribunal was the introduction of the civil sanctions regime introduced in 2008.⁵⁸ These sanctions were introduced following the Macrory Report, in part to secure a more effective system of compliance across the regulatory spectrum by allowing regulators more flexible mechanisms of enforcement.⁵⁹ In other words, and unlike similar institutions in other jurisdictions, the Tribunal was created in order to keep administrative agencies with increasingly wide-ranging powers in check and not because the executive thought it desirable to create a separate, specialist forum for environmental adjudication. Having said that, the bulk of the Tribunal’s case law has centred not on the

⁵¹ Richard Macrory, ‘Environmental Statutory Appeals 2010-2013’ (2014) UCL available on <http://blogs.ucl.ac.uk/law-environment/files/2014/05/Environmental-Statutory-Appeals-2010-2013.pdf> (accessed 25 April 2017).

⁵² Richard Macrory, (2013) ‘The Long and Winding Road – Towards and Environmental Court in England and Wales’ 25 JEL 371.

⁵³ E.g. Reg. 41 of the Waste (England and Wales) Regulations 2011, SI 2011/988.

⁵⁴ Environmental (England) Civil Sanctions Order 2010, SI 2010/1157.

⁵⁵ Marine Licensing (Notice Appeals) Regulations 2011, SI 2011/963.

⁵⁶ Initially the Tribunal initially heard appeals only under the civil sanctions regime. It now hears appeals under a wide range regimes, including The Climate Change Agreements (Administration) Regulations 2012 (SI 2012 no 1976), the CRC Energy Efficiency Scheme Order 2013 (SI 2013 no 1119) and the Energy Savings Opportunity Scheme Regulations 2014 (SI 2014 no 1643).

⁵⁷ Brian J Preston, ‘Characteristics of Successful Environmental Courts and Tribunals’ (2014) 26 JEL 365, 375.

⁵⁸ Regulatory Sanctions and Enforcement Act 2008; Environmental Civil Sanctions (England) Order 2010, SI2010/1157.

⁵⁹ Ole W Pedersen, ‘Environmental Enforcement Undertakings and Possible Implications: Response, Smarter or Rent Seeking?’ (2013) 76 319; Richard Macrory, (2013) ‘The Long and Winding Road – Towards and Environmental Court in England and Wales’ 25 JEL 371.

use of civil sanctions but on the designation of vulnerable zones as required by the Agriculture Nitrate Directive,⁶⁰ primarily because designations significantly restrict an occupier's ability to farm.⁶¹

From this overview of environmental adjudication in England and Wales several important points emerge. Primarily, the spectrum of adjudication represents a mixed picture with a wide range of institutions engaging in supervision, employing varying levels of scrutiny. In this mixed picture one encounters procedures akin to administrative review yet conducted by court-like institutions (such as the Planning Inspectorate);⁶² a specific Tribunal that is formally part of the judiciary, though its creation and operations are akin to administrative review proceedings; and the ordinary courts, hearing, as we have seen, a combination of statutory appeals and judicial review cases. These different institutional forms range from the 'departmentally embedded', to the specialist adjudicator, to the 'pure' or 'traditional' adjudication conducted by the generalist courts.⁶³

Moreover, in the context of the expansion of the environmental administrative state, it seems that a significant driver behind the institutional design of the newer forms of adjudication is found in the regulatory regimes themselves – for example, with the creation of the First-tier Environment Tribunal. Similarly, the strong drive towards public participation, manifested for example in the Environmental Impact Assessment ('EIA') regime, has served to shape environmental adjudication significantly in so far as this may well have led to the courts being called into action at a higher frequency than was previously the case. It is notable for example, that the courts have issued few decisions concerning the extensive regulatory system in place controlling industrial pollution (Environmental Permitting Regulations 2016) though the system allows for public participation and involvement much to the same extent at the EIA regime,⁶⁴ whereas they have played a prominent role in shaping the interpretation of planning law and EIA norms.⁶⁵ In summary, the adjudication of environmental disputes is taking place within a myriad of different legal frames and supervision is effected by merits review, appeals on points of law, and judicial review. While it is impossible to identify one institution creating a clear adjudicatory fulcrum - as we will see is the case with New Zealand - the overriding adjudicatory focus is one of formalism and judicialisation, with the ordinary courts remaining a dominant force.

C. Tensions and doctrinal inconsistency

⁶⁰ Directive 91/676/EEC concerning the protection of waters against pollution caused by nitrates from agricultural sources as implemented by the Nitrate Pollution Prevention Regulations 2015, SI 2015/668.

⁶¹ Reg. 8 of the Nitrate Pollution Prevention Regulations 2008 (now repealed).

⁶² Peter Cane, *Administrative Tribunals and Adjudication* (Hart, Oxford, 2010) 47.

⁶³ *Ibid*, 30.

⁶⁴ One sparse example is *R. (Blewett) v Derbyshire CC*, [2005] Env. L.R. 15.

⁶⁵ Richard Macrory, 'Regulating in a Risky Environment' in R. Macrory (ed) *Regulation, Enforcement and Governance in Environmental Law*, 2nd ed. (Oxford, 2014) 132-151, 142.

Institutional arrangements shape adjudicative forms. One important theme that follows from the continuing dominance of the generalist courts is that environmental adjudication is necessarily conceptualised within the confines of established public law adjudication more generally. That is, notwithstanding the characteristics of environmental adjudication highlighted above, the courts in England and Wales are, to a greater degree, approaching environmental law from within the confines of an existing ‘practice’ of public law thereby refraining from carving out special and specific measures for environmental law cases.⁶⁶ This approach creates inherent tensions.

A good example concerns the on-going judicial debates about what level of scrutiny to afford judicial review of environmental law cases. These debates centre on the claim that environmental cases deserve a higher level of judicial scrutiny than is traditionally afforded in judicial review subject to the *Wednesbury*⁶⁷ grounds. The primary reason for affording environmental cases a high level of scrutiny is the 1998 Aarhus Convention on access to environmental information, public participation and access to justice in environmental matters to which the UK (and the EU) is a party. The Convention provides for a series of procedural ‘rights’, allowing citizens to engage with environmental decision-making in order to facilitate ‘the right of every person of present and future generations to live in an environment adequate to his or her health and well-being’.⁶⁸ In respect to access to justice, the Convention provides for, firstly, ‘access to review [of] the substantive and procedural legality’ of specific decisions taken in pursuance of the Convention’s public participation provisions in art. 9(2) and, secondly, that citizens are afforded a general access to ‘administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment’ in art. 9(3)⁶⁹ These rights are given direct effect through changes to a host of EU Directives.⁷⁰ The Compliance Committee of the Aarhus Convention has stated that art. 9 constitutes a substantive right: that is, citizens are entitled to have the ‘substantive legality’ of a decision reviewed and has questioned whether judicial review in the UK affords this right.⁷¹ Consequently in a string of recent cases, the UK courts have been forced to consider whether environmental cases merit special treatment.⁷²

This case law suggests that the courts are not prepared to automatically discard traditional doctrine for the sake of environmental claims and while there might be good reasons for maintaining a focus on established practices - after all, modern environmental law is ‘public law’ and administrative in nature - this gives rise to inconsistency across different components of environmental law. In

⁶⁶ On ‘thinking within’ established practice, see Stanley Fish, ‘Dennis Martinez and the Use of Theory’ (1987) 96 Yale LJ 1773.

