NSW Land and Environment Court's International Outreach: Diffusion in India

1. Introduction

Environmental courts and tribunals (ECTs) play a leading role in ensuring fair, transparent and dependable environmental adjudication based upon the environmental rule of law.[1] ECTs are presented as 'organizations'[2] with public value and duty to operate within the 'new public management' (NPM) paradigm.[3] NPM, a powerful but diffused paradigm, structures the 'scholarly discussion of contemporary changes in the organization and management'[4] of public sector organisations by focusing on the 'importation of private sector practices to the internal workings of public administrations, and introduction of management ideas in public policy domains '.[5] It encompasses a 'critique of monopolistic forms of service provision and an argument for a wider range of service providers and a more market-oriented approach to management.'[6] Increasingly, NPM is reconfigured to fit the public value approach being 'substantively valuable to the citizenry, politically legitimate, feasible and sustainable, and operationally possible and practical.'[7] Public value is described as a 'multi-dimensional construct – a reflection of collectively expressed, politically mediated preferences consumed

[1] UNEP, *Environmental Rule of Law: First Global Report* (United Nations Environment Programme 2019) chapter 5.

[2] An organization is an organised or cohesive group of people working together to achieve their agreed mission, values and strategic goals. See Jennifer M Allen and Rajeev Sawhney, *Administration and Management in Criminal Justice: A Service Quality Approach* (SAGE 2018) 4.

[3] Gar Yein Ng, *Quality of Judicial Organisation and Checks and Balances* (Intersentia 2011) 11; Van d. Walle, Steven, & Gerhard Hammerschmid, 'The Impact of the New Public Management: Challenges for Coordination and Cohesion in European Public Sectors' (2011) 12 Halduskultuur— Administrative Culture 190.

[4] Elaine Mak, 'The European Judicial Organisation in a New Paradigm: The Influence of Principles of 'New Public Management' on the Organisation of the European Courts' (2008) 14 European Law Journal 718, 724.

[5] Victor Lapuente and Steve Van de Walle, 'The effects of new public management on the quality of public services' (2020) 33 Governance 461, 462; see also John Alford and Owens Hughes, 'Public value pragmatism as the next phase of public management' (2008) 38 The American Review of Public Administration 130; Patrick Dunleavy and Christopher Hood, 'From old public administration to new public management' (1994) 14(3) Public Money and Management 9.

[6] Janine O'Flynn, 'From new public management to public value: paradigmatic change and managerial implications' (2007) 66(3) 353, 354.
[7] ibid 359.

by the citizenry – created not just through 'outcomes' but also through processes which may generate trust or fairness.'[8]

NPM focuses on quality, namely 'achieving the full potential that one is capable of with the resources one has'[9] by exercising a 'client-oriented approach'.[10] In the context of ECTs, NPM quality involves the key values of effectiveness, efficiency, and transparency[11] that lead to fairness and public trust. Factors including time**,** competency, consistency, accessibility, accuracy, and responsiveness provide direction and help in assessing ECTs quality service.[12] Realising this quality requirement contributes in two ways towards operationalising the ECTs key characteristics and associated benefits. First, ECTs strengthen societal trust by exercising and displaying good governance. Second, by recognising the need for 'adaptive management that strives for organisational excellence that is continually looking, learning, changing and improving'.[13]

This chapter presents the New South Wales Land and Environment Court (NSWLEC) through the lens of functionality and the court's overseas reach and impact in India. The NPM paradigm is employed to test the practical application of functionality in the NSWLEC and the NGT. Section 2 briefly introduces the principle of functionality. Functionality offers 'better solutions' through the command of legal materials and its deeper understanding to discover similarities and substitutes. Environmental problems are global and associated disputes are polycentric, multi-disciplinary, complex and often political.[14] There is an on-

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[8] Ibid 358; see also Amir Hefetz and Milred Warner, 'Privatization and Its Reverse: Explaining the Dynamics of the Government Contracting Process' (2004) 14 (2) Journal of Public Administration Research and Theory 171; Gerry Stoker, 'Public Value Management: A New Narrative for Networked Governance?' (2006) 36(1) American Review of Public Administration 41.

[9] Ng (n 3) 29.

[10] Ibid 11-12. For example, see Client Service Charter for NSW Courts and Tribunal Services.

[11] Mak (n 4) 735; Max Visser, Roel Schouteten and Josje Dikkers, 'Controlling the courts: new public management and the Dutch judiciary' (2019) 40 (1) The Justice System Journal 39; Daniela Piana, 'Reforming the judiciary through standards; agency empowerment and centre (re)building in Italy 2001-2015' (2017) 83(4) International Review of Administrative Sciences 757; Richard Mohr and Francesco Contini, 'Judicial evaluation in context: Principles, practices and promises in nine European countries' (2007) 1(2) European Journal of Legal Studies 1. These articles argue that the NPM paradigm influences European judicial organizations to solve questions in liberal democracies.

[12] Joe Petrick and William Lindsay, *Total Quality and Organization Development* (CRC Press 1996) 55.

[13] Brian J Preston, 'Benefits of Judicial Specialization in Environmental Law: The Land and Environment Court of New South Wales as a Case Study' (2012) 29 Pace Envtl. L. Rev. 396, 440.

[14] Ceri Warnock, 'Environment and the Law: The Normative Force of Context and Constitutional Challenges' (2020) JEL 1, 4-5.

going need to promote transformative adjudicatory institutions that provide effective environmental justice and uphold the environmental rule of law.

In this context, Section 3 analyses NSWLEC's influential contribution as an 'ideal model' to the establishment of the National Green Tribunal (NGT) India. In 2010, the NGT was established as the first specialised environmental tribunal in a developing country. NSWLEC, a free-standing environmental court 'often called a Rolls Royce model'[15], is recognised as 'one of the most visionary and successful, based on its innovations, best practices and advising of other ECs around the world.'[16]

Section 4 selectively explores, through the NPM paradigm, Preston CJ's 'desirable dozen' institutional characteristics that are successfully embedded in the NSWLEC. The NPM paradigm includes three quality values: effectiveness, efficiency and transparency. This trio incorporates and tests the 'desirable dozen'. Preston's 'desirables' are also reflected in the working practices of the NGT although systematic cloning did not occur. The chapter identifies direct and indirect parallels with working practices found both in the NSWLEC and NGT. The concluding section acknowledges the need for continuously adopting 'better solutions' arising out of successful models such as NSWLEC, thereby promoting specialised and responsive environmental adjudication capable of global application.

2. The Principle of Functionality: Better Solutions

Konard Zweigert and Hein Kötz's classic work on functionalism provides an elaborate and robust perspective to understand and resolve legal and social conflicts through better solutions.[17] Functionality not only defines the problem but in its 'applied version' provides advice to solve the problem within given social and economic situations.[18] Functionalism both as 'mantra and *bête noire* of comparative law'[19] is an 'école de vérité' that extends and enriches the supply of solutions … and offers the opportunity of finding the 'better solution' in given time and place'.[20]

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[15] George Pring and Catherine Pring, *The ABCs of the ECTs: A Guide for Policy Makers for Designing and Operating a Specialised Environmental Court or Tribunal* (Nairobi: United Nations Environment Programme 2016) 20-21.

[16] Ibid.

[17] K Zweigert and H Kötz, *An Introduction to Comparative Law* (translated by Tony Weir, OUP 1998) 15.

[18] Ibid 11.

