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'The role of environmental courts and tribunals in promoting the rule of law and ensuring equal access to justice for all'

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INTRODUCTION

On 25 September 2015, The United Nations General Assembly adopted an outcome document, 'Transforming our World: The 2030 Agenda for Sustainable Development', containing 17 Sustainable Development Goals and 169 targets to achieve these goals. Goal 16 is:

> "Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels."

Amongst the targets for achieving this goal are:

> "16.3 Promote the rule of law at the national and international levels and ensure equal access to justice for all.
>
> 16.6 Develop effective, accountable and transparent institutions at all levels.
>
> 16.7 Ensure responsive, inclusive, participatory and representative decision-making at all levels.
>
> 16.10 Ensure public access to information and protect fundamental freedoms, in accordance with national legislation and international agreements."

This goal and these targets include the three pillars of access to information, public participation and access to justice in environmental matters encapsulated in Principle 10 of the Rio Declaration on Environment and Development issued at the United Nations Conference on Environment and Development in Rio de Janeiro on 3-14 June 1992. Principle 10 states:

> "Environmental issues are best handled with the 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. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided."

The Governing Council of the United Nations Environment Programme adopted, at its meeting in Bali, Indonesia on 26 February 2010, Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters (hence the colloquial name the Bali Guidelines). These Guidelines provide general guidance on promoting the effective implementation of the three pillars of Principle 10. There are seven guidelines to promote access to information, seven guidelines to promote public participation and 12 guidelines to promote access to justice in environmental matters.

Judicial institutions play a vital role in achieving these goals of promoting the rule of law and ensuring equal access to justice for all. Environmental courts and tribunals (ECTs) may be better placed than traditional courts to play this role. This paper explores what the rule of law involves[1] and the ways in which ECTs promote the rule of law and access to justice in environmental matters.

THE RULE OF LAW

Support for the rule of law has grown over time, but has accelerated in recent decades to a point where there is apparent unanimity.[2] The rule of law stands as the pre-eminent legitimating political ideal in the world today.[3] Peculiarly, however, there is no agreement as to what the rule of law precisely means. There is a core of meaning on which most would agree but an extended penumbra of meaning where agreement is absent.

Formulations of the rule of law can be grouped into two basic categories, formal versions and substantive versions. Each category can, in turn, be subdivided into three distinct forms.

Formal versions of the rule of law focus on the proper sources and form of legality. The three forms are rule by law, formal legality and legality with democracy. Substantive versions incorporate the formal requirements of formal versions of the rule of law but add requirements about the content of the law. These content requirements include individual human rights, rights of dignity and/or justice and social welfare rights.

In each category, the formulations can be seen to progress from simpler to more complex accounts or, what Tamanaha describes as, thinner to thicker accounts. Each subsequent formulation incorporates the main aspects of the preceding formulations, making them progressively cumulative.[4] Furthermore, substantive formulations are cumulative upon formal formulations, incorporating and adding to

[1] The discussion on the rule of law draws heavily on Brian J Preston, 'The enduring importance of the rule of law in times of change' (2012) 86 *Australian Law Journal* 175.
[2] Brian Z Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press, 2004) 1–3.
[3] Ibid 4.
[4] Ibid 91.

their aspects. Tamanaha tabulates this categorisation of the alternative rule of law formulations as follows:[5]

Thinner ---------- >--- to ----------> Thicker

FORMAL VERSIONS:	1. **Rule by Law**	2. **Formal Legality**	3. **Democracy + Legality**
	- law as instrument of government action	- general, prospective, clear, certain	- consent determines content of law
SUBSTANTIVE VERSIONS:	4. **Individual Rights**	5. **Right of Dignity and/or Justice**	6. **Social Welfare**
	- property, contract, privacy, autonomy		- substantive equality, welfare, preservation of community

Support for the various formulations of the rule of law is stronger for the formal versions over the substantiative versions and strongest for the first two forms of the formal version (rule by law and formal legality) but weakens with each cumulative formulation. A central reason is that formal versions of the rule of law have no content requirements, while substantive versions have increasing content requirements as one moves from thinner to thicker accounts. This lack of content requirement makes formal versions politically neutral. As Fuller notes, formal legality is "indifferent towards the substantive aims of law and is ready to serve a variety of such aims with equal efficacy".[6] This indifference or neutrality of formal versions of the rule of law enables the rule of law to be universally supported, a point well made by Summers:

> A relatively formal theory is itself more or less politically neutral, and because it is so confined, it is more likely to command support on its own terms from right, left and center in politics than is a substantive theory which not only incorporates the rule of law formally conceived but also incorporates much more controversial substantive content.[7]

The increasing substantive content of the rule of law in more complex or thicker formulations also obscures rather than illuminates the meaning and lessens the usefulness of the rule of law as a concept. Spigelman notes that the label of rule of law "becomes progressively less useful as its scope extends".[8]

I propose to discuss the three formal versions of the rule of law as these attract greater support and are more useful. In particular, I will focus on formal legality and examine the ways in which ECTs promote this version of the rule of law.

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[5] Ibid.
[6] Lon L Fuller, *The Morality of Law* (Yale University Press, revised ed, 1969) 153.
[7] Robert S Summers, 'A Formal Theory of the Rule of Law" (1993) 6 *Ratio Juris* 127, 136.
[8] James J Spigelman, "The Rule of Law in the Asian Region" in T D Castle (ed), *Speeches of a Chief Justice: James Spigelman 1998-2008* (CS2N Publishing, 2008) 54.