⁶⁷ *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* [1948] 1 KB 223.

⁶⁸ Aarhus Convention Aarhus Convention on Access to Informational, Public Participation in Decision-Making and Access to Justice in Environmental Matters art. 1.

⁶⁹ *Ibid.*, art. 9(2)-(3).

⁷⁰ Directive 30/313/EEC OJ L 158, 23/06/1990, 56-58; Directive 2003/4/EC OJ L 41, 14/2/2003, 26-32; Directive 2003/35/EC OJ L 156, 25/6/2003, 17-25.

⁷¹ Communication 2008/33 of May 19 2011 at 121-127.

⁷² See most recently *Langton and Forster v Forest of Dean District Council* [2016] EWCA Civ 869.

accordance with judicial review doctrine, the courts apply varying standards of review to initial decisions, leading to a willingness to engage more fully with some environmental law decisions than others. Of course, in judicial review, relativity matters: ‘context is everything’,⁷³ but it is not necessarily the ‘environmental aspects’ that are determinative. The overall effect is that outcomes differ in cases that may appear to the litigants to raise similar issues for environmental dispute resolution. Public participation in all its forms provides a good illustration of this tension. For example, in *Birkett* the Court of Appeal found that the refusal by a public authority to accommodate a request for release of environmental information must be subjected to a thorough review, reviewing the ‘merits, both the factual and legal, of a decision [...] afresh’.⁷⁴ The basis for this rationale is found in the underlying EU Directive on Access to Environmental Information,⁷⁵ implemented through the Environmental Information Regulations 2004,⁷⁶ providing for a *de novo* review of the administrative decision.⁷⁷ The need for a thorough, substantive review was endorsed in *Evans*, when the Supreme Court rejected the claim that the requirement for a substantive *de novo* review of a refusal to release environmental information would be met through judicial review. Lord Neuberger’s judgment is clear: the scope of traditional judicial review does not ordinarily allow for an assessment of the merits of the decision as required by the Directive.⁷⁸ While not concerned with access to information, the decision of *McMom* also supports a close-look scrutiny for ‘environmental decisions’ that impact private property. In *McMom*, Ouseley J determined that a ‘more intensive form of scrutiny’⁷⁹ was required of a series of decisions taken by Natural England, denying the claimant licenses to shoot raptors that were taking his livestock.⁸⁰

In contrast, in other important areas of environmental law that impact information gathering, dissemination, and subsequent decision-making, the courts have refused to entertain the claim that the subject matter invites a special level of scrutiny. In relation to the scrutiny of decisions and the assessment of statutory duties arising out of the EIA Directive and its implementing regulations, the courts have repeatedly stressed the decisions by local planning authorities are scrutinised on *Wednesbury* grounds only. No higher Aarhus level of scrutiny applies.⁸¹ In *Smyth Sales* LJ empathically rejected the claim that an intensive review was required in a decision concerning impact assessment under the Habitats Directive, arguing that there was no material difference in the context in which the rules of the Habitats Directive were applied to that of the EIA Directive: both sets of rules

⁷³ *R (Daly) v Home Secretary* [2001] 2 AC 532, 548.

⁷⁴ *Birkett v the Department for the Environment, Food and Rural Affairs* [2011] EWCA Civ 1606 [23].

⁷⁵ Directive 2003/4/EC OJ L 41, 14/2/2003, 26–32.

⁷⁶ SI 2004 no. 3391.

⁷⁷ Article 6(2).

⁷⁸ [2015] UKSC 21 Per Lord Neuberger [104-106] as well as Lord Mance [148].

⁷⁹ [2015] EWHC 3297 (Admin) [205].

⁸⁰ *Ibid.*

⁸¹ E.g. *R (Loader) v Secretary of State for Communities and Local Government* [2012] EWCA Civ 869 per Pill LJ [31] and *R (Evans) v Secretary of State for Communities and Local Government* [2013] EWCA Civ 114 per Beatson LJ [32-43].

being applied in the context of the domestic planning system.⁸² In seeking to further distinguish the context of the Habitats Directive (and thereby also the EIA Directive) from the Supreme Court's decision in *Evans* and its requirement for a heightened scrutiny in environmental information cases, Sales LJ found that the contexts and terms of the underlying directives simply varied too much.⁸³ But the decision in *Smyth* is troubling, and the primary reason is that the wording of the underlying directives is practically identical. Article 11(1)(b) of the EIA Directive thus confers the right to a 'review procedure [...] to challenge the *substantive* or *procedural* legality of decisions, *acts* or *omissions*' of the directive.⁸⁴ The Access to Environmental Information Directive similarly provides for a review procedure in which 'the *acts* or *omissions* of the public authority concerned can be reviewed'.⁸⁵ On the face of it, affording a more intensive scrutiny under the Environmental Information Directive but not under the EIA Directive (and the Habitats Directive with it) runs contrary to the wording of the provisions. Sales LJ justified his decision on the basis that the statutory contexts of the regimes are fundamentally different. Context may well have been determinative, but again not in a sense that necessarily makes sense to environmental disputants. In cases that are seen as falling within the well-established planning regime, the courts have traditionally refrained from scrutinising decisions with any intensity. As pointed out by Carnwath LJ: often these decisions 'require[...] the exercise of judgment, on technical or other planning grounds, and [that] is a function for which the courts are ill-equipped, but which is well-suited to the familiar role of local planning authorities.'⁸⁶ This contextual restriction does not appear to apply in other areas where 'officials' make determinations about access to environmental information, for example the Environmental Information Regulations. Ultimately, this scenario leads to an inconsistent application of the Aarhus Convention.

A further explanation for inconsistency in decisions may well be found in the very nature of environmental adjudication itself. As alluded to above, in environmental cases the courts often end up having to strike a fine balance between determining what essentially is a 'merits' question and what falls within a claim of illegality. Examples include the decision in *Downs*, in which the Court of Appeal rebuked Collins J, sitting in the Administrative Court, for having substituted his own opinion for that of the decision-maker when faced with a lack of scientific consensus in the context of risks arising from pesticide spraying.⁸⁷ Likewise in *R. (Mott) v Environment Agency*, the Court of Appeal held that Cooke J in the Administrative Court had been too keen to scrutinise the scientific underpinnings of the Environment Agency's decision to restrict fishing rights in the Severn estuary; a decision which was 'the result of an amalgam of assessments which are in part factual and in part predictive in nature' and

⁸² *Smyth v Secretary of State for Communities and Local Government* [2015] EWCA Civ 174 [80].