[19] Ralf Michaels, 'The Functionalist Method of Comparative Law', in Mathias Reimann and Reinhard Zimmermann (1st eds), The *Oxford Handbook* of *Comparative Law* 339, 340.

[20] Zweigert and Kötz (n 17) 15; see also Jaye Ellis, 'General Principles and Comparative Law' (2011) 22 (4) The European Journal of International Law 949, 959-961; Chrisopher A. Whytock, 'Legal Origins, Functionalism, and the Future of Comparative Law' 2009 BYU L. Rev. 1879, 1883; Jonathan Hill, 'Comparative Law, Law Reform and Legal Theory '(1989) 9 Oxford Journal of Legal Studies 101, 102.

Zweigert and Kötz assert 'incomparables cannot usefully be compared, and in law the only things which are comparable are those which fulfil the same function.'[21] The premise is based upon *praesumptio similitudnis*- the presumption of similarity. The presumption is the legal system of each society faces the same or similar problems and resolves them in independent ways that result in same or similar practical outcomes.[22]

In respect of institutions and rules, functionalism as *tertium comparationis* offers a response from a comparable common point of reference. Institutions are thought to be 'comparable because they fulfil the same (or equivalent) function(s), because they relate to the same problem'. This provides 'meta-nationally or cross-culturally'[23] valid points of common institutional denominators in the pursuit of better solutions. Accordingly, functionalism provides lessons of experience and neutral responses to 'look at different systems of the world [that] offer a greater variety of solutions.'[24]

Functionality fosters international understanding, exchange of legal ideas and reforms thereby promoting the domestic development of legal institutions and rules.[25] The principle is particularly helpful for developing countries where legal, procedural and regulatory systems are under-developed or slow to respond to socio-economic crises. Those countries are encouraged to address common environmental challenges and support the development of better solutions at the national level. This results in facilitating 'trans-frontier mobility of law'[26] for 'structural and discursive changes'[27] thereby improving the law and promoting globalisation discourse.

The environmental rule of law underpins the principle of functionality being a comparable common point of reference that reflects shared purpose or *tertium comparationis.*[28] It is

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For a critique on functionality see Michaels (n 19); Pierre Legrand, 'The Same and the Different' in Pierre Legrand and Roderick Munday (eds) Comparative Legal Studies: Traditions and Transitions (CUP 2003).

[21] Zweigert and Kötz (n 17) 34.
[22] Ibid 40; Julie De Coninck, 'The Functional Method of Comparative Law: "Quo Vadis"?' (2020) 74 The Rabel Journal of Comparative and International Private Law 318.

[23] Ibid Conick 323.
[24] Zweigert and Kötz (n 17) 15.
[25] Whytock (n 20) 1883. See also Rudolf B Schlesinger and others, *Comparative Law: Cases, Text and Material* (6th ed, Foundation Press: 1998) 22.

[26] Esin Örücü, 'Infusion of the Diffused: Four Cycles of Diffusion Infusing the Legal System of Turkey' in Sue Farran, James Gallen and Christa Rautenbach (eds) *The Diffusion of Law: The Movement of Laws and Norms Around the World* (Ashgate 2015) 7.
[27] Ibid.
[28] Marek Prityi and others, Locating environmental law functions among legislative, judicial, and implementation bodies' in Kirk W Junker (ed.) *Environmental Law Across Cultures: Comparisons for Legal Practice* (Routledge 2020) 73.

indispensable for environmental justice and sustainable development. In its 'unique' context, the environmental rule of law 'integrates critical environmental needs with the elements of rule of law [fair, just and accountable laws], thus creating a foundation for environmental governance that protects rights and enforces fundamental obligations'.[29] In this context, the environmental rule of law experiences articulation in institutional values and practices in an optimal manner. Globally, ECTs provides a strong institutional framework for environmental protection, diligent enforcement and effective access to justice by upholding the environmental rule of law. Strong and effective institutions are especially important because the 'benefits of environmental rule of law are diffused across society.'[30] The achievement of normative legitimacy lies in the realisation of environmental justice through the identification of common institutional denominators (values) resulting in better solutions for sound governance and social inclusion. ECTs such as NSWLEC that display the NPM's quality values- effectiveness, efficiency, and transparency- help uphold the environmental rule of law. NSWLEC is an example for other jurisdictions including India that helps shape the adjudicatory landscape and offers an 'enhanced opportunity to learn from the experience of those who went before, as legal systems borrow and learn from one another, while also bringing their own perspectives to bear to make improvements.'[31]

3. NSWLEC's Influence: Genesis of the NGT

The inauguration of NSWLEC on 1st September 1980 introduced a specialised environmental court that embraced a flexible mechanism for dispute resolution.[32] The vanguard status of NSWLEC, described as a 'superb EC model',[33] and its judicial leadership increased international interest in specialised environmental adjudication.

NSWLEC's outreach was witnessed when India's senior judiciary recognised the need to protect and improve the environment because of the Bhopal disaster in 1984.[34] The complex and uncertain scientific risks with shared environmental concerns influenced both the Supreme Court and subsequently the Law Commission of India to promote the establishment of a specialised environmental court. The Supreme Court, in three important judgments, advocated the establishment of environmental courts. In *M.C. Mehta v. Union of India*,[35] *Indian Council for Enviro-Legal Action v. Union of India*,[36] and *A.P. Pollution Control Board v. Professor M.V. Nayudu (I and II),*[37] the Supreme Court expressed judicial concern

[29] UNEP (n 1) 8.
[30] ibid 37.
[31] ibid 29.
[32] Land and Environment Court 1979 (NSW) (hereinafter NSWLEC Act).
[33] Pring and Pring (n 15) 22.
[34] *Union Carbide Corporation v Union of India* (1989) 2 SCC 540.

[35] (1986) 2 SCC 176.
[36] 1996(3) SCC 212.
[37] (1999) 2 SCC 718 and (2001) 2 SCC 62.

about its ability to evaluate and incorporate scientific input in complex environmental cases. Uncertainty becomes a problem when scientific knowledge, claims and counterclaims are institutionalized into policy-making as a basis for decision-making. Accordingly, as environmental cases frequently involve assessment of scientific data, it was desirable to establish regional environmental courts with a legally qualified judge and two experts, to undertake relevant adjudication as part of a faster judicial process.

In this context, the NSWLEC was described as an 'ideal' model for India providing appropriate judicial and scientific inputs rather than leaving complicated disputes regarding environmental pollution to officers drawn from the executive. The Supreme Court stated '[the] NSWLEC could be ideal. It is a superior Court of record and is composed of four Judges and nine technical and conciliation assessors. Its jurisdiction combines appeal, judicial review and enforcement functions. Such a composition in our opinion is necessary and ideal in environmental matters.'[38]

Additionally, specialised environmental courts would recognise the principle of good governance and maintain rule of law. Good governance in environmental matters includes effective state institutions, transparency and accountability in public affairs, respect for human rights and the meaningful participation of citizens including the scientific community. Accordingly, the Supreme Court suggested the Law Commission examine the establishment of a specialised environmental court.

Following these powerful judicial statements, the Law Commission undertook the recommended study. Ultimately, in its 186th Report 'Proposal to Constitute Environment Courts', it strongly advocated the establishment of environmental courts by examining courts in foreign jurisdictions.[39] The Law Commission was influenced by NSWLEC and observed its 'broad features commend themselves to us.'[40] For instance, NSWLEC's composition of judicial and expert members influenced the Law Commission in its recommendations. The Law Commission decided on a similar balanced complement. Environmental courts with legal and scientific inputs were thought to be better placed to reach a determination. Such courts could have wide powers to make on-the-spot inspections and hear oral evidence from resident panels of environmental scientists. The Law Commission followed NSWLEC's practice and recommended a qualified statutory panel of technical/scientific personnel called Commissioners to assist the proposed court. The Commissioners would advise and assist the court in analysing and assessing scientific or technological issues.[41]

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[38] ibid (1999) 735.

