Judicial Pro-Activism and Collaborative Constitutionalism:

Ensuring Environmental Justice in India, Ireland, and Bangladesh

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Declaration of Originality

I hereby confirm that the work presented in this thesis is my own. Any information derived from other sources has been indicated in the work. I have not previously obtained a degree in this university, or elsewhere, on the basis of this work.

Parts of this thesis have been published or is forthcoming in the following journals, special issues, and as a book chapter:

▪ 'Unenumerated Environmental Rights in A Comparative Perspective: Judicial Activism or Collaboration as A Response to Crisis?' (2020) 25(6) Environmental Liability - Law, Policy and Practice 260.

▪ 'Collaborative Environmental Governance: The Role of the Law Commission Bangladesh' (2021) Special Edition Law Commission, Bangladesh 126.

▪ 'Collaborative Constitutionalism and Courts as Partners in the Joint Enterprise of Governing' (2022) 1 Bangladesh University of Professionals Law Digest 88.

▪ 'An Empirical Study on the Role of the Courts in Environmental Protection: Bridging the Gaps between Academics and Practitioners' has been accepted for publication in a special edition of the Law, Environment and Development Journal (LEAD Journal).

▪ A book chapter titled 'The National Green Tribunal Model to Ensure Environmental Justice through Collaboration' has been accepted for publication in an edited book titled *The Future of Environmental Law: Ambition and Reality* to be published in the IUCN Academy of Environmental Law series by Edward Elgar Publishing 2022.

Abstract

This is a doctrinal, comparative, and socio-legal analysis examining the role of the courts of India, Ireland, and Bangladesh in environmental matters. Considering the challenges they face, this thesis proposes and constructs 'judicial pro-activism' and 'collaboration' as methods to help judges in ensuring environmental justice while maintaining the constitutional principles.

The thesis discusses environmental justice discourse and examines the roles of the judiciaries of the selected jurisdictions in ensuring the elements of environmental justice. The examination shows that in an attempt to protect the environment, these judiciaries have encroached on the domain of other organs and have engaged in adventurism in exercising activism, or have shown judicial passivity causing injustice. A critical examination of the judicial decisions also demonstrates that the judiciary alone cannot resolve multi-faceted environmental problems by pronouncing judgments.

It includes qualitative data gathered through semi-structured interviews with judges, lawyers, academics, and environmental activists. Data analyzed through a constant comparative method shows gaps between academics and practitioners impacting the development of environmental jurisprudence in the selected jurisdictions.

To better protect environmental rights and the environment, and based on qualitative data, this thesis proposes that the courts should adopt a proactive role and a collaborative approach to reach a sustainable, effective, and robust decision. Case references from the selected jurisdictions are examined to develop a collaborative method.

Finally, this thesis examines the functioning of the National Green Tribunal (NGT) of India to develop a stronger environmental institution to better protect and ensure environmental justice. The thesis demonstrates, through an examination of the salient features and innovative working procedures of the NGT (involving other organs and stakeholders by means of stakeholder consultation and monitoring mechanism), that the NGT has

adopted a collaborative approach and can be used as a model for Bangladesh and Ireland.

Preface

This thesis is submitted for the degree of Doctor of Philosophy at the School of Law of the University of Galway. This research has been funded by the Hardiman Research Scholarship. The extended period of two months due to the Covid-19 pandemic has been funded by the Higher Education Authority of Ireland.

The data used in this thesis was collected by the author between February 2020 and November 2021, and analyzed by the author. Ethics approval was obtained from the NUI Galway Research Ethics Committee Ref: 19-Jan-12.

In my research, I have examined the role of the courts in ensuring environmental justice and propose that judicial pro-activism in adopting a collaborative approach to environmental matters can bring sustainable and effective results. I being a judge myself find it difficult to craft a balance between environmental protection, economic development, and protecting the rights of the poor. This research is inspired by my personal experience and attempts to find a solution to these problems.

Masrur Salekin

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Note on Citations

Citations in this thesis follow the OSCOLA (Oxford Standard for the Citation of Legal Authorities) Ireland standard (2nd edition 2016).

Judgments and decisions from the National Green Tribunal (NGT) are not reported in a printed publication and are, therefore, referenced following the format of their publication in the official website of the NGT available at https://www.greentribunal.gov.in/. The format followed is the names of the parties and the date of judgment or order, e.g. *K. K. Singh v National Ganga River Basin Authority* (Judgment 16 October 2014).

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Abbreviations

AD	Appellate Division
ADR	Alternative Dispute Resolution
AIE	Access to Information on the Environment
BELA	Bangladesh Environmental Lawyers Association
BLAST	Bangladesh Legal Aid and Services Trust
CBDR	The principle of common but differentiated responsibility
CEI	Commissioner for Environmental Information
CIC	Central Information Commission
CETP	Common Effluent Treatment Plant
CJEU	Court of Justice of the European Union
DDA	Delhi Development Authority
DECLG	Department of Environment, Community and Local Government
DPSP	Directive Principles of State Policy
DoE	Department of Environment
DGHS	Directorate General of Health Services
EC	Environmental Clearance
EC	Environment Court
ESC	Economic, Social, and Cultural
EIA	Environmental Impact Assessment

ECA	Environmental Conservation Act
ECA	Environment Courts Act
ECJ	European Court of Justice
ECT	Environmental Court and Tribunal
EPA	Environmental Protection Agency
EU	European Union
FIE	Friends of the Irish Environment
FPSP	Fundamental Principles of State Policy
GT	Grounded Theory
HCD	High Court Division
NGO	Non-governmental Organization
HRPB	Human Rights and Peace for Bangladesh
MoH&FW	Ministry of Health and Family Welfare
MoEFCC	Ministry of Environment, Forest and Climate Change
NALSA	National Legal Services Authority
NGT	National Green Tribunal
NRCC	National River Conservation Commission
PDA	Planning and Development Act
PIL	Public Interest Litigation
PT	Practitioner
RTI	Right to Information

SIC	State Information Commissions
SDGs	Sustainable Development Goals
SOP	Standard Operating Procedure
SC	Supreme Court
UN	United Nations
UNEP	United Nations Environment Programme
UNECE	United Nations Economic Commission for Europe

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Chapter 1: Courts, Judges, and Environmental Justice

1.1. Introduction

This thesis proposes and constructs *judicial pro-activism* and *collaboration* as methods[1] that would help judges to ensure environmental justice while maintaining the constitutional balance of powers through scientifically informed, robust, and effective judgments.

Judicial pro-activism requires judges to be proactive and at the same time to adopt a balanced approach between over-activism and over-conservatism avoiding encroaching into the domains of other organs or undermining constitutional principles. *Collaboration* complements judicial pro-activism allowing judges to act as a facilitator engaging other organs of the state in participatory decision making to reach sound, sustainable, and effective decisions to tackle 'hot'[2] environmental problems. This thesis, recognizing the importance of the role of the courts as an independent organ to perform a meaningful supervisory role vis-à-vis the other organs of the state[3] and considering the features of collaboration,[4] argues that the collaborative approach can help judges to remain within constitutional parameters, promote the rule of law, and ensure government accountability.

Through an examination of the judicial pronouncements by the courts of India, Bangladesh, and Ireland (the selected jurisdictions) and the functionality of the National Green Tribunal (NGT), this thesis demonstrates that exercising judicial pro-activism in

[1] The methods were suggested by interviewees during the qualitative research and were developed through doctrinal research. The initial impetus to explore the idea of collaboration came from a journal article by Ioanna Tourkochoriti, 'What is the Best Way to Realize Rights?' (2019) 39(1) Oxford Journal of Legal Studies 209. The term collaboration has been used interchangeably in this thesis with 'collaborative constitutionalism' and 'collaborative approach'.

[2] The term 'hot' has been used to describe how environmental problems include 'socio-political conflict, polycentricity, interdisciplinarity, and scientific uncertainty'. Elizabeth Fisher, 'Environmental Law as "Hot" Law' (2013) 25(3) Journal of Environmental Law 347.

[3] Aileen Kavanagh, 'The Role of Courts in the Joint Enterprise of Governing' in Nicholas Barber, Richard Ekins and Paul Yowell (eds), *Lord Sumption and the Limits of the Law* (Hart 2016) 121.

[4] Collaboration has the capacity to embrace the distinct character of institutional conduct and realistically reflect the changing social power and political activity. It provides the benefit of producing a decision involving mutual engagement of different organs superior to a decision that might have been achieved by a single organ acting by itself. Eoin Carolan, 'Dialogue Isn't Working: The Case for Collaboration as A Model of Legislative–Judicial Relations' (2016) 36(2) Legal Studies 209.

adopting a collaborative approach to environmental decision making is not only desirable but also pragmatically possible for ensuring environmental justice.

1.2. Motivation Behind the Research

Protection of the environment and environmental rights, especially protecting the rights of the poor and disadvantaged and maintaining a healthy ecosystem, are the biggest contemporary challenges.[5] As governments have failed to tackle these challenges,[6] they fall to the judiciary, who have the delicate task of promoting the rule of law, protecting human rights, and ensuring effective compliance of environmental laws and regulations.[7] The central role of the judiciary in legal and constitutional systems due to its independence and capacity to ensure accountability to and fairness in the application of the law places it in an important position.[8] The importance of the judiciary has increased by an unprecedented surge in legal claims for both human rights and the environment.[9] Responding to the task, judges are increasingly emerging as an important actor in environmental protection in several jurisdictions around the world by handing down a series of landmark decisions requiring governments and industries to address various environmental issues including climate change and to safeguard the environmental rights of the citizens. The courts have pointed out to the government the obligations that it has to perform regarding taking proactive steps and adopt measures to protect environment.[10]

[5] Stuart Bell, Donald McGillivray, and Ole W. Pedersen, *Environmental Law* (Oxford University Press 2013) 3.
[6] Gitanjali Nain Gill, *Environmental Justice in India: The National Green Tribunal* (Routledge 2017) 39; Dublin City University (DCU), School of Law and Government, *Environmental Justice in Ireland: Key Dimensions of Environmental and Climate Injustice Experienced by Vulnerable and Marginalized Communities* (2022) 5; Thomas Andersson, 'Government Failure - the Cause of Global Environmental Mismanagement' (1991) 4 Ecological Economics 215.
[7] Kenneth J. Markowitz and Jo J.A. Gerardu, 'The Importance of the Judiciary in Environmental Compliance and Enforcement' (2012) 29 Pace Environmental Law Review 538; Nick Robinson, 'Expanding Judiciaries: India and the Rise of the Good Governance Court' (2009) 8 (1) Washington University Global Studies Law Review 1.
[8] Christina Voigt and Zen Makuch, 'Courts and the Environment: An Introduction' in Christina Voigt and Zen Makuch (eds), *Courts and the Environment* (Edward Elgar 2018) xii.
[9] Michael R. Anderson, 'Human Rights Approaches to Environmental Protection: An Overview' in Alan E. Boyle and Michael R. Anderson (eds), *Human Rights Approaches to Environmental Protection* (Claredon Press 1996) 1; Oliver A. Houck, *Taking Back Eden: Eight Environmental Cases That Changed the World* (Island Press 2009)**;** Elizabeth Fisher, Bettina Lange, and Eloise Scotford, *Environmental Law: Text, Cases & Materials* (Oxford University Press 2019).
[10] Emeline Pluchon, 'Leading from the Bench: The Role of Judges in Advancing Climate Justice and Lessons from South Asia' in Tahseen Jafry (ed), *Routledge Handbook of Climate Change* (Routledge 2019) 139.

But, at times, judges find it difficult to craft a balance between basic rights and the right to a healthy environment and face several challenges in dealing with environmental issues.[11] This research was motivated to find solutions to the challenges and problems transpiring from an analysis of existing literature, judicial decisions, and case studies. Judges, particularly in environmental matters, face the following challenges and problems:

► Striking a balance between excessive judicial assertion and judicial passivity resulting in environmental injustices;
► The conflict between right to the environment and other rights such as the right to property, right to livelihood, right to development;
► Transgressing the constitutional balance of powers;
► Not being sufficiently scientifically informed;
► A long delay in implementation or non-implementation;
► Unsustainable nature of orders;
► Ineffectiveness of judicial decisions and orders;
► Setting double standards in ensuring the right to a proper environment and the rights of the poor and disadvantaged.

The following discussion shows how these challenges gave rise to the research question, the research objectives, and how the thesis finds solutions to these problems.

1.3. The Research Question and Its Importance

On the eve of the World Summit on Sustainable Development around 120 judges from around 60 countries met at the UNEP Global Judges' Symposium in Johannesburg. The judges adopted the 'Johannesburg principles on the role of law and sustainable development', containing the following statement:

[11] James R. May and Erin Daly, *Global Judicial Handbook on Environmental Constitutionalism* (3rd edn, UNEP 2019) 49.

> We affirm that an independent judiciary and judicial process is vital for the implementation, development and enforcement of environmental law, and that members of the judiciary, as well as those contributing to the judicial process at the national, regional and global levels, are crucial partners for promoting compliance with and the implementation and enforcement of international and national environmental law.[12]

The key research question in this thesis is inspired by the challenges faced by judges in environmental decision-making and the role ascribed to judges above in environmental protection: *How can the role of the court as an amicus for the environment be developed to ensure environmental justice without compromising other human rights and development needs while remaining within constitutional mandates?*

There have been recurrent debates about the role of judges. Until recently, this has been largely influenced by the view expressed by Hamilton[13] that the court is the weakest of the three organs of the state. According to him, the only role of a judge is to pronounce judgment on a dispute without any power to take any active resolution. A similar role for judges has also been put forward by legal positivists.[14] However, the state's functions have expanded post-World War II. With the developing concept of the welfare state[15] and the expanded size and scope of administration and legislation, the scope and meaning of adjudication have also been expanded. As a consequence, in addition to the traditional civil and criminal matters, the courts are now involved in many new areas of law and public policy such as constitutionalism, environment, and climate change.[16]

Courts in a number of countries started to participate openly in the constitutional and political process in an attempt to control and monitor the actions and inactions of the executive and the legislature.[17] This helped the courts to become a key branch of the state in shaping the general direction of society. With this new prestige and powers, the

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[12] 'The Johannesburg Principles on the Role of Law and Sustainable Development' (2003) 15(1) Journal of Environmental Law 107.
[13] Alexander Hamilton, 'The Federalist, No. 78: The Judiciary Department' in Alexander Hamilton, John Jay and James Madison (eds), *The Federalist Papers* (1778), Ian Shapiro (ed) (Yale University Press 2009).
[14] Ridwanul Hoque, *Judicial Activism in Bangladesh: A Golden Mean Approach* (Cambridge Scholars Publishing 2011) 1.
[15] In a welfare state not only the basic rights of the citizens are ensured rather the minimum conditions of well-being such as education, health are also protected by the state along with the protection from the consequences of other social risks.
[16] Shimon Shetreet, 'Judging in Society: The Changing Role of Courts' in Shimon Shetreet (ed), *The Role of Courts in Society* (Martinus Nijhoff 1988) 467.
[17] Torbjörn Vallinder*, 'The Judicialization of Politics'* (1994) 15(2) International Political Science Review 91.

courts also have to cope with growing caseloads and more complex questions of law and public policy.[18] In an attempt to ensure access to justice to the poor and disadvantaged, the courts also started opening their doors by adopting various procedural mechanisms.[19] The courts become a means of addressing legal, political, and even moral demands. All these have increased the powers of the courts across the world.[20] However, this new role for the courts, especially in environmental cases, entails various challenges including maintaining constitutional balances,[21] crafting a balance between conflicting rights,[22] delay in implementation or non-implementation of orders,[23] and striking a balance between judicial over-activism and judicial passivity resulting into injustice.[24] All these challenges make this research significant as it seeks to develop methods to help judges in accomplishing their role in ensuring environmental justice while maintaining constitutional mandates.

In addition to a growing number of environmental cases, the importance of this research has increased with the growing 'explosion'[25] of climate change litigation all over the world. More than a thousand lawsuits (total 1547 at time of writing) have been filed for ensuring government and corporate responsibilities regarding climate change.[26] A complaint has been lodged before the United Nations (UN) Committee on the Rights of the Child[27] and cases have been filed before regional[28] and national courts.[29]

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[18] Hector Fix-Fierro, *Courts, Justice and Efficiency: A Socio-Legal Study of Economic Rationality in Adjudication* (Hart 2003) 15.
[19] Upendra Baxi, 'Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India' (1985) 4 (6) Third World Legal Studies 107.
[20] Carlo Guarnieri and Patrizia Pederzoli, *The Power of Judges: A Comparative Study of Courts and Democracy* (Oxford University Press 2002).
[21] Shubhankar Dam and Vivek Tewary, 'Polluting Environment, Polluting Constitution: Is A "Polluted" Constitution Worse Than A Polluted Environment?' (2005) 17 (3) Journal of Environmental Law 383.
[22] Michael R. Anderson, 'Individual Rights to Environmental Protection in India' in Alan E. Boyle and Michael R. Anderson (eds), *Human Rights Approaches to Environmental Protection* (Clarendon Press 1996) 199.
[23] Geetanjoy Sahu, 'Implications of Indian Supreme Court's Innovations for Environmental Jurisprudence' (2008) 4(1) Law, Environment and Development Journal 1.
[24] Maria Cahill and Seán Ó Conaill, 'Judicial Restraint can also Undermine Constitutional Principles: An Irish Caution' (2017) 36 (2) University of Queensland Law Journal 259; Hoque, *Judicial Activism in Bangladesh* (n 14) 2.
[25] Jacqueline Peel & Hari M. Osofsky, *Climate Change Litigation*: *Regulatory Pathways to Cleaner Energy* (Cambridge University Press 2015) xi.
[26] Climate Change Litigation Databases, <http://climatecasechart.com> accessed 03 March 2022.
[27] A Complaint has been launched by 16 young people, including Greta Thunberg, before the United Nations (UN) Committee on the Rights of the Child, 23 September 2019 <https://earthjustice.org/sites/ default/files/files/CRC-communication-Sacchi-et-al-v.-Argentinaet-al.pdf> accessed 03 March 2022.
[28] Case T-330/18 *Armando Ferrão Carvalho and Others v The European Parliament and the Council* [2018] ECLI:EU:T:2019:324 (People's Climate Case).
[29] *Urgenda Foundation v State of the Netherlands* NL:HR:2019:2007; *Friends of the Irish Environment v Ireland* [2020] IESC 49; *Lliuya v RWE AG*, Higher Regional Court of Hamm, 30 Nov. 2017; *Ridhima Pandey v Union of India* Original Application No. 187/2017; *Indian Council for Enviro-legal Action v MoEFCC & Others*, Application No. 170/2014; *Ashgar Leghari v Pakistan* [2015] Writ Petition No. 25501/201.