⁸³ *Id* [81]. See also *R (Dillner) v Sheffield City Council* [2016] EWHC 945 (Admin).

⁸⁴ Directive 2011/92/EU (consolidated version) (as amended) available on http://ec.europa.eu/environment/eia/pdf/EIA_Directive_informal.pdf (our emphasis).

⁸⁵ Directive 2003/4/EC OJ L 41, 14/2/2003, 26–32 (our emphasis).

⁸⁶ *R. (Jones) v Mansfield DC*, [2004] Env. L.R. 21 [61].

⁸⁷ *Downs v Secretary of State for the Environment, Food and Rural Affairs* [2009] EWCA Civ 664.

that Cooke J had ‘strayed beyond what is proper for a reviewing judge dealing with complex scientific materials’.⁸⁸ Instead, the Court found, that Cooke J ought to have afforded the Environment Agency a wider ‘margin of discretion.’⁸⁹ The risk of straying into merits review is perhaps even more likely in cases involving EU environmental law (as many cases do) where the underlying legal obligations are couched in vague and open-ended terms subject to purposive rules of interpretation.⁹⁰ When scrutinising such cases, it is sometimes hard to suppress the sense that claimants are seeking a merits review of the decision, reflecting the ‘problematic nature of the merits-legality dichotomy’ identified by T R S Allan, a distinction that in his view turns out to be ‘largely incoherent.’⁹¹ We can see the real impact of this incoherence in environmental adjudication. In a 2003 study, Macrory and Woods thus suggested that two-thirds of examined environmental cases (excluding planning and EIA cases) appeared merits driven and an attempt to re-litigate the substantive issues.⁹²

The EIA regime in particular has provided a fertile background against which claimants and counsel can frame what is in reality a claim for a merits review as a question of illegality, relying on the underlying open-ended provisions of the EIA Directive - an option that, for example, was not available to claimants in planning law prior to the EIA regime being implemented. In *Dillner*, the claimants sought to challenge the implementation of a tree management plan adopted by a local council on grounds that the ensuing felling of trees required an EIA and the Council’s failure to conduct one such resulted in the plan being illegal.⁹³ Despite a rather lengthy judgment, Gilbert J gave short shrift to the claimant’s case, arguing that the case effectively ought to be construed around the Highway Act 1980, and the responsibility of authorities to repair and maintain highways. In short, it had nothing to do with environmental impact assessments. Throughout the judgment, Gilbert J engages in a captivating exercise of framing the question before him, highlighting that what might appear to be facts to one party are normative values to another. In examining this inherent complexity in detail, His Honour reveals a core difficulty for decision-makers in adjudicating over the environment. The ‘evidence’ presented by the claimants was found to be irrelevant to the obligations arising from the Highways Act 1980, notwithstanding that it was adduced to support the claim that felling of tree would have a ‘significant’ environmental impact.⁹⁴ As Gilbert J observes: ‘I suspect that is because some of those mounting and advising the campaign against removal [of the trees] had not got to grips with the effect of the duties under the HA 1980, and saw the idea of the removal of trees as inherently objectionable, and as unlawful.’⁹⁵ The decision in *Dillner* emphasises that the courts will frame and approach environmental

⁸⁸ [2016] EWCA Civ 564 [78] and [66].

⁸⁹ *Ibid*, [69].

⁹⁰ For a critique of purposive approaches in environmental law see Emma Lees, *Interpreting Environmental Offences* (Oxford, Hart, 2015).

⁹¹ T R S Allan, ‘Pragmatism and theory in public law’ (1988) 104 LQ Rev 422, 423.

⁹² Richard Macrory and Michael Woods, ‘Modernising Environmental Justice: Regulation and the Role of an Environmental Tribunal’ (Centre for Law and the Environment, UCL, 2003).

⁹³ *R (Dillner) v Sheffield City Council* [2016] EWHC 945 (Admin).

⁹⁴ *R (Dillner) v Sheffield City Council* [2016] EWHC 945 (Admin) [66-59].

⁹⁵ *R (Dillner) v Sheffield City Council* [2016] EWHC 945 (Admin) [75].

claims from the confines of existing practices and frameworks – and of course the complex legislative compartmentalisation of the environment in UK law leads to divergent approaches to what may seem to the public to be classic environmental issues. But it also highlights the fine line that exists in environmental law cases between facts and values, and the difficulty in avoiding reviewing the merits in proceedings for legality.

To summarise, Asimow's clear adjudicatory fulcrum is difficult to identify in the English-Welsh context, however the generalist courts retain a significant role and appear to establish the predominant adjudicatory focus. Importantly, a primary avenue available to claimants is often that of traditional judicial review (for example, third parties seeking to challenge planning decisions have recourse only to judicial review, even though applicants have access to a full merits review by the Planning Inspectorate,). This focus poses challenges for all actors involved in environmental adjudication. Certain subsets of the law provide a better background for challenges. Many cases come across as little more than an attempt to engage in full merit review of an administrative decision, creating particular difficulties for the courts. Further, given the parameters and drivers of judicial review, the courts have understandably been reluctant to accept any contention that they ought to afford environmental claims special consideration. Context may impact decisions but not necessarily in a way that makes sense to environmental disputants, leading to an inconsistency in what may appear to claimants to be factually similar claims. From our initial mapping exercise, we can see that formalism in environmental adjudication may not necessarily correlate to certainty, equality, and coherence for environmental litigants, particularly when it operates against such a fractured regulatory backdrop. To illustrate this point further, we can turn to New Zealand – a jurisdiction within which adjudicatory structures have been created to more readily respond to the nature of environmental problems.

IV. ENVIRONMENTAL ADJUDICATION IN NEW ZEALAND

A. *Regulatory framework*

Before embarking on any analysis of institutional infrastructure, it is important to sketch an understanding of the regulatory framework in New Zealand. Environmental regulation is comparatively simple to the highly complex-legislative web that exists in England and Wales primarily because the Government took a conscious decision to address environmental problems in an integrated way.⁹⁶ One primary statute, the Resource Management Act 1991 ('RMA'), governs the environmental management of all land, air and water in New Zealand and merges many of the individual regimes seen in England and Wales – pollution controls, biodiversity protection, permitting for activities such as water take,

⁹⁶ Geoffrey Palmer, *Environment: the International Challenge* (Victoria University Press, 1995), 145-174.

town and country land-use planning, enforcement etc. – into one ‘coherent, integrated and structured scheme’.⁹⁷ The result is substantial integration across the management of environmental domains, through legislation and policy, and between institutions, so creating a holistic approach to environmental management. In this way, environmental law in New Zealand mirrors ecology. While other regulatory regimes exist to respond more discretely to specific environmental management issues (such as the Climate Change Response Act 2002, Hazardous Substances and New Organisms Act 1996 and Exclusive Economic Zone and Continental Shelf (Environmental Activities Act 2011)⁹⁸ and interrelate with the RMA in different ways, the RMA has the widest application.