[39] Law Commission of India, *186th Report on Proposal to Constitute Environment Courts* (Government of India 2003) 50-86.

[40] ibid 54, 63.

[41] ibid 154.

On the issue of standing the Law Commission recommended NSWLEC's approach as a good practice exemplar.[42] Any person or organization who or which has an interest in the subject matter or in the public interest should be able to approach the court. Further, NSWLEC's practice to conduct proceedings with as little formality and technicality as possible and with as much expedition, and mediation and conciliation should be encouraged and adopted in the Indian context.[43]

The Law Commission's recommendations resulted in the Green Tribunal Bill. It was debated in Parliament[44] where the NGT was described as 'one element of a reformist approach to environmental governance'[45] thereby acknowledging the importance of NPM quality values. The Bill received presidential assent in 2010 and became the National Green Tribunal Act (NGT Act) 2010.[46] The NSWLEC as an 'ideal' model helped India introduce and shape the NGT design and content as a specialised body to act as a forum offering greater plurality for environmental justice. The NSWLEC's institutional values and practices is illustrative of the better solution instinct of the applied functionality principle thereby promoting the environmental rule of law. An improved justice system (such as ECTs) that provides steadfast foundations of resolving environmental disputes and enforcing environmental law through NPM quality values namely effectiveness, efficiency and transparency optimises the environmental rule of law.

However, the NSWLEC was not cloned in India. The NGT's differences are an illustration of 'transposition and tuning… the transposition occurring to suit the particular socio-legal culture and needs of the recipient.'[47] NGT's transposition and tuning is based upon the legal context and system, nature of socio-economic assessments, and coordination and synergies between existing regulatory institutions and its processes including human and technical capacity constraints. For example, the Law Commission recommended a simpler procedure for the Indian environmental court.[48] It found the NSWLEC's classification of cases and its various proceedings too complicated. The Law Commission also excluded criminal jurisdiction to avoid the constitutional conflict that would result if the criminal appellate jurisdiction of the High Court were removed and vested in a tribunal manned by retired

[42] ibid 152.
[43] ibid 62 and 148.
[44] The Bill was introduced in Parliament on 31 July 2009; passed in Lok Sabha (the Lower House) on 30 April 2010 and in Rajya Sabha (the Upper House) on 5 May 2010.
[45] Statement made by Jairam Ramesh, former Minister of Environment and Forests, April 2010.

[46] The National Green Tribunal Act 2010, the Gazette of India Extraordinary (No 19 of 2010).

[47] Esin Örücü, Law as Transposition (2002) 51 *ICLQ* 205, 207.

[48] Law Commission (n 39) 63.

judges.[49] The Commission's position was upheld by the Parliament as 'criminal adjudication requires a hierarchy of courts and the tribunal system does not fit into the architecture of criminal courts.'[50] Neither did the Commission recommend the prospective tribunal be made a superior court of record with the power of judicial review.[51] It is settled constitutional law that tribunals only have a 'supplemental not a substitutional role and merely have the trappings of a court.'[52] The constitutional courts (Supreme Court and High Courts) have the power of judicial review which cannot be ousted or excluded. Vesting the power of judicial review in a tribunal would lead to constitutional confusion and complexity. The position of the Law Commission was upheld by the Supreme Court in *T N Pollution Control Board v Sterlite Industries*[53] wherein the court declared it would be 'fallacious to state that the NGT has the power of judicial review akin to the High Court… It is a statutory tribunal set up under NGT Act'.[54]

Despite differences in structure and substance between the NSWLEC and NGT, functionality through NPM quality values helped NGT in its 'internalisation and increased its own receptivity by making a significant adaptation of the foreign formal legal order to initial [internal] conditions.'[55] Functionality works best when the problems are similar and there is clarity about the goals and the new ways of working. The NGT benefitted through adopting those NSWLEC quality values identified through the 'desirable dozen' (as discussed in section 4) that are clear, auditable and secure legal continuity by promoting the environmental rule of law. The pervasive influence and positive outcomes of NSWLEC provide greater justification and serve as an entryway for its acceptance by countries that are creating or refining ECTs.

4. NSWLEC's 'Desirable Dozen': Reflections in the NGT

[49] ibid 156. The Law Commission examined the criminal jurisdiction matter in detail and observed that appeals/revisions from the trial Courts as filed in High Courts, - whether in case of conviction or acquittal under environmental laws – could be shifted to the Environment Court. However, there was no special law that transferred the criminal appellate jurisdiction of the High Court to another court at the state level. Hence, it is not fit to touch the criminal jurisdiction.

[50] Parliament of India, *Two Hundred and Third Report on the NGT Bill 2009* (Rajya Sabha Secretariat 2009).

[51] The NGT in *Wilfred J v MoEFCC* and *Kalpavriksh v Union of India (*Judgments 17 July 2014) used textual ambiguity to expand its jurisdiction and claim the power of judicial review. See Nupur Chowdhury and Nidhi Srivastava, 'The National Green Tribunal in India: examining the question of jurisdiction' (2018) 21(2) Asia Pacific Journal of Environmental Law 190.

[52] *L Chandra Kumar v Union of India* (1997) 3 SCC 261, 302; Gopal Krishna, 'When tribunals undermine the judiciary' *Rediff.com* (Delhi, 25 October 2013).

[53] 2019 SCC OnLine SC 221.

[54] Ibid para 52.

[55] Örücü (n 47) 208.

The recognition of the NSWLEC as a 'bold and brave experiment'[56] and being an innovative court is fulsome and positive. Justice Preston, Chief Judge of the NSWLEC, in illuminating articles and speeches, identifies twelve key characteristics, the 'desirable dozen', required for the successful operation of an ECT.[57] These characteristics are rationalisation and centralisation, scientific and technical specialisation, multi-door courthouse, superior court of record, independence from the government, responsive to environmental problems, facilitates access to justice, development of environmental jurisprudence, flexibility and Innovation, better court administration, value adding function, and unifying ethos and mission. The 'desirable dozen' constitute a characteristic framework capable of being tested through the NPM quality value paradigm.

The NPM paradigm operationalises the quality of justice through institutional values respectful of the environmental rule of law in judicial organisations including ECTs. These values- effectiveness, efficiency and transparency- are 'essential components of organisational culture…adherence to high-level public service values can generate substantial public trust and confidence.'[58] Inter-linked, inter-dependent and overlapping, these institutional values are given 'focus, structure and visibility'[59] through powerful statements, strategic goals and objectives that ensure elements of good judicial governance and sound decision-making. In this regard, 'development of standards… elaboration of benchmarks… diffusion of good practices…innovation'[60] facilitate and improve the quality of justice. The NPM in ECTs infuses accountability in an instrumental form to deliver 'good services to the users (citizens)'[61] thus responding and improving societal and environmental needs. NSWLEC reflects the NPM quality values in the 'best interests of the public, the litigants and the environment.'[62] The court's purpose is to safeguard and maintain the rule of law, equality before the law; access to justice; fairness, impartiality and independence in decision making; transparency, timely and certainty; accountability; competency and personal integrity of its judges, commissioners and support staff.[63]

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[56] Justice Neal Bignold, 'The Land and Environment Court: It's Contribution to Australia's Development of Environmental Law' (National Environmental Law Association Conference Fremantle September 2000).

