This is a draft chapter/article. The final version is available in Research Handbook on Environmental Law (2nd ed), edited by Douglas Fisher, published in 2022, Edward Elgar Publishing Ltd.

https://doi.org/10.4337/9781839108327

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Environmental Principles in Environmental Law

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1 Introduction

Environmental principles have become central ideas in environmental law globally.[1] However, they remain complex legal ideas to analyse. This is because their normative character is often developing or novel, or both. They are a good example of what Elizabeth Fisher describes as 'hot law',[2] where our familiar frames of legal reference do not provide clear maps for the legal phenomena we observe, which is a strong feature in environmental law generally due to the polycentric, uncertain, dynamic nature of many environmental problems. This chapter outlines the conceptual challenge of framing environmental principles as legal ideas, and analyses different ways in which environmental principles are taking on legal roles in jurisdictions around the world. Overall, it shows how the normative status of environmental principles is developing across diverse bodies of environmental law and constructing a rich if heterogeneous body of transnational jurisprudence.

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[1] Eloise Scotford, *Environmental Principles and the Evolution of Environmental Law* (Hart Publishing 2017); Ludwig Krämer and Emanuela Orlando (eds), *Principles of Environmental Law* (Edward Elgar 2018); Nicolas de Sadeleer, *Environmental Principles: From Political Slogans to Legal Rules* (2nd ed, OUP 2020).

[2] Elizabeth Fisher, 'Environmental Law as "Hot" Law' (2013) 25(3) JEL 347.

The legal trouble with 'environmental principles' starts with their nomenclature. 'Principles' connote many things – foundational ideas, generally applicable ideas, legal ideas, ethical ideas, high-level ideas. They are thus readily cast in many actual or potential legal (and other) roles. They are variously construed as jurisprudential foundations of environmental law as a discipline,[3] as 'substantive governing principles of global environmental law',[4] as the legal means to close the 'gap between political rhetoric and practical action' in addressing environmental problems,[5] and as policy ideas whose meanings are far from certain but which are easy to agree on.[6] They are readily described as '*legal* principles', which has doctrinal connotations, in both international or domestic legal systems,[7] as well as jurisprudential implications.[8] Alongside this, there is a strong purposive push for principles to drive the development of environmental law, whether on moral, methodological or policy grounds.[9] The populist and ethical appeal of environmental principles lend them gravitas and polemical force.[10] The legal reality (at the time of writing) of environmental principles is somewhere between these various doctrinal, jurisprudential, and policy positions. The chapter thus starts by setting out general features of environmental principles, before exploring the diverse conceptual foundations potentially underlying environmental principles as legal ideas.

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[3] de Sadeleer (n 1).
[4] Tseming Yang and Robert V Percival, 'The Emergence of Global Environmental Law' (2009) 36 Ecology LQ 615, 617.
[5] Marong # 49.
[6] Andrew Jordan and Timothy O'Riordan, 'The Precautionary Principle in Contemporary Environmental Policy and Politics' in Carolyn Raffensperger and Joel Tickner (eds), *Protecting Public Health and the Environment: Implementing the Precautionary Principle* (Island Press 1999) 15 ('the application of the precautionary principle will remain politically potent so long as it continues to be tantalizingly ill-defined and imperfectly translatable into codes of conduct').
[7] #
[8] See Bosselmann (2016) – or better ref?
[9] For the diverse policy and legal reasons motivating the popularity of environmental principles, see Scotford, *Environmental Principles* (n 1) ch 2.
[10] One might argue that the polemical role of principles is particularly important in a political age where intuition and deep-seated cultural worldviews may trump reason and self-preservation: Brian J Preston, 'The End of Enlightened Environmental Law?' (2019) 31(3) JEL 399.

This diversity is not to suggest that environmental principles are not important concepts in environmental law. Quite the contrary. They perform a range of notable legal functions, which have been increasing over time in many legal settings around the world. The chapter goes on to analyse those functions by considering: (1) the legal roles of environmental principles in national environmental decision-making; and (2) their legal roles in national policymaking. This analysis shows how environmental principles are legally relevant in different spheres of governance and different jurisdictions, and also highlights interconnections between those roles. Overall, the chapter shows that the legal roles of environmental principles range from the legally irrelevant to the legally transformative, and any single legal narrative about environmental principles as legal concepts risks obscuring the rich legal and political architectures in which environmental principles are taking on – and might yet take on – legal roles.

This chapter concludes by remarking on the legitimacy challenges that arise in legalizing environmental principles. As they take on legal roles in different legal cultures, there can be important questions about who should be authorizing, interpreting and implementing environmental principles and what the principles might mean in relation to specific environmental problems. In raising these questions, the chapter aims to move the debate on from asking whether environmental principles are legal concepts, and how to frame those concepts, to addressing the normative implications of their increasingly prominent legal roles.

2 Features of environmental principles

In this chapter, 'environmental principles' refer to environmental principles that are pure expressions of environmental policy, which do not explicitly articulate or express any right, duty or legal process. They are policy ideas concerning how environmental protection and

sustainable development ought to be pursued.[11] They include the precautionary principle, polluter pays principle, principle of prevention, principle of intergenerational equity, principle of non-regression, integration principle, principle of ecological integrity, and so on. They are principles that can guide policymaking and decision-making at all levels of governance – in this sense, they are universally applicable. These principles are often framed as subsidiary to the overarching notion of sustainable development or sustainability, which itself is variously described as a 'principle', 'objective', 'concept', 'goal', and so on.[12] This chapter does not explore the normative nature of sustainable development in any detail,[13] but the loose terminology over what might be identified as an 'environmental principle' is a common feature of environmental policy and law.

Having said that, environmental principles do constitute a distinctive breed of 'principle', and the boundary drawn in this chapter is deliberate. It highlights that certain environmental principles are gaining prominence in many legal settings globally, as distinctive notions that have roots in substantive policy, rather than arising from firm legal traditions.[14] This definition of an 'environmental principle' does not include environmental decision-making processes (such as environmental impact assessment), substantive rights (such as the right to a healthy environment) or procedural rights (such as those in the Aarhus Convention and Escazu Agreement).[15] These are all sometimes referred as environmental principles in a very broad sense,[16] but they are legal processes and rights that have or relate to

[11] Environmental principles are 'policies' in the sense that they reflect courses of action adopted to secure, or that tend to secure, a state of affairs conceived to be desirable: Neil MacCormick, *Legal Reasoning and Legal Theory* (Clarendon Press 1994) 261.
[12] See Verschuuren (2016).
[13] Ibid.
[14] They have 'no pre-programmed legal identities': Scotford, *Environmental Principles* (n 1) 6.
[15] 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters 2161 UNTS 447 (1999); Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (Escazu, 4 March 2018; in force 22 April 2021).
[16] Particularly in soft law documents where there is a bigger environmental or sustainability agenda (see eg Rio Declaration or draft Global Pact nn #).

distinctive legal traditions in international and domestic law and around which substantial lawmaking and discrete doctrine have grown in many jurisdictions. By contrast, environmental principles – as increasingly legalized policy ideas – comprise a relatively coherent descriptive group, which raise distinctive questions about *how* they are legalised.[17] Not all scholars or policymakers would agree with this definition or boundary,[18] but it brings a sustained analytical focus to a prominent and contentious part of the legal story about environmental principles without assuming *a priori* the nature of their legal functions, or getting lost in their global heterogeneity.[19]

Their heterogeneity arises partly because there is no definitive catalogue of environmental principles globally. There are some key international, soft law instruments that list environmental 'principles' – notably the Brundtland Report 1987,[20] Rio Declaration 1992,[21] the World Declaration on the Environmental Rule of Law 2016,[22] and the Draft Global Pact for the Environmental 2017[23] – but each instrument contains a different, if overlapping, categorical list of principles. This diversity reflects different contexts in which

[17] The bounds of this definition are porous (new principles are added through legal developments – as in NSWLEC case law where the grouping of statutory ESD principles has been expanded by judicial reasoning – see Eloise Scotford, 'Environmental Principles and the Construction of a New Body of Legal Reasoning' in Elizabeth Fisher and Brian Preston (eds), *An Environmental Court in Action: Function, Doctrine and Process* (Hart 2022, in press) #) and imperfect (eg the 'principle of common but differentiated responsibilities' arguably falls within this grouping but it is not necessarily restricted to *environmental* policymaking and it remains relatively firmly situated in international law and policymaking, rather than being relevant to environmental policymaking at all levels of governance).