1.4. Selection of Jurisdictions

To respond to the research question and to find solutions to the challenges faced by judges in environmental protection, following a literature review on the role of the courts in ensuring the elements of environmental justice, three jurisdictions (India, Bangladesh, and Ireland) were selected for comparative research.[30] The reasons for selecting these jurisdictions as comparable are:

First, all these countries follow the common law legal system.

Second, all have written constitutions and follow a similar format with constitutional supremacy, separation of powers, rule of law, democracy, independence of the judiciary and the fundamental rights incorporating a bill of rights. All three Constitutions incorporated unenforceable directive principles of state policy. The directive principles of state policy in the Constitution of India had been borrowed from the Constitution of Ireland.[31]

Third, all were under British dominance for a long period and share common griefs in the colonial and post-colonial era. India and Ireland strove for independence and a revolution took place, almost simultaneously.[32]

Fourth, not only the similarities in their legal systems and constitutional features but also the divergences in their courts' engagement in protecting environmental rights have been used as the parameters for the selection of jurisdictions. Despite significant legal and constitutional similarities, the judiciaries of the selected jurisdictions have gone in quite different directions in recognizing the right to the environment.[33] The two South Asian judiciaries have used judicial activism as a means of social progress.[34] Environmental

[30] A detailed discussion on research methodology is included later in this chapter (1.7).
[31] Masrur Salekin, 'Unenumerated Environmental Rights in a Comparative Perspective: Judicial Activism or Collaboration as a Response to Crisis?' (2020) 25(6) Environmental Liability - Law, Policy and Practice 260.
[32] Kate O'Malley, *Ireland, India and Empire: Indo-Irish Radical Connections, 1919–64* (Manchester University Press 2008).
[33] In *Subhash Kumar v State of Bihar* [1991] AIR 420 (SC), the Supreme Court of India declared the right to live in a healthy environment as a fundamental right; the Supreme Court of Bangladesh recognized the right to the environment in *Dr. M. Farooque v Bangladesh* [1997] 49 DLR 1 (SC); the Supreme Court of Ireland in *Friends of the Irish Environment v The Government of Ireland* [2020] IESC 49 declined to derive an unenumerated environmental right from the Constitution of Ireland.
[34] Venkat Iyer, 'The Supreme Court of India' in Brice Dickson (ed), *Judicial Activism in Common Law Supreme Courts* (Oxford University Press 2007) 126; Jona Razzaque, *Public Interest Environmental Litigation in India, Pakistan, and Bangladesh* (Kluwer 2004) 58.

jurisprudence in Ireland is still evolving but currently follows a more conventional route respecting constitutional mandates such as separation of powers. The Irish judiciary has shifted its role, from activist in the 1960s and 1970s to a more restrained one now.[35] This thesis examines the reasons behind this shifting of role as it can be an important model for the activist South Asian judiciaries.

Fifth, Countries both from the east and the west with constitutional and legal similarities have been selected to compare and contrast and to see if the research result is similar notwithstanding the social, economic, and political differences.

1.5. Scope of Thesis

To answer the research question, the following objectives were determined:

● Examine and evaluate the role of the courts of the selected jurisdictions in ensuring environmental justice; and
● Design processes to promote and produce collaborative outcomes in environmental cases through the exercise of judicial pro-activism.

1.5.1. Identifying Elements of Environmental Justice and Examining the Role of the Courts

To achieve the above objectives, this thesis explores the concept of environmental justice and identifies four elements: i. Distributive justice; ii. Recognition; iii. Ecological justice, and; iv. Procedural justice. The environmental justice situation prevailing in the selected jurisdictions is examined keeping in mind the North-South dimension of environmental injustice, the colonial and post-colonial impacts, and the impact of development initiatives on poor people's lives and livelihoods.

[35] Eoin Daly, 'Reappraising Judicial Supremacy in the Irish Constitutional Tradition' in Laura Cahillane, James Gallan and Tom Hickey (eds), *Judges, Politics and the Irish Constitution* (Manchester University Press 2017) 29.

To assess the role of the courts in ensuring environmental justice, judicial decisions from the selected jurisdictions are critically examined to see how far distributive justice, recognition, access to environmental information, public participation in environmental decision-making, and access to courts in environmental matters have been ensured through the intervention of the courts. Since excessive judicial activism has the tendency to produce injustice,[36] judicial pronouncements are examined to see how far judges have acted judiciously and without hampering the constitutional balance. In examining the role of the courts in ensuring environmental rights, a critical examination of judgments recognizing or refusing to recognize the right to the environment is included. The significant role played by public interest litigation (PIL) in developing environmental jurisprudence in the two South Asian countries and a brief analysis of the application of *suo motu* and epistolary jurisdictions by the two South Asian judiciaries is also included. The passive role adopted by the courts in large infrastructure projects is criticized showing the lack of coherence in judicial attitude.[37]

1.5.2. Proposing New Methods through Qualitative Research

This thesis includes data collected through qualitative socio-legal research showing the views of academics and practitioners regarding the role of the courts in environmental matters. Analyzed data shows suggestions made by the interviewees to bridge the gaps between academics and practitioners by improving environmental sensitization of judges, lawyers, and academics, by writing more directing practitioners, and by increasing consultation of legal scholarship. To develop a robust environmental jurisprudence and for ensuring environmental justice, the interviewees suggested establishing specialized environmental court and to have collaboration among the state organs.

Based on doctrinal, comparative, and qualitative socio-legal research, the idea of judicial pro-activism in adopting a collaborative approach is developed both theoretically and by providing practical outlines to help judges strike a balance between judicial adventurism

[36] Edwin Cameron, 'When Judges Fail Justice' (2005) 58 Current Legal Problems 83.
[37] Gitanjali Nain Gill, 'Environmental Protection and Development Interests: A Case Study of the River Yamuna and the Commonwealth Games, Delhi 2010' (2014) 6(1–2) International Journal of Law in the Built Environment 69.

and unacceptable passivity and apply their judicial discretion with environmental sensitivity and to societal specifies, underpinned by sufficient awareness about their roles mentioned in the constitution and their obligation to do justice.

1.5.3. Judicial Activism and Judicial Restraint

This thesis takes into consideration the point that the difference between judicial activism and judicial pro-activism is very delicate. It is also important to differentiate between judicial pro-activism and judicial restraint.

In general, judicial activism happens when the courts are not confining themselves to only adjudication of conflicts or disputes and adventure to make social policies touching a large number of citizens and interests. Judicial activism is different from judicial review[38] which is specifically provided to the courts by the Indian, Irish, and Bangladesh Constitutions. According to this thesis, *judicial activism* that is used by the courts to control the constitutional powers of the other two organs of the state, to make laws or policies, replace good governance with judicial governance, and violates the principle of separation of powers is problematic. Similar features of judicial activism have been outlined by Keenan D Kmiec.[39]

Judicial restraint is the role of a judge which would preclude him from intervening even when it is required by the constitution. This is the role of the courts which are generally liked by the government.[40] However, this thesis does not rule out the idea of judicial restraint fully, but rather builds on the idea that judicial restraint is sometimes warranted by the institutional limitations of the courts and judges should exercise their powers and discretion with caution to protect the constitutional mandates.[41]

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[38] Kenneth M. Holland (ed), *Judicial Activism in Comparative Perspective* (Macmillan 1991) 1.
[39] The core meanings of judicial activism are: '(1) invalidation of arguably constitutional actions of other branches, (2) failure to adhere to precedent, (3) judicial ''legislation'', (4) departures from accepted interpretive methodology, (5) result-oriented judging'. Keenan D Kmiec, 'The Origin and Current Meanings of Judicial Activism' (2004) 92(5) California Law Review 1441.
[40] David A. Strauss, 'Originalism, Conservatism, and Judicial Restraint' (2011) 34(1) Harvard Journal of Law and Public Policy 137.
[41] Aileen Kavanagh, 'Judicial Restraint in the Pursuit of Justice' (2010) 60(1) University of Toronto Law Journal 23.

A detailed discussion of judicial activism or judicial restraint is beyond the scope of this thesis. However, through an examination of judicial decisions from the selected jurisdictions, chapters two and three make the two concepts sufficiently clear to show that neither of them has helped the courts to achieve environmental justice and show the need to adopt a more balanced approach by judges because in many instances they have exercised undue judicial authority.

1.5.4. Developing the Idea of Judicial Pro-Activism

Compared to judicial activism and judicial restraint, the idea of *judicial pro-activism* proposed and developed in this thesis is an integrated idea of the judicial role aimed at achieving not only environmental justice but also good governance and rule of law. The idea of judicial pro-activism contemplates a creative and socially relevant form of enlightened interpretation of law, environmentally sensitive application of judicial discretion, high-level judicial craftsmanship, and aimed only at ensuring justice. However, informed by the qualitative data gathered through interviews, this thesis argues that the exercise of judicial pro-activism would be society specific. The arguments made in this thesis are based on the idea that to enforce government and public accountability and to protect constitutional rights, the judiciary has to be vigilant[42] and judges are required to be active in engaging in collaboration with other organs.

In developing the idea of judicial pro-activism, this thesis considers the role of a judge explained by Richard Posner, Aharon Barak, and P.N. Bhagwati. According to Posner, if judges do not exercise discretion and are only expected to apply laws made by the legislatures or follow precedents 'then judges would be well on the road to being superseded by digitalized artificial intelligence programs.'[43] The view expressed by Aharon Barak is in line with Posner because Barak thinks that it is the particular policy and judicial philosophy of a judge that guides her in the most difficult hours.[44] P.N. Bhagwati shared the same view mentioning that judges are expected to meet some

[42] Hoque, *Judicial Activism in Bangladesh* (n 14) 11.
[43] Richard A. Posner, *How Judges Think* (Harvard University Press 2008) 5.
[44] Aharon Barak, *The Judge in Democracy* (Princeton University Press 2006) 4.

minimum threshold in their responsibility towards constitutional democracy. The responsibilities emanate from the constitution, the fundamental ethos of democracy, and are extended beyond the mere resolution of disputes. However, while exercising their powers, judges should not lose sight of the basic tenets of a democratic system based on the rule of law and bear in mind that they owe an obligation to make available their philosophy and the reasons for exercising the powers for public scrutiny. [45] According to Bhagwati, a judge should be creative in giving a statute a new meaning to bridge the gap between law and life and cautioned that a judge should not entertain a purely political question not involving the determination of any constitutional or legal right or obligation.[46] This thesis argues that by exercising judicial pro-activism, a judge can accomplish the roles of a judge pictured by Bhagwati, Posner and fulfil both the functions mentioned by Barak.[47]

1.5.5. Developing the Collaborative Method

To assist judges in exercising judicial pro-activism and strike a balance between judicial over-activism and meek administration of justice and maintain the constitutional balance of powers in environmental issues, this thesis develops the collaborative method. Recognizing the institutional limitations of the courts and conscious of the lack of expertise of judges to deal multifaceted environmental problems,[48] this thesis proposes the role of the courts in a joint enterprise of governing as a partner. Through literature review and case studies from the selected jurisdictions, three different forms of collaboration to design processes to promote and produce collaborative outcomes in environmental cases have been identified and developed:

i. Courts Acting as a Facilitator in Collaboration.

[45] P.N. Bhagwati, 'Judicial Activism and Public Interest Litigation' (1985) 23 Columbia Journal of Transnational Law 561.
[46] P.N. Bhagwati, 'The Role of the Judiciary in the Democratic Process: Balancing Activism and Judicial Restraint' (1992) 18 Commonwealth Law Bulletin 1262.
[47] A judge in a democracy has two functions: *First*, upholding the constitution and the rule of law, and *second*, bridging the gap between law and society. According to the first role, the judiciary is the guardian of the constitution and of fundamental rights of the citizens. According to the second role, the judiciary is expected to ensure that rule of law is adapting itself to the constant process of transformation and that the process is taking place in an orderly manner and at the same time contributing toward greater justice. Barak (n 44).
[48] George Pring & Catherine Pring, 'The Future of Environmental Dispute Resolution' (2012) 40(1-3) Denver Journal of International Law and Policy 482.

ii. Collaboration in the form of Participatory Decision-Making.
iii. Collaboration in the Form of Suspended Declaration of Invalidity.

Through an examination of the functioning of the National Green Tribunal (NGT) of India two forms of collaborative methods have been identified and constructed for ensuring participatory decision-making:

a. Stakeholder consultative adjudicatory process; and
b. Tribunal monitored mechanism.[49]

The principle of separation of powers in the form of checks and balances is the backbone of the constitutional systems in the selected jurisdictions. An examination of the collaborative approach to show that it is in line with the principle of separation of powers as enshrined in the constitutions of the selected jurisdictions has been carried out.

1.5.6. The NGT Model

Based on suggestions made by the interviewees during the qualitative research, this thesis includes an examination of the salient features of the NGT to see how far Preston's 'desirable dozen'[50] is embedded in the NGT model. By applying the doctrine of functionality, the research proposes the NGT as a model for Bangladesh (which has a non-functional environmental court)[51] and Ireland (which is planning to create one specialized environmental court).[52] The major challenges of the NGT are also examined to improve the model for ensuring environmental justice through a collaborative approach.

[49] Gitanjali Nain Gill, 'The National Green Tribunal: Evolving Adjudicatory Dimensions' (2019) 49 (2-3) Environmental Policy and Law 153.
[50] Preston identified twelve characteristics required for the successful operation of an ECT. Brian J. Preston, 'Characteristics of Successful Environmental Courts' (2014) 26 (3) Journal of Economic Literature 365.
[51] Gill, *Environmental Justice in India* (n 6) 28.
[52] Harry McGee, 'New Court to Deal with Planning Issues to be Established' *The Irish Times* (Dublin, 28 April 2022).

1.6. Research Findings

This thesis has certain significant findings from doctrinal, qualitative, and socio-legal research:

First, despite the social, economic, and political differences, environmental justice situations in the selected jurisdictions are similar, with restricted access to justice, lack of participation in environmental decision-making, and restricted access to information.[53] In all three countries, it is the poor who are suffering most due to environmental degradation and attempts to protect the environment.

Second, through a critical analysis of the role of the courts in ensuring environmental justice, this thesis recognizes that judicial activism is both normatively and descriptively inappropriate. Neither judicial activism nor judicial restraint is an appropriate method for achieving environmental justice. Judicial activism can violate constitutional balances and judicial restraint can undermine constitutional principles.

Third, as environmental problems are multifaceted and polycentric, it is difficult for the judiciary alone to resolve environmental crises. To reach robust, sustainable, and effective decisions the courts need the support of legislative, regulatory, and enforcement mechanisms.

Fourth, there is a lack of development of environmental jurisprudence due to the lack of environmental sensitivity among practitioners, reluctance towards referring legal scholarship, the post-colonial attitude of the South Asian judges, and lack of training and expertise among judges, lawyers, and court staff.

[53] DCU Report (n 6); Lavanya Rajamani, 'Public Interest Environmental Litigation in India: Exploring Issues of Access, Participation, Equity, Effectiveness and Sustainability' (2007) 19 (3) Journal of Environmental Law 293; Md. Saiful Karim, Okechukwu Benjamin Vincents, and Mia Mahmudur Rahim, 'Legal Activism for Ensuring Environmental Justice' (2012) 7 (1) Asian Journal of Comparative Law 13.

Fifth, irrespective of the social, political, and economic differences between the selected jurisdictions, the interviewees expressed similar views preferring a court that follows constitutional principles, bases judgments on technical lawyerly grounds, and sound reasoning.

Sixth, the judiciary is required to be proactive in environmental matters as independence is the central value of the courts as an institutional actor, allowing them to apply the law in a fair and impartial manner by resisting political pressure.

Seventh, due to institutional incapacity, constitutional balances, and lack of expertise and information, the courts should eschew adopting a legislative and executive role and should not be involved in policy formulation. A collaborative approach by the court as a facilitator in participatory decision-making in the joint enterprise of governing can uphold the rule of law and ensure environmental justice.

Eighth, to resolve environmental crises and ensure environmental justice, a specialized and independent environmental court comprising technical experts and environmentally educated and sensitive judges, with comprehensive jurisdiction, and having the authority to exercise alternative dispute resolution mechanisms (ADR) is important.

1.7. Research Methodology

The research involves the application of both doctrinal and non-doctrinal legal methodologies. The argument that sociological inquiry is essential for legal research[54] applies to this thesis as it aims not only to explore what courts say about environmental rights but also to put their statements in a broader social context.

The research applies black letter law or doctrinal approaches as traditional sources of law (constitutions, legislation, and case law) have been used as primary data. Data has also

[54] Roger Cotterell, 'Why Must Legal Ideas be Interpreted Sociologically?' (1998) 25 Journal of Law and Society 171.

been collected from secondary resources such as books and journal articles. Adopting the doctrinal legal method, particularly in analyzing the judicial decisions, helped to provide a detailed, coherent, and nuanced picture of what the law is in the selected jurisdictions.[55]

It also uses comparative research methodology combined with socio-legal methods,[56] to determine and explore the reasons behind different routes adopted by the judiciaries of the selected jurisdictions in protecting the right to the environment although there are significant legal and constitutional similarities. The comparative research questions are:

- *What determines the stance of the judiciary of a country? Is it the individual characteristics of judges or the understanding of legal norms by judges or the legal and political culture of a country?*
- *How do academics and practitioners view the roles of the courts in environmental matters?*
- *Whether the theory of 'Collaboration' proposed by western jurists can be effectively applied in eastern countries, particularly in environmental matters?*

Based on De Coninck's argument that institutions are comparable as they fulfill the same or similar functions and are related to the same kind of problems,[57] the thesis applies the principle of functionality of comparative legal research in proposing the NGT as a model for Bangladesh and Ireland as Bangladesh has a non-functional environmental judicial system and Ireland is yet to have a specialized environmental court or tribunal. In applying the principle of functionality, the thesis also relies on Zweigert and Kötz's argument that the principle allows to look at different systems of the world to acquire experiences from a greater variety of solutions and responses.[58]

[55] Rónán Kennedy, 'Doctrinal Analysis: The Real "Law in Action"' in Laura Cahillane and Jennifer Schweppe (eds), *Legal Research Methods: Principles and Practicalities* (Clarus 2016) 21.
[56] Marie-Luce Paris, 'The Comparative Method in Legal Research: The Art of Justifying Choices' in Laura Cahillane and Jennifer Schweppe (eds), *Legal Research Methods: Principles and Practicalities* (Clarus 2016) 39.
[57] Julie De Coninck, 'The Functional Method of Comparative Law: "Quo Vadis"?' (2020) 74 The Rabel Journal of Comparative and International Private Law 318.
[58] Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (Tony Weir tr, 3rd edn, Oxford University Press 1998) 15.