[57] Brian J. Preston, 'Characteristics of Successful Environmental Courts' (2014) 26 (3) JEL365;

[58] European Commission, *Quality of Public Administration: A Toolbox for Practitioners* (European Commission's Inter-service group on Public Administration Quality and Innovation 2017) 18.

[59] ibid 19.
[60] Piana (n 11) 760-761.
[61] Ibid.
[62] Justice Terry Sheahan, 'Use of ADR in the New South Wales and in the Land and Environment Court' (Australasian Conference of Planning and Environment Courts and Tribunals September 2010.
[63] Land and Environment Court < http://www.lec.justice.nsw.gov.au/Pages/about/about.aspx > accessed 30 January 2021.

In this context, the NSWLEC's 'desirable dozen' as NPM quality values and their ultimate diffusion are reflected in the NGT's structure and working practices. The principal NPM headings being Effectiveness, Efficiency and Transparency are discussed below.

4.1 Effectiveness

Effectiveness concerns the extent to which high-level objectives and societal needs have been or should be achieved due to the organisation's activities. From a quality justice standpoint, it includes 'adequate material and human resources, accessibility of justice to citizens, putting in place assessment tools, and using quality standards.'[64]

In regard to, *rationalisation and centralisation* (the first of the desirable dozen), a strong institutional framework for environmental protection, diligent enforcement, and effective access to justice is fundamental in supporting environmental rule of law. The NSWLEC is a 'one stop shop',[65] a dedicated environmental court having an integrated, wide-ranging jurisdiction.[66] The rationalisation and centralisation of NSWLEC created a 'critical mass'[67] for a new style of environmental governance**.**

Rationalisation and centralisation in the NSWLEC facilitates improved quality and innovative decision-making in the substantive and procedural aspects of the wide subject-matter coverage, ensures effective enforcement, increases awareness of the end-users and reduces litigation and associated costs.[68] Thus, it provides a predictable and steadfast foundation to seek redressal of grievances and enforcement of legal rights and obligations.

Likewise, the NGT is 'one element of a reformist approach to environmental governance.'[69] It is a specialised body equipped with necessary expertise to handle environmental disputes. It is considered as a contributor to a more coherent and effective system of environmental governance and regulation.[70] The NGT aims to provide access to the tribunal through its

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[64] European Commission (n 58) Theme 7 (quality of justice systems); see also the EU Justice Scoreboard available at https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1316 accessed 30 January 2021

[65] Paul L Stein, 'Specialist environmental courts: the Land and Environment Court of New South Wales, Australia' (2002) 4 ENV L REV 5, 8.

[66] NSWLEC has an appellate and a review jurisdiction in relation to planning, building, environmental, mining and ancillary matters. It also exercises summary criminal jurisdiction and appellate criminal jurisdiction in relation to environmental offences. The jurisdiction is exercised by reference to the subject matter of the proceedings (Classes 1-8).

[67] Preston (n 57).

[68] Preston (n 57).

[69] Ramesh (n 45).

[70] Gitanjali N Gill, *Environmental Justice in India: The National Green Tribunal* (Routledge 2017); Sudha Shrotia, 'Environmental justice: Is the National Green Tribunal of India effective?' (2015) 17(3)

principal bench in Delhi and four regional benches.[71] Additionally, to become more accessible in remote areas, the NGT followed the circuit procedure of courts going to people and not people coming to the courts.[72]

In 2015, five years after the creation of the NGT, the Supreme Court of India reviewed its own environmental caseload, and again acknowledged its limited environmental expertise. The Supreme Court in *Bhopal Gas Peedith Mahila Udyog Sangathan v. Union of India*[73] *and T.N. Godavarman Thirumulpad v. Union of India* [74] transferred all environmental cases, both active and prospective, to the NGT to render expeditious and specialized judgments, speedy justice, reduced burden and cost of litigation in the higher courts and avoid the likelihood of conflicts of orders between High Courts and the NGT**.**

The NGT has wide jurisdiction (original, appellate and special) over all civil cases concerning substantial environmental questions if such matters arise from Schedule I.[75] The jurisdiction is expansive and may be exercised *ex debito justitiae*.[76] This 'one stop shop' tribunal developed innovative solutions, remedies and enforcement thereby promoting the environmental rule of law.

In regard to *scientific and technical specialisation,* environmental decision-making may involve science; consequently, scientific and technical expertise may provide appropriate solutions to technical or complicated environmental problems.[77] The importance and

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Environmental Law Review 169; Domenico Amirante, 'Environmental Courts in Comparative Perspective: Preliminary Reflections on the National Green Tribunal of India' (2012) 29 Pace Envtl. L. Rev. 441.

[71] MoEFCC, Government of India, Notification, 17 Aug. 2011, SO 1908 E. The regional benches found their bases in Bhopal (central zone), Chennai (south India), Pune (western territory), and Kolkata (eastern region).

[72] Ramesh (n 45).
[73] (2012) 8 SCC 326.

[74] Supreme Court Order, 5 November 2015.

[75] NGT Act 2010 s 14. The enactments in Schedule I include: Water (Prevention and Control of Pollution) Act 1974; Water (Prevention and Control of Pollution) Cess Act 1977; Forests (Conservation) Act 1980; Air (Prevention and Control of Pollution) Act 1981; Environment (Protection) Act 1986; Public Liability Insurance Act 1981; and Biological Diversity Act 2002. Further Section 15 of the NGT Act 2010 provides the Tribunal with special jurisdiction to order relief and compensation to victims of pollution and other environmental damage arising under the enactments specified in Schedule I, for restitution of damaged property and the environment in such areas as the Tribunal may think fit.

[76] *Wilfred J. v. Ministry of Environment and Forests* NGT Judgment 17 July 2014.

[77] Peter M Haas, *Epistemic Communities, Constructivism, and International Environmental Policy*

involvement of experts is recognised as 'experts define the regime of truth; they tell us what the world looks like, identify and quantify relevant variables, provide statistical measurements and risk analyses, and solve the equations that indicate the path towards increasing the aggregate level of well-being ... experts define the system.'[78]

Diverse scientific and technical expertise alongside specialised and experienced judiciary lends credence to the environmental legitimacy of the NSWLEC and acts as a guardian of the environmental rule of law. The Commissioners or assessors in the NSWLEC advise and assist judges, decide appropriate disputes (such as merit review)[79] and undertake alternative dispute resolution (ADR) such as mediation and conciliation.[80] The epistemic qualities of the Commissioners, as competent individuals, are recognized in a range of environmental areas.[81] According to Bignold J, the Commissioners undertake NSWLEC's work with 'considerable competence and efficiency…this enables speedy determination…'[82]

In addition, the NSWLEC may appoint experts or order the parties select a single expert to provide expert evidence.[83] The court may also obtain assistance from a specially qualified advisor on any matter arising in the proceedings and act on the advisor's opinion.[84] According to Preston CJ, the court's processes result in expert evidence reducing cost, the potential for partisan and biased testimony from external experts, a more efficient use of time and money, facilitation of a less adversarial and more flexible, problem-solving based approach, and provide judges and commissioners with greater assistance when reviewing the evidence given by experts on discrete issues.[85]

The NGT's 'scientifically-legal' composition was influenced by NSWLEC. The adjudicative process involves an interdisciplinary bench that harmonises legal norms with scientific knowledge. A unique feature of the NGT's adjudicative process engages legal judges and

(Routledge 2016); Aarti Gupta and others, 'Science Networks', in Frank Biermann and Philipp Pattberg (eds) *Global Environmental Governance Reconsidered* (MIT Press 2012) 69; Robin Feldman, *The Role of Science in Law* (OUP 2009).