[18] For example, de Sadeleer defines three environmental principles (the precautionary principle, principle of prevention and polluter pays principle) as 'landmark principles' or 'directing principles' that 'in some sense constitute the foundation of environmental law' and which 'are specifically intended to impose obligations on public authorities by providing guidance concerning choices and methods in relation to measures to limit environmental risks with the aim of guaranteeing citizens the right to enjoy a healthy environment' (# 9-11).

[19] This diversity comes not only from the different groupings of principles found in different legal and policy settings, but also from their conceptually different characters, straddling economic ideas, approaches to scientific uncertainty, notions of justice, overarching vs more focused policy ideas: Scotford, *Environmental Principles* (n 1) 77-78.

[20] World Commission on Environment and Development, *Our Common Future* (OUP 1987) Annex 1.

[21] 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).

[22] (n 45).

[23] Available at https://globalpactenvironment.org/en/document/draft-global-pact-for-the-environment-by-the-igep/ (accessed 12 November 2021).

these agreements were made,[24] and also different perspectives on what constitutes an environmental 'principle' and which principles are valuable to recognize.[25] There are also further legal groupings of environmental principles in regional and national contexts – in legislative texts,[26] in constitutional instruments,[27] and in jurisprudence.[28] These different groupings reflect political and judicial choices about what constitutes a relevant 'environmental principle', or which concepts are so described in academic commentary.

Even if an environmental principle is identified as such, there are no clear definitions of individual principles. They are open concepts, which admit of multiple meanings, making them concepts of rich policy and also legal potential, as well as subject to contestation. They are flexible 'verbal entities' that can apply to a range of factual situations in various and potentially conflicting ways.[29] Thus, perhaps most notoriously, there are debates over what the precautionary principle means and requires.[30] Differing definitions of principles matter as they might be seen to express very different levels of environmental ambition.[31] Environmental principles might also be described as expressing values or even fundamental norms. This is particularly in relation to principles justified by legal and environmental philosophical ideas. This would include principles such as intergenerational equity[32] and

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[24] Thus, for example, the Rio Declaration has a focus on development as well as environmental protection with some 'principles' reflecting this, whereas the World Declaration on the Environmental Rule of Law is a holistic set of 'principles' concerned with an 'environmental rule of law' which include legal rights and duties as well as substantive policy principles.

[25] See Scotford, *Environmental Principles* (n 1) 68-76.

[26] Give example of grouping/CR? #

[27] Give example of grouping/CR? #

[28] Give example of grouping/CR? #

[29] Julius Stone, *Legal System and Lawyers' Reasonings* (Stanford University Press 1964) 246.

[30] Compare the prohibitive, protectionist version of the principle (no action must be taken where there is any risk of environmental harm) and a more administrative version of the principle based on rigorous risk assessment and management processes: eg Cass Sunstein, *Laws of Fear: Beyond the Precautionary Principle* (CUP 2005); cf Commission of the European Communities, 'Communication from the Commission on the Precautionary Principle' COM (2000) 1.

[31] #

[32] Edith Brown Weiss, *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity* (Transnational Publishers 1989)

ecological integrity,[33] as well as the umbrella concept of 'sustainability'.[34] Viewing such philosophically empowered principles as fundamental values or norms arguably gives them inherent force as legal concepts (as discussed in the following section),[35] but this does not give a clear account of their legal roles or implications. Much will depend on the legal context in which they are adopted or employed.

Perhaps the most compelling aspect of environmental principles is their general, high-level applicability to scientifically complex, collective, interconnected environmental problems. Policy answers to such problems are rarely easy and environmental principles set a direction of travel for detailed legal and regulatory responses to those problems. They are vehicles for addressing the complexity and interconnectedness of environmental problems at a high level, when detailed regulatory regimes might not easily take this bigger view.[36] This view of principles characterizes them readily as regulatory *objectives*, and it is unsurprising that principles often appear in national legislation as objects of environmental law regimes.[37] However, that is not the full story.[38] Environmental principles are taking on a range of legal roles in different legal contexts, infusing environmental law regimes with their policy prescriptions in diverse ways. As Douglas Fisher notes about environmental law norms generally, the 'range of relevant interests has expanded exponentially and so has the range of relevant norms and rules'.[39] Environmental principles are a prime example of this normative expansion.

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[33] Aldo Leopold, *A Sand County Almanac* (OUP 1949); cf Yasha Rohwer and Emma Marris, 'Ecosystem Integrity is Neither Real nor Valuable' (2021) 3(4) *Conservation Science and Practice.*
[34] Klaus Bosselmann, *The Principle of Sustainability: Transforming Law and Governance* (Ashgate 2008).
[35] Eg Bosselman (2016)
[36] Chris McGrath, 'The Role Played by Policy Objectives in Environmental Law' ('In the absence of objectives, [environmental governance] activities are undirected and uncoordinated': 369).
[37] Eg 'sustainable management' and NZ RMA #.
[38] This is partly because regulatory objectives can be cast in forms other than principles eg 'environmental protection' or 'improving the natural environment'.
[39] (Fisher 2016) 20.

3 The normative conundrum of environmental principles

In analysing this normative expansion, routine legal tools are quite blunt. Environmental principles look like, or might be assumed to be, various kinds of recognisable 'legal' principles. In international law, environmental principles might be analysed as, or might become, principles of customary international law,[40] although they are better expressed as 'general' policy prescriptions which 'have broad, if not necessarily universal, support and are frequently endorsed in [international] practice'.[41] They might act as 'legal principles' according to regional or national jurisdictional doctrinal traditions,[42] although their asserted identification as, for example, 'general principles' of EU law does not withstand close scrutiny.[43] They might also be cast as legal principles in a jurisprudential sense, whether explaining these suggested doctrinal roles or as a normative position.[44] Environmental principles might also be understood as novel or less recognised legal concepts. Thus high hopes for environmental principles as foundations for a global 'environmental rule of law'[45] often forge an international narrative around the role of environmental principles as universal, transnational global norms.[46] Within discrete jurisdictions, environmental principles can also catalyse new legal reasoning, whether around constitutional rights[47] or within discrete areas

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[40] The principle of prevention is the prime example here (*Belgium/Netherlands* (*Iron Rhine* Arbitration) Award of 25 May 2005, PCA Award Series (2007) 59, 222), whilst other principles have echoes of international law status: see Philippe Sands, Jacqueline Peel, Adriana Fabra, Ruth MacKenzie, *Principles of International Environmental Law* (4th end, CUP) 197-201.
[41] Sands, Peel et al (n #) 197.
[42] Such as 'general principles of EU law', although even here the legal equivalence is complex: see Scotford, *Environmental Principles* #.
[43] The fateful identification of the precautionary principle as a 'general principle' of EU law in Artegodan# seems to refer to the precautionary principle having 'general' application across spheres of EU policy, rather than being a doctrinal statement as to the nature of the precautionary principle in EU law: see Scotford #
[44] See below nn # and accompanying text.
[45] IUCN, *World Declaration on the Environmental Rule of Law* (2017) https://www.iucn.org/sites/dev/files/content/documents/world_declaration_on_the_environmental_rule_of_law_final_2017-3-17.pdf.
[46] Krämer & Orlando (n **Error! Bookmark not defined.**); Tseming Yang and Robert V Percival, 'The Emergence of Global Environmental Law' (2009) 36 Ecology LQ 615.
[47] As in the case of Indian jurisprudence concerning environmental principles. See e.g. [case] and Eloise Scotford, 'Environmental Principles Across Jurisdictions: Legal Connectors and Catalysts' in Emma Lees and Jorge Vinuales (eds), *Oxford Handbook of Comparative Environmental Law* (OUP 2019).

of legal doctrine.[48] None of these characterisations – global or local, normative or doctrinal, established or emerging – is the complete legal story for environmental principles. The overall legal picture is one of legal pluralism.