The different stands taken by the judiciaries in protecting the right to the environment in the selected jurisdictions reflect the differing legal and political culture of the respective countries, as well as the understanding of legal norms by judges and the varying situation of rule of law. A written judgment does not always reflect what a judge thinks on a particular issue. Rather judicial decision-making is influenced by various other issues such as the individual characteristic of the judge, quality of pleadings, available legal resources, and independence of the judiciary.[59]

From that perspective, this thesis applies socio-legal methodologies,[60] particularly qualitative research, based on data gathered through semi-structured interviews with judges, lawyers, academics, and researchers from the selected jurisdictions to understand their views on the roles of the courts in environmental matters. Considering the importance of academic writings in providing both technical and legal information, arguments, and opinions related to environmental decision making, the empirical research also collects data to determine the influence of legal scholarship on environmental judicial decision making.

A total of thirty-two interviews (twelve academics and twenty practitioners) from the selected jurisdictions have been sources for this socio-legal research. The interviews helped to provide a deeper understanding of how the legal communities of the selected jurisdictions think about different environmental and constitutional issues and to highlight common patterns of similarities and differences in their respective worldviews. Countries both from the east and the west based on constitutional and legal similarities have been selected to compare and contrast and to see if the research result is similar notwithstanding the socio-economic-political differences. Adopting Thornberg's informed grounded theory[61] was beneficial for the research, rejecting the pure grounded theory (GT) developed by Glaser and Strauss which argues that literature review should be

[59] Brian M Barry, *How Judges Judge: Empirical Insights into Judicial Decision-Making* (Routledge 2021).
[60] Socio-legal studies has the capacity to embrace the influence of socio, political, and economic factors on the law and legal institutions. Darren O'Donovan, 'Socio-Legal Methodology: Conceptual Underpinnings, Justification and Practical Pitfalls' in Laura Cahillane and Jennifer Schweppe (eds), *Legal Research Methods: Principles and Practicalities* (Clarus 2016) 107.
[61] Robert Thornberg, 'Informed Grounded Theory' (2012) 56(3) Scandinavian Journal of Educational Research 243.

delayed until the data analysis is near to completion.[62] Literature review for the research was mostly done before commencing the empirical research because it was important to admit to the theoretical understandings from the outset of the study.[63] The literature review also helped to avoid the possibility of restricting the research field[64] and in shaping the research question, interview questions and helped in doing a comparative analysis.[65] Constant comparative method of data analysis[66] is applied in analyzing and comparing the collected data to determine any similarities and differences to identify the patterns. A detailed discussion of the methodology is included in chapter 4 (1) of the thesis.

1.8. Existing Literature: Role of the Courts in Environmental Issues

The research question mentioned above and the challenges faced by the courts in dealing with environmental issues give rise to certain inter-related questions:

First, what should be the role of the courts and judges in democracy in dealing with environmental rights and justice issues?

Second, are judges expected to merely state the law and/or they are expected to establish a judicial policy, with the formulation of a systematic and principled approach to exercise discretions?

Third, if neither judicial activism nor restraint can protect the right to the environment, what should be the role of the courts in ensuring environmental justice?

The constitutions of the selected jurisdictions provide in detail the role of the courts. *The Constitution of India* (the Indian Constitution) has given extensive jurisdiction to the Indian Supreme Court.[67] Wide power of judicial review has also been provided to the Indian

[62] Barney G. Glaser and Anselm L Strauss, *The Discovery of Grounded Theory: Strategies for Qualitative Research* (Aldine 1967).
[63] Catherina Bruce, 'Questions Arising about Emergence, Data Collection, and Its Interaction with Analysis in a Grounded Theory Study' (2007) 6 International Journal of Qualitative Methods 51.
[64] Janice M. Morse, 'Emerging from the Data: The Cognitive Processes of Analysis in Qualitative Inquiry' in Janice M. Morse (ed), *Critical Issues in Qualitative Research Methods* (Sage 1994) 23.
[65] Ciarán Dunne, 'The Place of Literature Review in Grounded Theory Research' (2011) 14 International Journal of Social Research Methodology 111.
[66] Sharan B. Merriam and Elizabeth J. Tisdell, *Qualitative Research: A Guide to Design and Implementation* (4th edn, Jossey-Bass) 32.
[67] According to Article 142(1) of the Indian Constitution, 'The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it…'

Supreme Court and the High Courts by the Indian Constitution.[68] It is this power which made the Indian Supreme Court to observe, 'in this regard, the courts of India possess a power not known to the English Courts…The range of judicial review recognized in the superior judiciary of India is perhaps the widest and the most extensive known to the world of law.'[69]

The Constitution of the People's Republic of Bangladesh (the Constitution of Bangladesh) provides for the role of the judiciary in Part VI. According to the constitutional provisions, the judiciary has been given the responsibility of seeing that no functionary of the State violates the mandate of the Constitution or oversteps the limit of its power under the Constitution.[70] Similar to Article 32 of the Indian Constitution,[71] the right to move the High Court Division (HCD) of the Bangladesh Supreme Court (SC) for enforcement of fundamental rights is itself a fundamental right under Article 44 of the Constitution of Bangladesh. The power of judicial review has been conferred on the HCD by Article 102 of the Constitution of Bangladesh.[72]

Articles 34 to 37 of *the Constitution of Ireland* (the Irish Constitution) provide for the powers of the courts. According to the Irish Constitution, the courts are bestowed with the responsibility to ensure justice and empowered to interpret and apply the law to disputes and conflicts arising between the State and the individuals and between individuals. Commenting on the power of the Irish judiciary to interpret the constitution, it has been mentioned that this power has made them more powerful than judges in other countries.[73] The Irish Constitution has also given judicial review power to the courts.[74]

A review of the relevant literature shows that the role of judges has been a prime concern of a long list of literature.[75] Legal scholarship which is more directly related to the role of

[68] Articles 32 and 226 of the Indian Constitution.
[69] *Union of India v Raghubir Singh* [1989] 2 SCC 747 [7].
[70] Mahmudul Islam, *Constitutional Law of Bangladesh* (Mullick Brothers 2012) 577.
[71] The Right to move the Indian Supreme Court to enforce the rights provided in Part III of the Indian Constitution is also contained in Part III, and thereby making itself a fundamental right. Ruma Pal, 'Separation of Powers' in Sujit Choudhry, Madhav Khosla, and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution* (Oxford University Press 2016) 253.
[72] A.K.M. Shamsul Huda, *The Constitution of Bangladesh* (Signet Press 1997) 830.
[73] John Coakley and Michael Gallagher, *Politics in the Republic of Ireland* (Routledge 2009) 90.
[74] Articles 26, 15.4.2°, 32.3.2°, and 50.1 of the Irish Constitution provide three constitutional mechanisms through which the Judiciary may review legislation.
[75] Posner (n 43); Barak (n 44); Laura Cahillane, James Gallen and Tom Hickey (eds), *Judges, Politics and the Irish Constitution* (Manchester University Press 2017); Robert Badinter and Stephen Breyer (eds), *Judges in Contemporary Democracy: An International Conversation* (New York University Press 2004); Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare*

the courts and judges in environmental matters can be divided into two sets. *First,* scholarship supporting the view that judges should play an active role in the protection of the environment,[76] and *second*, scholarship that is critical of judicialization of environmental policy.[77] These two sets are also visible in legal scholarship on the role of the courts in environmental matters in the selected jurisdictions.

1.8.1. Literature on the Role of the Indian Courts

According to the *first set* of literature, environmental jurisprudence has been advanced by the Indian Supreme Court by adopting various environmental principles nationally. It has been praised for extending the ambit of innovative procedural devices such as public interest litigation (PIL) and for adopting the principle of sustainable development to balance development and environmental concerns.[78] Shastri wrote that the judicial pronouncements by the Court have strongly contributed in giving 'a newer and a finer perspective to environmental protection in the form of a fundamental right.'[79] The activist role of the Indian Supreme Court also finds support in other legal scholarship.[80]

Rights in Comparative Constitutional Law (Princeton University Press 2008); Ronan Keane, 'Judges As Lawmakers: The Irish Experience' (2004) 4(2) Irish Judicial Studies Institute Journal 1; Gerard Hogan, 'Should Judges be Neutral?' (2021) Northern Ireland Legal Quarterly 63; Upendra Baxi, *The Indian Supreme Court and Politics* (Eastern Book Company 1980); Thomas Greiber (ed), *Judges and the Rule of Law: Creating the Links: Environment, Human Rights and Poverty* (IUCN 2006); Kermit L. Hall and Kevin T. McGuire (eds), *The Judicial Branch* (Oxford University Press 2005); Tom Finlay, 'The Role of the Judge' (2005) 5(1) Judicial Studies Institute Journal 1; Rónán Kennedy, 'Extra Judicial Comment by Judges' (2005) 5(1) Judicial Studies Institute Journal 199; Teresa Kramarz, David Cosolo and Alejandro Rossi, 'Judicialization of Environmental Policy and the Crisis of Democratic Accountability' (2017) 34(1) Review of Policy Research 31; Antonio Herman Benjamin, 'We, the Judges, and the Environment' (2011) 29(2) Pace Environmental Law Review 582.

[76] Christina Voigt and Zen Makuch (eds), *Courts and the Environment* (Edward Elgar 2018); Laura Burgers, 'Should Judges Make Climate Change Law?' (2020) 9(1) Transnational Environmental Law 55; Kenneth J. Markowitz and Jo J.A. Gerardu, 'The Importance of the Judiciary in Environmental Compliance and Enforcement' (2012) 29 Pace Environmental Law Review 538.

[77] Kramarz, Cosolo, and Rossi (n 75).

[78] Stellina Jolly and Zen Makuch, 'Procedural and Substantive Innovations Propounded by the Indian Judiciary in Balancing Protection of Environment and Development: A Legal Analysis' in Christina Voigt and Zen Makuch (eds), *Courts and the Environment* (Edward Elgar 2018) 142.

[79] Satish C. Shastri, *Environmental Law* (Eastern Book Company 2015) 59.

[80] Iyer (n 34); Shyami Puvimanasinghe, 'The Role of Public Interest Litigation in Realizing Environmental Justice in South Asia' in Sumudu A. Atapattu, Carmen G. Gonzalez, and Sara L. Seck (eds), *The Cambridge Handbook of Environmental Justice and Sustainable Development* (Cambridge University Press 2021) 137; K. Sivaramakrishnan, 'Environment, Law, and Democracy in India' (2011) 70(4) The Journal of Asian Studies 905; Michael G. Faure; A. V. Raja, 'Effectiveness of Environmental Public Interest Litigation in India: Determining the Key Variables' (2010) 21 Fordham Environmental Law Review 239; Geetika Walia and Prashish Kanwar, 'Environmental Protection vis-à-vis Judicial Activism' (2010) 2(5) International Journal of Sustainable Development 73; Peggy Rodgers Kalas, 'Environmental Justice in India' (2000) Asia-Pacific Journal on Human Rights and the Law 97;

In the *second set*, legal scholars have criticized the Indian courts for their role in environmental issues as the courts have made laws,[81] given policy directions, and violated the constitutional principles.[82] The courts have been criticized because matters which fall within the jurisdiction of the executive or the legislature are now debated in courts.[83] The courts have been criticized for weakening institutional balance.[84] Judicial activism by the courts in India has become a subject of controversy.[85] India's environmental jurisprudence has been criticized as constitutionally shackled because of the reliance by the Indian Supreme Court on constitutional remedies instead of statutory remedies.[86] In an attempt to enable effective enforcement of environmental laws and regulations, the Indian courts have been criticized for crossing the boundaries.[87]

1.8.2. Literature on the Role of the Bangladeshi Courts

A similar division in legal scholarship can also be seen regarding the role of the courts in Bangladesh. The *first set* contains the literature supporting an activist judiciary. The extension of the scope by Bangladeshi courts for judicial review in environmental matters has been praised as a forward-looking approach.[88] The liberalization of standing rules to grant access to environmental justice and innovative methods adopted by the Bangladeshi courts in environmental protection has been described as an important tool for the protection of the environment.[89] The role of the Supreme Court of Bangladesh in imposing fines and imprisonment for contempt of court has been described as effective.[90] In the face of constant infringement of human rights and environmental rights by the

[81] Shubhankar Dam, 'Lawmaking beyond Lawmakers: Understanding the Little Right and the Great Wrong (Analyzing the Legitimacy of the Nature of Judicial Lawmaking in India's Constitutional Dynamic)' (2005) 13 Tulane Journal of International and Comparative Law 109.
[82] Rajamani (n 53).
[83] Shyam Divan, 'Public Interest Litigation' in Sujit Choudhry, Madhav Khosla, and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution* (Oxford University Press 2016) 662; Armin Rosencranz and Michael Jackson, 'The Delhi Pollution Case: The Supreme Court of India and the Limits of Judicial Power' (2003) 28 Columbia Journal of Environmental Law 223.
[84] Dam and Tewary, 'Polluting Environment, Polluting Constitution' (n 21).
[85] S. P. Sathe, 'Judicial Activism: The Indian Experience' (2001) 6 Washington University Journal of Law and Policy 29.
[86] Nupur Chowdhury, 'Constitutionally Shackled: The Story of Environmental Jurisprudence in India' in Michelle Lim (ed), *Charting Environmental Law Futures in the Anthropocene* (Springer 2019) 159.
[87] Sahu (n 23).
[88] Jona Razzaque, 'Linking Human Rights, Development, and Environment: Experiences from Litigation in South Asia' (2007) 18 Fordham Environmental Law Review 587.
[89] Md. Al amin and Zakir Abu Mohd Syed, 'Application of Judicial Activism in Protecting the Environment: An Analysis' (2016) 21(1) Journal of Humanities and Social Science 35.
[90] Mohammad Saiful Islam, 'An Appraisal of Efficiency and Effectiveness of the Supreme Court of Bangladesh' (2019) 4(1) International Journal of Management, Technology and Social Sciences 110.

executive, judicial control of administrative action has been described as significant in protecting the rights of the citizens.[91] Judicial activism has been described as an important instrument in protecting human rights and rule of law in Bangladesh.[92]

The *second set* includes scholarship which is skeptical about judicial activism. Judicial activism in Bangladesh has been criticized as less than participatory and suffering from several limitations such as effectiveness, access, and sustainability.[93] Judicial overreach has been criticized as it can menace good governance.[94] The judicial decisions in most of public interest environmental litigation (PIEL) have been criticized as inadequately reasoned and analyzed thereby failing to add value to the environmental jurisprudential development of the country.[95]

1.8.3. Literature on the Role of the Irish Courts

The situation in Ireland is similar to the other selected jurisdictions. Legal scholarship seem to either support activism or restraint. Fiona de Londras, arguing in favor of judicial innovation, wrote that judges can be innovative in carrying out their interpretative role and that is a key element of constitutional evolution and uncontroversial.[96] The Irish Supreme Court has been criticized for its restrained approach in the recent *Climate Case Ireland*[97] for not recognizing a constitutional environment right and its findings on standing to sue.[98] Judicial restraint by Irish judges has been criticized as undermining the constitutional order.[99] The role of the Irish courts in recognizing unenumerated environmental rights has been praised as those have significantly contributed to Ireland's status as a liberal

[91] Esrafil Alam, Md. Abdul Malek, 'Judicial Control of Administrative Actions in Bangladesh: An Analysis and Evaluation' (2016) 21(3) Journal of Humanities and Social Science 65.
[92] Awal Hossain Mollah, 'Judicial Activism and Human Rights in Bangladesh: A Critique' (2014) 56(6) International Journal of Law and Management 475.
[93] Karim, Vincents, and Rahim (n 53).
[94] Md. Mostafizur Rahman and Roshna Zahan Badhon, 'A Critical Analysis on Judicial Activism and Overreach' (2018) 23 (8) Journal of Humanities and Social Science 45.
[95] Hoque, *Judicial Activism in Bangladesh* (n 14) 170.
[96] Fiona de Londras, 'In Defence of Judicial Innovation and Constitutional Evolution' in Laura Cahillane, James Gallen and Tom Hickey (eds), *Judges, Politics and the Irish Constitution* (Manchester University Press 2017) 9.
[97] *Friends of the Irish Environment (FIE) v Ireland* [2020] IESC 49.
[98] Victoria Adelmant, Philip Alston, and Matthew Blainey, 'Human Rights and Climate Change Litigation: One Step Forward, Two Steps Backwards in the Irish Supreme Court' (2021) 13 Journal of Human Rights Practice 1; Owen McIntyre, The Irish Supreme Court Judgment in Climate Case Ireland: 'One Step Forward and Two Steps Back' (IUCN, 28 August 2020) <https://www.iucn.org/news/world-commission-environmental-law/202008/irish-supreme-court-judgment-climate-case-ireland-one-step-forward-and-two-steps-back> accessed 08 February 2022; Áine Ryall, 'Climate Case Ireland: Implications of the Supreme Court Judgment' (2020) 3 Irish Planning and Environmental Law Journal 106.
[99] Cahill and Ó Conaill (n 24).

democracy[100] and have played a valuable role in protecting human rights.[101] The recognition of unenumerated environmental rights by the Irish High Court in *Merriman v Fingal County Council*[102] was welcomed by the Irish legal fraternity.[103]

Commenting on the role of the courts, Eoin Daly has stated that the courts have a limited role to determine whether restrictions on the exercise of constitutional rights are arbitrary or disproportionate.[104] Supporting a restrained role by judges, Ronan Keane, who was the Chief Justice of the Supreme Court of Ireland, wrote extra-judicially '… it is as well to remember that there is little that is novel in the idea of the judge as lawmaker.'[105]

1.9. Gaps in the Literature

Case studies from the selected jurisdictions show that neither an activist nor a restrained court is sufficient to ensure environmental justice although an effective, efficient, scientifically informed, and independent judiciary is indispensable for effective implementation of environmental legislation.[106] It appears from the literature review that existing scholarship on the role of the courts either advocates judicial activism or is sceptical about activism and prefers a conservative judiciary in environmental matters. This is problematic as although academic writings are an important source for judges,[107] they have not been of great help in striking a balance between excessive activism and judicial passivity. The other significant limitations of scholarship are that it is mostly focused on the tendency of judges to make laws or policies and does not address the socio-economic-political context nor the specific domestic needs.[108] The cross-jurisdictional empirical data collected in this research shows that the conflicting views expressed through the literature are making it challenging for judges to achieve

[100] Brendan Glynn, 'How Unenumerated Rights Have Created a More Tolerant and Liberal Ireland' (2016) 34(14) Irish Law Times (ns) 202.
[101] Emma Keane, 'Judicial "Discovery" of Unenumerated Rights' (2010) 28 Irish Law Times (ns) 177.
[102] [2017] IEHC 695.
[103] Orla Kelleher, 'The Revival of the Unenumerated Rights Doctrine: A Right to an Environment and its Implications for Future Climate Change Litigation in Ireland' (2018) 25 Irish Planning and Environmental Law Journal 100.
[104] Daly (n 35).
[105] Keane (n 75).
[106] Thomas Greiber, (ed), 'Judges and the Rule of Law. Creating the Links: Environment, Human Rights and Poverty' (IUCN 2006).
[107] Susan Kiefel, 'The Academy and the Court: What Do They Mean to Each Other Today?' (2020) 44(1) Melbourne University Law Review 447.
[108] Hoque, *Judicial Activism in Bangladesh* (n 14) 9.

environmental justice by maintaining constitutional balances, balancing between the conflicting rights, and striking a balance in their role.