RULE BY LAW

At its most basic, the rule of law postulates that law is the means by which government conducts its affairs. The rule of law requires that "the government shall be ruled by the law and subject to it".[9] This means "all government action must have formulation in law, must be authorised by law".[10] Put another way, "all authority is subject to, and constrained by, law".[11]

This first and most basic of the formal versions of the rule of law has been described as "rule *by* law". It is the broadest and oldest of the ideas of the rule of law. The root of the idea is the restraint of government tyranny. Restraining the tyranny of the sovereign has been a perennial struggle. The Magna Carta, originally signed in 1215, was the renowned action by nobles to use law to restrain King John and thereby subordinate the sovereign to law.[12] This understanding of the rule of law, as a restraint of government tyranny predated the emergence of the idea of individual liberty, when the emphasis of the rule of law shifted to formal legality.[13]

The idea of rule of law, of a government limited by law, involves two components. First, the government must abide by the currently valid law. The government may change the law, by Parliament enacting statutes or the executive exercising delegation to make subordinate legal rules, but until the law is changed, the law must be complied with.[14] Secondly, even when the government wishes to change the law, it is not entirely free to change it in any way it desires because there are certain restraints on the law making power.[15] These restraints are to be found in constitutional, statutory and common law.

Courts uphold the rule by law in their supervisory jurisdiction by judicial review to ensure that executive and legislative action is authorised by law. ECTs that are superior courts of record with this supervisory jurisdiction can ensure that government action and decisions on environmental matters are authorised by law.

The rule by law is a necessary aspect of the rule of law but it is insufficient in itself.[16] Tamanaha observes, "rule by law carries scant connotation of legal *limitations* on government, which is the *sine qua non* of the rule of law tradition.[17]

It is necessary, therefore, to progress in our examination to the second formal version of the rule of law, termed formal legality.

FORMAL LEGALITY

[9] Joseph Raz, *The Authority of Law* (Clarendon Press, 1979) 212.
[10] Ibid.
[11] A M Gleeson, 'Courts and The Rule of Law', a paper delivered to the Rule of Law Series, Melbourne University, 7 November 2001, 1.
[12] Tamanaha, above n 2, 25–26.
[13] Ibid 115.
[14] Ibid.
[15] Ibid 117–118.
[16] Spigelman, above n 9, 54.
[17] Tamanaha, above n 2, 22.

Formal legality involves a number of principles which fall into three groups: first, there are principles requiring that the law should conform to standards designed to enable the law to guide effectively the conduct of the government and the governed; secondly, there are principles designed to ensure that the legal machinery of enforcing the law does not deprive the law of its ability to guide conduct; and thirdly, there are principles designed to ensure that the laws and legal machinery actually achieve or realise the rule of law.

Standards of laws

In order for both the government and the governed to be ruled by law, the law must conform to certain standards so that the government and the governed are aware and understand what they can and cannot do, how they can do it and what are the sanctions if they do not comply. These standards or, to use Fuller's term, the desiderata are as follows.

Generality

The law must be general, both in statement and intent, and not be used as a way of harming particular individuals.[18] The law should apply, without exception, to everyone whose conduct falls within the prescribed conditions of application. Rousseau described this requirement of generality as being that "the law considers all subjects collectively and all actions in the abstract; it does not consider any individual man or any specific action".[19] Hayek asserts that this attribute of generality mandates another requirement of the rule of law, of the separation of powers between the legislature and the judiciary, for only in this manner can the law be set out in abstract terms in advance of its application to any particular individual.[20]

Equality

The law must apply to everyone equally without making arbitrary distinctions among people.[21] Put simply, everyone is equal before the law, including government officials.[22] An exception to the principle of equality before the law is where objective differences justify differentiation.[23]

Public accessibility

[18] John Rawls, *A Theory of Justice* (Harvard University Press, revised ed, 1999) 209; Fuller, above n 6, 46.
[19] Jean-Jacques Rousseau, *The Social Contract* (Penguin Books, 1968) 82, quoted in Tamanaha, above n 2, 66.
[20] Friedrich A Hayek, *The Constitution of Liberty* (University of Chicago Press, 1960) 210–212.
[21] Ibid 209-210.
[22] Albert V Dicey, *An Introduction to the Study of the Law of the Constitution* (Macmillan, 9th ed, 1945) 188; see also H W Arndt, 'The Origins of Dicey's Concept of the "Rule of Law"' (1957) 31 *Australian Law Journal* 117.
[23] Tom Bingham, *The Rule of Law* (Penguin Books, 2011) 55, 57–58.

Laws need to be publicly promulgated, adequately publicised and readily available. If law is to guide people, they must be able to find out what it is.[24]

Prospectivity

Laws ordinarily need to be prospective, not retrospective. A person cannot be guided by a retrospective law: it does not exist at the time of action.[25] Whilst there can be some occasional retrospective enactments, these cannot be pervasive or characteristic features of the system otherwise they cannot serve to organise social behaviour by providing a basis for legitimate expectations.[26] Penal laws, in particular, should not be retrospective to the disadvantage of persons to whom they apply.[27] Dicey's first aspect of the rule of law is centred upon the notion that there can be no punishment without a pre-existing law.[28]

Clarity

The meaning of the law must be clear as to what it enjoins or forbids.[29] "An ambiguous, vague, obscure or imprecise law is likely to mislead or confuse at least some of those who decide to be guided by it".[30]

Certainty and predictability

Laws should be certain and predictable:

> Certainty requires that those who are subject to the law should be able to predict reliably what legal rules will be found to govern their conduct and how those rules will be interpreted and applied. Predictability is a necessary aspect of the foreknowledge that enables freedom of action.[31]

