The Proactive Responsiveness of Environmental Courts

IV Forum on Environmental Justice, Santiago, Chile

16 January 2021

The Hon Brian J Preston
Chief Judge, Land and Environment Court of New South Wales, Australia

It is with great pleasure that I present to the 4th International Forum on Environmental Justice, being hosted by the Second Environmental Court in Santiago, Chile.

The session in which I have been asked to speak is on judicial experiences, a broad topic! I propose to speak about how courts, and particularly environmental courts, can respond to the challenges that society and the environment face from time to time, but can do so in a proactive way.

The outline of my discussion of the experience of courts, will be threefold. First, I will explore how courts respond to societal change. Secondly, I will identify how courts, in turn, drive societal change. Thirdly, with that general discussion, I will focus on a particular example of an environmental court, the Land and Environment Court of New South Wales, of which I am the Chief Judge.

We can start with this proposition with which we all agree: courts are responsive institutions. Courts respond to matters that are brought before them. Courts rarely act *suo moto* (on their own motion). There are some instances of courts, particularly in India, that do move on their own motion, but elsewhere that is very rare. Courts await parties bringing matters to the court. Courts do not have their own agenda, either for law or policy reform, or for societal change.

How do courts respond to societal change? There are some changes in society and they can drive changes in the law. Put shortly, these societal changes can influence court decisions. A former Chief Justice of Australia, the Honourable Robert French, put it in this way:

> "With legal change and social change, the question may often be asked: which comes first, the chicken or the egg? In a sense societal change always comes first. The cases which come before the courts and place demands on existing principles are a reflection of things happening in wider society. The courts do not have an agenda for promoting social change".[1]

[1] The Hon Robert French, "The Law in a Climate of Change: Inaugural Sir Francis Burt Oration", 6 November 2019 (Perth, Australia).

How does societal change influence court decisions? The influence of society´s attitudes on judicial decision-making can be seen in what might be referred to as both easy cases and hard cases.

Easy cases are where there is no dispute about what the law says or how it applies to a particular set of facts. Hard cases are where there is a dispute about what is the relevant law or what relevant legislation means or whether and how the relevant legislation applies to a particular set of facts. Jeremy Waldron disputes that there is any bright line between easy cases and hard cases.[2] Nevertheless, I use the concept of easy cases and hard cases to explain the different ways in which societal change can influence court decisions.

Let us start with the easy cases. In easy cases, courts simply apply obviously applicable legislation. They identify particular legislation, find it is obviously applicable and understand what the legislation means.

All legislation is normative: it fixes and directs the action that needs to be taken, according to the norms that are embodied in the legislation. In environmental legislation, the norms may reflect the environmental consciousness of society. Let us take climate legislation. The legislature responds to evolving societal attitudes calling for governments to take stronger action on climate change. When climate legislation is passed, the legislation reflects the environmental or 'climate consciousness' of society.[3] Thus, when courts apply legislation, they are applying the norms of society that are reflected in the legislation.

Let's come to hard cases. In hard cases, where there is no existing legal rule, that is immediately applicable, courts need to find and then interpret the legal rule to be applied. There are different views as to how this is done. Contrast, for example, the legal theories of two legal philosophers, HLA Hart and Ronald Dworkin. Hart suggests that judges do make law, and that is quite legitimate to do so, while Dworkin suggests that judges do not make law but instead find the law. I will not go into the different jurisprudential theories that each of these scholars put forward. What is important, however, is that no matter which way judges make decisions, judges will take into account moral considerations either in making the law, which is what Hart says, or in finding the law, which is what Dworkin says. These moral considerations include society´s attitudes, which in turn include society's environmental consciousness.

As can be seen, under either approach, whether making or finding the law, judges do take into account considerations of justice, social policy and moral standards. The environmental consciousness of society can influence these considerations; societal change places demands on the court´s adjudicative function.

---

[2] Jeremy Waldron, *The Law* (Routledge, 1990) 137.

[3] See Brian J Preston, 'Climate Conscious Lawyering' (2021) 95 ALJ 51

To discharge this responsibility, courts need to be proactive in responding to societal change. This is necessary in order for courts to discharge their role of either making or finding the law. Courts need to identify and take into account in their judicial decision-making, contemporary considerations of justice, social policy and moral standards.

I say contemporary, because considerations of justice, social policy and moral standards will change over time, and the court's task is to find out what are the contemporary considerations at the time the court makes it decision.

I have been talking so far about how societal attitudes and societal change can influence judicial decision-making. I want to now consider the converse, that is how a court's decision can influence societal change. The legal change effected by the court's decision can drive societal change. It does this by influencing society´s awareness and attitudes. One example is in the area of climate litigation. The court's decision in climate litigation can raise or lower climate consciousness of society, depending upon what is the particular decision.