[78] Jessica Lawrence, 'The Structural Logic of Expert Participation in WTO Decision-Making Processes', in Monika Ambrus and others (eds) *The Role of 'Experts' in International and European Decision-Making Processes: Advisors, Decision Makers or Irrelevant Actors?* (CUP 2014) 173, 186.

[79] NSWLEC Act Classes 1-3 proceedings.
[80] NSWLEC Act s 34-38.

[81] NSWLEC Act s 12. Non-legally trained Commissioners are qualified in areas such as town planning, environmental science, land valuation, architecture, engineering and heritage

[82] Justice Neal R Bignold, 'Overview of Court - constitution, jurisdiction and procedures' (NSW Young Lawyers' Seminar February 2001).
[83] Uniform Civil Procedure Rules 2005 Rule 31.46
[84] Ibid Rule 31.54
[85] Preston (n 57).

scientific experts with environmental knowledge as joint decision-makers of equal standing. The experts are 'central', not 'advisors', within the NGT's normative structure. The tribunal has contributed to the development of environmental jurisprudence not only through legal doctrine but also via science- based knowledge, resulting in domain- specific solutions.[86] The benefit of this multi-faceted, multi-skilled body produces a coherent and effective institutional mechanism to apply complex laws and principles in a uniform and consistent manner.[87] It simultaneously reshapes the approach to solving the environmental problem at its source rather than being limited to predetermined remedies. The NGT's willingness to offer scientifically-based structural policies that respond creatively to weak, ineffective or absent regulation reflects an accountability-based approach. For example, NGT's creativity includes the preparation and recommendation of policies on bio- medical waste,[88] tyre burning,[89] emission standards for clamp-type traditional brick kilns[90] and trans-location of trees.[91] Unbiased, in-house, scientific knowledge becomes an integral part that produces judicially binding decisions by adopting both a problem- solving and policy-creation approach.

The availability of merit review to the NGT allows the experts as primary decision-makers to undertake technical in-depth scrutiny that involves not only law but also the technical evaluation underpinning the decision. It promotes the effective application of the precautionary principle.[92]

However in 2019, the Supreme Court critically commented on the failure of the NGT to carry out a merit review when it discharged in a perfunctory paragraph its adjudicatory function concerning vital technical evaluation in the grant of an environmental clearance.[93]

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[86] Ibid.

[87] Gitanjali N Gill, 'Environmental Justice in India: The National Green Tribunal and Expert Members' 2016 5(1) TEL 175; 'The National Green Tribunal of India: Decision-Making, Scientific Expertise and Uncertainty' (2017) 29 (2-3) Journal of Environmental Law and Management 82.

[88] *Haat Supreme Wastech Limited v. State of Haryana* NGT Judgment 28 November 2013.

[89] *Asim Sarode v. Maharashtra Pollution Control Board* NGT Judgment 6 September 2014.

[90] *Sonyabapu v State of Maharashtra* NGT Judgment 24 February 2014.

[91] *K.D. Kodwani v. District Collector* NGT Judgment 25 August 2014.

[92] Through a series of NGT judgments and upheld by the Supreme Court of India, the NGT is vested with the power of merit review through the NGT Act 2010 (with special reference to sections 2, 14 to 20). See *Rajeev Suri v DDA* 2021 SCC OnLine SC 7; *Mahendra Pandey v Union of India* NGT Judgment 8 December 2017; *M/S Sterlite Industries v Tamil Nadu Pollution Control Board* Judgment 8 August 2013. See also Gitanjali N Gill, 'Precautionary Principle, its Interpretation and Application by the Indian Judiciary: 'When I use a word it means just what I choose it to mean-neither more nor less' Humpty Dumpty' (2019) 21(4) Environmental Law Review 292.

[93] *Hanuman Laxman Aroskar v Union of India* 2019 SCC OnLine 441, para 148.

A full bench is a *sine qua non* for the decision-making process. Since 2017, the NGT is experiencing an acute shortage of legal and scientific bench judges. Section 4 of the NGT Act requires a full-time chairperson and at least 10, but not exceeding 20 judicial and expert members at all times. In 2021, the NGT has only three judicial and three expert members.[94] The current expert judges are specialists in forest-related matters resulting in the loss of a previously wide spectrum of scientific expertise.[95] This limited expertise impacts on the effectiveness of delivering environmental justice. As a consequence of the increasing shortage of bench experts, the NGT, since 2019, has outsourced work to over 175 ad-hoc committees to review and monitor the compliance of environmental laws, and submit status reports to the NGT.[96] The truism that committees take minutes, but may waste years is illustrated by these committees. An abrogation of responsibility alongside a failure to meet statutory fixed deadlines for disposal of cases is a consequence of the mushrooming of these committees and their tardiness in reporting promptly to the NGT.

In August 2020, the Supreme Court directed the appropriate authorities to fill the bench vacancies resulting from the shortfall of scientific and legal expertise. A full bench offering a scientific and technical perspective generates hypotheses about environmental events and processes. It provides an evaluative statement to compare possible options in support of sound decision-making that upholds the environmental rule of law.

The *development of environmental jurisprudence* is related to scientific and technical specialisation. It requires the engagement of judges as constructive scholars. They develop environmental jurisprudence that ensures recognition of the mutually reinforcing relationship between rights, justice and the environmental rule of law. The NSWLEC's specialised adjudication has developed environmental jurisprudence in aspects of 'substantive, procedural, restorative, therapeutic and distributive justice.'[97] Substantive justice covers principles of ecologically sustainable development (ESD) within the context of both judicial review proceedings and in merit appeals**.**[98] For Pain J, the ESD principles reflect a 'human rights concern.'[99] Procedural aspects include relaxed standing, interlocutory

[94] https://greentribunal.gov.in/ accessed 8 January 2021.
[95] https://greentribunal.gov.in/expert-present-members accessed 8 January 2021.
[96] Remya Nair and Neelam Pandey, 'NGT decisions causing loss to industry, need to look at its mandate- ministerial panel' *The Print* (Delhi, 10 December 2020); Matham Ramesh, 'Turning a decade old, NGT faces some tough questions?' *The Hindu* (Chennai, 16 October 2020).
[97] Preston (n 57).
[98] Protection of the Environment Administration Act 1991 part 6. See *Telstra Corporation Limited v Hornsby Shire Council* [2006] NSWLEC 133; (2006) 146 LGERA 10; *Gray v The Minister for Planning* [2006] NSWLEC 720; *BT Goldsmith Planning Services Pty Ltd v Blacktown City Council* [2005] NSWLEC 210.

[99] Justice Nicola Pain, 'Human rights and environmental rights: A role for domestic courts? - an Australian perspective' (GNHRE Spain June 2014).

injunctions and costs rules.[100] The distributive aspects cover inter and intra generational equity,[101] and the balancing of public-private rights and responsibilities.[102] Restorative justice includes victim-offender mediation[103] and the polluter pays principle for environmental crime.[104] Therapeutic justice focuses on litigant welfare. by improving court practices that include accessibility.[105]

The NGT also developed an environmental jurisprudence and its practical application by preserving the link between life and a healthy environment and by successfully placing human rights within environmental discourse. In judicial pronouncements, the right to a healthy environment has been construed as a part of the right to life under Article 21 of the Constitution.[106] The derivative application of principles of international law are read in conjunction with the domestic constitutional right to a wholesome environment.[107] It offers a framework for reinforcing and strengthening the environmental rule of law by protecting vital environmental interests and claims.