Correctly understood, the RMA constitutes ‘goals focused’⁹⁹ legislation and the stated ‘goal’ of the RMA is to promote ‘the sustainable management’ of natural and physical resources¹⁰⁰ - and many other environmental states in New Zealand also state a purpose of ‘sustainability’-¹⁰¹ but, as Dryzek comments, sustainability connotes ‘a discourse, not a concept, and still less a scientific concept’.¹⁰² This helps in part to explain why in the New Zealand context the main environmental and planning statutes constitute frameworks, delegating various roles and responsibilities to different institutions, providing them with flexible powers to craft solutions in respect of environmental conflicts, and ensuring wide public participatory processes. Fisher has described the RMA ‘as a ‘power map’: it is enabling institutions, allocating power, framing legal discourses’ and in that sense, may be conceived as part of ‘environmental constitutionalism’.¹⁰³

For our purposes, the manifestation of this ‘environmental constitutionalism’ enables governance to take place at a multitude of different points – geographical, temporal, within and between social groups and peoples - and by utilising different legal mechanisms. And it also enables governance by different *institutional* forms including decision-making that flows from various adjudicatory bodies because of the flexible and participatory procedures employed by those bodies, sheer range of remedies granted, and wide-ranging impact of their decisions.¹⁰⁴

⁹⁷ *Environmental Defence Society Incorporated v Marlborough District Council* [2014] NZSC 38 [9].

⁹⁸ Ceri Warnock and Nicola Wheen, ‘Environmental Legislation in New Zealand’ in Ceri Warnock and Nicola Wheen (eds), *Brookers Environmental Legislation* (Thomson Reuters 2014), 1-28.

⁹⁹ David Schoenbrod, ‘Goals Statutes or Rules Statutes: The Case of the Clean Air Act’ (1982-1983) 30 *UCLA L Rev* 740, 784.

¹⁰⁰ RMA, s 5(1).

¹⁰¹ E.g. Exclusive Economic Zone and Continental Shelf (Environment Effects) Act 2012 (‘EEZA’); Fisheries Act 1996; Hazardous Substances and New Organisms Act 1996.

¹⁰² John S Dryzek, ‘Paradigms and Discourses’ in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (OUP 2008), 56.

¹⁰³ Elizabeth Fisher, ‘Towards Environmental Constitutionalism: A Different Vision of the Resource Management Act 1991?’ (2015) 11 *Resource Management Theory and Practice* 63, 70; Janet McLean, ‘New Zealand’s Resource Management Act 1991: Process with Purpose?’ (1992) 7 *Otago L R* 538.

¹⁰⁴ As Parliament noted, decisions by the forerunner to the NZEnvC (TCPA Appeal Board) had ‘far reaching effects’ greatly exceeding the ‘run-of-the-mill business that occupied the Supreme Court day by day’, 375 NZPD 3589.

B. Adjudicatory Pluralism and Specialisation

Adopting Asimow's typology and schematic, a spectrum of environmental 'adjudicators' exists in New Zealand, reflecting a complex pluralism. However, at a simple, pragmatic level, in contrast to the UK scenario, this division and allocation of adjudicatory roles appears capable of justification. At the 'initial decision' stage, this spectrum includes both executive and judicial decision-making. It includes decision-making by: ministers (in relation to the allocation of national resources, such as crown-owned minerals and fishing quota);¹⁰⁵ local authorities (who determine resource management applications in their localities, particularly under the RMA); Boards of Inquiry (that are established on an ad hoc basis to hear some RMA applications that have significant, national impacts);¹⁰⁶ the 'ordinary' courts that play a role in determining ex post facto compensatory disputes (including civil law tortious actions, statutory liability for oil tanker spills under the Maritime Transport Act 1994, and some enforcement actions); the Environmental Protection Authority (that is primarily concerned with national regimes conscribed by international treaty commitments); and, in some instances, the specialist Environment Court. In terms of 'first stage' challenges to initial decisions, most appeals are heard by bodies external to and independent from the initial decision maker: there are very few instances of appeal-routes being embedded within the same institution.¹⁰⁷ Appellate bodies constitute: the independent Catch History Review Committee (that review ministerial decisions in relation to fishing quota eligibility);¹⁰⁸ ad hoc Boards of Inquiry (that hear 'called-in' RMA appeals that are nationally significant); the superior courts that determine statutory appeals on a point of law or judicially review executive actions; and the Environment Court, that hears de novo merits appeals predominantly in relation to RMA decisions by local authorities.¹⁰⁹ In relation to Asimow's 'final stage' challenges, appeals are made to the superior courts.

Importantly for our mapping exercise, most of these decision-making institutions (excluding the 'ordinary' courts) have a multiplicity of functions: regulatory, administrative and adjudicative. This functional-plurality is justified by the concentration of expertise in these bodies, but it manifests in part because environmental problem-solvers need to be able to draw upon responsive problem-solving mechanisms that may include traditional legal remedies, administrative or reflexive responses. To that extent, these bodies demonstrate that in the New Zealand environmental context less emphasis is placed upon 'traditional politico-legal institutions';¹¹⁰ rather, we are seeing a shift away from rigid, prescriptive institutional forms and structures, towards more responsive, specialist bodies operating within 'less

¹⁰⁵ Crown Minerals Act 1991; Fisheries Act 1996.

¹⁰⁶ RMA, pt 6AA.

¹⁰⁷ For an isolated example see RMA, s 357.

¹⁰⁸ Fisheries Act 1996 (NZ) ss 51, 284.

¹⁰⁹ RMA, s 290.