Following the Global Judges Symposium 2002 in Johannesburg, South Africa, which spell out the crucial role of judges in protecting the environment, several training manuals and handbooks have been prepared by the United Nations Environment Program (UNEP)[109] to help judges with a set of useful reference materials on environmental law. Undoubtedly, all these materials have proved to be useful in addressing environmental disputes but do not assist judges to strike a balance between judicial over-activism and over-restraint. The literature is broadly focused either at encouraging judges in environmental constitutionalism or in environmental protection based on comparative jurisprudence. No doubt, these documents are vital for judges in their role in protecting the environment but they fall short in helping judges to do so without transgressing into the domain of other organs and are not sufficient to help judges to reach effective, sustainable, and participatory decisions ensuring environmental justice.

The 'golden mean approach'[110] that asks for activism by judges avoiding over-activism or transgression has been a good example for this thesis to show that balanced judicial activism is possible. However, that theory is particularly based on judicial activism in Bangladesh and does not include the issue of environmental justice. Moreover, in proposing the theory of middle course judicial activism, the literature does not include any method based on which balanced judicial activism can be exercised and how to counteract the challenges faced by a judge in environmental cases.

[109] Dinah Shelton and Alexandre Kiss, *Judicial Handbook on Environmental Law* (UNEP 2005); UNEP *Training Manual on International Environmental Law* (2006); UNEP *Compendium of Summaries of Judicial Decisions in Environmental Related Cases* (2004); May and Daly (n 11) 7.

[110] The theory of golden course judicial activism demands activism by judges in the first place and, secondly, their avoidance of over-activism. This theory distinguishes judicial activism from judicial excessiveness and seeks to develop a necessity-based, socially relevant form of enlightened judicial activism, fed by the constitutional values of the judges' respective jurisdiction and steered towards adequately meeting its dynamic socio-politico-economic demands. This theory argues that judicial activism can be exercised in a principles way. The middle ground judicial activism is indeed an extension of the judges' everyday function of balancing and weighing conflicting claims, interests, rights, or obligations in every particular case. The golden mean judicial activism requires judges to get out of legal formalism and resort to rational reasoning in light of the existing conditions in a particular society. Hoque, *Judicial Activism in Bangladesh* (n 14) 5

The collaborative method in this thesis is developed based on Christopher Ansell's idea of collaboration as-fruitful-conflict,[111] Aileen Kavanagh's theory of constitutional collaboration[112] and Eoin Carolan's work.[113] However, there exist definitional uncertainties with collaboration, turning it into a buzzword.[114] More complexities are created by using the term 'dialogue' in describing a collaborative approach.[115] However, although there are certain similarities between the collaborative approach and the dialogical approach[116] adopted by Canadian scholars[117] these two are different concepts. There also exist substantial knowledge gap regarding how to achieve successful collaborations when confronted with complex environmental problems.[118]

1.10. Contribution of Thesis

The principal contribution of the thesis is in proposing two methods and developing those to provide practical outlines for judges in ensuring environmental justice while maintaining constitutional mandates. This thesis develops the theory of collaboration to remove the definitional paradoxes, fill in the knowledge gaps, and help the courts to take a proactive role to reach a better decision through the mutual engagement of all the organs through facilitating collaboration, participatory decision making, and suspended declaration of invalidity.

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[111] Christopher Ansell, *Pragmatist Democracy: Evolutionary Learning as Public Philosophy* (Oxford University Press 2011).
[112] Aileen Kavanagh *Constitutional Review under the Human Rights Act* (Cambridge University Press 2009); Kavanagh, 'The Role of Courts in the Joint Enterprise of Governing' (n 3); Kavanagh, 'Judicial Restraint in the Pursuit of Justice' (n 41); Aileen Kavanagh, 'The Constitutional Separation of Powers' in David Dyzenhaus and Malcolm Thorburn (eds), *Philosophical Foundation of Constitutional Law* (Oxford Scholarship Online 2016) 221.
[113] Carolan, 'Dialogue Isn't Working' (n 4) 209; Eoin Carolan, 'The Relationship between Judicial Remedies and the Separation of Powers: Collaborative Constitutionalism and the Suspended Declaration of Invalidity' (2011) 46(1) Irish Jurist (ns) 180; Eoin Carolan, 'Leaving Behind the Commonwealth Model of Rights Review: Ireland as an Example of Collaborative Constitutionalism' (2016) <https://ssrn.com/abstract=2916378 or http://dx.doi.org/10.2139/ssrn.2916378> accessed 25 May 2021.
[114] Ann Marie Thomson, James Perry and Theodore Miller 'Conceptualizing and Measuring Collaboration' (2007) 19 Journal of Public Administration Research and Theory 23.
[115] Jeff King, 'Institutional Approaches to Restraint' (2008) 28 Oxford Journal of Legal Studies 409.
[116] 'Dialogue' is a conversation between two or more parties. The conversation can be open-ended or restrictive in terms of time and content, it might be objected to a specific purpose. Institutional dialogue has the objective 'to pursue the resolution of a constitutional dispute by a process of engagement.' Carolan, 'Dialogue Isn't Working' (n 4) 209.
[117] Madhav Khosla and Ananth Padmanabhan, 'The Supreme Court' in Devesh Kapur, Pratap Bhanu Mehta, and Milan Vaishnav (eds), *Rethinking Public Institutions in India* (Oxford University Press 2017) 104-105.
[118] Örjan Bodin, 'Collaborative Environmental Governance: Achieving Collective Action in Social-ecological Systems' (2017) Science 357.

This idea of judicial pro-activism is not commonly used in literature or has been used as a synonym for 'judicial activism'[119] or in the exercise of jurisdiction by the International Court of Justice.[120] This thesis is significant in demonstrating that how judges can adopt a balanced approach avoiding over-activism or transgression. An examination of judicial decisions to show the application of judicial pro-activism to adopt a collaborative approach provides a jurisprudential basis to court decisions which applied the methods without giving any theoretical explanation.

By using practical examples, this thesis removes the existing knowledge gaps[121] regarding how to achieve successful collaboration when confronted with complex environmental problems. This thesis develops a model of collaborative constitutionalism in realizing environmental rights and ensuring environmental justice having the courts as an equal partner in the joint enterprise of governance. It can help judges, lawyers, and academics not only to ensure environmental justice but also to develop a robust environmental jurisprudence by using the proposed methods.

Although a range of studies have been carried out to understand the matters influencing judicial decision-making[122] or to identify the links between judicial decisions and socio-economic factors,[123] this research is significant in using socio-legal methods, particularly qualitative research, based on data gathered through semi-structured interviews with judges, lawyers, academics, and researchers from the selected jurisdictions to

[119] Shashank Dahiya, 'Rise of Judicial Supremacy: A Threat or a Necessity' (2021) 4(3) International Journal of Law, Management and Humanities 10; Moeen Cheema (ed), *Courting Constitutionalism: The Politics of Public Law and Judicial Review in Pakistan* (Cambridge University Press 2021).
[120] Pieter Kooijmans, 'The ICJ in the 21st Century: Judicial Restraint, Judicial Activism, or Proactive Judicial Policy' (2007) 56 (4) International Comparative Law Quarterly 741.
[121] Bodin (n 118).
[122] Barry (n 59); Gregory C. Sisk, Michael Heise & Andrew P. Morris, 'Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning' (1998) 73(5) New York Law Review 1377; Lee Epstein, William M Landes and Richard A Posner, *The Behavior of Federal Judges* (Harvard University Press 2013); Daniel Kahneman, *Thinking Fast and Slow* (Farrar, Straus & Giroux 2011); Terry A Maroney, 'The Persistent Cultural Script of Judicial Dispassion' (2011) 99(2) California Law Review 629; Andrew J. Wistrich, Jeffrey J. Rachlinski & Chris Guthrie, 'Heart Versus Head: Do Judges Follow the Law or Follow Their Feelings?' (2015) 93(4) Texas Law Review 855; Lawrence Baum, *The Puzzle of Judicial Behavior* (University of Michigan Press 1997); Jeffrey J. Rachlinkski and Andrew J. Wistrich, 'Judging the Judiciary by the Numbers: Empirical Research on Judges' (2017) 13 Annual Review of Law and Social Science 203.
[123] Aparna Chandra, William H.J. Hubbard, and Sital Kalantry, 'The Supreme Court of India: An Empirical Overview of the Institution' in Gerald N. Rosenberg (eds), *A Qualified Hope: The Indian Supreme Court and Progressive Social Change* (Cambridge University Press 2019); George Gadbois, 'Supreme Court Decision making' (1974) 10 Banaras Law Journal 1; Nick Robinson, 'A Quantitative Analysis of the Indian Supreme Court's Workload' (2013) 10 Journal of Empirical Legal Studies 570; Varsha Aithala, Rathan Sudheer & Nandana Sengupta, 'Justice Delayed: A District-Wise Empirical Study on Indian Judiciary' (2021) 12 Journal of Indian Law and Society 106.

understand how they view the roles of the courts in environmental matters and how far the understandings of legal norms and writings of the academics are reflected in environmental judicial decision making.

The use of qualitative research methodology and socio-legal research methods in developing processes to promote and produce collaborative outcomes in ensuring environmental justice and sustainable development is also an important contribution.

Recognizing the advantages of a specialist environment court and deriving experience from the NGT, a significant contribution of this thesis is in proposing the NGT model for Ireland and Bangladesh by applying the principle of functionality. Although there were commitments in the Irish Program for Government 2020 to establish a new Planning and Environmental Law Court comprising specialist judges,[124] a recent newspaper report shows that the Irish Government is planning to establish only a new division of the High Court to deal with planning and environmental issues.[125] This thesis demonstrates the importance of specialist knowledge in dealing with polycentric and multidisciplinary environmental problems. Hence, establishing a separate list within the existing court system may not bring desired results. This thesis is important as it provides new knowledge to Irish policymakers regarding ensuring environmental justice through the NGT model by applying the collaborative approach.[126]

The research findings of this thesis has also opened new areas of research. The disjunctions between academics and practitioners identified through qualitative research can be the basis for further research in addressing the disjunctions between legal education and practice to improve the quality of legal education and courtroom practice.

[124] Programme for Government: Our Shared Future <https://www.gov.ie/en/publication/7e05d-programme-for-government-our-shared-future/> accessed 10 August 2021.
[125] McGee (n 52).
[126] A paper titled 'A Specialized Environmental Court for Ireland: What would the Court look like?' presented by the author at the 18th Annual Conference of the Centre for Law and the Environment, University College Cork, May 2022 was positively received by Irish environmental law experts and highlights the importance of this research.

1.11. Limitations and Constraints

Though this research uses case references from the selected jurisdictions to show that the proposed methods of judicial pro-activism and collaboration can be useful tools for the courts in performing their roles, it is not possible to say that adopting a collaborative approach will definitely result in success in every case. For example, this thesis uses *Saif Kamal's case*[127] from Bangladesh to show how the court can play a proactive role as a partner in the joint enterprise of governing. However, the government has shown a reluctance to enact any legislation following the commitment by the concerned government ministries expressed during the proceedings of the case. Showing inertia towards the direction given by the court, the guidelines have not yet been published in the official gazette.[128] However, this thesis does consider the challenges included in adopting a collaborative approach to suggest recommendations to counteract such reluctance.

The discussion of the NGT in this thesis shows that a collaborative approach has been adopted by the NGT only in a few cases having wider ramifications. Hence, the discretion to decide which environmental issue would involve the participation of the stakeholders through stakeholder consultative approach would depend on the individual judge's discretion. Although this thesis does not discuss in detail the issue of judicial accountability, an intrinsic nexus has been shown between judicial pro-activism and the constitutional accountability of judges.

Although thirty-two interviews are a solid foundation to base certain conclusions on the practice in three jurisdictions,[129] the initial plan was to conduct at least a dozen interviews from each jurisdiction. The collection of data through interviews was impacted by the Covid-19 pandemic. Approaches were made to the Chief Justice of the Supreme Court of Ireland and also the President of the High Court in Ireland. Although the Chief Justice of the Supreme Court of Ireland endorsed the research, ultimately no interviews could be

[127] *Syed Saifuddin Kamal v Bangladesh and others* [2018] 70 DLR 833 (HCD).
[128] Rashna Imam, 'Governmental Inertia in Ensuring Emergency Medical Services' *The Daily Star* (Dhaka, 16 November 2020). A review of the Bangladesh Gazette indicates that since 2020, no guidelines have been published.
[129] Sarah Elsie Baker and Rosalind Edwards, 'How Many Qualitative Interviews Is Enough?' (2012) <http://eprints.ncrm.ac.uk/2273/4/how many interviews.pdf?> accessed 15 October 2021.

arranged with the current judges of the Courts of Ireland. However, a number of practitioners from Ireland including retired judges and environmental and constitutional practitioners were interviewed. Nonetheless, the conclusions on Ireland could be enhanced if further interviews had been possible.

Although the European Court of Justice has played an exceptionally effective role in the enforcement of environmental law,[130] has shown activism in the interpretation of the EC legislation,[131] and has shaped and influenced the law and policy regarding environmental protection,[132] this thesis does not discuss judicial activism by this court due to lack of space and because the focus of the research is entirely on domestic courts. However, the research result can be useful for any court whether it be a national, regional, or international court as the aim of the thesis is to develop methods to help judges in dealing with environmental issues and ensuring environmental justice.

1.12. Thesis Outline

The thesis proceeds as follows: To provide a brief exploration of environmental justice discourse ***Chapter 2*** discusses environmental justice. The discussion also includes the environmental justice situation of the global South and the situation in Ireland. This chapter critically examines the role of the courts of the selected jurisdictions in ensuring the *three substantive elements of environmental justice*: *distributive justice*, *recognition of all in the society*, and *ecological justice*. Recognizing the importance of a right-based claim, it shows the flaws in recognizing the right to the environment by the courts of India and Bangladesh and also the problems created by the restrictive judgment given by the Irish Supreme Court in stating that there is no constitutional right to a healthy environment.

Chapter 3 is a doctrinal and comparative study of judicial pronouncements by the courts of the selected jurisdictions in ensuring the *three procedural elements of environmental*

[130] Francis Jacobs, 'The Role of the European Court of Justice in the Protection of the Environment' (2006) 18(2) Journal of Environmental Law 185.
[131] Hjalte Rasmussen, 'Between Self-Restraint and Activism: A Judicial Policy for the European Court' (1988) 13 European Law Review 28.
[132] Phillipe Sands, 'European Community Environmental Law: Legislation, the ECJ and Common Interest Groups' (1990) 53 Modern Law Review 685.

justice. The role of the courts to ensure access to environmental information and public participation in decision making is critically examined to find out how they have improved the situation. A discussion of environmental PIL shows both judicial over-activism and passivity by the courts resulting in double standards and injustice created by judicial decisions. This chapter shows that judicial activism aimed at protecting environmental rights has in many cases trespassed into the domains of the legislature and the executive, and has therefore impaired constitutional checks and balances. By showing that judicial activism is both normatively and descriptively inappropriate and that no single organ of the state can safeguard environmental rights, this chapter highlights the necessity of adopting new methods.

Chapter 4 is based on *qualitative data* gathered through semi-structured interviews with the objective of understanding the views of academics and practitioners of the selected jurisdictions regarding the role of the courts in environmental issues. The collected data analyzed through the constant comparative method of data analysis shows divergences between academics and the practitioners and also differences in the views of the stakeholders with their respective courts. The lack of development of environmental jurisprudence, following colonial traditions, lack of sensitivity, and the absence of collaboration between academics and practitioners are identified as major problems. Suggestions to overcome these challenges are also discussed, and form the basis of the next two chapters and also the recommendations made in the concluding chapter.

