

A Framework for Exploring the Idea of an Environmental Court for Ireland

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Background and context

This paper is based on a presentation at a conference on *Environmental Courts, Enforcement, Judicial Review and Appeals: Exploring the Options for Ireland* held at the School of Law, University College Cork on 19 June 2015. The conference examined a number of the challenges involved in designing appropriate institutional mechanisms to provide effective oversight and to improve the quality of environmental decision-making. This paper is informed by the rich and wide-ranging discussion that took place at that conference. It sets out the potential advantages and disadvantages of a specialist environmental court in the context of contemporary challenges in delivering access to environmental justice in Ireland. Rather than being in any way prescriptive, the overall aim of this contribution is to spark an informed debate on this issue and on how environmental disputes are dealt with more generally.

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Introduction

Numerous jurisdictions around the world have established environmental courts and tribunals (“ECTs”). Essentially, these are judicial or administrative bodies empowered by the State to specialise in resolving environmental disputes. The number of ECTs has expanded dramatically in recent years, with Pring and Pring identifying over 800 authorised ECTs worldwide.¹ Generally speaking, the main reason behind their establishment is the strong demand for specialisation due to the complex nature of both the law and the scientific and technical data involved in environmental disputes. There are many different models of ECTs in operation around the world.² Where ECTs have been established, their structure, jurisdiction, enforcement powers and impact usually reflect the specific legal, political, socio-economic and cultural conditions that exist at national and local level. Among the

¹ G Pring and C Pring, “Twenty-first Century Environmental Dispute Resolution – is there an ECT in your future?” (2015) 33 *Journal of Energy and Natural Resources Law* 10.

² See generally, G Pring and C Pring, *Greening Justice: Creating and Improving Environmental Courts and Tribunals* (The Access Initiative, 2009) <http://www.accessinitiative.org/resource/greening-justice>.

best known examples of ECTs are the Land and Environment Court in New South Wales (Australia),³ the Vermont Environmental Court (USA)⁴ and the Swedish Land and Environment Courts.⁵ England and Wales now has an Environment Tribunal⁶ and, more recently, a “Planning Court” which takes the form of a specialist (planning) list in the High Court.⁷ At the time of writing, Scotland is considering whether to establish an environmental court.⁸

There are no specialised environmental courts in Ireland. Environmental cases are dealt with across the different courts, from the District Court to the Supreme Court. There are, however, well-established environmental tribunals in the form of *An Bord Pleanála* and the Aquaculture Licences Appeals Board, while the Office of the Commissioner for Environmental Information deals with disputes over public access to information. There has been surprisingly little debate in Ireland as to the desirability or otherwise of an environmental court. While there have been passing references to the merits of specialisation from time to time, the idea has failed to gain any political traction. Given the complexity of both the law and the scientific and technical issues that frequently arise in environmental disputes, it is timely to consider whether an environmental court is a good idea in the Irish context. Furthermore, the mechanisms that are in place to determine environmental disputes must be assessed in light of Ireland’s obligations under international and European Union (EU) law. In particular, the Aarhus Convention on *Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters* 1998 (the Aarhus Convention) insists that the State provide the public with access to review procedures that are “fair, equitable, timely and not prohibitively expensive.”⁹ The cost of expert legal representation and the delays that arise in processing cases to completion are frequent complaints from those involved in environmental litigation in Ireland.

International and EU obligations driving access to environmental justice

The Aarhus Convention and related EU measures have had a significant impact on access to environmental justice in Ireland. Standing rules have been amended to accommodate the obligation to provide for “wide access to justice”. More

³ B J Preston, “Benefits of Judicial Specialization in Environmental Law: The Land and Environment Court of New South Wales as a Case Study” (2012) 29 *Pace Environmental Law Review* 396 and “Characteristics of Successful Environmental Courts and Tribunals” (2014) 26 *JEL* 365.

⁴ M Wright, “The Vermont Environmental Court” (2010) 3 *Journal of Court Innovation* 201.