This section breaks down the normative conundrum of environmental principles by examining them against an established paradigm of analytical jurisprudence (the distinction between rules and principles), and then as new forms of law and governance through a functional lens. This diametrical analysis shows the breadth of analytical and conceptual foundations potentially underlying environmental principles as legal ideas. The section argues that a functional approach to framing legal principles is most appropriate, since the legal character of principles is ultimately determined by the legal cultures in which they are taking on legal roles. This explanatory analysis nonetheless raises important normative questions about how principles are used in legal argument and reasoning, and how this is justified.

Analytical normative conceptualisation: principles versus rules

There are various ways to debate the (actual or potential) jurisprudential character of environmental principles analytically. They might be rejected outright as legal norms on Kelsen's 'pure' theory of law or other strict positivist traditions;[49] they might be appraised as developing positivist dimensions even as they display a moral or political character;[50] they

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[48] A good example of this is in the NSW Land and Environment Court. See Scotford, 'Environmental Principles and the Construction of a New Body of Legal Reasoning' (n 17).

[49] For Kelsen, policy arguments or moral values are not relevant to legal science. All legal norms are identifiable as elements of a system of coercive rules, irrespective of their content. Suggesting that substantive 'principles' could be part of the 'law' is to 'engage in highly subjective evaluation of law under the banner of legal objective cognition': Hans Kelsen, *General Theory of Norms* (Hartney translation, Clarendon Press, 1991) 117. Even Hart was of the view that, where rules run out and principles are used to justify judicial reasoning, this involved judges drawing on 'extra-legal' material: HLA Hart, *The Concept of Law* (2nd edn, Clarendon Press 1994) 259–272.

[50] Joseph Raz, *Practical Reason and Norms* (2nd ed, OUP 1990). On Raz's 'sources thesis', the authority claim of law-applying institutions is critical in identifying legal norms, which may include gap-filling norms based on value judgements.

might be considered as new aspects of the natural law tradition, underpinning the very validity of legal systems.[51] On each of these accounts, environmental principles are either incompatible with legal norms or fit awkwardly into existing jurisprudential debates (or more debate is needed).[52] This is mainly because most theories of law are theories of social organization, and thus focus on the duties and rights of individuals, and legal relations between individuals, rather than collective or environmental goals.[53] It is also because foundational norms in legal philosophy, whether grundnorms or tenets of natural law, are rationalized as being universally true or accepted and thus do not admit of political disagreement.[54]

Nonetheless, in much environmental law scholarship, making legal sense of environmental principles often involves resorting to the distinction between 'rules' and 'principles',[55] slotting into the most obvious, linguistically equivalent jurisprudential framing of environmental principles. In Western legal philosophy, this distinction is a dominant, if contested, way of framing the normative constitution of a legal system.[56] Put simply, both rules and principles constitute the law, but rules apply in an 'all-or-nothing' fashion, whilst

[51] John Finnis, *Natural Law and Natural Rights* (Clarendon Press 1980).
[52] Bosselmann notably engages in an ambitious jurisprudential argument drawing on various strands of analytical jurisprudence in relation to the principle of sustainability: (Bosselmann 2016).
[53] To take the natural law tradition as an example – even if the universal principles, 'basic goods' or truisms on which natural law norms are based have environmental resonance (eg humans need or wish to live, the world has limited resources), theorists such as Finnis deduce certain basic norms that relate to *individual legal relations* (eg rights not to be tortured, right of an individual to be taken into consideration in assessing the common good): Finnis (n 51) 34 et seq. Similarly, Hart on his view of the 'minimal content of natural law' deduces eg the need for laws against violence and a system of private property with rules against theft: Hart (n 49) 199-200.
[54] Kelsen (n 49); ibid. See also Kantian scholarship where the moral basis of law can be implied from rational human agency eg Deryck Beyleveld and Roger Browsword, *Law as a Moral Judgment* (Sweet & Maxwell, 2nd ed 1994).
[55] Michael 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 Richard Macrory, Ian Havercroft and Ray Purdy (eds), *Principles of European Environmental Law* (Europa Law Publishing 2004); Sands, Peel et al (n 40) 199-200; cf Douglas Fisher 2016 (identifying different jurisprudential categories of 'rules', including 'strategic rules' which might encapsulate some manifestations of environmental principles).
[56] Joseph Raz, 'Legal Principles and the Limits of the Law' [1972] Yale LJ 823; Ronald Dworkin, *Taking Rights Seriously* (rev edn, Duckworth 1978) ch 2; *cf* Hart (n 49).

principles are 'consideration[s] inclining in one direction or another' but which do not require a particular decision or outcome.[57] Legal principles should be taken into account, if relevant, by 'officials', including judges, and are open for balancing when principles intersect.[58] Environmental law scholars draw on this distinction between legal rules and principles in relation to environmental principles for at least three reasons.[59]

First, identifying environmental principles as relevantly 'legal' embeds them within legal systems, irrespective of their ambiguous meanings, justifying the applicability or even enforceability of these principles in supporting goals of environmental protection through law.[60] Second, this instrumental rationale can be supported by a moral account of legal principles, which frames legal principles as standards required by justice or morality.[61] Dworkin's rights thesis justifies legal principles in this way, giving them a dimension of 'weight'.[62] This moral basis for principles is particularly appealing in relation to certain (but not all) environmental principles, giving legal recognition to their ethical foundations.[63] It also justifies the role of environmental principles in legal reasoning, independent of other sources of legal authority. They can validly be used by judges to interpret legal rules and otherwise fill gaps in legal reasoning.[64] Finally, some philosophical accounts also identify a constitutive role for legal principles in rationalizing a body of law.[65] On this view, groupings

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[57] Dworkin, ibid, 24.
[58] Dworkin, ibid, 24–26.
[59] See further Scotford, *Environmental Principles* (n 1) 40-45.
[60] # This kind of analysis partly reflects a 'command' theory of law, without acknowledging the role of the sovereign in traditional accounts: cf John Austin, *The Province of Jurisprudence Determined* (4th impression, Weidenfeld & Nicolson 1971).
[61] See eg #.
[62] Dworkin (n 56) 82-90; *cf* Alexander & Sherwin arguing that Dworkin's theory of legal principles is compromised in its claim to a moral basis: Larry Alexander & Emily Sherwin, *The Rule of Rules: Morality, Rules and the Dilemmas of Law* (Duke University Press 2001) ch 8.
[63] Eg Bosselmann, *Principle of Sustainability* (n #) 49. Bosselmann sees the principle of sustainability as being a distinct legal principle, with a fundamental moral weight that means it is not subject to trade-offs with other environmental principles, which are not ethically grounded in the same way: 52, 63
[64] Doherty, 'Hard Cases' (n #) 78; de Sadeleer, *Environmental Principles* (n #) 264–65.
[65] Neil MacCormick, *Legal Reasoning and Legal Theory* (rev edn, Clarendon Press 1994) 232 (principles are 'relatively general norms which are conceived of as "rationalising" rules or sets of rules').

of environmental principles might serve to rationalize fragmented rules of environmental law, giving them unified foundations and legitimacy as a legal discipline. These three reasons all demonstrate high normative hopes for environmental principles as legal principles.

Looking at the roles that environmental principles are actually taking on, some of this account has explanatory force. In some contexts, they are statutory objectives that feed into teleological interpretation of more detailed rules, consistent with an account of principles as norms that point in a certain direction to inform and justify judicial reasoning in the application of rules. Thus, for example, the precautionary and preventive principles have informed widespread judicial interpretation of environmental legislation in EU law.[66] However, there are also some challenges with these normative arguments. As with doctrinal approaches, there is a risk of 'picking and mixing' existing jurisprudential approaches to explain or justify the emerging 'legality' of environmental principles. Thus, for example, there is no unique and universal set of environmental principles that might underpin and unify 'environmental law' globally,[67] even if there are discrete groupings that are becoming entrenched within jurisdictions.

