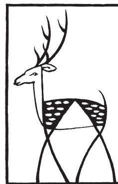
Environmental Principles and the Evolution of Environmental Law

Eloise Scotford



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Principles Principles Everywhere: Making Sense of Environmental Principles as Legal Concepts

I. Introduction

This book started from a creeping sense that there was something going on with environmental principles and legal reasoning. In reading decisions of the European Court of Justice (as it then was), I noticed the Court relying on the precautionary principle and the principle of prevention to reach their conclusions on some very knotty and significant legal points.[1] That got me thinking and digging and it soon became apparent that environmental principles seemed to be everywhere—whether it was the polluter pays principle, the precautionary principle or the 'principle' of sustainable development. They were found in different legal systems, and at different jurisdictional levels—rooted in international law and policy in some respects, but also manifesting in national and regional statutes and case law. They were also prevalent in environmental law scholarship,[2] and in policy and political debate relating to environmental issues and sustainability. It proved difficult to narrow down the focus for analysis. What were these popular pithy principles? Why were they becoming so commonplace in policy debate and legal argument? How on earth was a lawyer to make sense of them? Clearly there was something interesting going on from a legal perspective but isolating that amongst the policy and politics was a challenge, and to an extent is impossible.[3]

[1] eg Joined Cases C-418/97 and C-419/97 *ARCO Chemie Nederland v Minister Van Volkshuisvesting* [2000] ECR I-4475 (relying on the precautionary and preventive principles to interpret the fraught definition of waste in EU law); Case C-127/02 *Landelijke Vereniging tot Behoud van de Waddenzee and Nederlandse Vereniging tot Bescherming van Vogels* [2004] ECR I-7405 (relying on the precautionary principle to interpret the requirement for appropriate assessment in relation to proposed development that was to affect special areas of conservation in the EU Natura 2000 network).

[2] I am indebted to Liz Fisher for many reasons (see the Acknowledgments) but also for the title of this chapter. Liz wrote an inspiring piece on 'precaution spotting' by environmental law scholars that similarly noted the preponderance of references to the precautionary principle in EU law: Elizabeth Fisher, 'Precaution, Precaution Everywhere: Developing a "Common Understanding" of the Precautionary Principle in the European Community' (2002) 9(1) *MJ* 7.

[3] Elizabeth Fisher, Bettina Lange and Eloise Scotford, *Environmental Law: Text, Cases and Materials* (OUP 2013) ch 11; Martin Shapiro and Alec Stone Sweet, *On Law, Politics, and Judicialization*

This book aims to show what is legally interesting about environmental principles, at the date of writing. In essence, it shows two things. First, it demonstrates how environmental principles are being used by some judges to develop legal reasoning, facilitating steps in the evolution of legal doctrine relating to environmental problems that might not otherwise have been possible. Second, it shows how environmental principles are significant and highly charged concepts for scholars in thinking about the nature of environmental law as a discipline. Environmental principles carry high hopes for environmental law scholars, relating not simply to the roles and impact of environmental principles in legal reasoning, but also to the coherent structure and legitimacy of environmental law as a subject. In both these senses—concerning doctrinal development and subject identity—environmental principles are becoming important concepts in the evolution of environmental law.

These two evolutionary paths are intertwined, in a way that can generate a 'fuzzy' analytical focus, obscuring clear thinking about environmental principles as legal ideas. This is because the broader scholarly ambitions for environmental principles in environmental law can obfuscate the fine-grained detail of their legal impacts. Tseming Yang and Robert Percival struggle with this challenge in their exposition of 'global environmental law':[4]

> Global environmental law is the set of legal principles developed by national, international and transnational environmental regulatory systems to protect the environment and manage natural resources. As a body of law, it is made up of a distinct set of substantive principles and procedural methods that are specifically important or unique to governance of the environment across the world … We cannot set out in detail the substantive governing principles of global environmental law … Describing [this emergent system of legal principles] would be no easier a task than setting out the governing principles of national, international, and transnational environmental law.