⁵ U Bjällås, “Experiences of Sweden’s Environmental Courts” (2010) 3 *Journal of Court Innovation* 177 and J Darpö, “Environmental Justice through Environmental Courts? Lessons Learned from the Swedish Experience” in J Ebbesson and P Okowa, (eds) *Environmental Law and Justice in Context* (Cambridge: Cambridge University Press, 2009)

⁶ R Macrory, “The Long and Winding Road - Towards an Environmental Court in England and Wales” (2013) 25 *JEL* 371.

⁷ R Harwood, “The Planning Court comes into being” [2014] *JPL* 699.

⁸ An overview of the current state of play in Scotland is presented in CT Reid, “An Environmental Court for Scotland?” UKELA, *e-law*, Issue 89, July/August 2015, 24. See more generally, Friends of the Earth Scotland, *Litigation over the Environment: An Opportunity for Change* (January 2015).

⁹ Aarhus Convention, Article 9(4).

specifically, the “sufficient interest” test has been reinstated in the case of judicial review of planning decisions and special standing rules are now in place for environmental non-governmental organisations (NGOs). A special costs rule has been enacted for certain categories of planning and environmental litigation. While this rule continues to be problematic in practice, the fact that the usual “loser pays” principle has been modified in certain cases is very significant in facilitating greater access to the courts. But considerable work remains to be done to bring Irish law and practice into line with the Aarhus requirement that the cost of access to justice in environmental matters must not be “prohibitively expensive.”

Beyond judicial proceedings, the access to justice obligations in the Aarhus Convention and Directive 2003/4/EC on public access to environmental information¹⁰ led to the establishment of the Office of the Commissioner for Environmental Information in May 2007. The Commissioner deals with disputes concerning access to environmental information held by public authorities. Prior to the establishment of the Commissioner’s office, the only remedy available in most cases where access to information was delayed or denied was judicial review proceedings in the High Court. Such proceedings were generally too expensive and too slow to provide an effective remedy. The fact that there is now a dedicated, accessible, non-judicial forum to determine disputes in this area is a very significant development. However, as is well known, due to limited resources, there are unacceptable delays in processing appeals in the Commissioner’s office which severely undermines the effectiveness of this remedy in practice.¹¹

There remain a significant number of live issues in Ireland as regards access to justice in environmental matters. These include: the fact that there is no provision for an administrative appeal in certain categories of planning/environmental decision-making; the high cost of litigation and the absence of civil legal aid for environmental cases; uncertainty as to the scope and impact of the special costs rule; delay in processing cases; uncertainty around the appropriate standard of judicial review; and lack of specialist knowledge among judges as to the technical and scientific aspects of planning and environmental matters.

The Department of Environment, Community and Local Government (DECLG) completed a public consultation on “Access to Justice and Implementation of Article 9 of the Aarhus Convention” in September 2014.¹² A set of proposals, informed by the views expressed in submissions to the consultation process, is expected to be published in 2015. It is notable that the *Government Legislation Programme: Spring/Summer Session 2015* includes an “Aarhus Convention Bill”, the purpose of which is stated to be “to consolidate and clarify the existing costs provisions in one

¹⁰ [2003] OJ L 41/26.

¹¹ See, most recently, the Commissioner’s decision in *Tony Lowes, Friends of the Irish Environment and Department of Agriculture, Food and the Marine*, 13 July 2015.

¹² Details of the consultation are available here:

<http://www.environ.ie/en/Environment/AarhusConvention/PublicConsultation/>.

piece of legislation” and “to provide a statutory basis for a number of other provisions of the Aarhus Convention and related EU Directives.” It is clear, therefore, that there are interesting developments ahead as regards Aarhus implementation generally, and the rules governing access to justice in particular.