Furthermore, the policy-based nature of environmental principles raises a fundamental concern for the Dworkinian distinction between rules and principles, and for other philosophical accounts of law. On Dworkin's rights thesis, legal principles (justified as supporting individual rights) are distinct from 'policies', which are 'standard[s] that set out a goal to be reached, generally an improvement in some economic, political or social feature of the community'.[68] Such policies, which arguably include environmental principles, are to be debated and embraced in the political sphere, and are not legal norms that should inform

[66] See below, section #.
[67] See nn # above. Cf Tim Stephens; Sands, Peel et al.
[68] Dworkin, *Taking Rights Seriously* (n #) 22.

judicial reasoning.[69] Other philosophical accounts also contend that moral or political ideas should not have inherent legal force, but should be addressed by political institutions, including through legislation.[70] Even natural law approaches focus on anthropocentric and individual norms that constitute a 'good life', and communitarian or ecological norms are not readily acknowledged.[71] These limits about what constitutes law and thus what count as legal principles can be criticized for failing to reflect the philosophical reality of environmental law – environmental problems most commonly concern collective rather than individual rights, and environmental law must confront this reality jurisprudentially. But they nonetheless raise important questions about the *origins* of law for addressing environmental issues. Asserting that environmental principles are self-justifying norms underlying bodies of (environmental) law, drawing on their inherent morality as opposed to other sources of legal authority, is a bold jurisprudential move. This is because environmental principles as policy concepts are inherently political, whether in the choice of grouping or in their interpretation, and some justification for their legal character must be found. Empirically, we can see that groups of environmental principles *are* being adopted in legal instruments, within national and regional jurisdictions, giving them legal recognition.[72] The legal authority of such environmental principles is not generally due to their being identified as 'legal principles' – either in light of their inherent moral force or deriving from an incremental development of a body of judicial doctrine around such principles – but because they have been adopted in legal form by political institutions.[73] Furthermore, their legal form can vary. Supported by legislative

[69] Ibid 22–28, 84; *cf* Alexy, for whom principles can be related both to individual rights and to collective interests: Alexy, *Constitutional Rights* (n #) 65–66.
[70] See Hart and Kelsen (n #). See also Robert Alexy distinguishing 'principles' from 'values', where the former are deontological (representing what is obligatory and ought to be), and the latter axiological (representing what is good) and thus not legally enforceable: Robert Alexy, *A Theory of Constitutional Rights* (OUP 2002) 86-92.
[71] Above n #.
[72] Above n 97.
[73] An exception to this is seen in the Indian context, see nn # and accompanying text.

authority, it might be argued that environmental principles are being transformed into rules in some respects – for example, the requirement that a state must adopt environmental policy consistent with the precautionary principle[74] – but much will depend on the precise legislative context. Environmental principles can be legalized in many different, and not always obligatory, ways.[75]

In summary, the distinction between principles and rules is valuable in sparking philosophical inquiry about what kinds of legal roles environmental principles do and should have, but it does not provide a blueprint for their legal character or provide a complete philosophical platform to justify them as legal norms. Using existing frames of reference is nonetheless useful to show the shortcomings of our existing jurisprudential (and doctrinal) tools in understanding the phenomenon of environmental principles clothed with legal authority. The following section offers alternative ways of conceptualizing environmental principles, which embrace their normative plurality and idiosyncrasy as legal concepts across diverse legal cultures.

Functional conceptualisation: new forms of law and governance

If existing doctrinal and analytical jurisprudential tools are inadequate to conceptualise environmental principles legally, an alternative is required. This section proposes an alternative by considering principles functionally – describing the roles that they are designed to perform and actually performing, drawing on explanatory theories or heuristics. This functional conceptualisation interacts with traditions of sociological jurisprudence, although it focuses on the 'instrumentalities' or 'techniques' of law more than its underlying social

[74] Eg Article 191(2) TFEU ('Environmental policy shall be based on…). This may be interpreted as a 'rule of limitation' in Fisher's taxonomy of rules for environmental law: (Fisher 2016) #
[75] Eg Environmental Code 2000 (France) art L110-1: nn # and accompanying text.

goals.[76] To determine the legal functions of environmental principles, this section draws on the features of environmental principles and the legal environments in which they are taking on roles. Three features of environmental principles are suggestive of their functions – their flexibility; their role as policy objectives; and the diverse political communities that endorse them. These three aspects indicate that, to the extent they have legal roles, environmental principles resonate with explanatory accounts of transnational law and experimentalist governance, and also give rise to methodological challenges in ascertaining their legal roles. Some legal determinism comes from the specific legal environments that shape the legal roles of environmental principles, so that environmental principles are evolving globally as legal norms through specific legal cultures,[77] some of which interconnect and spread ideas transnationally.[78] This functional picture can be understood as a form of transnational legal pluralism, or more specifically, that environmental principles are developing as new norms through 'globalised localisms'.[79]

The first feature of environmental principles that indicates their functional potential is their flexibility and openness, as discussed above. This feature facilitates both their normative success and also their normative uncertainty. The flexibility of environmental principles in addressing the 'irreducible complexity of the environment' underscores their value in bodies of environmental law that must apply to environmental problems,[80] although suggests a normative utility other than establishing obligations or rationalising legal doctrine.[81] Flexible

[76] Robert S Summers and Charles G Howard, *Law: Its Nature, Functions and Limits* (2nd ed, Prentice Hall 1972) (notably also including a healthy environment as one of the social functions that legal institutions help to serve).
[77] Scotford, *Environmental Principles* (n 1).
[78] Scotford, 'Legal Connectors and Catalysts' (n 47).
[79] Boaventura de Sousa Santos, *Toward a New Common Sense: Law, Science, and Politics in the Paradigmatic Transition* (Routledge 1995).
[80] Andreas Philippopoulos-Mihalopoulos, *Absent Environments* # 30.
[81] Ibid 31. For Philippopoulos-Mihalopoulos, environmental law must be redefined in such a way that 'presupposes less normativity than the average law, more cognitive flexibility, and significantly greater "fuzziness" in decision-making'.

principles are also pragmatically attractive in forging agreements on environmental policy, allowing parties to agree environmental protection goals when they cannot agree more precise positions.[82] They have allowed such agreements to flourish in the international domain, proliferating as soft law instruments,[83] and 'facilitat[ing] the dynamic development of modern international environmental law'.[84] At the same time, normative uncertainty results, and public international lawyers have devised new concepts to describe the emergence of environmental principles. Beyerlin has described them as 'twilight norms', which are at the 'bottom of the normative hierarchy of modern international environmental law' and reflect patterns of 'relative normativity' in this legal field.[85]

Environmental principles are not confined to the international sphere. They have been embraced in different national and regional legal and regulatory settings – some originating in national regulatory histories and influencing global policy development in turn;[86] some taking inspiration from global soft law developments (rather than being required by them),[87] as well as developments in other national legal settings.[88] Again the flexibility and normative openness of environmental principles facilitates this easy transnational inspiration. This kind of transnational norm-building, where the lines of law and non-law are blurred and jurisdictional borrowing is fluid, is a hallmark of 'transnational law'.[89]

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[82] de Sadeleer (n #) 259 ('They inevitably facilitate the adoption of reforms that do not dare proclaim their true nature').

[83] We (as yet) have no international legal agreement consolidating a universal set of environmental principles, despite concerted efforts to achieve this: draft Pact #.

[84] Beyerlin 427-8.

[85] Ulrich Beyerlin, 'Different Types of Norms in International Environmental Law: Policies, Principles and Rules' in D Bodansky, J Brunee and E Hey (eds), *The Oxford Handbook of International Environmental Law* (OUP 2007) 426 (citing Prosper Weil, 'Towards Relative Normativity in International Law?' (1983) 77 *Am J Int'l L* 413). See also Daniel Bodansky, 'Customary (and Not So Customary) International Environmental Law' (1995) 3 Ind J Global Legal Stud 105.

[86] #

[87] #

[88] #

[89] Peer Zumbansen, 'Defining the Space of Transnational Law: Legal Theory, Global Governance and Legal Pluralism' (2012) 21(2) *Transnational Law & Contemporary Problems* 305.