One reason for this difficulty in seeing environmental principles in detail, whilst they also occupy a global stage, is that environmental principles are expected to achieve many things. It is suggested, often concurrently, that environmental principles will provide solutions to *environmental problems* and that they will provide solutions to *legal problems* in environmental law. In the latter sense, there are a number of suggested roles for environmental principles: that they are universal and foundational legal concepts that bring coherence and moral legitimacy to the disorganised, multi-jurisdictional bundle of regulation and decisions that constitute environmental law; that they might make environmental law look like other

(OUP 2002). If we see environmental principles as an example of transnational law, then the blurred line between formal state-based law and political rhetoric reflects 'the way legal rules are being formed and applied in today's world': Paul Schiff Berman, 'From International Law to Law and Globalisation' (2005) 43 *Colum J Transnat'l L* 485, 537.

[4] Tseming Yang and Robert V Percival, 'The Emergence of Global Environmental Law' (2009) 36 *Ecology LQ* 615, 616–617.

established legal subjects (including through the role of principles in judicial reasoning); or that they might otherwise overcome the considerable challenges of methodology in environmental law scholarship.[5] This final point is significant because environmental law is a discipline beset by methodological challenges—particularly due to its multi-jurisdictional, interdisciplinary, novel and reactive nature.[6] It has no long-standing legal tradition in which to frame and analyse its legal developments. To the contrary, environmental law deals with environmental problems that are, by their very nature, often legally disruptive.[7]

This book aims to show that, far from being a solution to these kinds of methodological challenges, environmental principles are affected by them in the same way as are other legal developments in environmental law. In particular, there is no way to define legally what an environmental principle is in the abstract. This is not simply because there is no universal doctrinal tradition of 'environmental principles' in environmental law,[8] but because such a singular theoretical tradition is not possible, considering the ambiguous and open-ended nature of environmental principles and the multiple jurisdictions in which, increasingly, they have legal roles. Further, environmental principles are inconsistently labelled, defined and grouped, and they are adopted and applied in a wide range of legal as well as non-legal contexts. This ambiguity in definition and application is in fact what makes environmental principles such powerful symbols, which can carry many meanings and have many potential roles. Legal confusion is further generated by the fact that environmental principles are, first and foremost, statements of policy. Environmental principles, such as the precautionary principle and polluter pays principle, represent goals of environmental protection and sustainable development. All of this represents a significant challenge for the legal study of environmental principles. Indeed it raises the question whether they are appropriate subjects of legal study at all.

This book argues that environmental principles are appropriate subjects of legal study, but only with a clearly framed methodology, appreciating both their open-ended nature and symbolic significance in environmental law. Its central contention is that there is no getting away from the detail when trying to understand the legal roles of environmental principles. Whilst it can be argued that environmental principles represent a new kind of high-level transnational legal norm and ethic in relation to environmental issues, the meanings and application of specific principles are only made concrete within discrete legal settings. The book thus examines

[5] These high hopes for environmental principles and the reasons for their proliferation in environmental law scholarship are examined in ch 2.

[6] Elizabeth Fisher, Bettina Lange, Eloise Scotford and Cinnamon Carlarne, 'Maturity and Methodology: Starting a Debate about Environmental Law Scholarship' (2009) 21(2) *JEL* 213.

[7] Elizabeth Fisher, 'Environmental Law as "Hot Law"' (2013) 25(3) *JEL* 347; Elizabeth Fisher, Eloise Scotford and Emily Barritt, 'The Legally Disruptive Nature of Climate Change' (2017) 80 *MLR* (in press).

[8] *cf* Sands and Peel who suggest that certain environmental principles have become accepted principles of international law through extensive state practice: Philippe Sands and Jacqueline Peel, *Principles of International Environmental Law* (3rd edn, CUP 2012) 188.

judicial reasoning in two jurisdictions in which a growing body of case law involving environmental principles has been developing: the European Union ('EU') and New South Wales ('NSW'). By mapping the doctrinal treatment of environmental principles in two sets of courts in these jurisdictions—the Court of Justice of the European Union ('CJEU'),[9] and the New South Wales Land and Environment Court ('NSWLEC')—the book analyses the evolving roles of environmental principles comparatively. This approach tests scholarly assumptions that environmental principles are or can be universal, in a manner that focuses in detail on the legal frameworks in which environmental principles are employed.