Previous calls for judicial specialisation in environmental matters

The idea of a planning “division” of the High Court has been mooted from time to time, primarily in the context of Government-led “strategic” priorities, including faster delivery of infrastructure development by expediting the determination of any legal challenges. This idea first surfaced prior to the enactment of the Planning and Development Act 2000, but a special planning division of the High Court never materialised.¹³ The contemporary focus on judicial specialisation in environmental matters is far broader than the early preoccupation with expediting judicial review of planning decisions. The Environmental Protection Agency (EPA) Review Group, which reported in May 2011, recommended that a wider review of environmental governance in Ireland was called for so that fragmentation in structures and processes could be examined more fully.¹⁴ It considered that such a review would be the most appropriate context in which to consider whether an environmental court or tribunal should be put in place and, if so, what form it should take. The Review Group was particularly alert to the relatively low fines imposed by the courts for environmental offences in certain cases and to the fact that tackling environmental crime effectively raises particular challenges. It also considered that persistent concerns over access to justice, including the adequacy of judicial review as a means to challenge EPA decisions and the high costs associated with legal proceedings, would best be addressed in a wider context, beyond the particular case of the EPA. To that end, the Review Group recommended that access to environmental justice should be a core theme in the proposed review of environmental governance.¹⁵ While many of the Review Group’s recommendations have been implemented, it is disappointing to note that there has been no progress to date on a review of environmental governance.¹⁶

¹³ See, e.g., Department of An Taoiseach, *Framework for Action on Infrastructure Development, including Public Private Partnership* (2000).

¹⁴ Environmental Protection Agency Review Group, *A Review of the Environmental Protection Agency* (May 2011) para 1.4.6. The author was a member of the Review Group.

¹⁵ *ibid.*, para 6.6.

¹⁶ The initial response to the Review Group’s recommendations published by the Department of Environment, Community and Local Government in 2012, acknowledged that a review of environmental governance “would be a valuable exercise”. However, it would require “concentrated engagement by a range of stakeholders, Government Departments, local authorities and other public bodies over a considerable period, to ensure a thorough and wide-ranging review.” It concluded that the staffing and financial resources were not in place at the particular point in time and set the timeframe for delivery as “Post-EU Presidency in 2013/2014”. See *EPA Review Implementation Plan* (2012) <http://www.environ.ie/en/Publications/Environment/Miscellaneous/FileDownload,29313,en.pdf>.

The next explicit reference to an environmental court came, unexpectedly, in a keynote address delivered by the Chief Justice, Mrs Justice Denham, in June 2012 to mark the 75th anniversary of the enactment of *Bunreacht na hÉireann*.¹⁷ The Chief Justice reflected on a range of issues, including the obvious need for a Court of Appeal. But she also looked to the future and the possibility and benefit of establishing other courts in light of the growth in the volume of litigation and its complexity and diversity”.¹⁸ The Chief Justice observed that rather than a specific amendment to the Constitution to provide for a specific court, consideration should perhaps be given to an amendment enabling the *Oireachtas* to establish courts other than those of local and limited jurisdiction. Such an amendment would take account of future potential needs of the courts system in a wider context. The Chief Justice highlighted the importance of family law courts and recalled the commitment in the *Programme for Government 2011-2016* to introduce a constitutional amendment to provide for the establishment of a distinct system of family courts. As regards the possibility of other new courts to administer the law in specific areas, the Chief Justice referred specifically to “environmental law courts”. Describing environmental law as “a complex area of law and technology”, she noted that some jurisdictions have specific courts in this area where judges sit with the benefit of technical assessors, for example the Land and Environment Court in New South Wales which has been in operation since 1979.¹⁹ The Chief Justice concluded her address by noting that “time does not stand still and that its inexorable passage undoubtedly raises new challenges” for the structure of our courts system. It is notable that a system of family courts has yet to be established and the Chief Justice’s reference to environmental courts did not attract any significant attention at the policy level.