Consider, for example, the decisions that have been made by the courts in The Netherlands in the *Urgenda* litigation.[4] The first instance decision of the District Court of The Hague, the decision of the Court of Appeal of The Hague, and the decision of the Supreme Court of The Netherlands, all have had an effect of raising climate consciousness not only in The Netherlands, but also, insofar as other countries look to those decisions, in other countries.

How do judicial decisions have this effect? It is done in the four ways in which the judiciary performs its role.

The first role is that courts uphold and enforce the law. They do this through declaring and upholding whatever is the law of the country. They also sanction and remedy any breaches of the law. The making and publicising of courts' decisions have the effect of raising the consciousness of both the parties in the case and society more broadly about the law.

Secondly, an essential role of the judiciary is to uphold the rule of law. In public law cases, courts can hold the executive branch of government to account, directing compliance with environmental and climate laws.

Thirdly, and more generally, courts can enhance democracy. Judicial review of administrative action or inaction can enhance democratic processes, including the rights of the public to participate in decision-making. Judicial review also enhances

---

[4] *Urgenda Foundation v Netherlands* (*Urgenda I*), The Hague District Court, C/09/456689/HA ZA 13-1396, 24 June 2015; *Netherlands v Urgenda Foundation* (*Urgenda II*), The Hague Court of Appeal, 200.178.245/01, 9 October 2018; and *Netherlands v Urgenda Foundation* (*Urgenda III),* The Supreme Court of the Netherlands, 19/00135, 20 December 2019, summarised in Brian J Preston, 'Influence of the Paris Agreement on Climate Change Litigation: Legal Obligations and Norms (Part I)' (2021) 33 *Journal of Environmental Law* 1, 15-16.

the quality of public administration. Courts do this through compelling the executive branch of government to comply with the will of the legislature as expressed in the legislation. The court´s decision also brings scrutiny to bear on the deficiencies of the law and its execution. The judicial remand bring matters to legislative and executive attention and forces them on their agendas.[5]

Fourthly, the court´s decisions uphold norms. These are norms that are found in the laws, particularly in the legislation. The court's decisions publicise and promote the norms in the laws. The courts also, in their adjudicative task of making or finding the law in order to decide a case, can expound norms. In both ways, the courts uphold the norms.

The exercise of these judicial functions has a number of effects. At a particular level, courts' decisions change the future behavior and attitudes of the parties to the litigation. More generally, because the courts' decisions are publicised, they raise awareness and can change the attitudes of actors in society, these include the government, the private sector, civil society, communities and individuals.

Because law is itself a form of social ordering, when the courts change the law through adjudication, they change the patterns of social ordering. Insofar as what the court has said concerned deficiencies in governance, the court's decision can have a catalysing effect on changing governance, whether by government itself or by the private sector.

Let me now come to apply these general considerations to a particular court, the Land and Environment Court of New South Wales (LEC). The LEC was the first specialised superior environmental court in the world, and commenced operation in 1980. Over four decades, the LEC, through it decisions, has effected both types of change. It has effected legal change by responding to the changing considerations of justice, social policy and moral standards, but it also has influenced societal change by its decisions. The LEC's decisions have developed aspects of justice, including substantive, procedural, distributive, recognition, reparative and restorative justice.[6]

I will highlight the ways in which is done this, starting with substantive justice. The LEC has developed substantive justice in three areas: firstly, the principles of ecologically sustainable development, including the principle of sustainable use, the precautionary principle, intergenerational equity, intragenerational equity, conservation of biological diversity and ecological integrity, and internalization of external environmental costs, including the polluter pays principle; secondly, in the area of environmental impact assessment; and thirdly, in sentencing for environmental crime.

---

[5] Joseph Sax, *Defending the Environment: A Handbook for Citizen Action* (Vintage Books, 1971) xviii and 152 and Brian Preston, 'The Role of Public Interest Environmental Litigation (2006) 23 EPLJ 337, 339.

[6] Brian Preston, 'The Land and Environment Court of New South Wales: A Very Short History of an Environmental Court in Action' (2020) 94 ALJ 631.

The LEC has developed procedural justice. The LEC has upheld access to information, public participation and access to justice. This has been done in many ways, including by lowering barriers to public interest litigation such as those concerning standing, undertakings for damages for interlocutory injunctions, security for costs, those concerning laches and costs of proceedings.

The LEC has developed distributive justice. It has ensured the equitable distribution of the benefits and the burdens of development between people and groups by upholding intergenerational equity and intragenerational equity, applying the polluter pays principle, and balancing public and private rights and responsibilities.

The LEC has developed recognition justice. The LEC has recognised and given a voice to marginalised and vulnerable individuals and groups, including Aboriginal people, by allowing access to the courts.