These close contextual analyses of environmental principles in EU and NSW law are found in Chapters Four and Five. They show that environmental principles perform very different legal roles in these different jurisdictional settings, albeit that they are implicated in novel and interesting doctrinal developments in both jurisdictions. The resulting maps of these two terrains of environmental law reinforce that there are no analytical shortcuts in appraising the evolution of environmental law, particularly not in the form of environmental principles. Environmental principles do not neatly unify environmental law as a universal body of law, legitimise it as a scholarly subject, solve its methodological problems, or otherwise provide quick solutions to environmental problems. Rather, environmental principles are significant focal points for determining the nuanced evolution of environmental law within discrete legal systems, in terms of their own legal frameworks, doctrines and cultures, which can reflect changing environmental policy priorities to the extent that such priorities inform legal reasoning. Further, the connections and cross-references between similarly named principles across jurisdictions can trigger and reinforce doctrinal developments within particular jurisdictions, but they do not indicate equivalent legal developments across jurisdictions. This approach, and conclusion, is one for environmental law scholarship generally—novel legal concepts are to be fundamentally understood within the complexities of the legal systems in which they operate, even if those systems are open to external legal influences.[10] A comparative analysis of judicial reasoning involving environmental principles is thus significant in relation to both of the book's aims—in elaborating the legal roles of principles within particular legal systems, and in examining their broader role within environmental law and environmental law scholarship.

[9] The CJEU is comprised of the Court of Justice ('CJ'), formerly the European Court of Justice ('ECJ'), and the General Court, formerly the Court of First Instance ('CFI'). See further n 75.

[10] This reflects a systems theory understanding of legal systems that are normatively closed but cognitively open, acting as self-referential systems that respond to external change through their own normative logics: see Gunther Teubner, 'Autopoiesis in Law and Society: A Rejoinder to Blankenburg' (1984) 18 *Law and Society Review* 291: *cf* the earlier work of Philippe Nonet and Philip Selznick, *Law and Society in Transition: Toward Responsive Law* (Harper 1978) ('responsive' legal systems are self-referential but responsive to external social influences, which are filtered through systems' internal frames of normative development).

This chapter introduces the project of the book by setting out its methodology and scope, showing that precise analytical steps are required to appraise developments concerning environmental principles in different legal cultures, whilst recognising that environmental principles can also have a transnational character. Chapters Two and Three then develop the argument for the importance of the book's comparative analysis, both in the context of environmental law scholarship and across different legal spaces in which environmental principles have been developing (often ambiguous) meanings and roles. Chapter Two examines the scholarly motivations for, and methodological approaches to, analysing environmental principles to date; while Chapter Three examines the evolution of environmental principles at both international and domestic/regional levels, focusing on the particular legal contexts mapped in this book. This deeper examination of environmental principles within legal contexts, and their role in environmental law scholarship, shows that environmental principles are not universal or autonomous legal concepts for which there is an obvious legal analytical framework. Rather, environmental principles look very different, despite similar names, in different jurisdictions. At the same time, environmental principles are playing important legal roles in these different legal settings and there is increasing and shared enthusiasm for their use across jurisdictions, although any commonality rests in their symbolism and ability to stimulate legal change rather than in their legal equivalence. The challenge in studying environmental principles as legal ideas is thus primarily a methodological one—how to make sense of principles that have some transnational connections but which are taking on different and prominent legal roles within particular jurisdictions.

As a brief introduction, Part II identifies the environmental principles with which this book is concerned and the extent of their high profile in environmental law. The deep scholarly interest in environmental principles is elaborated critically in Chapter Two, but a quick sketch here of the wide legal interest in environmental principles establishes that environmental principles are increasingly prominent legal phenomena globally. Even this brief outline highlights that environmental lawyers need to make sense of environmental principles and to take them seriously in appreciating how environmental law is evolving across jurisdictions.

II. Environmental Principles and Their High Profile in Environmental Law

There is no definitive and universal catalogue of environmental principles.[11] Further, it is not possible to state definitively what an 'environmental principle' is

[11] In environmental law scholarship, there is an extensive but inconsistent group of identified 'environmental principles': see eg Nicolas de Sadeleer, *Environmental Principles: From Political Slogans to*

or means. As indicated above, environmental principles are primarily policy ideas concerning how environmental protection and sustainable development ought to be pursued.[12] They are 'policies' in the broad sense that environmental principles reflect courses of action adopted to secure, or that tend to secure, a state of affairs conceived to be desirable.[13] Further, they are policies in the Dworkinian sense of 'collective goal[s] of the community as a whole'.[14] This raises an immediate question about whether environmental principles have any legal identity at all.[15] Certainly, environmental principles have no pre-programmed legal identities as generally expressed ideas of policy. This Part explains how environmental principles have come to have a high legal profile, despite their policy roots, through legal instruments, legal scholarship and judicial reasoning. More broadly, the book argues that it is fundamentally through their legal roles and treatment in particular legal settings, such as in EU and NSW law, that environmental principles develop focused legal identities and (marginal) legal meanings.

