

***Environmental Courts and Tribunals: Powers, Integrity and the Search for Legitimacy***

**Ceri Warnock**

**Hart Publishing, 2020, ISBN 9781509940080**

The specialist environmental court is an intricate institution, emerging from intertwined judicial, administrative and quasi-legislative roots.<sup>1</sup> Operating at the intersection between nature and human behaviour, the issues brought before environmental courts are often ‘multi-dimensional’, cumulative, dynamic and intergenerational.<sup>2</sup> However, expansion of these courts has been complicated by criticisms that they lack legitimacy.<sup>3</sup> In *Environmental Courts and Tribunals*, Ceri Warnock argues that environmental courts lack a clear theoretical underpinning, and constructs a new theory for their legitimacy.<sup>4</sup>

Warnock draws on David Beetham’s multi-dimensional concept of legitimacy for her theory, which asserts that legitimate power ‘must have [both] legal validity’ and ‘normative validity’.<sup>5</sup> As creatures of statute, specialist environmental courts are legally valid, therefore Warnock’s central claim is confined to the normative validity of these bodies.<sup>6</sup> She argues existing conceptual frames of environmental adjudication do not adequately address normative legitimacy.<sup>7</sup> The foundation of normative legitimacy, Warnock argues, is legal integrity.<sup>8</sup> Her ‘interactional theory

<sup>1</sup> See, eg, Stephen Rivers-McCombs, ‘Planning in Wonderland: The RMA, Local Democracy and the Rule of Law’ (2011) 9(1) *New Zealand Journal of Public and International Law* 43.

<sup>2</sup> See John Dryzek, *The Politics of the Earth* (Oxford University Press, 2<sup>nd</sup> ed, 2005) 9.

<sup>3</sup> Ceri Warnock, *Environmental Courts and Tribunals: Powers, Integrity and the Search for Legitimacy* (Hart Publishing, 2020) (*‘Environmental Courts and Tribunals’*) 8. See, eg, P Lulich and P Neilson, ‘Review of the Land and Environmental Courts Jurisdiction’ (2001) 7 *Local Government Law Journal* 52: the authors cite a Sydney City Council submission as an example of concerns regarding the courts’ consideration of matters of policy.

<sup>4</sup> *Ibid.*

<sup>5</sup> David Beetham, *The Legitimation of Power (Political Analysis)* (Springer, 2<sup>nd</sup> ed, 2013) 17; Warnock (n 3) 9.

<sup>6</sup> Warnock (n 3) 8.

<sup>7</sup> *Ibid* 76.

<sup>8</sup> *Ibid* 5.

for normative legitimacy’ posits that legal integrity is fostered when environmental courts lean into, and respond to, the ‘inherent features of environmental problems’.<sup>9</sup> She argues that identifying and acknowledging the problems that make environmental disputes distinct and developing doctrines which respond to these problems is essential to normatively justifying the independence of specialist environmental courts.

What then are these defining features of environmental disputes? One example is the ‘more creative’ problem-solving processes used in environmental adjudication when considering a wide range of interests, sometimes extending to generations who are yet to be born.<sup>10</sup> This ‘creative’ approach may obscure the distinction between judicial, administrative and legislative functions.<sup>11</sup> Warnock argues that the limited functions of ordinary courts are ill-suited to settle questions of this nature. In contrast, specialist environmental courts are capable of providing legal expertise, balanced with ‘flexible evidential processes’ and a high level of ‘environmental literacy’ in efficiently resolving disputes.<sup>12</sup>

Warnock’s scrutiny of the legitimacy of environmental adjudication is timely considering the exponential rise in environmental disputes.<sup>13</sup> However, environmental literature is far from an impoverished area of scholarship.<sup>14</sup> New additions must offer highly original analysis in order to fill a lacuna in the academic discourse. The existing literature on environmental courts largely neglects critique of their legitimacy.<sup>15</sup> *Environmental Courts and Tribunals* attempts to remedy this gap through Warnock’s ‘interactional theory’.<sup>16</sup> Warnock concludes that existing theories are inadequate in their failure to acknowledge the concerns which

<sup>9</sup> Ibid 16.

<sup>10</sup> Ibid 29.

<sup>11</sup> Ibid.

<sup>12</sup> Ibid 139.

<sup>13</sup> See, eg, George Pring and Catherine Pring, *Environmental Courts and Tribunals: A Guide for Policy Makers* (United Nations Environment Program, 2016) 1.

<sup>14</sup> Warnock (n 3) 4.

<sup>15</sup> Ibid.

<sup>16</sup> Ibid 204.

underpin the criticisms of illegitimacy,<sup>17</sup> and to provide a ‘theoretical anchor’ to appease these concerns.<sup>18</sup>

*Environmental Courts and Tribunals* is structured in three distinct ‘stages’ of methodology: ‘pre-theory’ in Chapters 2 and 3, ‘building the theory’ in Chapter 4, and ‘testing the theory’ through the case examples of the Environmental Court of New Zealand and the Land and Environmental Court of New South Wales in Chapter 5. In each stage, Warnock reiterates the initial observations and over-arching criteria of normative legitimacy set out in the introduction. This approach ensures that the evidence and effect of her argument are easily identified. Further, Warnock’s clear writing makes the text accessible to those with a basic understanding of environmental law. This is an admirable feat considering the theoretical complexities at issue.

Warnock’s book does not purport to provide definitive solutions to the question of legitimacy of environmental courts, rather proposing her conceptual frame as a ‘starting point’ for future critiques and development.<sup>19</sup> This lack of finality in her conclusion is surprisingly weak considering her preceding dismantling of existing conceptual frames for normative legitimacy. By not providing a solid alternative to the existing flawed theories, Warnock may be seen as having exacerbated the weakened status of environmental courts by leaving them vulnerable to further criticism. Nonetheless, Warnock’s identification of the challenges in establishing normative legitimacy for environmental courts and her proposed more convincing frame is commended to all those forging a path forward for specialist environmental adjudication.

In summary, Warnock’s book offers an original and vigorously justified conceptual frame for specialist environmental courts. *Environmental Courts and Tribunals* will be enjoyed by lawyers, law students, policy-makers, and indeed all those interested in specialist environmental courts.

Megwyn Mosenthal\*

<sup>17</sup> Ibid 90.

<sup>18</sup> Ibid 4.

<sup>19</sup> Ibid 205.

\* BA/LLB student at the University of Tasmania and member of the *University of Tasmania Law Review* Editorial Board in 2021.