Second, the role of environmental principles as objectives suggests a constitutive role within wider legal or regulatory architectures. Rather than seeing environmental principles as standalone legal concepts that are driving legal developments autonomously (as in the case of say legal rights), appreciating their role within denser regulatory schemes may better capture their role. Thus, for example, four key environmental principles are framed in the French Environment Code as principles that 'inspire' the protection, enhancement and management of the natural environment 'within the framework' of applicable French laws.[90] In EU law, environmental policy 'shall be based on' a specified catalogue of environmental principles,[91] with the legal impact of this constitutional prescription only seen by looking at the many laws made under this provision and how they are interpreted by courts and applied by decision-makers.[92] To the extent that environmental principles are also forging transnational connections,[93] environmental principles – as regulatory objectives – bear the hallmarks of 'experimentalist governance', providing broadly framed goals within a wider governance system that is flexible, multi-level and revisable.[94] De Burca identifies that new governance systems are emerging due to 'strategic uncertainty' (the need to address complex policy problems not easily amenable to state-based or market regulation) and interdependence (involving interacting spheres of regulation), as in the case of environmental problems that cross national and regulatory boundaries.[95] Whether jurisdictionally bounded, or transnationally influential, the embedded role of environmental principles within wider regulatory or governance architectures highlights the methodological risk of a 'select and

[90] (n 75) (the precautionary principle, the principle of preventive and corrective action, the polluter pays principle, and the principle of participation).
[91] TFEU art 191(2). See nn ## below and accompanying text.
[92] On a sociology of law approach, instrumentalities of law are a 'process' involving cooperation of legislators, administrators, lawyers, courts, private citizens, law enforcement officials: Summers & Howard (n 76).
[93] # check adequately shown
[94] Grainne de Burca, 'New Governance and Experimentalism: An Introduction' (2010) 2 *Wisconsin Law Review* 227, 234-5.
[95] Ibid 7.

collect procedure' in determining what 'segments' of legal material are considered relevant in observing and evaluating the legal roles of environmental principles.[96]

Third, environmental principles are agreed by different political communities. Whilst varying, if overlapping, groups of environmental principles are coalescing in different jurisdictional contexts, and in different international soft law instruments, indicating a common appetite for sets of environmental principles to underpin bodies of (environmental) law and policy, these foundations are distinctive. This is unsurprising considering the highly contested nature of environmental policy and politics. It often takes a constellation of political events and firm legalizing developments for a specific cluster of environmental principles to take root in a particular *legal* context. Thus we see highly evolved bodies of environmental law based on environmental principles where such legal fertilisation has occurred, as in EU law or New South Wales law.[97] But even in these settings, the clusters of principles are not equivalent, reflecting different political choices. In EU law, the principles constitutionalized in the EU treaties are the precautionary principle, polluter pays principle, principle of prevention, principle of rectification at source, the integration principle and the principle of sustainable development.[98] In NSW law, the statutory catalogue of 'principles of ecologically sustainable development' is overlapping but distinct,[99] comprising the 'principle of internalisation of environmental costs' (including the polluter pays principle), the integration principle, the principle of intergenerational equity, and the principle of conservation of biological diversity and ecological integrity. Furthermore, it is not only state actors or recognised organs of the state that agree (or fail to agree) environmental principles,

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[96] J W Harris, *Legal Philosophies* (2nd ed, Butterworths 1997) 256.
[97] See Scotford, *Environmental Principles* (n 1) chs 3-5.
[98] TFEU, arts 11 and 191(2).
[99] Including because these principles are defined to some extent in the legislation that sets them out: eg clarifying that the integration principles in this context refers to the idea that economic and environmental, and sometimes social, considerations should be integrated in public decision making (Protection of the Environment Administration Act 1991 s 6(2)(#)).

but also self-organised associations of NGOs[100] and legal experts.[101] This diverse political endorsement explains the different groupings of environmental principles and also shows that any conceptualisation of environmental principles should acknowledge the role of those different polities. There is a distinctive role for the state, but the role of non-state actors in global norm-building – a characteristic of transnational law [102] – also needs to be acknowledged.

These three features of environmental principles highlight their normative flexibility and novelty. This raises the question of how to identify their concrete legal roles. One might theorise that environmental principles are capable of constituting, and are constituting, a new form of 'global environmental law'[103] or even 'meta-rules' in a form of 'post-modern' law.[104] Such viewpoints capture the normative flexibility, connectedness and transnational nature of environmental principles. But they do not capture the important role of legal cultures in crystallising the legal roles of environmental principles. Appreciating the impact of legal cultures is the key reason why we see a spectrum of jurisdictions in which environmental principles are taking on legal roles, from legally transformative to legally restrained to legally marginal. The following sections highlights examples of these different legal manifestations of environmental principles in national environmental decision-making and policymaking, particularly through legislative endorsement and their treatment in judicial reasoning. As I have previously stated:[105]

> The full 'global' legal picture of environmental principles can only be captured through multiple refractions from local and regional levels, including through authoritative interpretive communities such as courts.

[100] Earth Charter Commission, 'Earth Charter' (The Hague, Netherlands, 2000).
[101] Draft Pact (n #).
[102] Thilo Marauhn, 'The Changing Role of the State' in D Bodansky, J Brunnee and E Hey (eds), *The Oxford Handbook of International Environmental Law* (OUP 2007).
[103] Yang & Percival (n #).
[104] de Sadeleer (n #).
[105] Scotford, *Environmental Principles* (n 1) ch 1#.

This picture is best described as transnational legal pluralism.

4 Environmental principles in national environmental decision-making

This section explores that legal pluralism by considering how environmental principles are legally relevant to environmental decision-making in different jurisdictions. These legal roles can be seen in public law claims that challenge environmental decision-making, where environmental principles are relevant (or not) to judicial reasoning in those cases. This section gives examples of cases in which environmental principles are found not to be doctrinally relevant in public law claims, and contrasts these with cases in which environmental principles inform and shape judicial reasoning, highlighting some examples of innovative and deeply reasoned jurisprudence involving environmental principles. This analysis shows how the legal relevance of environmental principles depends on the legal architectures and cultures of different jurisdictions, supported in some cases by transnational legal influences. Note that the selection of legal material in this section focuses on explicit references to environmental principles in reasoning, and does not consider regulatory regimes that themselves represent manifestations of different principles (such as contaminated land regimes based on the polluter pays principle),[106] although the role of principles in the latter sense is directly relevant in the first category of cases considered below.

'Policy cases'

In both UK and EU law, there are examples of cases where the policy-based nature of environmental principles means they are not justiciable or doctrinally relevant in reviewing decision-making. Thus, for example, in *R v Leicester City Council and others, ex parte*

[106] And arguably includes much of environmental law, albeit that manifestations of the principles can differ considerably (eg the prevention principle informing pollution control regimes might yield very different levels of ambition).

Blackfordby and Boothorpe Action Group Ltd[107] – a case challenging local authority planning approval of opencast mining and landfill – Mr Justice Richards in the English High Court noted the following:[108]

> It is difficult to see precisely how [counsel for the claimant] seeks to rely on the precautionary principle… Although it is said to illuminate the Waste Framework Directive and the implementing provisions of the [relevantly applicable] Regulations (which undoubtedly reflect the principle), it does not in my view take any further the arguments already considered in relation to those matters. In so far as reliance is placed on the incorporation of the principle within government policy and its consequent relevance as a material consideration, …the Council did take it into account as a material consideration. The submission, briefly advanced and again plucked out of the air in the course of oral argument, that the decision was *Wednesbury* unreasonable in its application of the principle is untenable...

Similarly in EU law, there are examples of cases where legal arguments on the basis of EU environmental principles are advanced to interpret regulatory schemes in a general sense but which have been rejected, since their legal role is limited to informing (and reviewing) decision-making that has been based on environmental principles.[109] Environmental principles otherwise remain policy ideas to be exercised by the EU institutions, with any legal accountability for environmental decision-making depending on the precise exercise of that power. The construction of institutional power under the EU treaties is thus important in determining the legal limits of the roles of environmental principles, just as the English doctrine of Wednesbury irrationality was driving the analysis in the *Blackfordby* case.

Even where judicial notice is taken of environmental principles as important principles underlying environmental law in a general sense, their legal roles may be non-existent, particularly in English law. They remain as policy ideas underlying the legal regime under consideration. Thus, in *Fishermen and Friends of the Sea v The Minister of Planning,*

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[107] [2001] Env LR 2.