Not contradictory or requiring of the impossible

Laws should not be contradictory, such as, at the same time, both commanding and forbidding an action to be done. Contradictions can arise within a single statute, a self-contradictory law, or between statutes passed at different times.[32] Equally, law should not command the impossible. As Rawls notes:

> the actions which the rules of law require and forbid should be of a kind which men can reasonably be expected to do and to avoid. A system of rules addressed to

[24] Ibid 37-40; Raz, above n 9, 214; Fuller, above n 6, 51; Rawls, above n 18, 209; Gleeson, above n 11, 2.
[25] Raz, above n 9, 214; Fuller, above n 5, 54.
[26] Rawls, above n 18, 209.
[27] Ibid.
[28] Dicey, above n 22, 208; Tamanaha, above n 2, 63.
[29] Rawls, above n 18, 209; Fuller, above n 6, 63; Bingham, above n 23, 37–38.
[30] Raz, above n 8, 214.
[31] Tamanaha, above n 2, 66; see also Hayek, above n 20, 208; Bingham, above n 23, 37-39; Spigelman, above n 8, 54.
[32] Fuller, above n 6, 65–70.

> rational persons to organise their conduct concerns itself with what they can and cannot do. It must not impose a duty to do what cannot be done.[33]

Stability

Laws should be relatively stable. Raz states that:

> [Laws] should not be changed too often. If they are frequently changed people will find it difficult to find out what the law is at any given moment and will constantly be in fear that the law has been changed since they last learnt what it was. But more important still is the fact that people need to know the law not only for short-term decisions (where to park one's car, how much alcohol is allowed duty free, etc) but also for long-term planning. Knowledge of at least the general outlines and sometimes even of details of tax law and company law are often important for business plans which will bear fruit only years later. Stability is essential if people are to be guided by law in their long-term decisions.[34]

These comments apply with equal cogency to environmental and planning laws. Relative stability or constancy in the law is necessary for developers, investors, residents and the community to be guided in their short-term and long-term decision-making.

Desiderata for subordinate legal rules and orders

Raz adds another principle concerning the making of subordinate legal rules and particular legal orders: "The making of particular laws (particular legal orders) should be guided by open, stable, clear, and general rules".[35] Raz introduces this principle because, increasingly, the executive government uses delegated law making powers to make particular legal regulations or to make particular legal orders in order to introduce flexibility into the law. However, such regulations and orders can be ephemeral and have the potential to run counter to the basic idea of the rule of law. This difficulty can be overcome if the process of making subordinate legal rules and orders is guided by open, stable, clear, and general rules so as not to undermine the standards of the primary statutes under which those subordinate legal rules and orders are made.[36]

Collectively, these standards of laws are the desiderata of a system for subjecting human conduct to the governance of the law. I now turn to the legal machinery of enforcing the law.

Machinery to enforce the law

In addition to the standards of the laws, there is a need for organisational and institutional structures and machinery to enforce the laws. These include: an independent and impartial judiciary; adjudicative procedures that are fair; constraints on arbitrary exercise of power; judicial review of administrative action; judicial

[33] Rawls, above n 18, 208; see also Fuller, above n 6, 70–79.
[34] Raz, above n 9, 214–215; see also Fuller, above n 6, 79–91.
[35] Ibid 215.
[36] Ibid 216.

decision-making being bounded by legal rules; courts being easily accessible; the law being enforced; and the discretion of crime preventing agencies not being allowed to pervert the law.

Independent and impartial judiciary

An essential component of a system governed by law is the existence of an independent and impartial judiciary charged with the duty of applying the law to cases brought before it and whose judgment in those cases is final and conclusive.[37]

Independence requires separation of the judiciary from other branches of government, being the executive and the legislature. There must be separation between executive and judicial functions.[38] The legislature cannot confer upon the judiciary, executive or administrative functions incompatible with the essential and defining characteristics of courts and the courts' place in a national integrated judicial system.[39] The legislature cannot confer judicial functions upon the executive.[40] The legislature is constrained in removing or confining the judiciary's supervisory jurisdiction over executive conduct.[41] There must also be a separation of legislative and judicial functions. The judiciary cannot engage in legislative rule making.[42]

Independence not only requires independence from government but also independence from all influences external to the court which might lead it to decide cases otherwise than on the legal and factual merits. Lord Bingham states that the principle of independence:

> calls for decision-makers to be independent of local government, vested interests of any kind, public and parliamentary opinion, the media, political parties and pressure groups, and their own colleagues, particularly those senior to them. In short, they must be independent of anybody and anything which might lead them to decide issues coming before them on anything other than the legal and factual merits of the case as, in the exercise of their own judgment, they consider them to be.[43]

This statement of the principle of independence is particularly apposite to a specialist environmental court or tribunal, which deals with environmental and planning disputes where there is high potential for significant external pressures.