Effectiveness also *facilitates access to justice.* Access to environmental justice is a pillar of democratic governance. It promotes just and equitable outcomes thereby supporting the environmental rule of law. Participatory mechanisms address issues of 'inequality and recognition'[108] concerning access justice. 'Participatory parity' comes with the satisfaction of two conditions: 'that institutionalised cultural patterns of interpretation and evaluation express equal respect for all participants and ensure equal opportunity . . .' and 'the

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[100] Preston (n 57).

[101] *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7; *Anderson v Director-General of the Department of Environment and Climate Change* (2008) 163 LGERA 400; *Warkworth Mining Limited* (2013) 194 LGERA 347.

[102] *Taralga Landscape Guardians Inc v Minister for Planning and RES Southern Cross Pty Ltd* (2007) 161 LGERA 1

[103] *Chief Executive, Office of Environment and Heritage v Clarence Valley Council* [2018] NSWLEC 205; *Garrett v Williams* (2007) 151 LGERA 92

[104] *Environment Protection Authority v Waste Recycling and Processing Corp* (2006) 148 LGERA 299

[105] Preston (n 57).

[106] *Federation of Rainbow Warriors v. Union of India* Order 21 August 2018; *Citizens for Green Doon v. Union of India* Order 8 October 2018; *Tribunal on Its Own Motion v. Secretary of State* Judgment 4 April 2014.

[107] NGT Act s 20. The principles include precautionary and polluter pays principles, sustainable development, inter and intra generational equity, and public trust. See *L G Polymers v Union of India* 2020 SCC OnLine NGT 129; *Westend Green Farms Society v. Union of India* Order 2 November 2018; *Aditya N. Prasad v. Union of India* Order 1 November 2018; *Anjani Kumar v. State of UP* 2017 SCC OnLine NGT 979

[108] David Schlosberg, Defining Environmental Justice: Theories, Movements and Nature (OUP 2007) 25-29.

resources to enable participation.' [109]

The NSWLEC's role is to 'administer justice in the adjudication and resolution of disputes'[110] and it is 'critical that our dispute resolution mechanisms adopt appropriate procedures.'[111] In this context, NSWLEC'S approach covers both 'its substantive decisions and its practices and procedures.'[112] The substantive decisions uphold the statutory rights that include public access to information,[113] public participation,[114] review and appeal legislative and administrative decisions,[115] and citizens having access to the courts to remedy or restrain breaches of public law, including environmental law.[116]

The NSWLEC has devised progressive practices and procedures applicable to public interest litigation (PIL) to provide access to environmental justice. Public interest, a 'multi-faceted concept'[117] but simultaneously a 'nebulous concept',[118] involves 'public and not private rights, and something more'[119] represented by parties to the litigation. The court offers a public forum to those affected by environmental issues and the opportunity to express their concerns and claims.[120] Accordingly, NSWLEC's relaxed procedural prescriptions facilitate

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[109] Nancy Fraser, 'Recognition without ethics?' (2001)18(2–3) *Theory, Culture and Society* 21, 29-30.

[110] Chief Justice Mahla L Pearlman AM, 'Celebration of 20 years of the Land and Environment Court' (Royal Australian Planning Institute Congress Conference October 2000).

[111] Chief Justice McClellan, 'Environmental Issues - how should we resolve disputes?' (National Environmental Law Association Canberra July 2005).

[112] Preston (n 57).

[113] *Environment Protection Authority v Hargraves* [2002] NSWLEC 113; *Brooklyn Resort Pty Ltd v Hornsby Shire Council* [1999] NSWLEC 214.

[114] *Reulie Land Co Pty Limited v Lee Environmental Planning Pty Limited* [2019] NSWLEC 194; *Stockland Development Pty Ltd v Manly Council* (2004) 136 LGERA 254).

[115] *Gibson v Mosman Municipal Council* [2001] NSWLEC 201.

[116] *Oshlack v Richmond River Council* (1994) 82 LGERA 236 at 238; *Anderson v Jali Local Aboriginal Land Council (No 2)* [2009] NSWLEC 222.

[117] *Ruddock v Vadarlis (No 2)* [2001] FCA 1865; *Engadine Area Traffic Action Group v Sutherland Shire Council (No 2)* (2004) 136 LGERA 365 at (15).

[118] *Caroona Coal Action Group Inc v Coal Mines Australia Pty Ltd and Another (No.3)* [2010] NSWLEC 59

[119] Ibid para 60.

[120] Brian J Preston 'The Contribution of the Courts in Tackling Climate Change' (2016) 28 JEL 11, 12.

access to environmental justice as 'judges should not fetter judicial discretions with self-imposed rigid rules.'[121] This relaxation includes broad and liberal standing requirements,[122] not to make an order for the payment of costs against an unsuccessful applicant in any proceedings,[123] not to require security for the proceedings of the costs,[124] not to require an undertaking for damages as a pre-requisite for granting interlocutory injunctive relief,[125] and the limited relevance of the equitable defences of laches, acquiescence and delay.[126] Further, use of technology and on-line services promote participatory mechanisms to access environmental justice.[127] Thus, the NSWLEC's jurisdictional and geographical accessibility practices strengthen the environmental rule of law and ensure justice is realised equitably and equally.

Certain of the NSWLEC's procedures reappear in the NGT and facilitate access to justice. The NGT's environmental dispute litigation is not solely adversarial. It is also quasi-investigative and quasi-inquisitorial.[128] The NGT developed and expanded its procedures and powers through participatory mechanisms that express equal respect and opportunity for all participants. The tribunal created receptive, accessible opportunities for the affected, dispossessed and representative non-governmental organizations (NGOs), through the encompassing term 'aggrieved person',[129] the genesis of which is derived from the Supreme

[121] Gibson v Mosman Municipal Council [2001] NSWLEC 201 para 11.
[122] Open standing provisions 'reflect the high social importance of protecting the environment by the processes of law' (Stein n 65 14); Environmental and Planning Assessment Act s 123; *Haughton v Minister for Planning and Macquarie Generation* (2011) 185 LGERA 373; *Anderson v Jali Local Aboriginal Land Council (No 2)* [2009] NSWLEC 222.

[123] NSWLEC Rules 2007 part 4 rule 4.2; *Friends of Hay Street* v *Hastings Council* (1995) 87 LGERA 44; n 108.

[124] Ibid (Rules) Part 4 Rule 4.2; *Byron Shire Business for the Future* v *Byron Shire Council (1994)* 83 LGERA 59.
[125] Ibid (Rules); *Tegra (NSW) Pty Ltd v Gundagai Shire Council* (2007) 160 LGERA 1; *Ross v State Rail Authority (NSW)* (1987) 70 LGRA 91.

[126] Preston (n 57).
[127] Ibid;
< http://www.lec.justice.nsw.gov.au/Pages/facilities_support/facilities_support.aspx >accessed 5 August 2020.

[128] *Forward Foundation v. State of Karnataka* Judgment 10 September 2015; *MoEFCC v. Nirma Ltd*, Supreme Court Order 4 August 2014.