The idea of an environmental court emerged most recently in the course of the public consultation initiated by the DECLG on “Access to Justice and Implementation of Article 9 of the Aarhus Convention” which ran from 21 July to 26 September 2014.²⁰ The purpose of the consultation was “to initiate discussion on a review of domestic provisions implementing Article 9 of the Aarhus Convention with a view to improving clarity and ensuring on-going effectiveness of the (national) implementing measures.” The DECLG published a background document *Public Consultation – Access to Justice* and also developed a “response template” to assist interested parties to prepare their submissions to the consultation in a focused manner. Section 2 of the background document, which concerned Article 9(2) of the Convention, asked participants whether there were alternatives to judicial review that could be used to implement the Aarhus requirement of access to a review

The most recent review of implementation of the Review Group’s recommendations (published in June 2014) indicated that: “Ongoing reform of the local government sector and the recent establishment of Irish Water will result in improved environmental governance.” See further Review of Environmental Protection Agency: Implementation of Recommendations (August 2014)

<http://www.epa.ie/pubs/reports/other/corporate/epareviewimplementationofrecommendations.html>.

¹⁷ S Denham, “Some Thoughts on the Constitution of Ireland at 75” in E Carolan (ed), *Constitution of Ireland: Perspectives and Prospects* (Dublin: Bloomsbury Professional, 2012).

¹⁸ *ibid*, p30.

¹⁹ Denham CJ also referred, in passing, to the environmental courts in Queensland, South Australia and Tasmania and cited an article by Lord Carnwath, a member of the UK Supreme Court, which examined environmental law and the role of the judiciary: “Judges for the Environment: We have a Crucial Role to Play” *The Guardian*, 22 June 2012

<http://www.theguardian.com/law/2012/jun/22/judges-environment-lord-carnwath-rio>.

²⁰ For commentary on the consultation see Á Ryall, “Planning for Access to Justice in Environmental Matters” (2014) 21 *IPELJ* 131.

procedure? It then went on to enquire whether a review before a court should be before the High Court or before the Circuit Court or “a newly established Environmental Court or a Regulatory appeal/review Court” at either High Court level or Circuit Court level? This explicit reference to a specialist environmental court is welcome and indicates that the DECLG is examining a range of mechanisms that could be adopted to improve oversight of environmental decision-making.

A significant number of submissions to the DECLG consultation favoured the establishment of a specialised environmental court or tribunal.²¹ For example, the Irish Planning Institute argued that “in the interests of improving efficiencies, consideration should be given to the establishment of a specialist environmental court, such as exists already in the shape of the Commercial Court.” Irish Water also expressed support for the establishment of an Environmental Court as a division of the High Court. According to its submission, such a court would “provide the expertise required to deal with environmental cases, and Court Rules similar to those in place in the Commercial Court could provide for an expedited procedure.” It added that, whatever the forum chosen following the consultation process, “there ought to be specialist training for any judges, arbitrators, mediators or other officials in adjudicating or otherwise dealing with environmental cases.” The submissions prepared by the Environmental Pillar and the Environmental NGO Partners to the Environmental Law Implementation Group called for a Planning and Environmental Tribunal “which could extend or subsume the functions of existing preliminary review bodies such as *An Bord Pleanála*, but whose remit would extend much wider to capture, for example, consent regimes which do not currently provide for the possibility of preliminary [administrative] review, such as IPC/IED licensing, afforestation consents etc.”.

According to the DECLG’s website, a “decision-making table” summarising the key points in the (51) submissions received is in preparation and the submissions will inform the review of the national implementation measures. Whether the idea of a dedicated environmental court or tribunal will form part of the proposals to be developed by the DECLG on foot of the public consultation on Article 9 of the Aarhus Convention remains to be seen.

Insights from *Greening Justice*: a comparative study of ECTs

A ground-breaking report by George Pring and Catherine Pring, entitled *Greening Justice* and published in 2009 by The Access Initiative,²² presented a detailed study of ECTs around the world. The Prings’ report identified over 350 ECTs operating in 41 different countries.²³ It is notable that their most recent research revealed over

²¹ All submissions received by the DECLG in response to the consultation are available here: <http://www.environ.ie/en/Environment/AarhusConvention/PublicConsultation/SubmissionsReceived/>.