Chapter 5 provides the *theoretical underpinning of collaboration and discusses its features*. Through case studies, this chapter discusses the three forms of collaboration exercised in the selected jurisdictions where the courts have acted as partners in a joint enterprise of governing, conducted stakeholder consultation, and adopted the remedy of suspended declaration of invalidity. This chapter demonstrates that adopting a collaborative approach through the exercise of judicial pro-activism will help judges play a role in helping the legislature in enacting new laws and rules and also help the executive in implementing laws and judicial decisions effectively. This chapter examines the theory of collaboration through the lens of the principle of separation of powers as enshrined in the constitutions of the selected jurisdictions and shows that collaboration can help the

courts to remain within the constitutional boundaries. This chapter discusses the challenges of collaboration and suggest recommendations to overcome the challenges.

Chapter 6 examines the *functioning of the National Green Tribunal (NGT)* of India to see how successful it has been. An examination of the innovative procedures adopted by the NGT shows that it has successfully applied the proposed concepts of judicial pro-activism in exercising collaboration to reach scientifically sound and practical decisions in environmental matters. Discussion in this chapter demonstrates that a proactive role by the judges in ensuring participatory decision making can help to achieve the elements of environmental justice discussed in chapter 2 and 3. A critical examination of the NGT in this chapter also shows the problems and challenges. Based on qualitative data and considering the success of the NGT and the principle of functionality, this chapter proposes that the NGT be used as a model for Bangladesh as it has an unsuccessful environmental justice system, and also for Ireland which is considering establishing a specialized environmental court.

The thesis concludes with ***Chapter 7***. Based on doctrinal and qualitative data this chapter includes *two types of recommendations*. *First*, to help judges to play a proactive role in adopting a collaborative approach in ensuring environmental justice it recommends:

- Improving competency of judges, lawyers, and court staff;
- Increased attention to legal scholarship by judges;
- Academic collaboration and writing for judges;
- Application of Alternative Dispute Resolution Mechanisms; and
- Establishing a specialized environmental court.

Second, recommendations are made to ensure access to environmental justice by:

- Recognizing a constitutional right to a healthy environment;
- Recognizing the rights of nature; and
- Providing legal aid to ensure access to environmental justice.

Chapter 2: Environmental Justice, Its Substantive Elements and the Role of the Courts

Introduction

Recognizing the importance of environmental justice in the struggle to improve and secure a clean and healthy environment for all, especially those who live and work closest to polluted vicinities, and in allowing everyone to have some level of agency over the decisions impacting their lives and livelihoods,[1] this chapter provides an exploration of environmental justice discourse and its elements and then critically examines the role of the courts of the selected jurisdictions in ensuring the substantive elements of environmental justice.

The emergence of the environmental justice movement has been sparked by the growing recognition that environmental benefits and burdens are distributed inequitably and it is generally the poor who has to bear the bulk of the load.[2] The importance of the concept of environmental justice is enhanced by the recognition of its complementary role in achieving the Sustainable Development Goals (SDGs).[3]

Although defining the concept of environmental justice is important, a review of the literature[4] shows that the concept, since its early days as a social movement, has always

[1] Adrian Martin, Shawn McGuire and Sian Sullivan, 'Global Environmental Justice and Biodiversity Conservation' (2013) 179(2) Geographical Journal 122.
[2] Alice Kaswan, 'Environmental Justice: Bridging the Gap between Environmental Laws and Justice' (1997) 47(22) the American University Law Review 221.
[3] The United Nations Sustainable Development Goals (SDGs) comprising 17 goals and 169 targets were adopted by the United Nations (UN) member states at a special UN Summit in 2015 under the Agenda 2030 (Transforming Our World: The 2030 Agenda for Sustainable Development, 25 September 2015, UNGA Res. 70/1). The SDGs aim to eradicate poverty and hunger, reduce inequality, improve health and education, and spur economic growth. They also calls for clean water and sanitation, tackling climate change, preserving oceans and forests, access to justice, and building effective and accountable institutions at all levels. The SDGs recognize that to fulfill their potential people need a healthy environment. Both the SDGs and the Agenda 2030 act as a blueprint for peace and prosperity for people and the planet, at present and also for the future. UN Sustainable Development Goals <https://sdgs.un.org/goals> accessed 02 March 2022.
[4] David Schlosberg, *Defining Environmental Justice* (Oxford University Press 2007); Ryan Holifield, 'Defining Environmental Justice and Environmental Racism' (2001) 22(1) Urban Geography 78; Gitanjali Nain Gill, *Environmental Justice in India: The National Green Tribunal* (Routledge 2017); Julie Sze and Jonathan K. London, 'Environmental Justice at the Crossroads' (2008) 2(4) Sociology

been confronted with definitional paradox due to a constantly evolving political climate and environmental priorities. The concept of environmental justice will never refer unproblematically to a single set of measurable conditions, rather it would mean different things in different contexts. The meaning of the term environmental justice will vary from a community fighting for the cleanup of a superfund site to another community struggling to have a wastewater treatment plant built.[5] Conscious that any definition of the concept would vary according to geographic locations, historical, political, and institutional contexts[6] and recognizing that activists and researchers are still broadly concerned with similar questions identified during the early days of the concept of environmental justice,[7] this thesis adopts the definition of environmental justice provided in the Report of Dublin City University (DCU Report), School of Law and Government because it gives a clear indication of the various dimensions of the concept:

> Environmental justice is the extent to which the physical and economic burdens of pollution and degradation, as well as environmental benefits, are equitably distributed across society, both spatially and temporally, and the degree to which individuals and communities most vulnerable to environmental risks can access and participate in relevant decision-making processes.[8]

Based on the above definition and on Schlosberg's[9] and Stone's[10] arguments this chapter identifies and examines four justice elements of the concept of environmental justice: distributive justice, recognition, participation, and ecological justice.

Compass 1331; Robert William Collin, 'Review of the Legal Literature on Environmental Racism, Environmental Equity, and Environmental Justice' (1994) 9 Journal of Environmental Law & Litigation 121.

[5] Holifield (n 4).

[6] This is relevant for this thesis as it includes Ireland which is an industrialized developed country of the global North whereas India and Bangladesh are developing countries of the global South. However, the North-South dimension is used because that is 'a useful tool for mobilizing collective resistance to an international economic order that perpetuates poverty, inequality and widespread environmental degradation.' Carmen G. Gonzalez, 'Environmental Justice, Human Rights, and the Global South' (2015) 13 Santa Clara Journal of International Law 151.

[7] Gordon Walker, *Environmental Justice: Concepts, Evidence and Politics* (Routledge 2012) 2; Dublin City University (DCU), School of Law and Government, *Environmental Justice in Ireland: Key Dimensions of Environmental and Climate Injustice Experienced by Vulnerable and Marginalized Communities* (2022) 5.

[8] DCU Report (n 7) 13.

[9] David Schlosberg, 'Reconceiving Environmental Justice: Global Movements and Political Theories' (2004) 13(3) Environmental Politics 517.

[10] Christopher D Stone, 'Should Trees have Standing?' (1972) Southern California Law Review 450; Thomas Berry, *the Great Work* (Harmony 1999) 5.

In line with the objective of the thesis to examine the role of the courts of the selected jurisdictions in ensuring environmental justice, this chapter examines how and whether judicial decisions have ensured the elements of the environmental justice concept.

An examination of judicial decisions pronounced in relation to distributive justice, recognition of the diversity of the participants, participation, and ecological justice shows that a host of litigation has been brought before the apex courts of the selected jurisdictions and in many cases the courts have responded to complex legal issues with novel treatment.[11] The domestic courts have to repeatedly step in to ensure the implementation of the right to a proper environment or to determine a number of points of interpretation regarding the relevant legislation.[12] Undoubtedly, over the last few decades, the Supreme Court of India has played a significant role by initiating several environmental cases on its own motion, determining damages for environmental victims, and allowing petitions on behalf of pollution-effected people.[13] The Indian judiciary has not only expansively interpreted constitutional provisions but also statutory rights.[14]

A critical examination of the environmental justice situation in the selected jurisdictions demonstrate that despite the social, economic, and political differences, access to environmental justice and participation are suffering from restricted access . In India and Bangladesh, although the courts have done exemplary work in requiring the states not to cause human rights violations through environmental pollution and destruction,

[11] A robust jurisprudence of public interest litigation has been developed by the South Asian judiciaries to champion the rights of the poor and marginalized sections of the society. Parvez Hassan, 'Good Environmental Governance: Some Trends in the South Asian Region' (2016) 18 Asia Pacific Journal of Environmental Law 169; The courts in India have expanded the ambit of constitutional provisions to incorporate concerns of environment, created unique environmental principles and adopted international legal principles to balance environmental protection and development. Stellina Jolly and Zen Makuch, 'Procedural and Substantive Innovations Propounded by the Indian Judiciary in Balancing Protection of Environment and Development: A Legal Analysis' in Christina Voigt and Zen Makuch (eds), *Courts and the Environment* (Edward Elgar 2018) 142; The Judiciary in Bangladesh has stressed the need of harmonious interpretation of unenforceable state policies to accommodate environmental protection and granted injunctive relief to protect the environmental right. Jona Razzaque, 'Access to Environmental Justice: Role of the Judiciary in Bangladesh' (2000) 4(1&2) Bangladesh Journal of Law 1; The Irish Supreme Court has declared the National Mitigation Plan to be unlawful in *Friends of the Irish Environment v The Government of Ireland* [2020] IESC 4. Áine Ryall, 'Supreme Court Ruling a Turning-point for Climate Governance in Ireland: Government Must Now Produce a New Compliant National Mitigation Plan' *The Irish Times* (Dublin, 07 August 2020).

[12] The Courts in Ireland have been called upon to determine several points such as the definition of 'public authority', 'environmental information'. Áine Ryall, 'Access to Information on the Environment: The Evolving EU and National Jurisprudence' (2016) 23 Irish Planning and Environmental Law Journal 3. The role of the Indian Judiciary has been mostly focused on the implementation of the procedural environmental rights to guarantee better environmental outcomes. Shibani Ghosh, 'Procedural Environmental Rights in Indian Law' in Shibani Ghosh (ed), *Indian Environmental Law: Key Concepts and Principles* (Orient BlackSwan 2019) 55.

[13] Geetanjoy Sahu, 'Why the Underdogs Came Out Ahead: An Analysis of the Supreme Court's Environmental Judgments, 1980-2010' (2014) 49(4) Economic and Political Weekly 52.

[14] Loveleen Bhullar, 'The Judiciary and the Right to Environment in India: Past, Present and Future,' Shibani Ghosh (ed), *Indian Environmental Law: Key Concepts and Principles* (Orient BlackSwan 2019) 1.

environmental justice is suffering from distributive injustice, and the status of public participation, access to information and access to the court is poor, elitist, and personalized.[15] In Ireland, gaps have been identified in the application of the principles of environmental justice.[16] Access to environmental justice in Ireland is restricted due to high cost.[17] Concerns have been expressed extra-judicially by the Chief Justice of the Supreme Court of Ireland that lack of adequate access to justice for the people will result in law becoming dangerously disconnected. He further stressed that access to justice also includes access to information to legal right and court system.[18] Although the success of the Green Party has provided a 'tipping point' to Ireland, citizens are still discouraged from participating in the decision making process due to a lack of democratic and accountable process. This is also hindering the goal of achieving sustainable development.[19]

This chapter includes a critical examination of judicial pronouncements by the courts of the selected jurisdictions aimed to ensure three substantive elements of environmental justice, distributive justice, recognition, and ecological justice. The role of the courts in ensuring the three procedural elements of justice, access to environmental information, public participation in environmental decision making, and access to courts will be examined in the next chapter.

The discussion in this chapter is divided into *three parts*. The *first part* briefly explores the evolution of the term environmental justice and its elements. In exploring the distributive justice situation in the selected jurisdictions, the discussion in this part examines the North-South dimension of environmental injustice and the environmental injustices in the global South countries and in Ireland. This part critically examines the role of the courts in ensuring distributive justice in the selected jurisdictions, showing that the courts have

[15] Lavanya Rajamani, 'Public Interest Environmental Litigation in India: Exploring Issues of Access, Participation, Equity, Effectiveness and Sustainability' (2007) 19 (3) Journal of Environmental Law 293; Md. Saiful Karim, Okechukwu Benjamin Vincents, and Mia Mahmudur Rahim, 'Legal Activism for Ensuring Environmental Justice' (2012) 7 (1) Asian Journal of Comparative Law 13; Geetanjoy Sahu, 'Implications of Indian Supreme Court's Innovations for Environmental Jurisprudence' (2008) 4/1 Law, Environment and Development Journal 1.
[16] DCU Report (n 7) 5.
[17] Áine Ryall, 'Realising Environmental Information Rights: The Impact of the Aarhus Convention in Ireland' (2015) 4 Environmental Law and Practice Review 1.
[18] Mary Carolan, 'Chief Justice Warns about Access to Justice and Importance of Independent Courts' *The Irish Times* (Dublin, 21 March 2022).
[19] J. Barry and Liam Leonard, *The Environmental Movement in Ireland* (Springer 2007); DCU Report (n 7) 28.

failed to strike a balance between the right to the environment and other rights, passed unsustainable orders, and applied double standards in ensuring the rights of the poor and disadvantaged.

In the *second part*, judicial decisions from the selected jurisdictions are examined to determine how far the courts have been able to ensure equality to suppress differences experienced by individuals and social groups. Considering that a constitutional right to live in a healthy environment can lead to stronger laws, enhance public participation, and can help the poor and disadvantaged individuals and communities to ascertain their rights,[20] this part shows the creativity exhibited by the courts of India and Bangladesh in recognizing a constitutional right to the environment. This part also shows how recognition of a right to a healthy environment by the courts has imposed positive obligations on the states. Although recognition of a constitutional environmental right expanded the doors for access to environmental justice, the reliance by the courts of India and Bangladesh on constitutional provisions protecting the right to life as a basis for recognizing the right to the environment is criticized. It also examines the judgment in *Climate Case Ireland*[21] where the Supreme Court of Ireland has stated that no constitutional right to the environment can be derived from the Constitution. Both the over-enthusiastic role of the courts of India and Bangladesh in extending the scope of environmental rights and the restrained approach adopted by the Irish judiciary are critiqued to demonstrate the failure of the courts to do justice to the expectation of individuals and NGOs in ensuring environmental justice and violated constitutional principles.

In the *third part*, particular attention is given to the judicial decisions pronounced by the courts of India and Bangladesh in adopting an ecological approach and giving rights to nature and rivers. While acknowledging the praiseworthy role played by the courts in declaring the rivers as legal entities, this part critiques the courts for their judicial over-reach in adopting both a policy making and executive role.

[20] David R. Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (UBC Press 2011) 7.
[21] *Friends of the Irish Environment (FIE) v Ireland* [2020] IESC 49.

Part I

1. Environmental Justice and its Elements

The term 'environmental justice' was symbolically initiated in Warren Country in North Carolina,[22] USA 1982 when toxic waste was dumped within and resisted by a marginalized community.[23] The terms 'environmental racism' and 'environmental equity' precede the term environmental justice. The term environmental racism was used in earlier literature by Benjamin Chavis who described environmental racism as discrimination based on race regarding environmental pollution and environmental policymaking and enforcement of laws and regulations.[24] Subsequently, the term environmental equity[25] emerged to encompass several factors associated with discrimination in environmental impacts including economic status, gender, immigration status, and the inter-connections between the factors. Environmental justice is the social movement that emerged as a consequence and a response to these problems.[26] In the context of racial progress and civic activism, the term environmental justice was used to designate *first*, the discrimination in exposure to environmental hazards based on racial and ethnic inequalities and *second*, the exclusion of minority groups such as African-Americans from the decision-making and application of environmental legislation, regulations, and policies.[27] In relation to that, a different meaning was also given to the term 'environment' to include the place where people live, work, and play and to address the criticism that the traditional environmental movement does not address the environment properly the way poor people experience it.[28]

The term environmental justice has been re-contextualized within numerous jurisdictions over time and again to include issues of fairness, equity, standing, rights, and meaningful

[22] Warren Country has the highest proportion of African Americans (84%) and the lowest incomes of any county in North Carolina.
[23] Julian Agyeman, *Sustainable Communities and the Challenge of Environmental Justice* (New York University Press 2005).
[24] Benjamin Chavis Jr and Charles Lee, 'United Church of Christ Commission on Racial Justice, Toxic Wastes and Race in the United States: A National Report on the Racial and Socio-Economic Characteristics of Communities with Hazardous Waste Sites' (United Church of Christ 1987).
[25] According to the USA Environmental Protection Agency (EPA), 'Environmental equity is the distribution of environmental risks across population groups and to our policy responses to these distributions.' The term environmental equity was abandoned by the EPA later in favor of environmental justice. Christopher Foreman, *The Promise and Peril of Environmental Justice* (Brookings Institution Press 1998).
[26] Sze and London (n 4).
[27] Marina de Oliveira Finger and Felipe Bortoncello Zorzi, 'Environmental Justice' (2013) 6 UFRGS Model United Nations Journal 222.
[28] Penn Loh, 'Environmental Justice' in Sana Loue and Martha Sajatovic (eds), *Encyclopedia of Immigrant Health (*Springer 2012).

participation in the decision-making process to ensure environmental governance, environmental rule of law and ecological conservation.[29] With the evolution of the concept, its elements have also expanded and environmental justice as it stands today is not solely tied with distributive justice. There are four interlinking elements of justice included in the environmental justice concept:

► Equity in the distribution of environmental benefits and burdens;

► Recognition of oppressed individuals and communities, and;

► Ensuring the meaningful involvement of all people regardless of race, color, national origin, or their economic status in the development, implementation, and enforcement of laws, regulations, and policies relating to the environment.[30]

► The fourth element of environmental justice is ecological justice arising from legal scholarship[31] and supported by judicial decisions from the Indian and Bangladeshi courts.