¹¹⁰ Gráinne De Burca and Joanne Scott (eds), *Law and New Governance in the EU and the US* (Oxford, Hart, 2006), 2.

hierarchical' structures.¹¹¹

We can explore this perspective further by briefly considering two bodies that have (in the main) different jurisdictions – the Environmental Protection Authority and the specialist Environment Court. Both have the multi-functional characteristics mentioned above but take different forms. As part of the executive, with a ministerially appointed Board,¹¹² the Environmental Protection Authority (EPA) monitors and reviews the efficacy of certain legislative regimes; advises the Minister as to appropriate regulatory developments;¹¹³ issues permits for the use and development of hazardous substances and new organisms, and for the import of ozone depleting substances;¹¹⁴ and enforces the climate change regulations.¹¹⁵ It also has an important adjudicatory role in deciding whether to grant 'marine consents', permitting activities such as petroleum exploration and ocean-bed phosphate mining, in the exclusive economic zone and managing the environmental impacts of those activities. Interestingly while the EPA must interpret statute law and consider legal doctrine,¹¹⁶ and conduct hearings to determine factual disputes and apply legal norms to findings,¹¹⁷ it does not have a judicial chair and (according to the empowering statute) need not have legally trained members in the adjudicative role.¹¹⁸ Importantly however, its adjudicatory role is concerned with geographical areas where full sovereignty starts to diminish and private property or other existing rights are not impacted. In undertaking adjudication, the EPA invites submissions from the public, thus fostering full participation; it bases decision on what best promotes 'sustainable management' of the relevant resource;¹¹⁹ and a wide-range of remedies is available to it.¹²⁰ As a relatively new creation, the EPA has issued few decisions to date and it is hard to see if any particular substantive or procedural norms are developing. Appeals are to the generalist courts, not the Environment Court.

In contrast, the specialist Environment Court (NZEnvC) is both a judicial body and a court of expertise: tenured and independent judges sit with expert 'lay' commissioners. It makes decisions impacting public resources and private property and so individual rights may be impacted: hence the constitutional propriety of an independent court determination. The Court determines some first instance decisions, but is predominantly concerned with appeals from Local Authority decision-making that it hears *de novo* on the merits. It is not confined to legality review. It is the primary environmental adjudicative body in New Zealand, empowered specifically to determine cases under the RMA – and so all of the Court's decisions must accord with the statutory mandate to 'promote sustainable

¹¹¹ Gráinne De Burca and Joanne Scott (eds), *Law and New Governance in the EU and the US* (Oxford, Hart, 2006), 2.

¹¹² Crown Entities Act 2004, s 7.

¹¹³ Environmental Protection Authority Act 2011, s 13.

¹¹⁴ Hazardous Substances and New Organisms Act 1996, s 11.

¹¹⁵ Climate Change Response Act 2002, s 87.

¹¹⁶ E.g. Environment Protection Authority 'Decision re: Trans-Tasman Resources Ltd' (June 2014), 23-38.

¹¹⁷ EEZA, ss 50, 53, 69.

¹¹⁸ Environmental Protection Act 2011.

¹¹⁹ EEZA s 10.

¹²⁰ EEZA pt 3, subpt 2.

management' of the resources in question¹²¹ - but it also has jurisdiction under a number of other environmental statutes.¹²² In one sense it is a classic judicial body. It finds facts and applies the law to those facts, and interprets both statute law and planning documents that constitute regulations in the statutory scheme.¹²³ It tends to follow litigious procedures (although, can control its own procedures and adopt an inquisitorial approach where appropriate),¹²⁴ and it also enforces the law (albeit, has a great deal of flexibility as to the enforcement approach it takes).¹²⁵ But the Court also has a regulatory role and is explicitly empowered under the RMA to hear and determine disputes concerning local authority plans and policy-documents, i.e. statutory regulations, to refine those documents to ensure that they 'promote sustainable management', and to give them final approval. In doing so, it must ensure full public participation.¹²⁶ The Court also has a role more traditionally reserved to the administration: it licenses specific activities with regards to the take, use, development and discharge into land, air and water that are not automatically permitted, and in this sense is concerned with prediction, uncertainty, risk-evaluation and allocation. How to 'promote sustainable management' of a resource will be determined by the facts and relevant context of any given case but will be guided by the legislation and policy framework¹²⁷ that the Court must in turn interpret or may have played a role in crafting. The Court has considerable flexibility in terms of procedure, methods of interpretation, the decision-making process (with legal and non-legal expertise feeding into both fact and law evaluation, and the application of law to facts) and remedies.¹²⁸

These select examples and brief survey given above reveal that the adjudicative landscape in our two nations differs. While equally pluralistic, New Zealand's adjudicatory spectrum appears rational and capable of explanation; specialist, multi-functional bodies have been created that can respond to the challenges of environmental adjudication; and these bodies can be seen to form part of wider environmental governance. In light of this pluralism, is it possible to see Asimov's adjudicative fulcrum at work in New Zealand environmental adjudication? We suggest that the New Zealand Environment Court appears sited at the adjudicatory fulcrum and this reality raises a number of interesting possibilities, explored below.

C. The adjudicatory fulcrum

¹²¹ RMA s 5(1).

¹²² Including: Biosecurity Act 1993, Crown Minerals Act 1991, Electricity Act 1992, Forests Act 1949, Heritage New Zealand Pouhere Taonga Act 2014, Local Government Act 1974, Public Works Act 1981, Government Rounding Powers Act 1989, EEZA 2012, Housing Accords and Special Housing Areas Act 2013, Land Transport Management Act 2003.

¹²³ Ceri Warnock, 'Reconceptualising the Role of the New Zealand Environment Court' (2014) 26 JEL 507.

¹²⁴ Laurie Newhook, 'The Constitution, Work, Powers and Practices in Trial and Pre-Trial Work of the Environment Court of New Zealand' (International Forum of Environment Judges, IUCN AEL Colloquium, Oslo, June 2016)

¹²⁵ RMA, pt 12.

¹²⁶ *Canterbury Regional Council v Apple Fields Ltd* [2003] NZRMA 508 (HC).

¹²⁷ *Environmental Defence Society Incorporated v Marlborough District Council*, [10-11].

¹²⁸ Including civil, criminal and reflexive responses, see RMA pt 12.

Asimow's 'fulcrum' test is premised upon the use of resources that best facilitate procedural fairness and substantive accuracy. There can be little doubt that (to date, at least) financial, administrative and legal resources have been invested in the Environment Court.¹²⁹ Comprehensive procedural and evidential rules have developed and the Court has issued a series of Practice Notes that responds to the nature of disputes it hears.¹³⁰ However, similar resources are available to the ordinary courts and many other adjudicatory bodies in New Zealand that hear 'first' and 'final stage' challenges. To explain our contention that the NZEnvC provides an adjudicative fulcrum other factors are important.

Firstly, decisions of the Court have significant collective impact on the ecological, economic and socio-cultural landscape of New Zealand. For example, it has resolved disputes concerning: the allocation of space in the coastal marine area for aquaculture; water-take for large-scale dairy irrigation; the displacement of endangered fauna for coal mining;¹³¹ heritage demolition; the use of geothermal fluid for macro-electricity generation; protecting Maori land from compulsory acquisition; and rezoning protected land for development.¹³² This small snapshot illustrates the expansive remit of the Court and the wider impact of its decisions on New Zealanders' wellbeing, which as Parliament has acknowledged in the past far exceeds that of the ordinary courts.¹³³ But its decisions also mould the legal landscape and this factor is important for considering Asimow's 'substantive accuracy'.