²² G Pring and C Pring, *Greening Justice: Creating and Improving Environmental Courts and Tribunals* (The Access Initiative, 2009).

²³ *ibid*, p11.

800 authorised ECTs worldwide and that the “explosion” of ECTs is continuing.²⁴ The *Greening Justice* report defined ECTs in general terms as follows:

[J]udicial or administrative bodies of government empowered to specialize in resolving environmental, natural resources, land use development and related disputes. The term “court” is used to indicate a body in the judicial branch of government and “tribunal” to indicate all non-judicial government dispute-resolution bodies (typically in the executive or administrative branch of government).²⁵

While this is a useful working definition, it is important to recall that there is a wide range of ECTs operating around the world and that there are extensive variations between ECTs in terms of composition, jurisdiction, practice and procedure, remedies offered and enforcement tools.

As regards the triggers behind the establishment of ECTs, the most significant factor is demand for specialisation due to the complex nature of environmental law and the scientific and technical data that underpin effective regulation in this field.²⁶ Serious and often highly visible environmental problems, increased public awareness of environmental issues, together with greater media interest in environmental matters, have added to the pressure on governments to deliver accessible and effective mechanisms for resolving disputes and enforcing environmental law. As the Prings put it rather pithily:

[I]f the general courts system fails to deliver access to environmental justice, civil society and business interests begin calling for reform, to get a more expert, efficient and reliable process.²⁷

Governments and the judiciary are, of course, often influenced by new developments elsewhere and may be prompted to establish their own ECTS on the basis of successful experiences in other jurisdictions. Predictably, the access to justice obligations in the Aarhus Convention, and the related EU measures, have led to increased interest in ECTs and in the innovative procedural and other tools deployed by ECTS to deliver efficient and affordable environmental justice.

²⁴ G Pring and C Pring, “Twenty-first Century Environmental Dispute Resolution – is there an ECT in your future?” (2015) 33 *Journal of Energy and Natural Resources Law* 10. The Prings emphasise that ‘authorised’ does not necessarily mean that a particular ECT is actually operating and they note that some jurisdictions authorised ECTs but did not proceed to establish them for various reasons.

²⁵ G Pring and C Pring, *Greening Justice: Creating and Improving Environmental Courts and Tribunals* (The Access Initiative, 2009) p3.

²⁶ See generally, G Pring and C Pring, “Twenty-first Century Environmental Dispute Resolution – is there an ECT in your future?” (2015) 33 *Journal of Energy and Natural Resources Law* 10, pp13-18.

²⁷ *ibid*, pp13-14.

Why ECTs are attractive in principle

The *Greening Justice* study presented the main arguments in favour of ECTs as including: expertise/specialisation; greater efficiency and less cost; consistency in decision-making; improved judicial oversight leading to greater public confidence in the system; greater visibility of environmental issues; scope to develop special procedures, including more flexibility and an emphasis on alternative dispute resolution (ADR); a more integrated approach to decision-making and to remedies; greater public participation due to accessible hearings at local venues; and web-based information about the ECT and its role.²⁸

Counter arguments

The study noted that the main arguments against the establishment of ECTs are arguments against any form of judicial specialisation more generally. These arguments include: the fact that other areas of law, apart from environmental law, also deserve specialist knowledge and expertise; how to define “environmental” cases; the risk of marginalising environmental courts from the mainstream judicial system; fragmentation of the judicial system; a potentially insufficient caseload to justify a specialist court; and the significant start up costs involved in setting up a new “stand alone” court. Significantly, the study also noted that incremental reform within the existing courts system may be preferable to the establishment of ECTs and that a sufficient pool of expertise from which to appoint specialist judges may be lacking in particular jurisdictions.²⁹