[108] Ibid [66].

[109] Case C-236/01 *Monsanto Agricoltura Italia* [2003] ECR I-8105; Case C-132/03 *Ministero della Salute v Codacons* [2005] ECR I-3465. See Scotford, *Environmental Principles* (n 1) 137-142.

Housing and the Environment (Trinidad and Tobago),[110] Lord Carnwath for the Privy Council took notice of the polluter pays principle in soft law instruments and EU law, but ultimately construed a specific Trinidad & Tobago (T&T) policy statement (concerning the polluter pays principle) to determine whether it had been complied with by regulations prescribing fixed fees for permits to discharge pollutants to water. As Hilson notes:[111]

> [the judgment] tells us everything and yet nothing about the [polluter pays principle]. [We] learn everything about the PPP in an interesting policy-application sense because we see the background to T&T's choices concerning the principle in relation to permit charging. But that is ultimately not justiciable material.

Informing interpretation and application of legal rules

By contrast, environmental principles can be legally relevant in informing the interpretation and application of legal rules, usually when they have been included in legislation or constitutional provisions as relevant objects. This teleological role for principles has both narrow and wide legal implications in different legal contexts. In a narrow sense, individual regulatory provisions are enlivened with a meaning that reflects a vision of environmental protection policy. For example, note two instances of interpretive reasoning involving EU environmental principles, construing key legislative provisions within environmental regulatory regimes:

- In EU waste law, the European Court of Justice (ECJ) concluded from the fact that EU policy on the environment, under Article 191(2) 'is to aim at a high level of protection and is to be based, in particular, on the precautionary principle and the

[110] [2017] UKPC 37.

[111] Chris Hilson, 'The Polluter Pays Principle in the Privy Council: *Fishermen and Friends of the Sea (Appellant) v The Minister of Planning, Housing and the Environment (Respondent) (Trinidad and Tobago)* [2017] UKPC 37' [2018] 30(3) JEL 507, #.

principle that preventive action should be taken', that the definition of 'waste' in the Waste Framework Directive should not be interpreted restrictively.[112]

- In EU nature conservation law, the ECJ has construed when a plan or project is 'likely to have a significant effect' on a special area of conservation, thereby triggering the requirement for an 'appropriate assessment' to be carried out, by reference to the precautionary principle, again relying on the constitutional imprimatur in Article 191(2) TFEU. Interpreting the provision accordingly, 'such a risk [ie likelihood] exists if it cannot be excluded on the basis of objective information that the plan or project will have significant effects on the site concerned.'[113]

These examples show how environmental principles must be defined to take on interpretive roles, and take on different marginal meanings in different regulatory contexts, even within the same jurisdiction.[114] Beyond examples of environmental principles aiding the interpretation of legislative provisions, they are also informing legal tests in some jurisdictions.[115] In these different interpretive roles, they seem to fulfil a Dworkinian role for legal principles by guiding judicial reasoning. This is a fair functional description, but does not account for the legislative or constitutional context that gives environmental principles legal authority within specific jurisdictions. These examples show that environmental principles are not inherently legal influential; rather, they are often weaved into legal orders through interpretive reasoning after their formal adoption in legislation or constitutions. They are legalised within a wider regulatory architecture.

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[112] Joined Cases C-418/97 and C-419/97 *ARCO Chemie Nederland v Minister Van Volkshuisvesting* [2000] ECR I-4475 [36]-[40].

[113] Case C-127/02 *Landelijke Vereniging tot Behoud van de Waddenzee and Nederlandse Vereniging tot Bescherming van Vogels* [2004] ECR I 7405 [44].

[114] See also the interpretation of 'sustainable management' as a central statutory objective (arguably a 'principle') in the New Zealand Resources and Management Act 1991: (Fisher 2016 #).

[115] Eg #

The interpretive role of environmental principles can also trigger wider developments in legal reasoning. Thus, in EU law, the integration principle can expand reach of environmental policy objectives into other fields of regulation through interpretive reasoning.[116] In a quite different jurisdictional context – New South Wales – the legal culture of the NSW Land and Environment Court (NSWLEC) has constructed a dense body of legal reasoning around environmental principles (or principles of ecologically sustainable development, 'ESD principles').[117] This ESD jurisprudence has been seeded by interpretive reasoning, starting with a 1993 landmark case.[118] In *Leatch*, Stein J found that the precautionary principle was a legally required consideration under a specific statutory framework – the National Parks and Wildlife Act 1974 (NSW) – which required 'any matter considered to be relevant' to be taken into account in relation to decisions regarding fauna destruction licence applications.[119] On the basis of this open statutory requirement, Stein J concluded that the precautionary principle was required to be considered in relation to the facts of the case, relying on the 1992 Rio Declaration and the Australian federal-state Intergovernmental Agreement on the Environment (which included a catalogue of politically agreed environmental principles)[120] to interpret and apply this statutory framework in light of the principle. Over time, the NSWLEC engaged in an ever expanding body of interpretive reasoning incorporating ESD principles,[121] eventually interpreting 'most if not all' public

[116] Case C-513/99 *Concordia Bus Finland Oy Ab v Helsingin Kaupunki and HKL-Bussiliikenne* [2002] ECR I-7213 (interpreting public procurement law by reference to the EU intergration principle).
[117] Scotford, 'Environmental Principles and the Construction of a New Body of Legal Reasoning' (n 17).
[118] *Leatch v Director General of National Parks and Wildlife Service* (1993) 81 LGERA 270, 282.
[119] Additionally, the NSW Land and Environment Court Act 1979 provides that, in all merits appeals, the 'public interest' should be taken into account (s #).
[120] Scotford, Environmental Principles (n 1) #.
[121] Ibid ch 4.

decision-making involving environmental impacts as requiring consideration of ESD principles, as explained by the NSW Court of Appeal:[122]

> the principles of ESD are likely to come to be seen as so plainly an element of the public interest, in relation to most if not all decisions, that failure to consider them will become strong evidence of failure to consider the public interest and/or to act bona fide in the exercise of powers granted to the Minister, and thus become capable of avoiding decisions.

To get to this point, where ESD principles sit at the heart of a body of environmental decision-making, involved a legislative landscape that explicitly incorporated ESD principles as statutory objectives and included the 'public interest' as a key element in environmental decision-making.[123] It also reflected the specific legal culture of the NSWLEC, which has a specialised and wide-ranging environmental jurisdiction,[124] and a concerted attitude to embed ESD principles widely, as part of a 'paradigm shift [to a world] where a culture of sustainability extends to institutions, private development interests, communities and individuals'.[125] Part of this outward-looking attitude is seen in the Court's appeals to broader political and international soft law developments involving environmental principles to support its ESD reasoning. As a result, ESD principles have been transformed from policy and 'non-legal' norms to doctrinally central ideas that inform a wide range of environmental

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[122] *Minister for Planning v Walker* [2008] NSWCA 224 [#]. See also *Warkworth Mining Limited v Bulga Milbrodale Progress Association Inc* [2014] NSWCA 105 [296] ('where it is necessary to consider the environmental impact of a project, the public interest [embraces ESD]').

[123] As Ceri Warnock points out, a 'critical element with environmental legislation [is] that it tends to guide rather than prescribe', giving the Court an important interpretive role: Ceri Warnock, *Environmental Courts and Tribunals: Powers, Integrity and the Search for Legitimacy* (Hart 2020) 164.