A critical point is that the Environment Court hears a massive amount of cases. Many of those cases are reported in the general or specialist law reports and all decisions are made available to the public.¹³⁴ In comparison, relatively few (non-RMA) environmental law cases either go directly or are successfully appealed to the superior courts, and very few appeals against Environment Court decisions are successful. Between 2006-2016, the NZEnvC issued 937 substantive judgments; 210 appeals were lodged in the High Court; 53 were allowed or part allowed (5.6%); 12 were further appealed to the Court of Appeal of which two were allowed, three dismissed, five were abandoned and (at the date of writing) two remained outstanding.¹³⁵ During this period, only 21 reported cases were concerned with non-RMA environmental legislation in the higher courts.¹³⁶ As a result, case law focuses predominantly on RMA disputes before the NZEnvC, and to a lesser extent, the other 16-plus legislative regimes that the Court has jurisdiction over, and rests primarily on the Court's reasoning. Beyond a quantitative analysis, the NZEnvC appears to play a significant qualitative role in norm development. To explore this contention further, we can consider and compare the role of the ordinary courts to that of the

¹²⁹ New Zealand Environment Court, *Annual Review by Members of the Court* (Environment Court, Wellington, 2014).

¹³⁰ Environment Court of New Zealand 'Practice Note 2014'.

¹³¹ *Solid Energy NZ Ltd v West Coast Regional Council* C74, 2005, 24 May 2005 (NZEnvC).

¹³² Environment Court, *Annual Review by Members of the Court*.

¹³³ 375 NZPD 3589.

¹³⁴ See <http://www.nzlii.org/nz/cases/NZEnvC/> (Accessed 25 April 2017).

¹³⁵ Communication between the author and Ministry of Justice, 31 October 2016.

¹³⁶ For 'environmental legislation' see Warnock and Wheen, 'Environmental Legislation in New Zealand'.

NZEnvC in norm development.

As with the UK, the ordinary courts are concerned with legality: there is no ‘final stage’ merits review. Environmental problems in New Zealand are predominantly managed by legislative regimes, and the pervasive focus in environmental appeals on a point of law or judicial review to the superior courts concerns statutory interpretation.¹³⁷ The development of environmental law might therefore be categorised as ‘dependent common law’, i.e. ‘the creation of norms generated as a by-product of the application of statutory and constitutional norms’ during adjudication.¹³⁸ Even so, the higher courts development of environmental law has been relatively conservative. International environmental law principles appear to play a limited role,¹³⁹ and like the scenario in the UK, the Court of Appeal has emphasised that judicial review of decisions preventing participation does ‘not demand a closer scrutiny’ in environmental cases than non-environmental law cases unless the statute requires it.¹⁴⁰ The effect is that the courts tend to defer to first stage decision-makers rather than providing for rights of public participation in environmental matters *per se*.

Most environmental statutes contain purpose sections to aid a purposive interpretation and / or set a general policy direction,¹⁴¹ and while some judgements acknowledge wider interpretative frames beyond the statutory confines, factors external to the national statute are seldom determinative. For example, in *Friends of Turitea Reserve*, Baragwanath J found the High Court could take judicial notice of increasing environmental concerns in society, and that ‘statutes are no longer considered in isolation but, where reasonably possible, as forming part of a wider and seamless public policy’ that includes sustainable development.¹⁴² Nevertheless, in refusing to protect a local reserve for the conservation of indigenous flora and fauna and sanctioning the development of a wind-farm, the Court found it did ‘not follow that the basic functions of local government ... were to be performed outside the scope of the Reserves Act.’¹⁴³ This relatively conservative or confined focus is standard.

The ordinary courts face significant interpretative difficulties however when statutory purpose sections contain vague or conflicting principles, which is common with sustainability-focused statutes. In *New Zealand Recreational Fishing Council v Sanford* the Supreme Court found that the Fisheries Act 1996 expresses ‘two competing social policies’ i.e. utilisation and sustainability, but the Act recognises the potential for conflict, and a pragmatic approach ultimately requires that ‘utilisation must

¹³⁷ Marcelo Rodriguez Ferrere, ‘The Functional Convergence of Appeal and Judicial Review’ [2016] NZLR 157.

¹³⁸ Peter Cane, *Controlling Administrative Power: An Historical Comparison* (Cambridge 2016), 333.

¹³⁹ *National Beekeepers v Chief Executive of Minister of Agriculture* [2007] NZCA 556, [25]; *Bleakley v Environmental Risk Management Authority*, [154]; *Greenpeace v Minister of Fisheries* (unreported) CP492/93 (HC); *Greenpeace v Environmental Protection Agency* [2014] NZRMA 112 (HC).

¹⁴⁰ *Far North District Council v Te Runanga-A-Iwi O Ngati Kahu* [2013] NZCA 221 [56]; albeit the courts approach standing liberally given s 27 of the New Zealand Bill of Rights Act 1990 (*Westfield New Zealand Ltd v North Shore City Council*, [54-55]).

¹⁴¹ *Environmental Defence Society Incorporated v Marlborough District Council*, [151].

¹⁴² *Friends of Turitea Reserve Society Inc v Palmerston North City Council* [2008] 2 NZLR 661 (HC) [22].

¹⁴³ *Friends of Turitea Reserve Society Inc v Palmerston North City Council* [2008] 2 NZLR 661 (HC) [22].

not be such as to jeopardise sustainability'.¹⁴⁴ In the *King Salmon* case, when faced with making legal sense of the purpose section of the RMA that contains multiple conflicting principles, the Supreme Court refused to subject the statutory section to close interpretation eschewing its value as an interpretative tool and stating instead that it was a guiding statement of general policy.¹⁴⁵ As the superior courts have explicitly acknowledged, it is precisely for this reason that the specialist NZEnvC exists and has the power to undertake merits review.¹⁴⁶

Clearly, the NZEnvC has certain features that might limit its contribution to the development of environmental law if a strictly legalistic or formalist approach is adopted, but its norm generating-role has significant implications if conceived of as part of the broader governance structures. The first feature is that, as an inferior court, the decisions of the NZEnvC do not constitute *de jure* authoritative precedent.¹⁴⁷ However, in practice, decisions of the Court act as norms for local authorities (who make the vast majority of resource management decisions) as well as informing other decisions of the Court itself,¹⁴⁸ and while the Court hears appeals *de novo* from authorities, decisions may also act as a review of administrative action, helping to influence future administrative behaviour. Further, it is possible to see a deferential approach by the superior courts to the Environment Court,¹⁴⁹ particularly in its interpretation of planning documents, deemed regulations under the RMA.¹⁵⁰