[129] NGT Act s 18(2); *Kishan Lal Gera v. State of Haryana* (2015) ALL (I) NGT REPORTER (2) (DELHI) 286; *Sri Ranganathan v. Union of India* (2014) ALL (I) NGT REPORTER (2) (SZ) 1.

Court's public interest litigation.[130] In *Samir Mehta v Union of India*[131] the NGT observed 'an "aggrieved person" is to be given a liberal interpretation…the person has to show that he is directly or indirectly concerned with adverse environmental impacts… the construction that will help in achieving the cause of the Act should be accepted and not the one which would result in deprivation of rights created under the statute.'[132]

The adoption of an on-spot investigative procedure involving the inspection of affected sites by expert members allows the comparison of contradictory claims, positions and reports filed by the parties.[133] The stakeholder consultative process engages the diversity of stakeholders, ensures information sharing is effective and employs techniques that help the submission of time-bound, clear-cut proposals and suggestions for the effective enforcement of environmental laws.[134] It's applicable to cases of wider significance involving Pan-India issues such as river cleaning or air pollution. The use of *suo-motu* (on its own motion) is an integral part of the NGT.[135]

The NGT also employs technology to facilitate quick access to justice. This includes the use of geo-tagging, e-petition throughout India, video-conferencing technologies and a user-friendly website with detailed information about cases, reports and guidance documents.[136] However, technology can work both for the benefit and to the detriment of parties. For example, recently video conferences have been cancelled without notice or offered insufficient time.[137] Shockingly, it is reported that lawyers have been put on 'mute settings' while presenting their arguments from regional benches.[138] Such regressive practices coupled with the absence of proper hearings strike at the very heart of the NGT's mandate that offers environmental justice, increased public confidence and the promotion of the environmental rule of law**.**

Finally in relation to effectiveness, it is worth considering the *value adding* function of the NSWLEC and NGT. NPM effectiveness involves a 'process in which a feedback loop is represented by using standards of performance, measuring system performance, comparing

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[130] *State of Uttranchal v. Balwant Singh Chaufal* 2010 3 SCC 402; *In re Noise Pollution* AIR 2005 SC 3136; Geetonjoy Sahu, 'Implication of Indian Supreme Courts Innovation for Environmental Jurisprudence' (2008) 4 LEAD 377; Lavanya Rajamani, 'Public Interest Litigation in India: Exploring Issues of Access, Participation, Equity, Effectiveness and Sustainability' (2007)19 JEL 29.

[131] NGT Judgment 2 August 2016.

[132] ibid paras 31-32.
[133] Gill, Environmental Justice in India (n 71) 166.
[134] Ibid 167-168.
[135] *EAS Sarma v Union of India* NGT Order 1 June 2020; Gill, Environmental Justice in India (n 88).
[136] Green Tribunal < https://greentribunal.gov.in/ > accessed 30 January 2020.
[137] Geetanjoy Sahu, 'Whither the NGT?' *Down to Earth* (Delhi, 23 September 2019).
[138] Ritwick Dutta, 'Woes of the NGT: Are the recent appointments unconstitutional?' *Bar and Bench* (Delhi, 17 December 2019).

that performance with standards, feeding back information about unwanted variances in the system, and modifying the system.'[139] NSWLEC is the first court to implement the International Framework for Court Excellence to improve its performance and administration.[140] Effectiveness is measured through quantitative and qualitative indicators (affordability, accessibility, responsiveness to the needs of users, and timeliness and delay measured by a backlog indicator and compliance with time standards).

However, the NGT has not endorsed an evaluative performance framework. There is no public evidence that this measure is under consideration. The absence of a feedback loop raises questions about the quality and effectiveness of justice. Since 2017, there are concerns that the NGT is waning and 'losing its bite'.[141] For example, limited availability of scientific expertise has resulted in reduced access to regional benches. To build legitimacy both in the NGT and environmental rule of law, a robust feedback loop would improve judicial accountability and good quality services.

4.2 Efficiency

Efficiency relates to managing inputs, outputs and processes to achieve best results for the communities and value for money. It includes factors such as quick disposal, costs, reasonable information, clearance rate, pending cases and average length of proceedings.[142] Both the NSWLEC and NGT are *multi-door courthouses.* A 'just, quick and cheap resolution of real issues in proceedings'[143] increases confidence in the ECTs and environmental rule of law. Streamlined processes 'ensure expedited proceedings consistent with a full and fair determination.'[144]

The NSWLEC's commitment to ADR illustrates a 'multi-door courthouse' approach that results in swifter dispute resolution.[145] The court offers in-house and external dispute resolution processes. These include conciliation, mediation, neutral evaluation and order mediation to a referee.[146] For instance, in 2019, 74% of Class 1 appeals were finalised by

[139] Visser (n 11) 40-41.
[140] Brian J Preston, 'Achieving Court Excellence: The need for a collaborative approach' (2017) 8 International Consortium for Court Excellence Newsletter 4.
[141] Ramesh (n 96).
[142] European Commission (n 64).
[143] UNEP (n 1) 184.
[144] ibid 211.
[145] Preston (n 57); Brian J Preston, 'The use of alternative dispute resolution in administrative disputes' (2011) 22 ADRJ 144, 151-153; 'The Land and Environment Court of New South Wales: Moving towards a multi-door courthouse – Part I' (2008)19 ADRJ 72.

[146] NSWLEC Act s 34; Civil Procedure Act 2005 (NSW), s 26. NSWLEC Rules 2007 (NSW), pt 6 r 6.2.

ADR processes and negotiated settlement.[147] To that extent, the NSWLEC's inbuilt efficient process improves accountability in environmental decision-making, and ensures public legitimacy.

ADR is not included within NGT's statutory mandate. The tribunal is a 'creation of a statute and its jurisdiction will have to be construed with reference to the language of its provisions.'[148] This omission is a missed opportunity especially within an Asian context as ADR reflects 'cultural acceptance of the resolution of community disputes.'[149] Nevertheless, there is also the danger of a pressured compromise within this process especially if inequality of arms exists between the parties. To promote environmental rule of law, ADR should be a problem-solving process informed by relevant expertise to achieve an appropriate environmental outcome to the satisfaction of the parties.

In regard to *better court administration,* managing cases through efficient procedures determine 'whether parties have confidence in environmental rule of law.'[150] Consequently, ECTs must be fair, cost-effective, thorough, timely and user-friendly. For example, NSWLEC's 'reasoned and transparent judgments'[151] and their public availability helps inform the parties and public how environmental law is interpreted and applied. At an institutional level, concurrent evidence, sometimes called the 'hot tub', is an efficient method that saves court time and costs.[152] Additionally, the court makes available explanatory documentation and information for external stakeholders. The issuance of Practice Notes helps 'adapt quickly and appropriately to inefficiencies in its own practices and procedures.'[153] Efficiency is also highlighted in the NSWLEC Annual Report 2019. It states there is an improvement in the overall clearance rate (Class 1-8), increase in the percentage of pre-hearing attendances conducted by online court and an increase in the percentage of reserved judgments delivered within the Court's time standards. However, NSWLEC also identified its

[147]< http://www.lec.justice.nsw.gov.au/Pages/types_of_disputes/class_1/class_1.aspx > accessed 10 August 2020. In 2019, the Court was a Finalist in the 'ADR Group of the Year' category at the Australian Disputes Centre ADR Awards (NSWLEC Annual Report 2019, 21).
[148] *M P Pollution Control Board v Commissioner Bhopal* NGT Judgment 8 August 2013 para 7.
[149] Asian Development Bank, *Asian Judges Symposium on Environmental Decision Making, the Rule of Law and Environmental Justice* (ADB 2010) 43.
[150] UNEP (n 1) 188.
[151] Justice Terry Sheahan AO, 'Use of ADR in the New South Wales and in the Land and Environment Court' (Australasian Conference of Planning and Environment Courts and Tribunals September 2010).
[152] McClellan (n 101); Justice Rachel Pepper, "Hot-Tubbing': The Use of Concurrent Expert Evidence in the Land and Environment Court of New South Wales and Beyond' (Annual Alaskan Bar Association Conference May 2015).