[124] The NSWLEC's jurisdiction includes in merits appeal as well as judicial review, meaning that it has scope to apply ESD principles to the facts of case, as well as to interpret the legality of administrative action in light of them, giving it a wider jurisdiction to embed ESD principles deeply within a body of environmental law: LEC Act #

[125] *Telstra Corporation v Hornsby Shire Council* [2006] NSWLEC 133 [120].

decision-making in NSW law,[126] as part of a consciously transnational project to 'domesticate' environmental principles.[127]

Catalysing new legal doctrine

The NSWLEC example shows how a body of legal reasoning has been constructed around environmental principles, generating a new body of legal doctrine through incremental reasoning over time, supported by a dense domestic legislative architecture, within a jurisdiction and legal culture primed to develop new environmental law.[128] In other jurisdictions, environmental principles are being used to catalyse new doctrine in different ways. These range from modest developments where the indeterminacy of principles requires further doctrinal reasoning to use them meaningfully in judicial review (within a legal architecture where they have been legislated) to more radical developments. An example of the former is the EU courts' development of a new legal test for determining whether EU institutions have properly applied the precautionary principle (being held to account for a proper application of the precautionary principle having first exercised discretion based on the principle).[129]

As for more radical doctrinal development, the Indian and Brazilian courts provide good examples. The Indian Supreme Court has actively developed a form of quasi-rights review based on environmental principles in its constitutional jurisprudence. The Indian constitution contains no explicit references to environmental principles, but the Court has interpreted Article 21 of the Constitution – guaranteeing protection of life and personal

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[126] Including informing the application of sentencing principles in cases of environmental crime: eg *Bentley v BGP Properties* [2006] NSWLEC 34.
[127] Louis J Kotzé and Caiphas B Soyapi, 'African Courts and Principles of International Environmental Law: A Kenyan and South African Case Study' (2021) 33(2) JEL 257, 23#.
[128] See further Scotford, 'Environmental Principles and the Construction of a New Body of Legal Reasoning' (n 17).
[129] Case T-13/99 *Pfizer Animal Health SA v Council* [2002] ECR II-3305 # (test#). See Scotford, 'Environmental Principles' (n 1) #.

liberty – as a basis for incorporating the principle of sustainable development, the precautionary principle, the polluter pays principle, and the principle of intergenerational equity as part of Indian law and its constitutional framework.[130] It has relied on international soft law developments – notably the Brundtland Report and Rio Declaration – to support this reasoning, asserting that various environmental principles are 'salient principles' of sustainable development, which has been 'accepted' as part of international law.[131] In applying these environmental principles to review state action, the Court has been activist in determining remedial measures for breaches of the principles (applying both administrative and private remedies),[132] showing how the principles have a very strong normative role in Indian law.

In Brazil, doctrinal innovation based on the precautionary principle has been based on the principle being included in a number of domestic statutes and implicitly referred to in Article 225 of the Constitution.[133] With this more explicit legal endorsement of the precautionary principle, courts throughout the federal hierarchy in Brazil have been active in applying the precautionary principle to catalyse new legal developments, in public law review of environmental decision-making and beyond this to civil liability law. Thus, for example, the Superior Tribunal de Justiça adapted the established civil liability test for causation in cases of environmental damage caused

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[130] *Indian Council for Enviro-Legal Action v Union of India* (1996) 3 SCC 212 (polluter pays principle); *Vellore Citizens' Welfare Forum v Union of India AIR* 1996 SC 2715 (principle of sustainable development, precautionary principle, polluter pays principle); *State of Himachal Pradesh v Ganesh Wood Products* AIR 1996 SC 149 (principle of intergenerational equity).

[131] 'We have no hesitation in holding that 'Sustainable Development' as a balancing concept between ecology and development has been accepted as a part of the Customary International Law though its salient features have yet to be finalised by International Law Jurists [going on to list those salient principles, 'culled out' from international soft law documents]: *Vellore* (n 130).

[132] Eg *S Jagannath v Union of India and ors* 1997 (2) SCC 87.

[133] Art 225 of the Brazilian Constitution requires public authorities to control techniques or substances that pose a risk to life, quality of life, and the environment. See Carina de Oliveira and Igor da Silva Barbosa, 'Le Principe de Précaution en Droit de la Responsabilité Civile Brésilien: Les Limites de sa Mise en OEuvre par les Tribunaux Brésiliens' in Mathilde Hautereau-Boutonnet and Jean-Christophe Saint-Pau (eds), 'L'Influence du Principe de Précaution en Droit de la Responsibilité Civile et Penale Comparé' (Mission de Recherche Droit & Justice 2016) 746.

by activities posing serious risks, reversing the burden of proof to require the proponent of the allegedly harmful activity to show that its actions did not cause the relevant damage.[134]

The range of ways in which environmental principles have catalysed new legal doctrine reflects the different legal cultures and legal architectures involved. Environmental principles form part of wider bodies of environmental law, constitutional law, and legal doctrine. In each case, they are applied by a court, within a discrete body of reasoning, using a particular mode of judicial reasoning, reflecting a specific legal culture. This culture will also inform the extent to which courts draw on global and transnational developments to support and legitimise new doctrinal developments involving environmental principles domestically. In short, the role of environmental principles in triggering new legal developments is shaped by, and constitutes part of, specific bodies of law. This section has shown that those bodies of law all look quite different. On a wider normative view, environmental principles are developing legally as 'globalised localisms'.

5 Environmental principles in national policymaking

Environmental principles are not only having legal effects in relation to cases of individual environmental decision-making (or bilateral relations). Consistent with their nature as expressing substantive policy on collective issues, environmental principles are inherently implicated in environmental policymaking, and they can have legal roles in constituting or delimiting that policymaking function for some governments.[135] This gives environmental principles a legal role at a higher level of decision-making than in individual cases.[136] This section outlines this legal frame for environmental principles, considering their roles in

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[134] eg STJ, Resp n 1330027/SP, 3a turma, decision of 11 June 2012 (civil liability case relating to impacts on aquatic fauna caused by dam construction)

[135] The *implementation* of policy often involves decision-making in more specific instances. To that extent, the legal influence of environmental principles in policymaking flows through into the legal roles of environmental principles in public law cases examined in the previous section.

[136] This is akin to strategic environmental assessment: see Gregory Jones and Eloise Scotford, *The Strategic Environmental Assessment Directive: A Plan for Success?* (Hart 2017).

policymaking on a spectrum from legally constraining (principles legally delimit policymaking) to legally unconstraining (principles simply underlie policymaking). At the former extreme, principles have an elevated status in sitting above routine government policymaking,[137] in a quasi-constitutional or actual constitutional role, or a supranational role. At the opposing end, they are relegated to the policy sphere, thus less impactful (particularly in light of the compromised reality of policymaking), with no legal accountability for their implementation. These different functions of environmental principles – from legal to non-legal – again reflect different legal (including constitutional) architectures, as well as different political traditions and choices of political communities about what constraints should bind their executive policymaking.

Principles delimiting policymaking

The notion that environmental principles, as expressions of environmental policy, might legally constrain government policy autonomy is anathema to some constitutional traditions.[138] But legalized roles for 'policy' are not anathema to environmental law,[139] and environmental principles in some policymaking contexts venture once more into less familiar legal territory. When environmental principles do limit or bind policymaking in some way, they can be seen as a 'framework of normative values' as well as 'strategic rules' in Douglas Fisher's taxonomic structure of environmental law.[140]

[137] See (Verschuuren 2016).
[138] #
[139] For a taxonomy of examples in the UK context, see Elizabeth Fisher, Bettina Lange & Eloise Scotford, *Environmental Law: Text, Cases and Materials* (2nd ed, OUP 2019) ch 8#.
[140] And possibly also 'competence rules': Douglas Fisher, *Australian Environmental Law: Norms, Principles and Rules* (3rd ed, Thomson Reuters 2014) 10-11.

The paradigm example of environmental principles delimiting environmental policymaking is the EU Treaty provision prescribing how EU environmental policy competence should be exercised, as already discussed.[141] Article 191(2) TFEU provides:

> Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It *shall be based* on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.

This constitutional provision does not compel the adoption of certain environmental policies,[142] but it constrains how policymaking – by EU or Member State institutions acting within the sphere of EU environmental policy competence – should be exercised. As noted above,[143] once exercised in specific instances, this policy competence is legally reviewable to establish proper compliance with environmental principles. Due to the multi-level governance structure of the EU, this judicial review can involve review of government policies adopted by the EU institutions or Member States.[144] The constitutional tradition and legal culture of EU law fundamentally shapes this legal role for environmental principles, which has led to an extensive body of legal reasoning.[145]

Another interesting example where environmental principles – as 'guiding principles' of environmental policy – have legal force in delimiting policymaking is seen in the Scottish Continuity Act,[146] which was adopted to provide legal continuity in Scotland after the United Kingdom's withdrawal from the European Union ('EU exit'). Environmental policy was an

[141] #

[142] Arguments based on environmental principles cannot be used as standalone arguments to compel policy action: Case C-379/92 *Re Peralta* [1994] ECR I-3453; Case C-445/00 *Austria v Council* [2003] ECR I-08549.