“Decisional steps” towards the establishment of an environmental court

Overall, the most significant arguments in favour of the creation of ECTs relate to specialised decision-making leading to increased public confidence, more consistent decision-making and the scope for greater flexibility around practice and procedure, including ADR where appropriate. The *Greening Justice* study presented a series of “decisional steps” which a jurisdiction considering the establishment of an ECT should consider.³⁰ The recommended steps are: First, identifying and weighing the arguments for and against a specialist environmental court based on the particular jurisdiction’s legal structure, political situation, socio-economic conditions and environmental goals. Second, if a decision is taken to proceed with establishing an environmental court, then the various options and best practices set out in the 12 “design decisions” identified by the Prings (explained below) should be analysed and a decision taken on which combination of options best suits the jurisdiction’s particular characteristics and goals. Third, strategic planning is required regarding implementation strategies for developing an environmental court. This stage usually involves *inter alia* public information and participation; working to secure buy-in from

²⁸ G Pring and C Pring, *Greening Justice: Creating and Improving Environmental Courts and Tribunals* (The Access Initiative, 2009) pp14-16.

²⁹ *ibid*, pp17-18.

³⁰ *ibid*, pp5-6.

stakeholders; developing the necessary underlying legislation; arranging funding; selecting and training members of the court and support staff; and adopting appropriate rules of practice and procedure. Fourth, it is important to develop a system to provide for the ongoing evaluation of the environmental court's procedures and outcomes in order to assess its effectiveness in delivering access to environmental justice from both a procedural and a substantive point of view.

Framework of “design decisions” towards establishing an environmental court

The most important factor in developing and designing an environmental court is to ensure that whatever model is adopted “fits” with local legal structures and systems, and in particular with the local judicial system. The *Greening Justice* study identified an elaborate decision-making framework comprising 12 “design decisions” when establishing an ECT, with each stage of the design process presenting a range of options for consideration. In summary, the “design decisions” presented in the Prings’ study are as follows:

- (1) Type of forum (e.g. judicial body/court, administrative tribunal, Ombudsman or other specialised forum etc.);
- (2) Legal jurisdiction (e.g. covering all laws relating to environmental protection or just a selection; administrative, civil, criminal jurisdiction etc.; enforcement jurisdiction and powers);
- (3) Level of decisional review (e.g. agency level; trial level etc; location within the judicial hierarchy and options for appeal);
- (4) Geographic coverage (national, regional, local etc.);
- (5) Case volume (anticipated workload);
- (6) Standing/*locus standi* (any conditions that a potential litigant must meet in order to gain access to the ECT);
- (7) Cost of engaging with the ECT;
- (8) Scientific and technical expertise (internal, external or both);
- (9) Alternative Dispute Resolution (e.g. mediation and/or negotiation; ADR may be annexed to the ECT);
- (10) Competence of judges and decision-makers (independent and expert);
- (11) Case management strategy;
- (12) Enforcement tools and remedies.³¹

Of these 12 “design decisions”, the Prings identified the following as being of particular importance to the success and effectiveness of an ECT: standing; costs; access to scientific and technical expertise; and ADR. Predictably, case management, enforcement tools and remedies were also ranked highly here.

Hallmarks of successful ECTs

Assuming that the political will to create an ECT, and to fund its operation exists, the *Greening Justice* study identified a number of specific characteristics of successful ECTs including: independence from government and administration; high visibility;

³¹ *ibid*, pp20-21. More detailed analysis is presented at pp21-87 of the report.

specialist judges with legal and technical expertise; wide standing provisions; integrated and comprehensive jurisdiction; commitment to ADR; court procedures and strategies to keep litigation costs to a minimum; and effective enforcement tools.³²

After an ECT is established, ongoing review and evaluation of its operation and impact is essential to determine whether it is delivering access to justice affordably and effectively and to assess how it is regarded by the public, environmental NGOs, government, public authorities, industry and other stakeholders. Any shortcomings identified in light of practical experience may then trigger the necessary changes in law and practice so that the ECT continues to evolve and improve over time. It is notable that the Land and Environment Court of New South Wales has developed and applied a methodology for ECT review and evaluation involving a set of performance indicators.³³

General assessment

There is no doubt that carefully designed and adequately resourced ECTs have the potential to deliver considerable benefits in terms of specialisation and consistency, as well as faster, cheaper and more effective access to justice. However, there are many challenges involved in creating and maintaining an effective ECT. The most significant point to emerge from the *Greening Justice* study is the obvious need to ensure that the particular model of ECT adopted for implementation is carefully tailored to local conditions and integrated thoughtfully into the national legal and judicial system. Each jurisdiction faces a unique set of factors and challenges when selecting and designing a suitable model for an ECT. The *Greening Justice* study provides an invaluable starting point by presenting a framework of “design decisions” and highlighting the importance of taking account of local idiosyncrasies when making design choices.