Closely related to the principle of independence is the requirement that a judicial decision-maker be impartial. This requires that there be no conflict of interest and no

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[37] Ibid 216–217; Rawls, above n 18, 210; Bingham, above n 23, 91–92; Marilyn Warren, 'Does Judicial Independence Matter?' (2011) 85 *Australian Law Journal* 481, 481.
[38] Gleeson, above n 11, 2.
[39] *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51; *South Australia v Totani* (2010) 242 CLR 1; *Wainohu v New South Wales* (2011) 278 ALR 1.
[40] Elizabeth Southwood, 'Extending the Kable Doctrine: *South Australia v Totani*' (2011) 22 *Public Law Review* 83, 95.
[41] *Kirk v Industrial Court (NSW)* (2009) 239 CLR 531.
[42] Peter Cane, 'Merits Review and Judicial Review – the AAT as Trojan Horse' (2000) 28 *Federal Law Review* 213, 237.
[43] Bingham, above n 23, 92.

actual or apprehended bias.[44] A decision-maker can, of course, not be a judge in his or her own cause.[45] It also requires judicial decision-makers to alert themselves to, and to neutralise as far as practicable, personal predilections or prejudices or any extraneous considerations that might pervert their judgment.[46]

In order to demonstrate that the judicial decision has been reached independently, impartially and with fidelity to the law, the judicial decision-maker needs to provide reasons for the decision. The reasoning for judicial decision-making is "inextricably interwoven with judicial independence."[47]

The independence and impartiality of the judiciary can be enabled by institutional arrangements and rules concerning: selection of judges for appointment based upon appropriate legal qualifications; long-term tenure and security of tenure; procedural and substantive protection against removal of judges; the means of fixing and reviewing reasonable remuneration and other conditions of service; and sufficient resources to maintain a functioning court system. Such institutional arrangements and rules are intended to guarantee that judges will be free from extraneous pressures and be independent from all authority except that of the law.[48]

In addition to an independent and impartial judiciary, there is the need for an independent legal profession, "fearless in its representation of those who cannot represent themselves, however unpopular or distasteful their case may be".[49] The judiciary and legal profession are "interrelated in a symbiotic manner".[50] A strong and independent legal profession contributes to a strong and independent judiciary.

Fair adjudicative procedures

The adjudicative procedures used to determine cases should be fair. This requires procedural fairness or the principles of natural justice be observed.[51] The principles of natural justice are manifold but include the absence of bias (impartiality) and an open and fair hearing. These principles are guarantees of impartiality and objectivity.[52] They are intended to preserve the integrity of the judicial process.[53] "Procedural fairness effected by impartiality and the natural justice hearing rule lies at the heart of the judicial process".[54]

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[44] Ibid 93; Warren, above n 37, 482; Steven Rares, 'What is a Quality Judiciary?' (2011) 20 *Journal of Judicial Administration* 133, 137–138.
[45] Rawls, above n 18, 210.
[46] Bingham, above n 23, 93.
[47] Warren, above n 37, 482.
[48] Raz, above n 9, 217; Tamanaha, above n 2, 124; Tom Ginsberg, 'The Politics of Courts in Democratization' in James J Heckman, Robert L Nelson, Lee Cabatingan (eds), *Global Perspectives on the Rule of Law* (Routledge, 2010) 176; Rares, above n 44, 135–136; Robert French, 'The State of the Australian Judicature' (2010) 84 *Australian Law Journal* 310, 317–318.
[49] Bingham, above n 23, 92-93.
[50] Spigelman, above n 8, 55.
[51] Raz, above n 9, 217.
[52] H L A Hart, *The Concept of Law* (Oxford University Press, 2nd ed, 1994) 160, 206.
[53] Rawls, above n 18, 209–210.
[54] *South Australia v Totani* (2010) 242 CLR 1, 43 [62]; see also *International Finance Trust Co Ltd v The New South Wales Crime Commission* (2009) 240 CLR 319, 379–381 [141]–[145].

The hearing should also be open to the public. The open-court principle provides a visible assurance of independence and impartiality. It is also an essential aspect of the characteristics of all courts.[55]

Fairness requires giving both sides, not just one side, a fair opportunity to present their case. This applies equally to criminal matters as it does to civil matters. The prosecutor or claimant should be given a fair opportunity to present their case as should the defendant to rebut it.[56]

Fairness requires equality of alms: "a trial is not fair if the procedural dice are loaded in favour of one side or the other, if … there is no equality of alms".[57]

Ordinarily, there should be provisions for conducting orderly trials and hearings,[58] rules of evidence that guarantee rational procedures of enquiry,[59] and a system of adversarial trial,[60] including cross-examination of adverse witnesses.[61]

Constraints on arbitrary exercise of power

A core attribute of the rule of law is that the law must operate to constrain the arbitrary exercise of power, both public and private.[62] Arbitrariness, in the sense of unbounded discretion is the antithesis of the rule of law.[63] A former Lord Chief Justice of England, Lord Hewart, criticised various legislative provisions, including in town planning and rating legislation, which conferred excessive and unchallengeable discretions on ministers and government officials as undermining the rule of law.[64]

The exercise of discretionary powers should be pursuant to legal rules that possess the qualities of generality, equality, certainty and the other desiderata to which I have earlier referred, as well as be subject to judicial oversight (which I will discuss next).[65]

Judicial review of legislative and administrative action

To ensure conformity to the rule of law, courts should have supervisory jurisdiction to review both parliamentary and subordinate legislation and rules and executive action.[66] As Justice Brennan has pointed out:

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[55] *South Australia v Totani* (2010) 242 CLR 1, 43 [62]; *Russell v Russell* (1976) 134 CLR 495, 505, 520, 532; James Spigelman, 'Seen to be Done: The Principle of Open Justice' (Part 1) (2000) 74 *Australian Law Journal* 290, 294–295; James Spigelman, 'Seen to be Done: The Principle of Open Justice' (Part 2) (2000) 74 *Australian Law Journal* 378, 378.
[56] Bingham, above n 23, 90.
[57] Ibid.
[58] Rawls, above n 18, 210.
[59] Ibid.
[60] *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 76 [64].
[61] Fuller, above n 6, 81.
[62] Spigelman, above n 8, 53.
[63] Tamanaha, above n 2, 64, 67; Bingham, above n 23, 48.
[64] Lord Hewart of Bury, *The New Despotism* (Ernest Benn, 1929), 13; see Bingham, above n 22, 48-49.
[65] Hayek, above n 20, 212–217; Bingham, above n 23, 50.
[66] Raz, above n 9, 217; Gleeson, above n 11, 5.