This Part introduces the environmental principles examined in this book by name and a brief description to orient the discussion, focusing on those principles that have become prominent in the case law of the European courts and NSWLEC. The general descriptions given here belie a wide range of often-conflicting definitions given for environmental principles, which reflect their open-textured formulation. These definitional conflicts are further examined in Chapter Three, and mean that, in legal terms, environmental principles fall within a 'category of concealed multiple reference'.[16]

Legal Rules (OUP 2002) 1–2 (examining the precautionary principle, principle of prevention and polluter pays principle as the 'three foremost environmental principles' amongst a number of principles whose 'disparity leads to perplexity'); *cf* Alhaji B M Marong, 'From Rio to Johannesburg: Reflections on the Role of International Legal Norms in Sustainable Development' (2003) 16 *Geo Int'l Envtl L Rev* 21, 59–64 (identifying a variety of groupings of principles said to constitute 'legal principles of sustainable development'). This variety of groupings reflects developments in a range of legal and policy contexts: see ch 3.

[12] Environmental protection and sustainable development are not the same goals: Mary Pat Williams Silveira, 'International Legal Instruments and Sustainable Development: Principles, Requirements, and Restructuring' (1995) 31 *Willamette L Rev* 239, 241–2.

[13] Neil MacCormick, *Legal Reasoning and Legal Theory* (Clarendon Press 1994) 261; Leonor Moral Soriano, 'A Modest Notion of Coherence in Legal Reasoning: A Model for the European Court of Justice' (2003) 16(3) *Ratio Juris* 296, 308–9.

[14] Ronald Dworkin, *Taking Rights Seriously* (rev edn, Duckworth 1978) 82.

[15] There is extensive jurisprudential debate on the role of policy in law, including Dworkin's concern about the proper distinction between policy and law in judicial reasoning, which is examined in ch 2 to the extent that it has influenced environmental law scholarship on environmental principles: see ch 2(II)(D)(i). Environmental law scholars however recognise that policy plays an important, if doctrinally challenging, place in environmental law: Fisher, Lange and Scotford, *Environmental Law: Text, Cases and Materials* (n 3) 439–459; D E Fisher, *Australian Environmental Law: Norms, Principles and Rules* (Thomson Reuters 2014) 125.

[16] Julius Stone, *Legal System and Lawyers' Reasonings* (Stanford University Press 1964) 246. The connection between amorphous ideas like environmental principles and Stone's legal categories of 'illusory reference' was made by the editors in their introduction to Paul Martin and others (eds), *The Search for Environmental Justice* (Edward Elgar 2015) 2.

In the case law of the European courts, six environmental principles can be identified. These are the *preventive principle* (that pollution or other environmental harm should be prevented, as opposed to remedied once generated), the *principle of rectification at source* (that environmental harm should be prevented at its source), the *precautionary principle* (that lack of full scientific knowledge should not be a reason for postponing preventive action where there is a risk of serious environmental harm), the *polluter pays principle* (that polluters should pay for the environmental harm they cause), the *integration principle* (that environmental protection requirements should be integrated into other policy areas), and the *principle of sustainable development* (generally reflecting some balancing of environmental, economic and social factors, or as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs').[17]

In the case law of the NSWLEC, there is some overlap with these EU law environmental principles, although they are referred to as *principles of 'ecologically sustainable development'* in NSW law. Thus there are identifiable versions of the precautionary principle, the polluter pays principle and the integration principle, although the latter two have explicitly different manifestations in this context. The polluter pays principle is contained within a broader '*principle of internalisation of environmental costs*', and the integration principle in this legal context refers to the idea that economic and environmental (and sometimes social) considerations should be integrated in public decision-making. Two other environmental principles also feature prominently in NSWLEC reasoning—the *principle of intergenerational equity* (that current generations owe duties to future generations to conserve environmental resources), and the *principle of conservation of biological diversity and ecological integrity* (as it suggests, that biodiversity should be conserved and ecological integrity maintained).

All these environmental principles, and others,[18] now have a high profile in environmental law and policy internationally, and in environmental law

[17] There is extensive debate over the concept of sustainable development, including its elusive definition: see ch 3, text accompanying nn 75–91. The definition quoted here is the often-cited one from the Brundtland Report: World Commission on Environment and Development, *Our Common Future* (OUP 1987) 43 ('Brundtland Report').