Issues arising in the Irish context

The specific constitutional and legal constraints that arise when considering the establishment of an environmental court in the Irish context are presented and analysed with admirable clarity by Mr Justice Frank Clarke in a background paper prepared for the UCC conference entitled “A Possible Environmental Court: The Constitutional and Legal Parameters” – text available here: <http://environmentaljustice.ie/index.php/background-reading-conference-environmental-courts/>.

For this reason, my paper does not address this particular aspect.

³² *ibid*, ch3.

³³ B J Preston, “*Benefits of Judicial Specialization in Environmental Law: The Land and Environment Court of New South Wales as a Case Study*” (2012) 29 *Pace Environmental Law Review* 396 pp421-423.

In considering the idea of an environmental court for Ireland, the overall goal is, presumably, to put in place a system of environmental dispute resolution that is “fair, equitable, timely and not prohibitively expensive” (as per Article 9(4) of the Aarhus Convention). But is a specialist environmental court necessary in order to achieve that goal? What added value would a specialist environmental court bring to the current system operating in Ireland? Taking account of the findings of the *Greening Justice* study and the discussion at the UCC environmental courts conference, a number of important questions arise that need to be considered carefully at the outset.

[1] The first (deceptively simple) question is: what is the problem that we are seeking to address by considering the establishment of an environmental court? There are many persistent challenges around access to environmental justice in Ireland, including, in particular, the high cost of litigation, delays in processing cases and dissatisfaction with the narrow scope of judicial review. A number of submissions made in response to the DECLG’s public consultation on implementation of Article 9 of the Aarhus Convention called for a specialist environmental court with judges who have expertise in this field. There seems to be an assumption that having specialist judges to preside over planning and environmental cases would serve to improve public confidence in the system and deliver faster and cheaper environmental justice. Obviously, the situation is far more complicated than simply appointing specialist judges. Delivering faster and cheaper environmental justice will involve making significant changes to rules of practice and procedure, deploying intensive case management, and, of course, a commitment to invest the resources necessary to support the efficient administration of justice.

[2] The next question is how best to recruit and appoint expert decision-makers/specialist judges? Apart from the obvious challenge posed by the small pool of judges and lawyers in Ireland who specialise in this field, consideration will also have to be given to the potential role of experts who are not lawyers (i.e. technical and scientific experts) as members of a specialist environmental court. For example, the regional Land and Environment Courts in Sweden comprise a legally qualified judge, a technical judge (with technical expertise in environmental matters) and two expert lay members. The Land and Environment Court of Appeal is comprised of three legally qualified judges and one technical judge. Interestingly, the Supreme Court of Sweden (which is the court of final appeal in certain environmental cases) does not have any technical expertise and this is considered problematic in practice. Another example is the Land and Environment Court of New South Wales is made up of legally trained judges, together with Commissioners who have qualifications and experience in a wide range of relevant areas including: town, country or environmental planning; environmental science; environmental assessment; natural resource management and engineering etc. The idea of specialist environmental judges who are comfortable with the material, willing to engage with it and who can understand the technical and scientific evidence is certainly attractive. Specialisation

should deliver consistency and reliability in the case law. But, as noted previously, more fundamental systemic changes to the judicial system are required to deliver timely and affordable environmental justice.