> [j]udicial review is neither more nor less than the enforcement of the rule of law over executive action; it is the means by which executive action is prevented from exceeding the powers and functions assigned to the executive by law and the interests of the individual are protected accordingly.[67]

Rules have been developed to identify the kinds of unlawfulness in respect of which the courts will intervene in judicial review. They include that government authorities and officials exercise powers conferred on them by the legislature, fairly, in good faith, for the purpose for which the powers were conferred, without exceeding the limits of such powers, considering relevant matters and ignoring irrelevant matters, and not manifestly unreasonably.[68]

Central to all grounds of judicial review is the sole focus on the lawfulness and not the merits of administrative action. In the often quoted words of Justice Brennan:

> The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power… The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.[69]

This demarcation between the legality and the merits of administrative action is fundamental to a system of governance based on the rule of law.[70] It preserves the separation of powers and the balance between the branches of government.

The demarcation between legality and merits "does not involve a bright line test. The boundary is porous and ill defined."[71] Yet the legitimacy of judicial review depends on courts policing that boundary, ensuring that judicial interference with administrative decisions and conduct only occurs in respect of the legality and not the merits of such decisions and conduct.[72]

Tatel observes that:

> judicial review performs a quasi-constitutional role: it prevents the rule of administrative policy judgment from supplanting the rule of law. On the flip side, these rules also restrict the courts. The basic administrative law framework narrows and focuses judicial review, obliging us judges to assess not the merits of agency

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[67] *The Church of Scientology Inc v Woodward* (1982) 154 CLR 25, 70 citing Louis L Jaffe and Edith G Henderson, 'Judicial Review and the Rule of Law: Historical Origins' (1956) 72 *Law Quarterly Review* 345; Bernard Schwartz and H William R Wade, *Legal Control of Government: Administrative Law in Britain and the United States* (Clarendon Press, 1972), Ch 9.
[68] Spigelman, above n 8, 55; Bingham, above n 23, 60–65.
[69] *Attorney General (NSW) v Quin* (1990) 170 CLR 1, 35–36.
[70] James J Spigelman, "The Integrity Branch of Government" (2004) 78 *Australian Law Journal* 724, 730.
[71] Ibid 732; see also Cane, above n 42, 220.
[72] Brian J Preston, "Judicial Review of Illegality and Irrationality of Administrative Decisions in Australia" (2006) 28 *Australian Bar Review* 17, 18.

> policy but rather the agency's compliance with a discrete set of fairly well-defined and policy-neutral requirements.[73]

The rule of law, and judicial review of legislative and administrative action, are assumed and adopted by the Australian Constitution.[74] As a consequence, the legislature's capacity to remove or confine the supervisory jurisdiction of federal or State supreme courts to review legislative and administrative action is constrained by the limits imposed by the Constitution.[75]

Judicial decision-making bounded by legal rules

The rule of law is not only enforced by courts; it also controls the operation of courts themselves.[76] Just as unbridled administrative discretion runs counter to the rule of law, so too does unbridled judicial discretion. The rule of law requires that "no discretion should be unconstrained so as to be potentially arbitrary. No discretion may be legally unfettered".[77]

The constraining of judicial discretion accords with the precept that there should be "rule by law, not men", including judges. To live under the rule of law is to be not subject to the unpredictable vagaries of other individuals, whether they be legislatures, government officials or judges. Rule by law is preferable to unrestrained rule by another person, even by a wise person, out of concern for the potential abuse that exists in the power to rule.[78]

Various rules have emerged to direct the exercise of judicial discretions. These include: judges should find, interpret correctly and apply the appropriate legal rule;[79] judicial decisions should be made according to legal standards, rather than undirected considerations such as fairness or policy;[80] and judges should observe fidelity to the law, that is the inherited, enacted and judge-made law, and not create what they perceive to be better law according to some subjective or personal preference.[81]

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[73] David S Tatel, "The Administrative Process and the Rule of Environmental Law" (2010) 34 *Harvard Environmental Law Review* 1, 3.
[74] As to judicial review of legislative action, see *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 193, 205, 271; as to judicial review of administrative action, see *Kirk v Industrial Commission (NSW)* (2009) 239 CLR 531, 566 [55], 580–581 [96]–[100].
[75] *Kirk v Industrial Commission* (NSW) (2010) 239 CLR 531; James J Spigelman, "The Centrality of Jurisdictional Error" (2010) 21 *Public Law Review* 77; John Basten, "The Supervisory Jurisdiction of the Supreme Courts" (2011) 85 *Australian Law Journal* 273.
[76] Gleeson, above n 11, 7.
[77] Bingham, above n 23, 54.
[78] Tamanaha, above n 2, 122.
[79] Rawls, above n 18, 206–207; Roscoe Pound, *An Introduction to the Philosophy of Law* (1954) 48; Brian J Preston, 'The Art of Judging Environmental Disputes' (2008) 12 *Southern Cross University Law Review* 103, 103–105, 107–108.
[80] Gleeson, above n 11, 2.
[81] Owen Dixon, 'Concerning Judicial Method' in *Jesting Pilate* (William S Hein, 2nd ed, 1997) 157–158; Murray Gleeson, 'Judicial Legitimacy' (2000) 20 *Australian Bar Review* 4, 11.