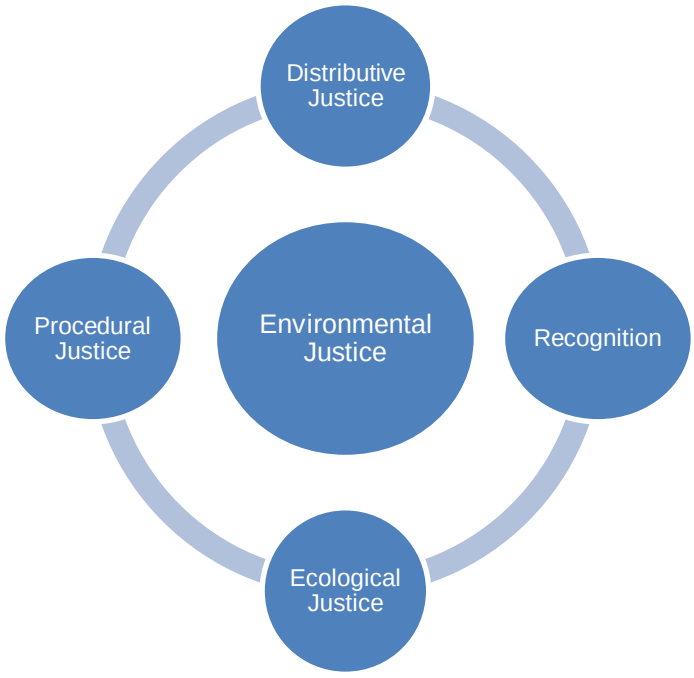

Figure 1.1: Elements of Environmental Justice

[29] Kristin Shrader-Frechette, *Environmental Justice: Creating Equality, Reclaiming Democracy* (Oxford University Press 2002).
[30] Schlosberg, 'Reconceiving Environmental Justice' (n 9).
[31] Stone (n 10).

The following discussion includes a critical examination of the role of the courts of the selected jurisdictions in ensuring the distributive justice element.

1.1. Distributive Justice

Environmental justice has been defined by Wenz as distributive justice: 'Environmental justice is the manner in which benefits and burdens should be allocated when there is a scarcity of benefits (relative to people's wants or needs) and a surfeit of burdens.'[32] Distributive justice can uncover the inequitable distribution of social, economic, and political burdens on individuals or communities with different levels of development. It recognizes the principle that past and current producers of waste and environmentally harmful substances are the ones who are responsible to people. Low-income and minority populations have the right to be free from disproportionate health impacts. Distributive justice also recognizes the right of victims of environmental pollution to receive compensation and reparation for damages.[33] Fair distribution from the context of the environment denotes not only the equal distribution of environmental hazards among the rich and the poor communities but also the cessation of the production of materials that are detrimental to the environment.[34]

Environmental justice has great relevance to both national and international levels. It is not only poor and disadvantaged people who are suffering more, countries of the global South[35] are suffering more also due to colonial and post-colonial impacts,[36] and lack participatory rights.[37] Developed countries tend to treat the developing countries in the same way as government and industries treat low-income communities.[38] The Bhopal

[32] Peter S. Wenz, *Environmental Justice* (State University of New York Press 1988).
[33] Ruchi Anand, *International Environmental Justice: A North-South Dimension* (Routledge 2004) 9.
[34] Robert R. Kuehn, *A Taxonomy of Environmental Justice, Aboriginal Policy Research Consortium International* (APRCi 2000) 307.
[35] The term South does not only denote geographic location as it includes countries of Asia, Africa, and Latin America. Rather the term South is a reflection of the common experiences of people living in those countries as a result of the historically determined social and economic conditions occurring from their colonial and imperial past. Countries referred to as the South are economically weaker and more vulnerable to the global economic system. Their subservient economic condition compared to the North has also made them politically weak. Anand (n 33) 2.
[36] Colonialism is the root of contemporary environmental injustice. It was colonialism that paved the way for social and economic inequality by dispossessing indigenous farmers and by importing indentured workers to provide cheap labor for their colonial overloads. Clive Ponting, *A New Green History of the World: The Environment and the Collapse of Great Civilizations* (Penguin Books 2007).
[37] The decision-making process in international organizations has always been dictated by the rich countries due to their greater economic and political powers. The global North dominates negotiations in multilateral environmental and human rights conventions also. Özgüç Orhan, 'Environmental Justice in World Politics' (2009) 8(1) Turkish Journal of International Relations 59.
[38] David E. Newton, *Environmental Justice: A Reference Handbook (*ABC-CLIO 2009).

disaster of 1984[39] shows that developing country people have to face worse environmental threats compared to those living in a developed country.[40]

Recognizing that the core issues regarding environmental injustice are similar at the domestic and the global levels because poor or underdeveloped countries have less power and ability to demand respect for their environment and to assess the role of the courts in achieving distributive justice the following discussion proceeds under four heads:

First, North-South dimension of environmental injustice;

Second, environmental injustice in the global South countries;

Third, environmental justice in Ireland and;

Fourth, the role of the courts regarding unenforceable economic and social rights.

The following discussion over the above points demonstrates that despite the selected jurisdictions belong to both global North and South, they have similarities regarding distributive injustice issues and the courts have shown indiscretion in environmental decision-making. The discussion also shows that the courts of India and Bangladesh have violated constitutional principles by enforcing unenforceable directive principles of state policy whereas the Irish judiciary has shown fidelity to the constitutional principles.

1.1.1. North-South Dimension of Environmental Injustice

The most controversial debate of global environmental justice has been generated by the North-South dimension.[41] Overconsumption of natural resources by developed countries has contributed to environmental pollution in developing countries. Despite their small historical contribution to environmental degradation, the poor countries are the ones who suffer most due to environmental change. Vulnerability due to geographic location,

[39] As a result of unsafe design, 40 tons of a highly toxic chemical, methyl isocyanate, leaked from the pesticide factory of Union Carbide Corporation in Bhopal in 1984. The incident resulted in an estimated 7,000 to 10,000 deaths in the first three days. Amnesty International, *Clouds of Injustice: Bhopal Disaster 20 Years on* (Alden Press 2005). Over 25,000 lives have lost to date. Satinath Sarangi, 'Compensation to Bhopal Gas Victims: Will Justice Ever be Done?' (2012) 9(2) Indian Journal of Medical Ethics 118.
[40] Gill, *Environmental Justice in India* (n 4) 10.
[41] Carmen Gonzalez, 'Bridging the North-South Divide: International Environmental Law in the Anthropocene' (2015) 32 Pace Environmental Law Review 407.

scarcity of resources, and lack of administrative capacity to control and manage waste disposal, logging, mining, and polluting businesses have added to the disproportionate burden on developing countries. Since the days of colonization, the appropriation of the natural resources of the global South by the countries of the global North to fuel their economic expansion has generated harmful economic and environmental consequences. This has trapped the Southern nations in vicious cycles of poverty and environmental degradation.[42] Countries in Latin America, Asia, and Africa have been exporting raw materials and importing manufactured goods. This has resulted in serious problems to their environment and development. Forestry, indigenous people, and ecosystems in developing countries have suffered due to mining and logging.[43] The developed countries send their waste for disposal in low-income countries. They also transfer polluting industries to developing countries. One such example is the ship-breaking industries in India, Bangladesh, and Pakistan. It has been reported that thousands of workers have died or been maimed in dismantling the world's ships.[44]

A failure to maintain distributive justice and a departure from environmental citizenship has been shown by the Indian Supreme Court vide Order dated 30 July 2012 in allowing a hazardous ship called *Exxon Valdez* to enter India for dismantling at the Alang ship-breaking yard. The same court previously refused import of the toxic end-of-life ship vide its Orders dated 13 February 2006,[45] 03 May 2012, and 06 July 2012.[46] Although it is prohibited to send hazardous ships from the UK to developing countries, two UK cruise ships were scrapped on an Indian beach.[47] This shows not only a marked departure from environmental protection initiatives by the Indian Supreme Court[48] but also the post-colonial impact on the environment of the global South countries.

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[42] Carmen Gonzalez, 'Environmental Justice and International Environmental Law' in Shawkat Alam (eds), *Routledge Handbook of International Environmental Law (*Routledge 2013).
[43] Gonzalez, 'Environmental Justice, Human Rights, and the Global South' (n 6).
[44] John Vidal 'This is the World's Cheapest Place to Scrap Ships' – but in Chittagong, It's People Who Pay the Price' *The Guardian* (London, 2 December 2017)
[45] The Supreme Court of India decided that the French carrier *Clemenceau* is to stay outside Indian waters. Marcos A. Orellana, 'Shipbreaking and Le Clemenceau Row' (2006) 10(4) American Society of International Law 5.
[46] Laurie Kazan-Allen, 'Confusing Verdict by India's Supreme Court' <http://www.ibasecretariat.org/lka-confusing-verdict-by-india-supreme-court.php> accessed on 23 March 2022.
[47] Kate West & Margot Gibbs, 'UK Cruise Ships Scrapped in India's Ship Graveyard' *BBC News* (London, 2 March 2021).
[48] Vipin Mathew Benjamin (ed), *Has the Judiciary Abandoned the Environment?* (Human Rights Law Network 2010) 10.

Compared to the Indian counterpart, the Supreme Court of Bangladesh has shown consistency in restricting the import of hazardous ships. The following discussion shows how the apex court of Bangladesh has tried to ensure distributive justice by preventing the import of hazardous ships because they caused high health hazards to the workers and pollute the coastal zone. In the absence of necessary environmental clearance to operate, the High Court Division (HCD) of the Supreme Court (SC) of Bangladesh in *BELA v Bangladesh*[49] directed the Government to set up a committee to ensure the impartial supervision of the shipbreaking industry and asked the Government to comply with the requirements under the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal 1989 (the Basel Convention).[50] The HCD also ordered the authorities to restrict entry of any ship without pre-clearing certificate. Interestingly, the Department of Environment (DoE) has on 10 October 2021 downgraded the status of the harmful shipbreaking industry from red to orange. As a result of that no Environmental Impact Assessment (EIA) would be required to carry out ship breaking and the yard owners can continue without having to take stock of the impact on the environment created by their business.[51] This shows that even the courts are taking the initiatives the executives have the tendency to bypass the implementation of the orders of the courts.

Though a country of the global North, environmental injustice is prevalent in Ireland in the form of distributive injustice. Ireland has witnessed several environmental injustices due to poverty and colonialism. It has now less than 11% of its total land area under forest cover but was once known for its dense woodlands. Ireland witnessed the felling of forests and changes of land use while a British colony. To supply cheap timber for ship building purposes and for fuel, Ireland was almost entirely denuded of tree cover by the end of the 19th century and continues to be among the least forested regions in Europe.[52] In addition, when pollution controls imposed by the USA were tightened, Ireland desperately

[49] [2008] Writ Petition No. 7260 (HCD).
[50] Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (adopted 22 March 1989, entered into force 05 May 1992) 1673 UNTS 57.
[51] Mostafa Yousuf, 'Shipbreaking Industry Status: Orange from Red; Green Overlooked' *The Daily Star* (Dhaka, 14 November 2021).
[52] Marjan Shokouhi, 'Despirited Forests, Deforested Landscapes: The Historical Loss of Irish Woodlands' (2019) 44(1) Études irlandaises 17.

attempted to attract multinationals into the country resulting in loss of habitats and environmental pollution.[53]

The discussion in the following two parts shows more specific distributive injustice issues in the selected jurisdictions along with the failure of the judiciaries to ensure environmental justice.

1.1.2. Environmental Injustice in the Global South Countries

The main barriers to environmental justice in the countries of the global South include poverty, illiteracy, unawareness, restricted access, high cost, and delay in the justice delivery system.[54] There is evidence that the economic policy of India has significantly affected the environment and the lives and livelihood of people. Statistics show that 60% of the cultivated land in India has been affected by soil erosion, waterlogging, and an increase in salinity. The amount of available water has also reduced by almost 70% in the post-independence period. It is beyond doubt that these are hampering the lives of mostly the poor people as they are more dependent on the ecosystem.[55]

In India, two major environmental justice issues have been pointed out by environmentalists; first, displacement induced by development initiatives, and second, the gender dimension of the problem where women are suffering more because of environmental crises.[56] Since independence, several large dams have been built causing an estimated 40 million people to be displaced.[57] What is alarming is that less than a quarter of those displaced persons have been resettled. Such an executive failure has

[53] Barry and Leonard (n 19).
[54] Indira Gandhi, the Prime Minister for India from 1967 to 1984, during her address at the Plenary Session of the 1972 Stockholm Conference described poverty and needs as the biggest polluters. According to Indira Gandhi if the people are deprived and living in a contaminated atmosphere it is not possible to convince them not to pollute the rivers, seas, air, and water and the animals can never be protected. (Indira Gandhi, 'Man and Environment', Plenary Session of the United Nations Conference on Human Environment, Stockholm, June 1972).
[55] James Boyce and Barry Shelley (eds), *Natural Assets: Democratizing Ownership Of Nature* (Island Press 2013).
[56] Ravi Rajan, 'A History of Environmental Justice in India' (2014) 7(5) Environmental Justice 117.
[57] The Government of India undertook the construction of Sardar Sarovar Project which includes the construction of 30 large dams, 135 medium dams, and 3000 smaller dams along the Narmada River. An estimated 248 towns and villages were scheduled to be submerged. In 1987 when the construction of the dams started, the Ministry of Environment, Forest, and Climate Change (MoEFCC) gave a conditional EC mentioning that instead of completing environmental impact studies prior to the approval of the Project, the studies would be done concurrently with construction. This decision undermined the basis of environmental planning and resulted in the inundation of more land than expected. It was concluded by an independent review team from the World Bank that the difficulties emerged from the absence of an adequate database and failure to consult with the people whose lives and environment was affected. Thomas R. Berger, 'The World Bank's Independent Review of India's Sardar Sarovar Projects' (1993) 9(1) American University International Law Review 33.

also caused human trauma due to forced relocation, delayed or no resettlements, loss of employment, and lack of compensation.

Several socio-economic and cultural issues arose due to such forced relocation. Unfortunately, the Indian Courts have refused to interfere in such projects undertaken by the Government causing distributive injustice. The issue regarding the Sardar Sarovar Project was brought before the Indian Supreme Court in *Narmada Bachao Andolon v Union of India*.[58] The Project was challenged for non-compliance with Environmental Impact Assessment (EIA) and the inadequacy of the rehabilitation and resettlement efforts made for the affected people. The Court refused to intervene in the Project as it was a policy decision of the Government and any decision to stop or abandon the Project would lead to a huge wastage of public money.[59] The stance taken by the Supreme Court of India in dealing with questions of environmental clearance granted to mining projects also demonstrates how the judiciary has played an inadequate role in protecting distributive justice. In cases involving mining projects the Indian Supreme Court has stated that the larger interests of the nation must not suffer due to minor procedural lapses.[60]

The same sort of problem can be seen in judicial pronouncements by Bangladeshi courts regarding large infrastructure projects. Despite strong resistance to the Rampal Power Plant Project[61] from both within and outside the country, not only due to the possible destruction of the Sundarbans[62] but also the displacement of over 3,500 land-owning families and others dependent on the forest for a livelihood,[63] the High Court Division

[58] [2000] AIR 3753 (SC).
[59] Nupur Chowdhury, 'Sustainable Development as Environmental Justice: Exploring Judicial Discourse in India' (2016) 26 & 27 Economic & Political Weekly 84.
[60] *Lafarge Umiam Mining Ltd v Union of India & Others* [2011] AIR 2781 (SC); *Sterlite Industries (India) Ltd v Union of India* [2013] Civil Appeals Nos 2776–2783 of 2013. In *ND Jayal and Another v Union of India and Ors* [2004] SCC 9, even on the face of obvious non-compliance regarding EIA, the Supreme Court of India preferred to focus on the economic gains from the projects. Chowdhury, 'Sustainable Development as Environmental Justice' (n 59) 84.
[61] A 1320MWx2 coal-based power plant near the Sundarbans, the largest mangrove forest in the world. The project's impact area falls more than 10 km radial distance which is within the environmentally critical area of the Sundarbans. Transparency International Bangladesh *Rules Violated in Acquiring Land and Paying Compensations in Rampal and Matarbari Projects* (2015) <http://www.ti-bangladesh.org/beta3/index.php/en/activities/4635-rules-violated-in-acquiring-land-and-paying-compensations-in-rampal-andmatarbari-projects> Accessed 5 January 2022.
[62] An Environmental Impact Assessment (EIA) conducted in the proposed coal-based power plant area (Rampal), Mongla and the Sundarbans showed that most of the impacts of the coal-fired power plants are negative and irreversible (-81) which can't be mitigated in any way. Abdullah Harun Chowdhury, 'Environmental Impact of Coal Based Power Plant of Rampal on the Sundarbans (world largest mangrove forest) and Surrounding Areas' (2017) 2(3) MOJ Ecology and Environmental Science 85.
[63] Sangeeta Barooah Pisharoty, Despite Opposition, Work on Controversial Rampal Power Project Continues' *The Wire* (India, 24 April 2018) <https://thewire.in/south-asia/rampal-power-project-sundarbans-india-bangladesh> accessed 10 January 2022.

(HCD) of the Supreme Court of Bangladesh (SC) refused to intervene. A Public Interest Litigation[64] was filed seeking direction to the government to stop the construction of the coal-fired power plant until an assessment of the project's environmental impact was done. The Court while summarily rejecting the petition termed the attempt by the petitioning lawyers to be 'over activism' and 'actuated by publicity motive'.[65] This shows the failure of the court to ensure distributive justice.

It is the poor who are suffering most due to environmental degradation and any initiative to protect the environment is also hurting them the most.[66] An illustration of such distributive injustice is *Bangladesh Environmental Lawyers Association (BELA) v Bangladesh and others*.[67] The HCD in June 2009 directed the tannery owners to move the tanneries from Hazaribagh to Savar to protect the life and environment of Dhaka City. The relocation of factories started in 2017 and caused high unemployment because the factory owners lay off thousands of workers. To add to the misery, almost all the workers were denied financial compensation during, and after the relocation.[68] Although on 30 June 2021, the Ministry of Industries declared the completion of the Tannery Industrial Estate Project, which took decades to implement and the project cost is gone up by six times the tannery owners still find the tannery industrial city to be incomplete and environmentally unfriendly. The tannery estate project in Savar is termed as the best example of project mismanagement.[69] According to a recent newspaper report, due to environmental pollution done by the Savar Tannery Project, the parliamentary standing committee of the Ministry of Environment, Forest and Climate Change has recommended and is going to serve a notice to the Ministry of Industries to shut down the Project.[70] If this is done, thousands of workers will lose their livelihood.