[18] eg the principle of intra-generational equity, the principle of sustainability, the principle of sustainable use, the principle of substitution, the proximity principle and the principle of self-sufficiency. These are discussed in chs 3, 4 and 5, as they arise as principles at the fringe of judicial reasoning in EU and NSW law, or otherwise in environmental policy and legal scholarship. There are also other 'environmental principles' that have been suggested by scholars as emerging norms of environmental law, such as the non-regression principle (Michel Prieur, 'Le Nouveau Principe de «Non Régression» en Droit de l'Environnement' in Michel Prieur and Gonzalo Sozzo (eds), *La Non Régression en Droit de l'Environnement* (Bruylant 2012), the principle of resilience (Nicholas A Robinson, 'Evolved Norms: A Canon for the Anthropocene' in Christina Voigt (ed) *Rule of Law for Nature: New Dimensions and Ideas in Environmental Law* (CUP 2013), and the principle of ecological proportionality (Gerd Winter, 'Ecological Proportionality: An Emerging Principle of Law for Nature?' in Christina Voigt (ed) *Rule of Law for Nature: New Dimensions and Ideas in Environmental Law* (CUP 2013)). See also the various 'principles' of sustainable development discussed in ch 3(II)(B).

scholarship. As indicated above, they constitute a seemingly amorphous group of policy catchphrases.[19] They are designated as 'principles' by their name, by the instruments in which they are found,[20] or by commentators by way of shorthand. It is in this third sense particularly that the study and profile of 'environmental principles' in environmental law has flourished, in particular since the early 1990s. Thus environmental law textbooks now have chapters or sections on 'principles' of environmental law and policy,[21] serious scholarly works on environmental principles in law have been written,[22] legal conferences and judicial symposia concerning environmental principles have been held,[23] and legal academic articles and book chapters on environmental principles proliferate.[24] In addition, interdisciplinary and 'transdisciplinary' works include legal appraisal of environmental principles.[25]

[19] *cf* Stephen Tromans, 'High Talk and Low Cunning: Putting Environmental Principles into Legal Practice' [1995] *JPEL* 779, 780.

[20] eg Brundtland Report (n 17) annexe 1; the Rio Declaration also sets out its agreed environmental protection proclamations as 'principles': United Nations Conference on Environment and Development, 'Rio Declaration on Environment and Development' (14 June 1992) UN Doc A/CONF.151/26 (Vol. I), 31 ILM 874 (1992); Treaty on the Functioning of the European Union (Lisbon Treaty) ('TFEU') arts 11, 191; Protection of the Environment Administration Act 1991 (NSW) ('POEA Act') s 6(2).

[21] eg Stuart Bell, Donald McGillivray and Ole Pedersen, *Environmental Law* (8th edn, OUP 2013) 56–75; Fisher, Lange and Scotford, *Environmental Law: Text, Cases and Materials* (n 3) ch 11; Susan Wolf and Neil Stanley, *Wolf and Stanley on Environmental Law* (6th ed, Routeledge-Cavendish 2014) [1.8]; Jan H Jans and Hans HB Vedder, *EU Environmental Law*, 4th edn (Europa Law Publishing 2012) 13–31; Sands and Peel, *Principles of International Environmental Law* (n 8) ch 6; Maria Lee, *EU Environmental Law, Governance and Decision-Making* (2nd edn, Hart 2014) 4–15; Maurice Evans, *Principles of Environmental and Heritage Law* (Prospect Media 2000) chs 5–9; Fisher, *Australian Environmental Law: Norms, Principles and Rules* (n 15) chs 5–7.

[22] In particular, de Sadeleer, *Environmental Principles* (n 11). See also Richard Macrory, Ian Havercroft and Ray Purdy (eds), *Principles of European Environmental Law* (Europa Law Publishing 2004).

[23] eg M Sheridan and L Lavrysen (eds), *Environmental Law Principles in Practice* (Bruylant 2002); UNEP, 'Johannesburg Principles on the Role of Law and Sustainable Development', Global Judges Symposium, Johannesburg, South Africa, 18–20 August 2002. Interdisciplinary conferences have also been held on environmental principles, including their legal appraisal, eg Timothy O'Riordan and James Cameron (eds), *Interpreting the Precautionary Principle* (Cameron May 1994); Ronnie Harding, Michael Young and Elizabeth Fisher, 'Interpretation of Principles' (Fenner Conference on the Environment—Sustainability: Principles to Practice 1994).