Secondly, the Court does not have general jurisdiction, rather it is empowered and constrained by statute.¹⁵¹ So, like the superior courts, the NZEnvC is concerned with 'dependant common law'. Nevertheless we can chart a more creative process of developing legal norms. In practice, given the inherently interstitial nature of environmental legislation, the Court has developed a vast body of jurisprudence that forms the web of environmental case law in New Zealand and fills in the statutory lacunas. Often the development of legal principles over a line of cases may appear to have a very slender tether to the statutory text. To give one example, the Court has had to develop an entire jurisprudence on uncertainty, risk evaluation, and risk management with extremely limited guidance from the regulatory regime, in order to make sense of the predictive role that decision-makers play in environmental management. With two scant statutory references upon which to draw¹⁵² the Court

¹⁴⁴ *New Zealand Recreational Fishing Council Inc v Sanford Ltd* [2009] NZSC 54, [39].

¹⁴⁵ *Environmental Defence Society Incorporated v Marlborough District Council*, [24].

¹⁴⁶ *Environmental Defence Society Incorporated v Marlborough District Council*, [150].

¹⁴⁷ *Dye v Auckland Regional Council* [2002] 1 NZLR 337 (NZCA), [32].

¹⁴⁸ E.g. *Outstanding Landscape Protection Society Inc v Hastings District Council* [2008] NZRMA 8 (NZEnvC) [15], [46], [69], [105], [108].

¹⁴⁹ E.g. *Stark v Auckland Regional Council* [1994] 3 NZLR 614 (HC), 617; New Zealand Law Commission, *Delivering Justice for All* (NZLC Wellington, 2004), 221.

¹⁵⁰ E.g. *Thumb Point Station Ltd v Auckland Council* [2015] NZHC 1035 [56-59].

¹⁵¹ RMA, pt 11 note however NZEnvC is regarded as a court not a statutory tribunal (New Zealand Law Commission, *Tribunals in New Zealand* (NZLC Wellington, 2008).

¹⁵² RMA ss 3(f), 32(2)(c).

developed expansive doctrine and procedural mechanisms for managing risks into the future.¹⁵³ Case law addresses: the rules of evidence and burdens and standards of proof;¹⁵⁴ approaches to expert evidence;¹⁵⁵ and the development of novel remedies, such as adaptive management that respond to uncertainty with continual information gathering and the consequential adjustment of permit conditions.¹⁵⁶ Jurisprudence from the Court has therefore had a profound impact on the manifestation of precaution within New Zealand ‘legal culture’,¹⁵⁷ giving meaning to a core principle of environmental law - the precautionary principle - in this national context.

There are also numerous examples of the Court crafting complex environmental or ecological phenomena into concepts that can be used in legal contexts. For example in the ‘Lake Wakatipu cases’¹⁵⁸ the Court gave meaning to the statutory term ‘landscape’ – a layered social and ecological concept that is difficult to translate into a simple legal definition for uniform application. Rather the Court created schemata for the gathering of evidence that would help decision-makers fit factual contexts within legal frameworks. In doing so, the Court impacted the future administrative behaviour of local authorities (who have a statutory duty to identify and protect outstanding natural landscapes via planning documents) and provided a guide for future litigation (that may bring into dispute those wanting to develop outstanding natural landscapes with conservationists). The development of the Treaty of Waitangi¹⁵⁹ jurisprudence is another example of the attempts of the Court to translate socio-cultural ontologies – such as ‘waahi tapu’¹⁶⁰ and kaitiakitanga¹⁶¹ - into a common language usable in legal settings, and demonstrates the contribution of the Court to wider environmental law norms concerning ‘access to justice as recognition’¹⁶² for the indigenous Maori peoples.

How it develops these interpretations or dependent common law is important. As a specialist court, the NZEnvC is well positioned to examine difficult concepts and give legal meaning to them ‘in light of their actual use’.¹⁶³ Commissioners contribute their expertise to the legal interpretation of socio-cultural and ecologically complex statutory terms and the higher courts have explained that the NZEnvC

¹⁵³ *Golden Bay Farmers v Tasman District Council* EnvC Christchurch W42/2001 (NZEnvC), [421]-[423]; *McIntyre v Christchurch City Council* [1997] NZRMA 289 (PT); *Transpower New Zealand Ltd v Rodney District Council* PT Auckland A85/94.

¹⁵⁴ *Shirley Primary School v Christchurch City Council* [1999] NZRMA 66 (NZEnvC) [68].

¹⁵⁵ *Shirley Primary School v Christchurch City Council* [1999] NZRMA 66 (NZEnvC) [68].

¹⁵⁶ *Golden Bay Farmers v Tasman District Council*; *Crete Energy Kaipara Ltd v Northland Regional Council* [2011] NZEnvC 26; *Sustain Our Sounds Inc v New Zealand King Salmon Company Ltd* [2014] NZSC 40.

¹⁵⁷ David Nelkin, ‘Using the Concept of Legal Culture’ (2004) 29 *Austl J Leg Phil* 1.

¹⁵⁸ *Wakatipu Environmental Society Inc v Queenstown Lakes District Council (No 1)* [2000] NZRMA 59 (EC) *Wakatipu Environment Society Inc v Queenstown Lakes District Council* [2003] NZRMA 289 (NZEnvC) and see Wamock, ‘Reconceptualising Specialist Environment Courts and Tribunals’.

¹⁵⁹ Treaty of Waitangi 1840 is the quasi-constitutional agreement as to sovereignty between the colonising British Crown and the indigenous Maori.

¹⁶⁰ Akin to sacred site, RMA, s 6(e).

¹⁶¹ Akin to guardianship, RMA s 7(a).

¹⁶² Gordon Walker, *Environmental Justice: Concepts, Evidence and Politics* (Routledge 2012), 50.