[153] <http://www.lec.justice.nsw.gov.au/Pages/practice_procedure/practice_notes.aspx> accessed 21 August 2020.

underperforming areas and the willingness to improve its administrative functioning.[154] The adoption of user-friendly approaches ensures the NSWLEC's services and facilities are efficient and publicly available.[155]

Likewise, the NGT Act mandates a low-cost fee (£13) to file an application or appeal[156] and a fast-track process requiring the decision of cases within six months of application or appeal.[157] Financial accessibility and speedy justice reflects the NGT's open-door commitment to environmental justice. To illustrate, the latest official figures between July 2011- May 2020, state there were 32,626 filed cases, out of which 29,760 were disposed and 2,866 remain pending. Thus, 91.3% of the cases were decided whereas 8.7% of cases remain pending. Further, from 2018 onwards the tribunal mandates an advance service of notice for speedy disposal of cases. [158] Although the official clearance rates appear impressive, of late the NGT reality is disturbing. The 'new 4-D approach to dealing with cases – 'dismiss, dispose, delegate and de-reserve'… without providing due reasons… since July 2018, the Tribunal has disposed of over 700 cases, all at different stages of hearing, with largely generic orders directing the concerned authorities "to look into the matter and take appropriate action in accordance with law."'[159] These systemic disposal changes undermine the environmental rule of law and public trust. Reasoned and transparent decisions help 'build predictability of law and confidence in legal process and institutions.'[160]

4.3 Transparency

Transparency opens a window into the inner workings of the organisations. Factors such as judicial independence including appointment and removal process are indicators related to promoting institutional independence, impartiality and integrity.[161] In regard to i*ndependence from the executive,* the establishment of the NSWLEC with its judicial independence has 'served as a bulwark against political attack.'[162] This encourages independent and impartial decisions leading to transparent and effective environmental decision-making. Granting tenure to judges further enhances independence and ensures

[154] Annual Report (n 147) 3.
[155] ibid 40.
[156] NGT Rules 2011 r 12.
[157] NGT Act s 18(3).
[158] NGT website (n 126).
[159] Maya Ramesh, 'Nearly a decade old, is the NGT losing its bite?' The Wire (India, 11 May 2019); *Hariram Singh v State of Bihar* NGT Order 14 January 2019; *R R Raja v State of Jharkhand* NGT Order 3 May 2019.
[160] UNEP (n 1) 212.
[161] Ibid
[162] Stein (n 65) 7.

impartiality and accountability.[163]

For the NGT, as in the NSWLEC, the statutory provisions act as a benchmark for a rigorous appointment process, tenure and removal provisions subject to public scrutiny.[164] In *Wilfred J. v. Ministry of Environment and Forests*[165] the tribunal observed that the appointment and selection process to the NGT remains free from executive influence and ensures parliamentary scrutiny. However, India has developed a patronage culture that provides sinecure, post-retirement assignments to former judges, senior administrators and technocrats in judicial and quasi-judicial bodies at national and state levels. This has been questioned and accusations made regarding the appointment of NGT judges. For example, the present NGT Chairperson's appointment was questioned in the Indian parliament as a 'reward' for supporting the Prime Minister Modi government's policy whilst sitting as a Supreme Court judge.[166] Within hours of his retirement as a Supreme Court judge, he was appointed Chairperson of the NGT.[167] Additionally, the appointment of two serving expert members has been questioned. They were senior officials in the Ministry of Forests involved in deciding forest clearance issues and are now hearing appeals against their previous decisions.[168] These executive interventions cripple the independence of the NGT and question the NGT's ability to maintain environmental rule of law.

5. Conclusion

The proto-type environmental court, NSWLEC, established in 1980, is badged as a 'Rolls Royce model'. Today it stands *primus inter pares*. The national and international status of the NSWLEC is such that this chapter has placed its jurisdiction, structure, composition, judgments, accessibility, and impact under the forensic microscope. The current Chief Judge, Brian Preston, identified and catalogued twelve key characteristics of the NSWLEC: the 'desirable dozen'. These are the building blocks of a successful environmental court.

This chapter unpacks and tests these key characteristics through the NPM paradigm and places them for a comparative review alongside its younger Indian counterpart, the NGT. The commonality is striking especially when the tribunal's genesis is considered. This comparative analysis is undertaken through the lens of functionality underpinned by the environmental rule of law. It examines the common problems that produce the same or

[163] NSWLEC Act sections 8-9; see Justice D H Lloyd, 'Judicial Accountability' (Judicial Conference of Australia November 1998).

[164] NGT Act s 4-5.
[165] NGT Judgments 17 July 2014
[166] https://www.newindianexpress.com/nation/2018/jul/26/congress-raises-issue-of-appointment-of-justice-adarsh-kumar-goel-as-ngt-chairman-in-lok-sabha-1848938.html accessed 4 January 2021.
[167] Ibid.
[168] Dutta (n 138); Gill, Environmental Justice in India (n 71 at 206) states that between 2010-15 the Ministry of Environment and Forests was the defendant in 25.1% of all NGT cases.

similar outcomes resulting in better solutions. Judicial institutions founded on environmental rule of law 'solidify its legitimacy and trust across society.'[169] Although India is a developing country of 1.3 billion people it also shares the common law, the English language and democratic values with Australia. They both experience the daily consequences of the environmental crisis. There exists a unifying platform upon which similar environmental institutions were built. The NSWLEC continues to employ best practices as demonstrated through the NPM paradigm. It simultaneously offers in common cause its model and experiences to those nations that seek to contribute through law a meaningful response to current environmental issues to maintain environmental rule of law.

Influenced initially by the diffusionary adoption of the NSWLEC structure, processes and principles, the NGT's garnered widespread praise and popular expectation. This recognition, both national and international, ultimately produced a political backlash as politicians, government policy makers, and bureaucrats were unexpectantly exposed to critical examination by the tribunal and often found wanting.[170] A Thucydides trap was set and is now triggered. Jairam Ramesh, the then Minister of Environment and Forests, and architect of the NGT Act who shepherded it through Parliament, has described the tribunal as 'emasculated' and 'decimated'.[171] Institutions are subject to change from both internal and external forces. Today, the NGT displays structural cracks and deficiencies when subjected to the analysis of the NPM paradigm. The practices and performance of the NGT require re-assessment through the process of reconstruction and re-energising in order to support the environmental rule of law that will strengthen both legitimacy and trust throughout Indian society.

[169] UNEP (n 1) 19.

[170] *Sudeip Shrivastava v. State of Chhattisgarh* NGT Judgment 24 March 2014 ; *K. K. Singh v. National Ganga River Basin Authority* NGT Judgment 16 October 2014 ; Economic Times, 'Why Contempt Should Not Be Initiated Against Delhi Govt, DJB: NGT' *The Economic Times Politics* (Delhi, 23 October 2017).

[171] Ramesh (n 97); https://twitter.com/jairam_ramesh/status/1317657118183354368.