Similar cases should be treated similarly except where objective differences justify differentiation.[82] The principle that like decisions be given in like cases limits the discretion of judges.[83]

One mechanism for ensuring fidelity to the law by judges is the appellate system. As Gleeson notes:

> [t]he appellate system is a powerful instrument for ensuring adherence to the principle of legality by the judiciary. The possibility of appellate review means that, even in that small minority of cases where judges might be called upon to break new legal ground, or in areas where they are invested with substantial discretion, judges must conform to a legal discipline by which their powers are circumscribed. Only a relatively small number of cases go on appeal, and all but a few appeals are finally disposed of by an intermediate appeal court. But the very existence of the appeal system, and of an ultimate court of appeal, is a powerful influence for judicial conformity to law.[84]

Courts should be easily accessible

As courts have a central position in ensuring the rule of law, it follows that accessibility of the courts is of central importance.[85] There are multiple ways of ensuring accessibility of the courts.

First, citizens must have rights to access the courts to enforce claims of right and accusations of guilt and to prevent the law from being ignored or violated.[86] In particular, citizens should be able to challenge decisions and action concerning access to information, public participation and access to justice in environmental matters. 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.[87]

Second, 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".[88] Courts can facilitate standing by a liberal interpretation of standing provisions[89] and adopting court rules of procedure that include a broad standing provision.[90]

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[82] Rawls, above n 18, 208–209.
[83] Ibid 209.
[84] Gleeson, above n 11, 7.
[85] Raz, above n 9, 17.
[86] Gleeson, above n 11, 2.
[87] Guidelines 15, 16 and 17 of the UNEP Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters (UNEP Guidelines).
[88] Guideline 18 of the UNEP Guidelines.
[89] An example is the decision of the Supreme Court of the Philippines in *Minors Oposa v Secretary of the Department of Environment and Natural Resources* 33 ILM 173 (1994) in which the Supreme

Third, 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".[91] Courts need to adopt effective and efficient case management of their caseload to ensure the timely hearing and disposal of pending cases. Courts need to set time standards for case processing and measure their performance in achieving these time standards.[92] Proceedings should also be "fair, open, transparent and equitable".[93]

Fourth, review procedures should be affordable. Governments and courts "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".[94] Courts need to ensure that court fees and charges do not impede access to the court for those litigants with less financial means. Courts also need to review their practices and procedures and manage their caseload with the intention of reducing the significant costs of litigation in the court.

Fifth, there should be redressability. There should be "a framework for prompt, adequate and effective remedies in cases relating to the environment, such as interim and final injunctive relief."[95] Remedies should include "the use of compensation and restitution and other appropriate measures."[96] Courts should have jurisdiction to grant a wide range of remedies, in civil and in criminal matters, and be creative in the selection of the remedies that are available so as to address appropriately the wrongdoing and its consequences, including environmental harm.[97]

Adequate redress and remedy are fundamental to the achievement of environmental justice. If rights cannot be upheld, duties cannot be enforced or wrongs cannot be remedied, justice is left undone. The court must also be willing to grant the

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Court held that a class of minors represented by their parents had standing to file a class suit on behalf of themselves, others of their generation and for the succeeding generations.

[90] An example is the Rules of Procedure of Environmental Cases adopted by the Supreme Court of the Philippines which include a broad standing provision: "Any Filipino citizen in representation of others, including minors or generations yet unborn, may file an action to enforce rights or obligations under environmental laws".

[91] Guideline 19 of the UNEP Guidelines.

[92] For example, the Land and Environment Court of NSW measures the effectiveness and efficiency of the court by reference to the output indicators of backlog indicator, time standards for finalisation of cases, time standards for delivery of judgments, clearance rate and attendance indicator: see Land and Environment Court of NSW Annual Review 2015, pp39-50.

[93] Guideline 19 of the UNEP Guidelines.

[94] Guideline 20 of the UNEP Guidelines.

[95] Guideline 21 of the UNEP Guidelines.

[96] Ibid.

[97] Examples include the creative use of continuing mandamus by courts in India and the Philippines to compel public authorities to perform their public duties, with the courts retaining jurisdiction over the matter to ensure continued compliance. In India, the remedy of continuing mandamus has been used to ensure that public authorities regulate tanneries on the Ganges River. In the Philippines, the remedy of continuing mandamus has been used to ensure that public authorities clean up the pollution in Manila Bay. These courts have also established advisory bodies of experts to assist in monitoring compliance with the court's orders.

appropriate remedies. The grant of a remedy is usually at the discretion of the court. This is necessary to achieve justice in the individual circumstances of the case. However, inappropriate or too frequent exercise of the discretion to withhold relief can undermine the rule of law and the statutory purpose and scheme, and may not secure equal justice.

Sixth, 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."[98] Courts need to fashion their orders so that they are capable of being enforced. They also need to have the power to enforce their orders, including the power of punishment for contempt for failure to comply with the court's orders.