[24] eg Tromans, 'High Talk' (n 19); Ben Boer, 'Institutionalising Ecologically Sustainably Development: The Roles of National, State, and Local Governments in Translating Grand Strategy into Action' (1995) 31 *Willamette L Rev* 307; Paul Stein, 'Turning Soft Law into Hard—An Australian Experience with ESD Principles in Practice' (1997) 3(2) *The Judicial Review* 91; Michael G Doherty, 'Hard Cases and Environmental Principles: An Aid to Interpretation?' (2004) 3 *YEEL* 57; Gerd Winter, 'The Legal Nature of Environmental Principles in International, EC and German Law' in R Macrory, I Havercroft and R Purdy (eds), *Principles of European Environmental Law* (Europa Law Publishing 2004); Astrid Epiney, 'Environmental Principles' in R Macrory (ed) *Reflections on 30 Years of EU Environmental Law* (Europa Law Publishing 2006); Eloise Scotford, 'Mapping the Article 174(2) Case Law: A First Step to Analysing Community Environmental Law Principles' (2008) 8 *YEEL* 1; Brian Preston, 'Sustainable Development Law in the Courts: The Polluter Pays Principle' (2009) 26 *EPLJ* 257; Andrew Edgar, 'Institutions and Sustainability: Merits Review Tribunals and the Precautionary Principle' (2013) 16(1) *Australasian Journal of Natural Resources Law and Policy* 61; Brian Preston, 'The Judicial Development of Ecologically Sustainable Development' in Douglas Fisher (ed), *Research Handbook on Fundamental Concepts of Environmental Law* (Edward Elgar 2016).

[25] eg Sharon Beder, *Environmental Principles and Policies: An Interdisciplinary Introduction* (Earthscan, 2006); Andreas Philippopoulos-Mihalopoulos, *Absent Environments: Theorising*

The profile of environmental principles in environmental law has particularly grown internationally in recent decades because of their increasing presence in international treaties and soft law agreements, binding regional agreements, and domestic legislation.[26] The wide range of 'environmental principles' that have been formulated in international soft law agreements concerning sustainable development are of particular significance, since these provide an apparent basis on which to build a universal understanding of environmental principles as legal concepts.[27]

Environmental principles also have a high profile in case law across jurisdictions. They have been judicially recognised in at least three ways. First, judicial reasoning has considered environmental principles contained in legal instruments that a court is interpreting or applying—this is seen in both the European judgments and NSWLEC decisions analysed in Chapters Four and Five, in relation to the Treaty on the Functioning of the European Union ('TFEU') and NSW statutes, which respectively contain references to certain environmental principles. Second, judicial reasoning has also been innovative in its recognition and treatment of such principles. Judges of the NSWLEC recognised environmental principles and employed them in judicial reasoning before they were included in NSW legislation,[28] and, in public international law, Judge Weeramantry delivered (often dissenting) opinions in the International Court of Justice declaring various environmental principles to be 'important and rapidly developing principle[s] of contemporary environmental law',[29] and important legal principles that must be recognised.[30] The Indian courts have also been particularly progressive in reading environmental principles into their constitutional jurisprudence.[31]

Third, judicial reasoning in particular jurisdictions has promoted the profile of environmental principles by cross-referring to judgments concerning

Environmental Law and the City (Routeledge-Cavendish, 2007); Robinson, 'Evolved Norms: A Canon for the Anthropocene' (n 18).

[26] On how environmental principles are appearing and evolving at different jurisdictional levels, see ch 3.

[27] See ch 3(II)(A).

[28] See ch 3(IV)(C)(i).

[29] In relation to the precautionary principle and principle of intergenerational equity: *Nuclear Tests Case (New Zealand v France)* [1995] ICJ Rep 288, 341 (dissenting opinion).

[30] Judge Weeramantry has identified the precautionary principle as 'gaining increasing support as part of the international law of the environment': ibid 342. In a subsequent case, he found that the principle of sustainable development is a legal 'principle of reconciliation' between the needs of development and the need to protect the environment: *Gabčikovo-Nagymaros Project (Hungary v Slovakia)* [1997] ICJ Rep 7, 90 (separate opinion). The majority judgment in *Pulp Mills (Argentina v Uruguay)* [2010] ICJ Rep 14 supported this approach, finding that the concept of sustainable development informed a key treaty provision (at [178]).