[143] (n 109).

[144] E.g. Case C-2/90 *Commission v Belgium (Walloon Waste)* [1992] ECR I-4431 (challenging a Belgian waste policy that interfered with EU rules on free movement of goods, applying the principle of rectification at source to inform the relevant legal test in this case).

[145] # EU and Member State examples

[146] UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021.

area where legal and governance gaps would arise in UK law on EU exit, including on legal control of policymaking. Section 14(1) of the Act accordingly provides that 'Scottish Ministers *must*, in making policies (including proposals for legislation), have due regard to the guiding principles on the environment.' Other Scottish public authorities are subject to a similar duty when their policymaking is likely to have significant effects on the environment.[147] The Scottish environmental principles listed in the Act are expressly stated to be derived from the 'equivalent' EU environmental principles, and are to be interpreted having regard to their interpretation by the Court of Justice of the European Union.[148] This Scottish statutory scheme legalises and embeds environmental principles as policymaking norms across Scottish government, and defers interpretation of these norms to a supranational court, albeit that UK courts will have oversight of the application of this duty. This legal architecture has features of a strong environmental governance system, linking norms transnationally and embracing environmental principles as firmly embedded regulatory goals through legislative endorsement.

A final example of how environmental principles might constrain national policymaking comes from international law. As indicated above, there is no treaty containing universal environmental principles binding the policymaking discretion of states, but there are many bilateral and multilateral environmental agreements (MEAs) containing environmental principles in relation to specific environmental or other issues.[149] As an example, the EU-UK Trade and Cooperation Agreement contains a guarantee that the EU and UK retain their sovereign right to determine their own environmental policies,[150] alongside a joint commitment to respect a nominated catalogue of 'internationally recognised

[147] Ibid s 15. Clarify cross-ref to 'likely to have significant effects on the environment' #.
[148] Ibid s 13.
[149] See Jonathan Weiner 2007 #
[150] TCA art 391(1). This policymaking discretion is seemingly limited by a commitment 'to adopt or modify its law and policies in a manner consistent with each Party's international commitments, including '.

environmental principles to which [each] has committed'.[151] The list of principles largely overlaps with EU environmental principles, but not exactly,[152] asserting their international recognition in light of the Rio Declaration and specific MEAs. This treaty commitment raises a novel legal question about how these 'international' environmental principles might restrict the freedom of nation states to adopt their own environmental policies in the future, and how this might be legally reviewed.

Principles underpinning policymaking

By contrast, environmental principles might also inform policymaking in the political sphere, with limited legal prescription. In this sense, environmental principles retain their character as ideas underpinning policymaking, with limited legalisation. A good example of this is seen in the complex statutory construction of environmental principles in the English Environment Act 2021, also introduced to fill the environmental governance gap after the UK departed the EU, but in England rather than Scotland.[153] The EU law tradition of delimiting environmental policymaking through legalised principles was politically debated and partly resisted when the UK sought to re-establish its domestic environmental law post-Brexit.[154] The UK's legal response was a fragmented one. Unlike the Scottish Continuity Act, the English Environment Act 2021 relegated environmental principles firmly to the policy sphere, mandating that they should be articulated in a 'policy statement' to which Ministers must have due regard in setting policy, with the policy statement setting out how environmental principles should be

[151] Ibid art 393(1). See also Art 193 ITLOS: 'States have the sovereign right to exploit their natural resources pursuant to their environmental policies *and in accordance with their duty* to protect and preserve the marine environment.'
[152] Notably the precautionary principle is referred to as the 'precautionary approach' due to political disagreement over including the principle.
[153] Environmental policy is a devolved policy competence in the UK. The Environment Act 2021 mainly applies to England, but also covers reserved UK powers as they relate to the environment, and extends to the UK's devolved administrations in some agreed respects.
[154] Eloise Scotford, 'Legislation and the Stress of Environmental Problems' (2021) CLP #.

'proportionately applied' alongside other relevant considerations.[155] Here the fact that environmental principles are endorsed (differently) by different political communities is starkly demonstrated, shaping their legal roles within discrete, albeit connected bodies of law.

The English framing of environmental principles is far from a green thread of environmental protection animating all English environmental law; rather they are policy ideas to be debated and weighed in the sphere of Ministerial policy, with some legal impetus for this to happen. With English environmental policymaking being minimally constrained, it is unlikely that cascading legal roles for environmental principles into environmental decision-making and other areas of English environmental law will develop. By contrast with the Scottish position, they suggest a weak environmental governance system, with no strong environmental policy goals to steer it. This is consistent with the pre-existing English legal culture and its approach to environmental principles as legal ideas outlined above.[156]

6 Concluding remarks: the legitimacy of legalized environmental principles

Environmental principles are important but unusual concepts in environmental law, forging transnational connections across diverse legal cultures and spurring new conceptual understandings in environmental law. In analysing environmental principles as legal phenomena, it can be tempting to ask whether environmental principles are 'legally enforceable' (or argue that they should be), in the sense that their legalized form might require certain environmental protection outcomes in government decision making, akin to rights that require certain kinds of action by the state. This chapter has shown that environmental principles are taking on much more diverse and nuanced roles in bodies of environmental law, in a variegated transnational tapestry that interweaves global, regional

[155] Environment Bill, cll 16-18.
[156] (nn #) and accompanying text.

and local legal developments, fundamentally shaped by specific legal cultures. Within these legal cultures, environmental principles are sometimes driving real legal innovation. This innovation arguably reflects new forms of governance required by polycentric and often uncertain environmental problems, which benefit from an entrenched strategic and collective policy on environmental protection, including to drive environmental decision-making in individual cases. Transnational developments can bolster the case for these domestic legal developments. But legal innovation involving environmental principles also raises some prior, fundamental questions about the central sites of policymaking in environmental law, and how actors are accountable for this when policymaking is legalized and consequently judicialised.

This legitimacy challenge is particularly due to the open-textured and policy-based nature of environmental principles. Environmental principles are open to diverse applications and contestation over their meanings and effects. Particular concerns arise where environmental principles are used to justify legal reasoning – such as the precautionary and prevention principles informing the definition of waste in EU law[157] – where the reasoning (for example, why these principles support a broad concept of waste) is not clearly explained and different understandings of those principles (more aligned, say, with 'preventing' waste through incentivising a circular economy) arguably justify different legal outcomes.[158] Furthermore, casting environmental principles as legal norms may imply that political contests over policy (balancing environmental protection, economic interests, and other social goals) are transformed into legal disputes where competing principles are to be balanced through legal reasoning, and resolved ultimately by courts and judges.

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[157] (n 112) and accompanying text.

[158] Eloise Scotford, 'Trash or Treasure: Policy Tensions in EC Waste Regulation' (2007) 19(3) *Journal of Environmental Law* 367.

This means that the source of legal authority for environmental principles taking on legal roles is very important. As seen in Section Three, some argue for the inherent moral and thus legal force of (certain) environmental principles, but the uneven political endorsement of environmental principles globally (both in terms of their groupings and their legal imprimatur) suggests other sources of authority must be found. Legal authority most obviously comes from constitutional foundations (where environmental principles are adopted in constitutions or legislation) and it also comes from the quality of legal reasoning where courts are elaborating the legal roles of environmental principles. Questions may be raised where transnational developments alone are the source of authority for such domestic reasoning, particularly considering the weak status of environmental principles in public international law.[159] Ultimately, domestic norms will judge how well reasoned are cases involving environmental principles. However, in whichever legal culture environmental principles take on legal roles, some legitimate process is required to determine and develop the meanings and functions of environmental principles in environmental policymaking and decision-making. Exploring this legitimacy question is not a reason to reject the legalization of environmental principles, but to take seriously how they are being legalized and to what end.

[159] See critique of Indian cases #