[3] Another important strand in this debate concerns the adequacy of the systems currently in place to provide oversight of planning and environmental decision-making. Legislation provides for an administrative appeal on the merits of certain categories of planning and environmental decisions via *An Bord Pleanála*, the Aquaculture Licences Appeals Board and the Office of the Commissioner for Environmental Information. But, in other significant areas, for example, decisions on strategic infrastructure development and EPA licensing decisions, the only remedy is judicial review. This lack of consistency in the range of available review mechanisms must be examined as part of any debate on developing an environmental court. There are also important issues to be considered regarding the scope of judicial review and whether the general review of *legality* that it offers is appropriate to deal with contemporary environmental controversies. Recall also that the Aarhus Convention Compliance Committee has indicated that it is not convinced that the standard of judicial review applied by the courts in the United Kingdom is compatible with the access to justice provisions of the Convention, specifically Article 9(2) which demands a review procedure to challenge “the substantive and procedural legality” of certain environmental decisions.³⁴ The impact of the Aarhus Convention and EU law on the standard of review applied in Ireland remains a live issue at the time of writing.

[4] A further issue that must be considered is whether there is a sufficient volume of litigation in this field to justify a specialist environmental court. Accurate and comprehensive data on current levels of environmental litigation and outcomes, including judicial review proceedings in the field of planning and environmental law, should be published to inform this debate. Data on criminal prosecutions, and the levels of penalties imposed by the courts for environmental crime, is also required in order to get a full picture of current activity in environmental matters in all courts from the District Court to the Supreme Court. These data sets are vital to support informed decisions about the potential jurisdiction of any proposed environmental court and, more generally, to inform policy on the future of access to environmental justice in Ireland.

[5] There is no doubt that the Aarhus Convention and the related EU access to justice measures have raised the public’s expectations as to what the Irish legal system should deliver where disputes arise in the planning and environmental field. The generally poor quality of Irish planning and environmental legislation adds an unnecessary layer of complexity to the law. A clear, coherent user-friendly legislative framework is required to underpin a successful environmental court.

³⁴ ACCC/C/2008/33 United Kingdom (24 September 2010) paras 123-127.

[6] Finally, an overarching complicating factor is that many aspects of international and EU environmental law remain in a highly fluid state and there is still considerable scope for genuine disputes over the interpretation and implementation of obligations falling on the State and its emanations, including access to justice obligations. An appeal to the Supreme Court and/or a reference to the Court of Justice of the European Union is often necessary to bring certainty, thereby inevitably adding to the length of proceedings and to the cost of determining the dispute between the parties. The establishment of an environmental court will not impact directly on this wider state of affairs, at least in the short to medium term. But a specialist environmental court should provide greater consistency in decision-making and, with the benefit of tailor-made rules of court, should deliver more efficient access to environmental justice.

Concluding observations

There is a wide range of important practical issues to consider and to be weighed up in determining whether a specialist environmental court would bring any added value to the current system operating in Ireland. And, even if a specialist court was considered to be desirable, the question then arises as to what model would best fit the particular Irish situation: a “stand alone” environmental court or a separate environmental “division” or “list” within the existing court structure?³⁵ The latter option would not involve any radical change to the current system and could perhaps be designed along the lines of the current Commercial Court (which is, in effect, the Commercial List of the High Court which operates under special provisions of the Rules of the Superior Courts).

Whether or not an environmental court is established, delivering a dispute resolution system that is efficient, affordable and user-friendly will require innovative approaches and a significant ongoing investment of resources by the State. A thorough, well-informed debate about how best to resolve environmental disputes in a manner that is compatible with Ireland’s obligations under the Aarhus Convention and EU law is the best starting point. An important part of that debate must be how we can reduce the scope for environmental disputes so as to prevent disputes from arising in the first place. Working to improve the quality of decision-making at first instance, through dedicated training, capacity building and awareness-raising initiatives for decision-makers and the public, is an obvious practical step in the right direction.

31 July 2015

³⁵ See Mr Justice Clarke’s paper “A Possible Environmental Court: The Constitutional and Legal Parameters” (June 2015): <http://environmentaljustice.ie/index.php/background-reading-conference-environmental-courts/>.