Seventh, there should be adequate information about the availability of and procedures for a court review. Governments and courts "should provide adequate information to the public about the procedures operated by courts of law and other relevant bodies in relation to environmental issues".[99] Courts need to be proactive in publicising their court practices and procedures and the substantive and procedural laws relevant to the proceedings in the court.[100] Courts also need to publish reviews, on an annual basis, of their performance.[101]

Eighth, court decisions should be publicly available and accessible.[102] Courts should publish electronically their decisions on publically accessible websites at no cost. Accessibility can be improved by publishing summaries of notable decisions, such as in publically available newsletters and specific webpages on topics of interest to court users.[103]

Ninth, 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".[104] Courts can improve their knowledge capacity by having experts within the court,[105] appointing judicial officers and other members with knowledge and experience in environmental and

[98] Guideline 22 of the UNEP Guidelines.
[99] Guideline 23 of the UNEP Guidelines.
[100] For example, the Land and Environment Court of NSW has an extensive website which provides information to the public on the court, the types of cases which it deals with, the different dispute resolution processes available, its practice and procedure and its decisions.
[101] For example, the Land and Environment Court of NSW publishes an annual review that reports on the court's performance in achieving the objectives of court administration of equity, effectiveness and efficiency.
[102] Guideline 24 of the UNEP Guidelines.
[103] For example, the Land and Environment Court of NSW publishes a judicial newsletter, on a quarterly basis, which summarises key decisions in the court, relevant decisions in other courts in Australia and overseas and recent legislation. The court also has specific webpages on its website on topics of interest such as heritage, biodiversity, water and mining, which include relevant cases, legislation and other government information.
[104] Guideline 25 of the UNEP Guidelines.
[105] For example, the Land and Environment Court of NSW and the Environment Court of New Zealand have commissioners with special knowledge and experience in relevant environmental and planning disciplines.

planning law and providing continuing professional development to maintain and improve knowledge and expertise.[106]

Tenth, alternative dispute resolution mechanisms should be available and utilised where these are appropriate.[107] Courts can provide and promote use of alternative dispute resolution services. The availability of alternative dispute resolution mechanisms allows the tailoring of mechanisms to the nature of the dispute and the needs of the parties to that dispute.[108]

Eleventh, there needs to be accessibility to the court in practice. This involves ensuring geographical accessibility, language accessibility, access for persons with disabilities, access to help and information and access for unrepresented litigants.

Geographical accessibility concerns ensuring parties and their legal representatives and witnesses are able to access the court in geographical terms. To overcome geographical accessibility problems courts can adopt a number of measures, including conducting interlocutory and final hearings by means of telephone or by online court, enabling communication between the court and parties and their legal representatives by email, conducting final hearings on the site of the dispute, and sitting in courthouses proximate to the parties and the site of the dispute.

Language accessibility concerns ensuring parties and their witnesses are able to participate in and understand court hearings in a language that they understand. Courts can provide interpreters to assist parties and their witnesses. Courts can also provide information about the court and its processes in a variety of languages. Access for persons with disabilities aims to ensure that all members of the community have equal access to the court's services, regardless of their disability. Courts should make special arrangements for parties and witnesses with special needs.[109]

Courts should provide access to help and information about the court and its organisation, resources and services, the court's practices and procedures, its forms and fees, court lists and judgments, publications and other information. The provision of such help and information facilitates access to justice and allows the people who use the court to understand it and make better use of it. Courts should

[106] For example, the Land and Environment Court of NSW has adopted and implements a continuing professional development policy to enhance professional expertise, facilitate development of professional knowledge and skills and promote the pursuit of juristic excellence: see Land and Environment Court of NSW Annual Review 2015, pp56-59.

[107] Guideline 26 of the UNEP Guidelines.

[108] For example, the Land and Environment Court of NSW provides a form of multi-door courthouse that provides a range of dispute resolution options at different stages in proceedings, including conciliation, mediation, early neutral evaluation, administrative merits review, litigation and reference to an external referee: see B J Preston, "The Land and Environment Court of New South Wales: Moving towards a multi-door courthouse – Part 1" (2008) 19 *Alternative Dispute Resolution Journal* 72; B J Preston, "The Land and Environment Court of New South Wales: Moving towards a multi-door courthouse – Part 2" (2008) 19 *Alternative Dispute Resolution Journal* 144.

[109] For example, the Land and Environment Court of NSW has a disability strategic plan to ensure access for persons with disabilities. The court's website contains special webpages outlining the disability services provided by the court. The court's website also has a facility for the information to be read aloud for blind people.

also make special efforts to assist unrepresented litigants through the court's website and its published information and by the court's staff. Some courts provide a special process advisor to assist unrepresented litigants. The Environment Court of New Zealand assigns a process advisor to unrepresented litigants and groups to guide them through relevant court procedures. The Land and Environment Court of NSW provides a helpdesk service, particularly to assist unrepresented litigants in neighbour disputes about trees.

Twelfth, there needs to be simple and understandable court practices and procedures that promote access to justice. The originating process to commence proceedings in the court and the forms to make applications in proceedings should not be technical or complicated or require legal expertise to complete them. The court and the rules of court should provide instruction as to the type of originating process or form required and its content and on the means of lodgment.

A court needs to promote access to justice by removing or lowering barriers to public participation and public interest litigation. 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 cost of the proceedings.[110]

Courts need to prevent, or deal with quickly, proceedings that prevent or stifle public participation and public interest litigation, such as strategic litigation against public participation (SLAPP) suits.[111]

Finally, the court needs to be responsive to the needs of court users. Access to justice is facilitated by the court taking a more user-orientated approach. The justice system should be more responsive to the needs and expectations of people who come into contact with the system. The principle of user orientation implies that special steps should be taken to ensure that the court takes specific measures both to assist people to understand the way the institution works and to improve the facilities and services available to members of the public. These steps require sensitivity to the needs of particular groups. Measures adopted by courts for ensuring accessibility (discussed above) make the court more responsive to the needs and expectations of people who come into contact with the court. Courts can also consult with court users and the community to assist the court to be responsive to the needs of users.[112]

Enforcement of the law

[110] See, for example, r 4.2 of the Land and Environment Court Rules 2007.
[111] 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' (2014) 31 *Environmental and Planning Law Journal* 47.
[112] For example, the Land and Environment Court of NSW has a Court Users Group to maintain communication with, and feedback from, court users as to the practice and procedure, administration and performance of the court.