[64] Writ Petition No. 10937 of 2013 (HCD).
[65] ibid para 13.
[66] Karen Bickerstaff, Gordon Walker, and Harriet Bulkeley (eds), *Energy Justice in a Changing Climate: Social Equity and Low-Carbon Energy* (Zed Books 2013).
[67] Writ Petition No. 1430 of 2003 (HCD).
[68] Mohammed Monirul Alam, 'Relocation of Tanneries Imperil Workers' *Dhaka Tribune* (Dhaka, 21 July 2019).
[69] Abul Kashem and Rafiqul Islam, 'Savar Tannery Estate: Complete Yet Incomplete After 19 Years' *The Business Standard* (Dhaka, 19 July 2021).
[70] Rashidul Hasan, 'Shut Down Savar Tannery Estate' *The Daily Star* (Dhaka, 24 August 2021).

This judgment demonstrates that the court while ordering relocation did not consider the cost of rehabilitation of workers and allowed time sought on several occasions by the government and tannery owners causing more pollution and health hazardous. The Supreme Court even waived BDT 308.3 million (€3,224,186.22) previously imposed as penalties and asked 142 tanneries to pay one-time fine of BDT 50,000 (€522.90) each only.[71] It shows that the apex court was at times very reluctant to safeguard the environment and the rights of the poor workers thereby infringing distributive justice.

1.1.3. Environmental Injustice in Ireland

To achieve environmental justice, it is important to determine and understand how different groups and communities are experiencing environmental burdens and benefits. In Ireland, there is not only a significant gap in the application of environmental justice principles but also lack of information to assess environmental impacts and social inequalities. As an exhibition of distributive injustice and lack of recognition, vulnerable and marginalized communities are largely excluded from participating in environmental and planning decisions resulting in their voices being unheard and distributive injustice. Environmental injustice is visible as pollution is concentrated in certain geographical areas. In addition, poor water quality and waste disposal are affecting some communities more than others. An important role could have been played by litigation in enforcing environmental and climate policy, but the high cost of litigation makes the judicial system inaccessible for the people on low to moderate incomes.[72] Although Ireland as a member state of the Aarhus Convention[73] has obligations to make judicial mechanisms accessible to the public,[74] ensure access to justice,[75] and public participation,[76] it has performed

[71] Staff Correspondent, 'SC Orders Govt to Protect Dhaleshwari from Tannery Pollution in Savar' *bdnews24.com* (Dhaka, 09 April 2017).
[72] DCU Report (n 7) 27.
[73] Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (adopted 1998, entered into force 30 October 2001) 2161 UNTS 447.
[74] Article 18 of the Aarhus Convention.
[75] Article 9 of the Convention, Directive 2003/4/EC on Public Access to Environmental Information and the European Communities (Access to Information on the Environment) Regulations 2007 to 2018 (the AIE Regulations) SI No. 133/2007.
[76] Directive 2003/5/EC of 10 January 2003 amending Council Directive 91/414/EEC to include Deltamethrin as Active Substance [2003] OJ L 8/7.

poorly.[77] The Irish legal system is described as 'designed by lawyers for use by lawyers' shows extreme inequalities and is less accessible to low-income communities.[78]

Although in a few cases, community support and interest-driven 'influential allies' helped to take on multinational toxics industries,[79] there are instances where senior Irish politicians have tried to influence projects, including the Glanbia/Royal Dutch-A-Ware cheese factory in Belview, Co. Kilkenny. Although several environmental objections were raised regarding the plan by An Taisce, the High Court of Ireland decided in favour of the Belview plant. Such incidents raise concerns as to the environmental justice situation of the country.[80]

The discussion below shows how the courts of the selected jurisdictions have attempted to ensure distributive justice based on unenforceable directive principles of state policy.

1.1.4. Enforcing Directive Principles of State Policy

To determine the role of the courts in ensuring distributive justice this part briefly examines the different ways in which courts of the selected jurisdictions have intervened to facilitate the enforcement of economic, social, and cultural (ESC) rights. All three constitutions of the selected jurisdictions incorporated ESC rights either under the heading of Directive Principles of State Policy (DPSP)[81] or Fundamental Principles of State Policy (FPSP)[82] and make it clear that the ESC rights are non-justiciable.[83]

[77] The Court of Justice of the EU (CJEU) in Case C-427/07 *Commission v Ireland* [2009] EU:C: 457 found Ireland to have failed to make practical information available to the public regarding administrative and judicial review procedures. Ireland has broadly failed to fully transpose the obligations imposed by the Aarhus Convention and the Environmental Impact Assessment (EIA) Directive. Ryall 'Access to Information on the Environment' (n 12) 3.
[78] Eilis Barry, 'Access to Justice Requires Much More Than Access to Legal Aid' *The Irish Times* (Dublin, 16 May 2019).
[79] In *Hanrahan v Merck Sharp and Dohme (Ireland) Ltd* [1988] IESC 1 the Irish Supreme Court held Merck Sharp accountable for toxic emissions from the factory.
[80] Mark Hilliard, 'Taoiseach Says An Taisce Should Not Appeal Court Decision on Cheese Factory' *The Irish Times* (Dublin, 11 May 2021).
[81] Socio-economic rights have been incorporated under Part IV of the Indian Constitution as Directive Principles of State Policy; Article 45 of the Irish Constitution uses the heading of Directive Principles of State Policy and includes ESC rights.
[82] In the Constitution of Bangladesh, the socio-economic rights are included in Part II under the heading Fundamental Principles of State Policy (FPSP).
[83] The express bar to judicial enforcement is contained in Article 37 of the Indian Constitution. Article 45 of the Irish Constitution states that, 'the principles of social policy set forth in this article….. shall not be cognizable by any court under any of the provisions of this constitution.' Article 8 of the Constitution of Bangladesh expressly declares the FPSP to be judicially unenforceable.

Protection of the environment has been made part of the Indian Constitution by inserting two new articles by the Constitution (Forty-second) Amendment Act, 1976[84] under the Directive Principles of State Policy. In several cases, the Indian courts have given effect to these unenforceable articles and did not merely treat them as guiding principles.[85] The Rajasthan High Court while explaining the scope of Article 51-A (g) in *L.K. Koolwal v State*[86] observed:

> We can call Article 51-A ordinarily as the duty of the citizens, but in fact, it is the right of the citizens as it creates the right in favour of citizens to move to the Court to see that the State performs its duties faithfully and the obligatory and primary duties are performed in accordance with the law of the land. Right and duty co-exist. There cannot be any right without any duty and there cannot be any duty without any right.[87]

In *T. Damodhar Rao v S.O. Municipal Corporation, Hyderabad*,[88] the Court asserted that in view of Article 48-A and 51-A(g), it is clear that protection of the environment is not only the duty of every citizen, but it is also their right as it imposes an obligation on the State and all other State organs including Courts. The Supreme Court of India in *M.C. Mehta v Union of India*,[89] observed that Article 48-A created a duty on the State to protect and improve the environment. In *Intellectual Forum v State of A.P.*,[90] the Supreme Court held that Articles 48-A and 51-A are not only fundamental in the governance of the country but also it shall be the duty of the State to apply these principles in making laws and further, these two Articles are to be kept in mind in understanding the scope and purpose of the fundamental rights guaranteed by the Constitution.

The way the Indian courts have given effect to Articles 21, 48-A, and 51-A (G) by citing them as mutually complementary, and by interpreting the duty imposed upon the state as

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[84] Article 48-A provides that 'State shall endeavor to protect and improve the environment and to safeguard the forests and wildlife of the country.' Article 51-A (g) states that 'It shall be the duty of every citizen of India- (g) to protect and improve the natural environment including forests, lakes, rivers, and wildlife, and to have compassion for living creatures.'
[85] Paramjit Jaswal, Nishtha Jaswal, and Vibhuti Jaswal, *Environmental Law* (Allahabad Law Agency 2017) 49.
[86] [1988] AIR Raj 2.
[87] *L.K. Koolwal v State* [1988] AIR Raj 4 (HC).
[88] [1987] AIR 171.
[89] [2002] 4 SCC 356.
[90] [2006] 3 SCC 549 at 576-577.

a corresponding right of the citizen, seems to be a major shift in the constitutional paradigm, and also creates controversy because in view of Article 37 of the Indian Constitution, courts are not allowed to actively enforce the directive principles. A closer look at Indian constitutional history and the decisions of the Supreme Court of India in some of the earlier cases[91] involving constitutional questions shows how the Indian courts have deviated in the last few decades from the fundamental understanding that the principal force behind the implementation of directive principles is political rather than legal. Although the directive principles are legal norms and are relevant for the judiciary for interpretation of legislation, they cannot be enforced by courts.[92]

Similar to its Indian counterpart, the right to life vested in Article 32 of the Constitution of Bangladesh has been interpreted by the Supreme Court of Bangladesh to include ESC rights.[93] *In Chairman, National Board of Revenue (NBR) v Advocate Zulhas Uddin Ahmed and others*[94] the Court treated the right to medical care to be judicially enforceable, in the consideration that it too is a part of the right to life. Protection of the environment has been made a part of the Constitution of Bangladesh through the Constitution of Bangladesh (Fifteenth Amendment) Act, 2011 by inserted a new Article 18A.[95] Since this provision has been included in the Fundamental Principle of State Policy part it is unenforceable. However, this unenforceable provision under Article 18A along with Articles 31 and 32 has been relied upon by the High Court Division of the Supreme Court of Bangladesh in orders regarding protection of the environment.[96]

The position of the Irish judiciary is in contrast with that of the Indian and Bangladeshi judiciaries.[97] The Irish courts have not enforced non-justiciable ESC rights. In *O'Reilly v Limerick Corporation*[98] Costello J evoked the doctrine of the separation of powers as a

[91] In *Minerva Mills v Union of India* [1980] AIR 1789,1843 (SC) the Supreme Court observed: 'Part III and Part IV of the Constitution together constitute the commitment to social revolution and they together are the conscience of the Constitution ... The two paths are like the two wheels of a chariot, one no less important than the other.'
[92] Kagzi, *The Constitution of India* (1989) 938.
[93] Muhammad Ekramul Haque, 'Justiciability of Economic, Social and Cultural Rights Under International Human Rights Law' (2021) Dhaka University Law Journal 39.
[94] [2010] 15 MLR 457 (AD).
[95] The Article states: 'The State will protect natural resources, biodiversity, water bodies, forest, and wildlife, and preserve and develop the environment for the present and future generations.'
[96] [2022] Writ Petition No. 2014 of 2022. Order dated 15 February 2022.
[97] In *McGee v Attorney-General* [1974] IR 284 (SC) in a dissenting judgment, FitzGerald CJ said that: 'Article 45 refers to principles of social policy which are intended for the general guidance of the Oireachtas in its making of laws and which are declared to be exclusively its province and not cognizable by any court. In my opinion, the intervention by this, or any other court, with the function of the Oireachtas is expressly prohibited under this Article. To hold otherwise would be an invalid usurpation of legislative authority.'
[98] [1989] IRLM 181 (HC).

reason for precluding the court from exercising a role of distributive justice.[99] The fidelity of the Irish judges to the doctrine of separation of powers in following the restraint approach is best described by Hardiman J:

> The role of the judiciary is to administer justice and to uphold the Constitution and the laws. The judiciary is not, and cannot be, directly politically responsible for their decisions, or liable to recall if their decisions are unpopular. An unpopular or powerless individual or a minority is as much entitled to justice as anyone else. The judiciary's independence of the political branches of government is essential if impartial justice is to be done between citizen and citizen and between the citizen and the State, and if laws are to be kept within constitutional bounds.[100]

The decisions in *Sinnott v Minister for Education*[101] and *TD v Minister for Education*[102] also show the reluctance of the Irish Supreme Court to provide substantive vindication of economic and social rights.[103]

[99] Alastair Richardson, 'The Justiciability of Social, Economic and Cultural Rights' Trinity College Law Review Online <https://trinitycollegelawreview.org/the-justiciablity-of-social-economic-and-cultural-rights/> accessed 10 January 2022.
[100] *TD v Minister for Education* [2001] 4 IR 259.
[101] [2001] 2 IR 545 (SC).
[102] [2001] 4 IR 259 (SC).
[103] William Binchy, 'The Supreme Court of Ireland' in Brice Dickson (ed), *Judicial Activism in Common Law Supreme Court* (Oxford University Press 2007) 169.

Part II

2. Recognition as an Element of Justice

The central reason behind distributive injustice is lack of recognition. Effective participation can ensure recognition and one must have the right to participate to get equitable treatment.[104] Attention to both distribution and recognition is important to ensure environmental justice. It is important to look at the 'why' of inequality to understand the problem and to remedy it. There is a direct link between lack of recognition and decline in participation by an individual or a community. This means that if someone or a community is not recognized she or the community has no right to participate.[105]

In this regard, a constitutional right to live in a healthy environment represents a tangible embodiment of hope as it can stimulate stronger legislation, the evolution of institutions and norms, and allow the courts to defend citizens' rights.[106] This thesis acknowledges the argument that like any other constitutional right, the right to the environment also has to pass the acid test of improving peoples' lives[107] or otherwise the right will become a mere paper tiger. Considering that the real impact of a constitutional environmental right will depend on the legal and political culture of a specific country, on the relationship of the state organs and the power structure, and on the presence of advocacy groups,[108] the role of the courts of the selected jurisdictions regarding recognizing a constitutional environmental right is examined below. By recognizing the right to a healthy environment the courts of India and Bangladesh have imposed positive obligations on the state. Positive substantive duties include ensuring that air, water, and soil are free from pollution and ensuring access to sustainably produced food and a safe climate. Positive procedural duties on state include providing access to environmental information, fulfilling the right

[104] Schlosberg, *Defining Environmental Justice* (n 4).
[105] Nancy Fraser, 'Rethinking Recognition' (2000) New Left Review 107.
[106] Charles R. Epp, *The Rights Revolution: Lawyers, Activists and Supreme Courts in Comparative Perspective* (University of Chicago Press 1998).
[107] Michael Ignatieff, *Human Rights as Politics and Idolatry* (Princeton University Press 2001).
[108] David R Boyd, *The Environmental Rights Revolution* (n 20).

to participate in decision-making related to the environment, and providing access to justice where environmental standards are breached.[109]

The discussion will show the differences in the standings of the courts of the selected jurisdictions. In one hand, the courts of India and Bangladesh have recognized a constitutional right to the environment, and on the other, the Irish Supreme Court has stated that the right to the environment cannot be derived from the Constitution. The discussion below also shows that the courts of India and Bangladesh were able to appreciate the dangers of environmental degradation and attempted to ensure access to environmental justice by recognizing the right to a healthy environment. On the other hand, the Irish judiciary has shown reluctance in guaranteeing the right of recognition.

2.1. Recognizing a Constitutional Right to a Healthy Environment

Global awareness building and enhanced international commitments following the 1972 Stockholm Conference[110] and the 1992 Rio Conference[111] inspired more than one hundred and fifty countries to incorporate provisions into their constitutions recognising a right to a healthy environment, either expressly or impliedly.*[112]* The right to a clean, healthy and sustainable development has also been recognized as an important human right by the United Nations Human Rights Council on 08 October 2021.[113] The United Nations General Assembly has adopted resolution GA/12437 on 28 July 2022 recognizing the right to a clean, healthy and sustainable environment as a human right.[114]

In at least twelve countries where governments were slow to act or took no such step, the courts took the initiative and recognised a right to the environment.[115] This part includes

[109] Elsabé Boshoff, 'Positive Obligations On The State To Safeguard Environmental Human Rights' <https://www.humanrightspulse.com/mastercontentblog/positive-obligations-on-the-state-to-safeguard-environmental-human-rights> accessed 23 August 2022.
[110] The United Nations Conference on the Human Environment, Stockholm, Sweden 1972.
[111] The United Nations Conference on Environment and Development, Rio de Janeiro, Brazil 1992.
[112] David R Boyd, 'The Implicit Constitutional Right to Live in a Healthy Environment' (2011) 20 Review of European Community & International Environmental Law 171.
[113] United Nations Human Rights Council Resolution 48/13 <https://news.un.org/en/story/2021/10/1102582> accessed 24 March 2022.
[114] <https://press.un.org/en/2022/ga12437.doc.htm> accessed 04 August 2022.
[115] These countries include Bangladesh, Estonia, Guatemala, India, Italy, Israel, Malaysia, Nigeria, Pakistan, Sri Lanka, Tanzania, and Uruguay.

case studies from the selected jurisdictions through which the right to the environment has been recognized and developed. The relevant Irish case law is also examined to show the differences in views between the courts of the selected jurisdictions.

2.1.1. A Constitutional Right to the Environment in India

In India, the doctrine of unenumerated rights[116] was initiated by the Supreme Court of India in the *Maneka Ghandhi Case,*[117] where the Court, by extending the ambit of Article 21 of the Constitution of India, declared that the right to life also includes the right to travel abroad. Following that, the application of the doctrine of unenumerated rights in India has expanded over the years.[118] In the language of the Supreme Court of India:

> Article 21 got unshackled from the restrictive meaning placed upon it ... It came to acquire a force and vitality hitherto unimagined. A burst of creative decisions of this Court fast on the heels of *Maneka Ghandi* gave a new meaning to the Article and expanded its content and connotation.[119]

Environmental activism in India was triggered by the Bhopal gas tragedy and the Supreme Court and the High Courts have worked from case to case to make a clean environment a fundamental right, and then extended its meaning to include a right to compensation, clean water, and air.[120] The Indian Courts have been motivated by the long-standing ineffectiveness of political leadership and government authorities in India in discharging their constitutional and statutory duties as well as widespread inefficiency in the public sector and extreme corruption.[121]

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[116] According to Ronald Dworkin, '[c]onstitutional lawyers use unenumerated rights as a collective name for a particular set of recognized or controversial constitutional rights, including the right to travel; the right of association; and the right to privacy.' Ronald Dworkin, 'The Concept of Unenumerated Rights--Unenumerated Rights: Whether and How Roe Should be Overruled' (1992) 59 The University of Chicago Law Review 381.
[117] *Maneka Ghandi v Union of India* [1978] AIR 597 (SC).
[118] Right to legal aid and speedy trial: *Hoskot v State of Maharashtra* [1978] AIR 1548 (SC).
Right to livelihood: *Olga Tellis v Bombay Mun. Corp* [1986] AIR 180 (SC).
Right of access to medical treatment: *Panikulangara v India* [1987] AIR 1990 (SC).
Right to education until the age of 14: *Krishnan v State of Andhra Pradesh* [1993] AIR 2178 (SC).
Right against workplace sexual harassment of a woman: *Vishaka v State of Rajasthan* [1997] AIR 3011 (SC).
Right to privacy: *Justice K S Puttaswamy (Retd.) v Union of India and Others* [2012] AIR (SC).
[119] *Antulay v Naik* [1992] AIR 1701, 1717 (SC).
[120] *Charan Lal Sahu v Union of India* [1990] AIR 1480 & 717 (SC).
[121] Gill, *Environmental Justice in India* (n 4) 39.