[31] See eg *Vellore Citizens' Welfare Forum v Union of India* AIR 1996 SC 2715, 2721-2 (the precautionary principle and polluter pays principle applied as rules of law by relying on constitutional provisions); *AP Pollution Control Board v Nayudu* AIR 1999 SC 812, 821 (principle of intergenerational equity); *Samaj Parivartana Samudaya v State of Karnataka* AIR 2013 SC 3217 (principle of intergenerational equity). The Pakistani courts have been similarly progressive in adopting the precautionary principle as a legal rule in interpreting the Pakistan constitution: *Zia v WAPAD* PLD 1994 SC 693 [8].

environmental principles in other jurisdictions, building what looks like global, or transnational, jurisprudence on environmental principles independent of the legal context in which they are being used.[32] Examples of this are seen in NSWLEC reasoning,[33] as well as in other jurisdictions such as India and Canada,[34] although this kind of transnational judicial discussion is notably absent from European decisions involving environmental principles. All this judicial activity has been developed partly through networks of judges,[35] who have a 'sense of shared purpose and values, and willingness to learn from the experiences of each other'.[36] This cross-fertilisation of judicial reasoning has also informed, and been informed by, legal scholarly developments with respect to environmental principles. Together, these authoritative discussions have progressively built a mutually reinforcing footing for the high profile of environmental principles in environmental law generally. In short, environmental principles are now part of the 'lingua franca' of environmental lawyers across jurisdictions internationally.[37] This high profile suggests that environmental principles are concepts that environmental lawyers need to understand and analyse.

The following Part sets out the distinctive methodology of the book, which is designed for such lawyerly analysis. In particular, it is designed to analyse environmental principles as novel legal concepts in environmental law, by avoiding generalisations or assumptions about the legal nature of environmental principles and, instead, explicitly inquiring into the detail of how environmental principles operate (or do not operate) as part of the legal fabric of different legal systems.

[32] Boer sees this as part of the globalisation of environmental law, particularly based on common principles: Ben Boer, 'The Rise of Environmental Law in the Asian Region' (1999) 32 *U Rich L Rev* 1503, 1510. See also Robert Carnwath, 'Judicial Protection of the Environment: At Home and Abroad' (2004) 16(3) *JEL* 315; Brian Preston, 'The Role of the Judiciary in Promoting Sustainable Development: The Experience of Asia and the Pacific' (2005) 9(2) *Asia Pac J Envtl L* 109; Lord Carnwath, 'Environmental Law in a Global Society' (2015) 3 *JPEL* 269; Preston, 'The Judicial Development of Ecologically Sustainable Development' (n 24).

[33] eg *Telstra Corporation v Hornsby Shire Council* [2006] NSWLEC 133; (2006) 146 LGERA 10; (2006) 67 NSWLR 256 [156–9] (Preston CJ drew on European cases to elucidate the precautionary principle); *Gray v Minister for Planning* [2006] NSWLEC 720; (2006) 152 LGERA 258 [121] (Pain J refers to *Minors Oposa v Secretary of the Department of Environment and Natural Resources* 33 ILM 174 (1994) (Supreme Court of the Philippines) to 'underscore the importance of [the principle of intergenerational equity]'). See ch 5.

[34] *Nayudu* (n 31) 821 (referring to New Zealand Decision *Ashburton Acclimatisation Society v Federated Farmers of New Zealand* [1998] 1 NZLR 78); *114957 Canada Ltee v Hudson (Town)* [2001] 2 SCR 241 [32] (referring to Indian cases, above n 31).

[35] These include the Asian Judges Network for the Environment (<http://www.asianjudges.org> accessed 28 July 2016), the European Union of Judges for the Environment (<http://www.eufje.org/index.php/en?> accessed 28 July 2016), and UNEP's Judges Programme under the Division of Environmental Law and Conventions (http://www.unep.org/delc/judgesprogramme> accessed 28 July 2016). On the role of judicial networks in globalising law, see Anne-Marie Slaughter, 'Judicial Globalisation' (2000) 40 *Va J Int'l L* 1103.

[36] Carnwath, 'Environmental Law in a Global Society' (n 32) 274.

[37] Doherty, 'Hard Cases' (n 24) 58.