The existence of laws which meet the required standards, and of institutional arrangements and machinery to enforce the law, are necessary components of the rule of law. But they will be insufficient unless there is actual enforcement of the law.[113] Enforcement can be by the executive as well as by citizens. There is, of course, a discretion as to whether to enforce the law. However, a miscarriage of that discretion can subvert the rule of law. Raz makes the point, in relation to criminal enforcement, that the actions of the police and prosecuting authorities can subvert the law:

> The prosecution should not be allowed, for example, to decide not to prosecute for commission of certain crimes or for crimes committed by certain classes of offenders. The police should not be allowed to allocate its resources so as to avoid all effort to prevent or detect certain crimes or prosecute certain classes of criminals.[114]

Raz's comments resonate in the field of environmental law. Ministers and governmental agencies in New South Wales, from time to time, have not allocated resources to and have elected not to prosecute at all or to prosecute only certain persons for the commission of certain offences under national parks and wildlife legislation and native vegetation legislation. Sometimes, citizens have been forced to take civil enforcement actions in the absence of action by the relevant government agencies. An example is *Corkill v Forestry Commission of NSW*[115] where an environmental activist took action to enforce the provisions of the *National Parks and Wildlife Act* 1974, prohibiting the taking or killing of protected endangered fauna, against the Forestry Commission which was breaching those provisions in the conduct of logging operations.

Realisation of the rule of law

The realisation of the rule of law depends on congruence between action and the law[116] or between what may be termed "law in action" and "law on the books".[117] Unless there is congruence, "the rules contained in law will not provide a clear signal about what is permitted and what is proscribed. Persons will never acquire the requisite degree of security and predictability in their dealings with others".[118]

Congruence is also required for legitimacy. Legitimacy involves reasoned deference to authority. Levi and Epperly suggest that:

> When legitimacy exists, rule of law can create a virtuous circle of increasing levels of voluntary compliance … The expectation that others, including government officials and elites, should obey the law, followed by the observation that they are indeed obeying the law, increases the willingness of the populous to comply. Wide-scale compliance with the law then enhances the ability of government to provide law and other public goods that rule of law facilitates. Rule of law institutions are only effective to the extent that the general public believes in the value of being law-

[113] Spigelman, above n 8, 54.
[114] Raz, above n 9, 218.
[115] (1991) 73 LGRA 126.
[116] Fuller, above n 6, 81.
[117] Spigelman, above n 8, 54.
[118] Ibid.

> abiding and the powerful of the society believe they, too, are subject to the law. If officeholders and the privileged act as if they are above the law, the rule of law becomes fragile or non-existent. And the virtuous circle is ruptured.[119]

Hayek makes a similar point: "[The rule of law] will be effective only in so far as the legislature feels bound by it. In a democracy this means that it will not prevail unless it forms part of the moral tradition of the community, a common ideal shared and unquestionably accepted by the majority".[120]

FORMAL LEGALITY AND DEMOCRACY

The third and last formal version of the rule of law adds democracy to formal legality. Like formal legality, democracy does not say anything about what must be the content of law. Rather, it is a decision procedure that specifies how to determine the content of law.[121]

One of the fundamental ideals of Western political thought is the notion of political liberty, that freedom is to live under laws of one's own making.[122] Political liberty, therefore, provides the justification for adding democracy to formal legality. Tamanaha explains this justification:

> According to philosopher Jurgen Habermas, who has provided the most sophisticated account of the link between formal legality and democracy, 'the modern legal order can draw its legitimacy only from the idea of self-determination: citizens should always be able to understand themselves also as authors of the law to which they are subject as addressees.' Law obtains its authority from the consent of the governed. Judges, government officials, and citizens must follow and apply the law as enacted by the people (through their representatives). Under this reasoning, formal legality, especially its requirements of certainty and equality of application, takes its authority from and serves democracy. Without formal legality democracy can be circumvented (because government officials can undercut the law); without democracy formal legality loses its legitimacy (because the content of the law has not been determined by legitimate means).[123]

CONCLUSION

The paper has sought to unpack what is involved in achieving the goals of promoting the rule of law and ensuring equal access to justice for all in environmental matters. The institutional structure of the court system and of individual courts and tribunals in that system; the substantive and procedural laws that create rights of access to the courts; the practice and procedure of the courts; the administration of the courts and management of the caseload; and the decisions and orders of the courts, will all influence the extent to which courts achieve these goals. The legislature, executive

[119] Margaret Levi and Brad Epperly, "Principled Principals in the Founding Moments of the Rule of Law" in James J Heckman, Robert L Nelson and Lee Cabatingan (eds), *Global Perspectives on the Rule of Law* (Routledge, 2010) 192.
[120] Hayek, above n 20, 206.
[121] Tamanaha, above n 2, 99.
[122] Ibid.
[123] Ibid.

and judiciary need to evaluate and improve these institutional and system features to better promote the rule of law and access to justice in environmental matters. ECTs should, in the pursuit of court excellence, evaluate and improve their court administration, case management, practice and procedure and decisions and orders to do their part in promoting the rule of law and access to justice.