The LEC has developed reparative justice, by crafting remedies for breach of planning or environmental laws and in sentencing for environmental offences. The LEC has sought to repair the harm caused by a breach of the law or offence, and implemented the polluter pays principle.

Finally, the LEC has developed restorative justice. The LEC has, in sentencing for environmental offences, directed the taking of restorative action for the benefit of the victims of the crime and the community affected by the commission of the offence. The restorative process can include a restorative justice conference, or victim-offender mediation.

The LEC's decisions have also changed governance, not only by the government itself, but also by the private sector. One example is in the principles of ecologically sustainable development. The LEC's decisions explicating and applying the principles of ESD have changed the assessment, approval and implementation of activities that may impact the environment.[7] A more particular example is of social impact assessment. The LEC's decisions on the assessment of the social impacts of activities have changed the assessment, approval and implementation of activities that impact on communities, groups and individuals.[8]

Another example is in the area of climate litigation. The LEC's decisions in climate litigation have influenced litigation not only in Australia, but also overseas. One example is the recent decision in *Gloucester Resources Ltd v Minister for Planning*.[9] Of the *Gloucester* decision, one professor from Finland said that it "is certainly getting attention outside of Australia… climate litigation is emerging everywhere

---

[7] Brian Preston, 'The Judicial Development of Ecologically Sustainable Development' in Douglas Fisher (ed) *Research Handbook on Fundamental Concepts of Environmental Law* (Edward Elgar, 2016) 480.

[8] Brian Preston, 'The Adequacy of the Law in Satisfying Society's Expectations for Major Projects' (2015) 32 EPLJ 182.

[9] (2019) 234 LGERA 257; [2019] NSWLEC 7.

around the world, meaning that the people have an interest in seeing what courts in other countries decide".[10] Another professor from Belgium said, "Climate change cases tend to feed off each other…where you see the law moving into areas that are, in some respects, new… it´s not at all uncommon for both plaintiffs and judges alike to look across borders for examples of relevant precedence".[11]

The *Gloucester* decision has been picked up around the world, as well is in Australia.[12] One example is litigation by youth plaintiffs in *Chernaik v Brown* supported by Our Children´s Trust in the Supreme Court of Oregon.[13] In an amicus brief filed in support of the youth plaintiffs, the authors referred to the LEC's finding in *Gloucester*, concerning intergenerational inequity.

In an ongoing Canadian judicial review application, *Rainforest Conservation Foundation v Attorney General of Canada*,[14] the youth plaintiffs allege that the approval for the Trans Mountain pipeline expansion project is invalid for failing to consider the climate change impacts of the project resulting from downstream emissions. The plaintiffs refer to the reasoning in *Gloucester* rejecting the market substitution argument in their reply submissions. In another Canadian case, the Supreme Court of Canada cited with approval the *Gloucester* decision's rejection of the drop in the ocean argument.[15]

Closer to home, the Independent Planning Commission in NSW had followed the decision in *Gloucester* to refuse a new coal mine partly because of climate change impacts. The mining company was disappointed by that decision, and sought to judicially review the government decision. The LEC rejected the judicial review challenge,[16] a decision which was upheld on appeal.[17]

In conclusion, the famous jurist Oliver Wendell Holmes said:

> "The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share

---

[10] Harry van Asselt, quoted in Peter Hannam, 'These residents stopped a coal mine, made history and sent ripples through boardrooms around the world' *The Sydney Morning Herald* (online, 17 February 2019).
[11] Carroll Muffet, quoted in Jennifer Hijazi, 'Climate cases to watch around the world' *E&E News* (online, 10 July 2019) <https://www.eenews.net/climatewire/stories/1060718241?t=https%3A%2F%2Fwww.eenews.net%2Fstories%2F1060718241>.
[12] Brian Preston, 'The Influence of the Paris Agreement on Climate Litigation: Causation, Corporate Governance and Catalyst (Part II)' (2020) 33 JEL 227, 247.
[13] Brief of Amici Curiae Law Professors in Support of Petitioners, filed in *Chernaik v Brown* (Supreme Court of Oregon, S066564, 31 July 2019) 14 (original amicus brief filed 11 May 2015).
[14] [2020] 1 FCR 362; 2019 FCA 259.
[15] *Reference re Greenhouse Gas Pollution Pricing Act* [2021] SCC 11 at [189]
[16] *KEPCO Bylong Australia Pty Ltd v Independent Planning Commission (No 2)* (2020) 247 LGERA 130; [2020] NSWLEC 179.
[17] *KEPCO Bylong Australia Pty Ltd v Bylong Valley Protection Alliance Inc* [2021] NSWCA 216.

> with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed."[18]

So too, we can see that the life of courts dealing with environmental disputes has been experience, responding to an ever-changing society and environment.

[18] Oliver Wendell Holmes, *The Common Law* (1881).