¹⁶³ H L A Hart, ‘Definition and Theory in Jurisprudence’ (1954) 70 *LQ Rev* 37.

has to call upon ‘the whole range of its collective experience’¹⁶⁴ in determining both ‘legislative facts’¹⁶⁵ and understanding policy documents. The legal nature of the Court means that it is willing to look beyond the evidence produced by the parties, and refer to a wider range of materials to help interpretation,¹⁶⁶ so adopting something akin to a ‘Brandeis brief-type’ approach.¹⁶⁷ Because of the Court’s specialist nature, coupled with its power to hear matters de novo on the merits, the difficulties experienced in the UK context disappear.¹⁶⁸

Accordingly, the Environment Court fulfils an important role in expository justice and acutely reflects Spann’s observation that ‘it is the function of the judiciary to give meaning to the general, often abstract, policies adopted by the legislature, through reference to specific factual contexts’.¹⁶⁹ This exposition can, in turn, provide useful information to the executive and the legislature¹⁷⁰ and the NZEnvC is part of a feedback loop. In particular, problem-solving approaches crafted through adjudication before the Court, feed back to other branches of government and impact regulatory development. Through dispute-resolution, the Court has created novel remedies such as ‘environmental compensation’ or ‘offsetting’,¹⁷¹ and ‘adaptive management’,¹⁷² best categorized as forms of experimentalist intervention. The superior courts have confirmed the legal validity of these developments¹⁷³ and the Government has responded to the Environment Court’s lead by adopting these mechanisms, developing them into wider policy responses,¹⁷⁴ and adapting the concepts for use in other regulatory regimes.¹⁷⁵ Thus, we see a synergist process: court-created responses to discrete environmental problems have in turn informed other branches of government. In validating the Environment Court’s wider influence in norm-development, perhaps we ‘find ourselves with a new and richer understanding of what we mean by ‘law’ in this context.’¹⁷⁶

¹⁶⁴ *Electricity Corporation of New Zealand Ltd v Manawatu-Wanganui Regional Council* (unreported) W70/90, 29 October 1990 (PT) [95]; *Turner v Allison* [1971] NZLR 833 (CA), 843.

¹⁶⁵ Kenneth C Davis, ‘An Approach to the Problems of Evidence in the Administrative Process’ (1952) 55 Harv L Rev 402.

¹⁶⁶ E.g. *Winstone Aggregates Ltd v Franklin District Council* A80/2002, 17 April 2002 (NZEnvC) *Marlborough Ridge Ltd v Marlborough District Council* [1998] NZRMA 73 (NZEnvC).

¹⁶⁷ *Muller v Oregon* (1908) 208 US 412.

¹⁶⁸ Though raising different tensions: Ceri Warnock, ‘Reconceptualising Specialist Environment Courts and Tribunals’ (2017) 37 Legal Studies (in press).

¹⁶⁹ Girardeau Spann, ‘Expository Justice’ (1983) 131 U Pa L Rev 585, 595.

¹⁷⁰ Girardeau Spann, ‘Expository Justice’ (1983) 131 U Pa L Rev 585, 585-586.

¹⁷¹ *JF Investments Ltd v Queenstown Lakes District Council* C48/2006, 27 April 2006 (NZEnvC); *Royal Forest and Bird Protection Society v Gisborne District Council* W26/2009, 7 April 2009 (NZEnvC).

¹⁷² *Golden Bay Marine Farmers v Tasman District Council* W42/2001, 27 April 2001 (NZEnvC).

¹⁷³ E.g. *Sustain Our Sounds Inc v New Zealand King Salmon Company Ltd* (adaptive management); *Royal Forest and Bird Protection Society v Buller District Council* [2013] NZHC 1346 (offsetting).

¹⁷⁴ New Zealand Government *Guidance on Good Practice Biodiversity Offsetting in New Zealand* (Wellington, 2014).

¹⁷⁵ Ministry for the Environment *2011 Users’ Guide to the revised National Environmental Standards for Air Quality: Updated 2014* (ME 1141, August 2011) [4.10.3] (employs offsetting); EEZA, s 64 (employs adaptive management).

¹⁷⁶ David Trubek and Louise Trubek, ‘Hard and Soft Law in the Construction of Social Europe: the Role of the Open Method of Co-ordination’ (2005) 11 European Law Journal 344, 364.

The result of all this is that Asimow's adjudicatory fulcrum appears to rest with the Environment Court. Identifying this fulcrum leads us to question whether Asimow's analysis has deeper ramifications: can the identification of a fulcrum have implications for legal norm-development? In our New Zealand example, it would appear so. Importantly, these norm-developments are coherent because the specialist Court is responsive enough to address the inherent challenges in environmental problem solving and operating within an integrated regulatory frame, and they are (relatively) consistent because one body with one institutional culture is making the bulk of decisions.

V. CONCLUSION

By comparing the adjudicatory spectrum in England and Wales and New Zealand we show how the forms and structures of adjudication create complex and subtle influences on the way environmental law develops. Adjudicatory pluralism in New Zealand mirrors to an extent that in England and Wales. However, there the similarities diverge. In contrast to England and Wales, the legal landscape in New Zealand has responded more readily to Rubin's exhortation that the 'problems of modernity ... require new rules and particularised remedies, and deliberately designed agencies'.¹⁷⁷ In terms of Asimow's classification system 'adjudicatory resources' in New Zealand appear most heavily invested in the 'first-stage challenge', and primarily in appeals to the specialist Environment Court. This has led to the Court creating a large body of jurisprudence, and in both quantitative and qualitative terms playing a major role in expository justice. In formalist terms, this creates an odd scenario with an inferior court making most of the jurisprudence, so disrupting the normal hierarchies of law. But the dominance of this specialist body, sited within a holistic regulatory frame, has led to the development of coherent norms and avoided the inconsistency and tensions that pull UK doctrinal development in different directions. In New Zealand-environmental management, 'court-law' does not appear to stand in opposition to environmental governance, limiting and bracketing as the purist, judicial review-heavy approach in England and Wales does. Rather, through the role of the NZEnvC, adjudication becomes an integral part of environmental governance, and in checking for 'legality', the superior courts need exercise the lightest of supervisory roles.

In contrast, it is difficult to identify a clear adjudicatory axis in England and Wales that exists outside the 'ordinary' courts, and the courts remain anchored to a significant degree in established doctrines of law derived from disciplines and understandings that are not unique or specific to environmental law. The law is approached within traditional structures set up to protect individual rights and give force to constitutional principles, and the attempts by the courts to maintain a dichotomy between legalism and merits review is precarious. In a large part, this is because the inherent challenges

¹⁷⁷ Edward L Rubin, 'From Coherence to Effectiveness: A Legal Methodology for the Modern World' in Rob van Gestel, Hans-W. Micklitz and Edward L Rubin (eds), *Rethinking Legal Scholarship* (CUP, 2017) 310-350, 322.

of environmental dispute resolution, magnified by the structures of the law itself (and reliance on background norms in EU law). This, however, gives rise to pressures, resulting in doctrinal inconsistency. In a sense, it is difficult to see how the overly formalistic approach to environmental adjudication is contributing to equality and certainty. In fact it may actually be hindering consistent and coherent dispute-resolution of environmental problems. Fundamentally, our analysis raises the interesting possibility that Asimow's thesis *can* be extended to demonstrate that a clear adjudicatory focus - or lack of focus - impacts upon the role that adjudication plays in the development of environmental norms – an important possibility worthy of deep study by legal scholars.