One of the earliest cases dealt with by the Supreme Court of India concerning the protection of environmental rights was *R.L. & E. Kendra, Dehradun v State of U.P.* (popularly known as the *Doon Valley Case*).[122] This case is also an example of the application of epistolary jurisdiction[123] by the Court. In the judgment, the Supreme Court did not articulate the infringement of any particular fundamental right but accepted the submission that the disturbance of ecology and the pollution of air and water due to a quarrying operation affects the life of individuals and is thus a violation of the right to life under Article 21 of the Constitution of India.[124] In subsequent years, the Indian Courts implicitly based their decisions on the right to life provision contained in Article 21 in a series of cases. In *M.C. Mehta v Union of India,*[125] the Supreme Court implicitly treated the right to live in a pollution-free environment as a part of the fundamental right to life. In *T. Damodhar Rao v S.O. Municipal Corporation Hyderabad*[126] the Andhra Pradesh High Court of Indian State pronounced that: 'The slow poisoning by the polluted atmosphere caused by environmental pollution and spoliation should also be regarded as amounting to a violation of Article 21 of the Constitution.'[127] Ultimately, in *Subhash Kumar v State of Bihar*,[128] the Supreme Court expressly declared the right to live in a healthy environment as a fundamental right under Article 21 of the Constitution of India. In this case, the Court observed:

> The right to life is a fundamental right under Article 21 of the Constitution and it includes the right of enjoyment of pollution-free water and air for full enjoyment of life. If anything endangers or impairs that quality of life in derogation of laws, a citizen has the right to have recourse to Article 32 of the Constitution for removing the pollution of water or air which may be detrimental to the quality of life.[129]

Showing continuous pursuance by the Indian courts to ensure environmental justice, recognition of an unenumerated right to the environment was reaffirmed in a long series

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[122] [1985] AIR 652 (SC).
[123] The procedure for moving the court by just addressing a letter on behalf of the disadvantaged class of persons is popularly known as *epistolary jurisdiction*. Ghosh (n 12).
[124] Jaswal, Jaswal, and Jaswal (n 84) 53.
[125] [1987] AIR 1986 (SC).
[126] [1987] AIR 171 (SC).
[127] [1987] AIR 181 (SC).
[128] [1991] AIR 420 (SC).
[129] *Subhash Kumar v State of Bihar* [1991] AIR 420 (SC).

of cases in subsequent years, which include but are not limited to *Virender Gaur v State of Haryana*,[130] *N.D. Jayal v Union of India*,[131] *Municipal Corpn. of Greater Mumbai v Kohinoor CTNL Infrastructure Co. Pvt. Ltd*,[132] *Smt. S. Maheswari v The State of Andhra Pradesh*[133], *Municipal Corporation v Ankita Sinha.*[134]

2.1.2. A Constitutional Right to the Environment in Bangladesh

In the absence of any enforceable provision in the Constitution regarding the protection of the environment, the Supreme Court of Bangladesh recognized the right to the environment in *Dr. M. Farooque v Bangladesh.*[135] A writ petition was filed by Bangladesh Environmental Lawyers Association (BELA) on the apprehension of environmental harm from a flood action plan affecting the life, property, and livelihood of more than a million people. The plea was that in formulating and implementing the action plan, the plight of local communities was not taken into consideration. The Appellate Division (AD) of the Supreme Court of Bangladesh pronounced:

> Articles 31 and 32 of our constitution protect the right to life as a fundamental right. It encompasses within its ambit, the protection, and preservation of the environment, ecological balance free from pollution of air and water, sanitation without which life can hardly be enjoyed. Any act or omission contrary thereto will be violative of the said right to life.[136]

The High Court Division (HCD) of the Supreme Court in the case of *Dr. Mohiuddin Farooque v Bangladesh and other*,[137] stated the 'right to life… includes the enjoyment of pollution-free water and air, improvement of public health by creating and sustaining conditions congenial to good health and ensuring the quality of life consistent with human dignity.'

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[130] [1995] 2 SCC 577.
[131] [2004] 9 SCC 362.
[132] [2014] 4 SCC 538 (556).
[133] [2021] SCC 218.
[134] [2021] SC.
[135] [1997] 49 DLR 1 (SC).
[136] [1997] 49 DLR (AD).
[137] [1996] 48 DLR 438 (HCD).

2.1.3. Problems with the Basis of the Right Recognized by the Courts

The case studies of India and Bangladesh show that their courts recognized a right to the environment based on the constitutional provisions regarding the right to life. The language used by the right to life provisions in both constitutions is very similar.[138]

It appears from a reading of the constitutional provisions of India and Bangladesh that the right to life has been perceived as a negative right and the language of the relevant Articles amounts to a declaration that no person is to take the life or liberty of another person, except under a law authorizing him to do so. However, in each of the cases where the courts have recognized a right to the environment, they have changed the nature of the constitutional provision and reframed the right to life as a positive right. This implies that, while traditionally the right to life is understood as a protection against the arbitrary deprivation of life by the state, it can be invoked by individuals even to claim compensation in the event of death from environmental disasters.[139] As the Indian and Bangladeshi courts relied only on the right to life provisions in giving relief in relation to drastic and present environmental harm, this thesis argues this to be a problem, since the right to life provisions in the constitutions are largely negative in character.

There are concerns as to the extent to which the existing right to life provisions in constitutions involve positive obligations on the state to preserve and promote life expectancy in the form of supplying less polluted water, air, etc. However, the courts of India and Bangladesh have invariably extended the meaning of the right to life and the right to the environment to impose positive obligations on the state. In *M.C. Mehta v Union of India*,[140] the Indian Supreme Court reiterated that 'every citizen has a right to fresh air and to live in a pollution-free environment.'[141] In *Rabia Bhuiyan, MP v Secretary, Ministry*

[138] Article 21 of the Constitution of India provides that: 'No person shall be deprived of his life or personal liberty except according to the procedure established by law.' Article 32 of the Constitution of Bangladesh provides: 'No person shall be deprived of life or personal liberty save in accordance with law.'
[139] Robin Churchill, 'Environmental Rights in Existing Human Rights Treaties' in Alan E. Boyle and Michael R. Anderson (eds), *Human Rights Approaches to Environmental Protection* (Clarendon Press 1996) 89.
[140] [1992] 3 SCC 256.
[141] *M.C. Mehta v Union of India* [1992] 3 SCC 257.

of LGRD and Others,[142] the Supreme Court of Bangladesh, based on the right to life provisions, pronounced that everyone has the right to safe drinking water.

2.1.4. Right to the Environment in Ireland

Compared to India and Bangladesh, the doctrine of unenumerated rights has received more attention from the Irish judiciary. Kenny J in *Ryan v Attorney General*,[143] seized on the fact that Article 40.3.2° of the Irish Constitution enumerates a number of specific rights that are protected, prefaced by the phrase 'in particular,' to infer that there were other rights protected by Article 40.3.1° that were unenumerated. In his seminal judgment, Kenny J also relied on the Christian and democratic nature of the State (partly using a papal encyclical to identify some characteristics of a Christian state) to identify a right to bodily integrity.[144] Once the decision of Kenny J was approved on appeal by the Supreme Court headed by Ó Dálaigh CJ, it made the courts the real defenders of personal rights in Ireland. This case put down markers for future events and made the Supreme Court judges more powerful, as in subsequent years the Supreme Court identified twenty[145] new constitutionally protected rights.

In addition to Kenny J's Christian and democratic approach to identifying a new right, the Irish courts developed two other approaches to identifying rights under the guise of Article 40.3.1°. Henchy J in *McGee v Attorney General*[146] relied on the human personality approach for holding unconstitutional the ban on the importation and sale of

[142] [2007] 59 DLR 176 (SC).
[143] [1965] IR 294 (HC).
[144] *Ryan v Attorney General* [1965] IR 294 (SC) 313-314.
[145] Right of access to the courts: *Macauley v Minister for Posts and Telegraphs* [1966] IR 345 (HC).
Rights of an unmarried mother vis-à-vis her child: *The State (Nicolaou) v An BordUchtála* [1966] IR 567 (SC).
Right to travel: *State (M) v Attorney General* [1969] IR 73 (HC).
Right to fair procedures: *Re Haughey* [1971] IR 217 (SC).
Right to earn a livelihood: *Murtagh Properties v Cleary* [1972] IR 330 (HC).
Right to marital privacy: *McGee v Attorney General* [1974] IR 284 (SC).
Right not to have one's health endangered: *State (C) v Frawley* [1976] IR 365 (HC).
Right to state-funded legal representation in criminal trials: *The State (Healy) v Donoghue* [1976] IR 325 (SC).
Right to communication: *Attorney General v Paperlink Ltd*. [1984] ILRM 373 (HC).
Right to procreate: *Murray v Ireland* [1985] IR 532 (HC).
Right to privacy: *Kennedy v Ireland* [1987] IR 587 (HC).
Right to independent domicile and the right to maintenance: *CM v TM* [1991] ILRM 268 (HC).
Right to know the identity of one's natural mother: *O'T v B* [1998] 2 IR 321 (SC).
[146] [1974] IR 284 (SC).

contraceptives. The Natural Law approach was the third approach used by Walsh J in the *McGee Case*[147] for identifying new constitutional rights.[148]

However, the doctrine of unenumerated rights, which was one of the most influential doctrines in Irish constitutional law in the twentieth century, lost its appeal in the late 1990s.[149] The open-ended nature of the doctrine has lately been criticized by judges, academics, and constitutional lawyers. The Irish judiciary has become more restrained in the last two decades in recognizing any new right and has embraced an epistemological modesty.[150] After a long break, during which there were clear indications that the doctrine of unenumerated rights had run its course, *NVH v Minister for Justice and Equality*[151] was a revival of the doctrine.[152]

Later in the same year (2017), in *Merriman v Fingal County Council*[153] Barrett J stated that it should be recognised that there is a 'right to an environment that is consistent with the human dignity and well-being of citizens at large.' While going against the current trend of restraint in recognizing any new right, Barrett J seemed to have taken a cautious approach addressing the criticisms levelled against the doctrine of unenumerated rights and also articulating the basis of his authority in identifying a new right.[154]

However, the Irish Supreme Court in *Friends of the Irish Environment (FIE) v Ireland*[155] declared the National Mitigation Plan 2017 (the Plan) ultra vires as it did not comply with the statutory mandate and stated that there is no constitutional right to a healthy environment. By this decision, the Supreme Court overruled the earlier dictum by Barret

[147] ibid.
[148] Oran Doyle, 'Legal Positivism, Natural Law and the Constitution' (2009) 3 Dublin University Law Journal 208.
[149] Ruadhán Mac Cormaic, *The Supreme Court* (Penguin Ireland 2016) 334.
[150] Eoin Daly, 'Reappraising Judicial Supremacy in the Irish Constitutional Tradition' in Laura Cahillane, James Gallen, Tom Hickey (eds), *Judges, Politics and the Irish Constitution* (Manchester University Press 2017) 29.
[151] [2017] IESC 35 [17]. It was held in this case that there was an unenumerated 'right to work, at least in the sense of freedom to work or seek employment', which was deemed to be 'part of the human personality.'
[152] Maria Cahill and Seán Ó Conaill, 'Judicial Restraint Can also Undermine Constitutional Principles: An Irish Caution' (2017) 36 (2) University of Queensland Law Journal 259.
[153] [2017] IEHC 695.
[154] Orla Kelleher, 'The Revival of the Unenumerated Rights Doctrine: A Right to an Environment and its Implications for Future Climate Change Litigation in Ireland' (2018) 25 Irish Planning and Environmental Law Journal 100.
[155] [2020] IESC 49.

J in *Merriman v Fingal County Council*.[156] The Supreme Court judgment mentioned the right identified by Barrett J to be 'impermissibly vague.'[157] In the language of the Court:

> the right to an environment consistent with human dignity, or alternatively the right to a healthy environment … is impermissibly vague. It either does not bring matters beyond the right to life or the right to bodily integrity, in which case there is no need for it. If it does go beyond those rights, then there is not a sufficient general definition (even one which might, in principle, be filled in by later cases) about the sort of parameters within which it is to operate.[158]

However, it was also mentioned in the judgment that the conclusion does not prohibit pleading of constitutional rights in environmental cases and the Supreme Court leaves the door open for further development in environmental constitutionalism.[159] The Supreme Court attempted to highlight the importance of guarding against what Clarke CJ described as 'a blurring of the separation of powers' in this context 'by permitting issues which are more properly political and policy matters (for the legislature and the executive) to impermissibly drift into the judicial sphere.'[160]

The outcome in the *Climate Case Ireland*,[161] although has been hailed by commentators as a 'landmark decision,'[162] has also been described as a 'disappointing judgment' and 'retrogressive' because of the negative lessons the international community can draw from it. Concerns have been raised towards the justification for rejecting the right to the environment by the Supreme Court of Ireland. In a case where the plaintiff lacks standing and it was not necessary to decide the matter, the rationale given by Clarke CJ for making

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[156] [2017] IEHC 695.
[157] Áine Ryall, 'Climate Case Ireland: Implications of the Supreme Court Judgment' (2020) 3 Irish Planning and Environmental Law Journal 106.
[158] [2020] IESC 49 [8.11].
[159] Rónán Kennedy, Maeve O'Rourke and Cassie Roddy-Mullineaux, 'When Is a Plan Not a Plan?: The Supreme Court Decision in "Climate Case Ireland"' (2020) 27(2) Irish Planning and Environmental Law Journal 60.
[160] *Friends of the Irish Environment (FIE) v Ireland [2020]* IESC 49 [8.9].
[161] ibid.
[162] Brendan Montague, 'Historic Win for Climate Case Ireland' *The Ecologist* (Ireland, 5 August 2020) <https://thee cologist.org/2020/aug/05/historic-win-climate-case-ireland> accessed 04 February 2022.

a finding regarding the status of the right to environment has been described as unconvincing.[163]

The above judgment by the Irish Supreme Court shows a clear division between the apex court of Ireland with the apex courts of India and Bangladesh in terms of recognizing a constitutional environmental right. The Irish Supreme Court is more in support of the view that 'the fundamental principle of the separation of powers dictates that general questions of policy are not subject to judicial review.'[164] This kind of approach is not new with the Irish Supreme Court as has been discussed above (1.1.4). However, this thesis supports the argument that by not responding to the human rights context, the Supreme Court has missed important opportunities and has introduced additional obstacles for future litigants in a time when environmental protection is at a stake.[165] A constitutional right to the environment facilitate access to justice and can be a 'powerful and potentially transformative step' in achieving ecological sustainability.[166]

[163] Victoria Adelmant, Philip Alston, and Matthew Blainey, 'Human Rights and Climate Change Litigation: One Step Forward, Two Steps Backwards in the Irish Supreme Court' (2021) 13 Journal of Human Rights Practice 1.
[164] Ryall, 'Climate Case Ireland' (n 157) 106.
[165] Adelmant, Alston and Blainey (n 163).
[166] Boyd (n 20) 1.

Part III

3. Ecological Justice

In the recent years, there has been a growing concern for looking into the natural world while discussing justice discourse.[167] In articulating the aspects of environmental justice, Schlosberg not only mentioned recognition of human interests but also non-human interests in decision-making and distribution.[168] Baxter also adopted a broader approach and includes non-human nature within the concept of environmental justice.[169] The basis of ecological justice is that everything is interrelated and that 'ethical action in the environmental sphere is central to equity as a social level.'[170] Among the selected jurisdictions, the Indian Supreme Court has been the front runner in recognizing and adopting an approach. Although it previously followed an anthropocentric approach,[171] it has recently adopted an ecological approach, stressing the intrinsic values of all the naturally present things. In the language of Radhakrishnan J:

> Environmental justice could be achieved only if we drift away from the principle of anthropocentric to ecocentric. …. Ecocentrism is nature-centered where humans are part of nature and non-human have intrinsic value. In other words, human interests do not take automatic precedence and humans have obligations to non-humans independently of human interest. Ecocentrism is therefore life-centered, nature-centered where nature include both human and non-humans.[172]

The Indian Courts have adopted an ecocentric approach in several cases. In *T.N. Godavarman Thirumulpad v Union of India,*[173] a series of directions were issued to the government authorities to protect the endangered Asiatic wild buffalo.

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[167] Martin, McGuire and Sullivan (n 1).
[168] Schlosberg, *Defining Environmental Justice* (n 4).
[169] Brian Baxter, *Ecologism: an introduction* (Georgetown University Press 2000).
[170] Jesuit Social Services, *Ecological Justice: Expanding the Conversation* (2018) <http://jss.org.au/wp-content/uploads/2018/02/Ecological-Justice-Expanding-the-Conversation.pdf> accessed 18 December 2021.
[171] An anthropocentric approach by the Indian Supreme Court can be seen in *Vellore Citizen' Welfare Forum v Union of India* [1996] 5 SCC 647; *M.C. Mehta (Taj Trapezium Matter) v Union of India* [1997] 2 SCC 353; *M.C. Mehta v Union of India (Delhi Vehicular Pollution Case)* [2001] 3 SCC 756; *Consumer Education & Research Centre v Union of India* [1995] AIR 922 (SC).
[172] *T.N. Godavarman Thirumulpad v Union of India & Ors* [2012] 4 SCC 362.
[173] [2012] 3 SCC 277.

In *T.N. Godavarman Thirumulpad v Union of India,*[174] the judges issued a series of directions to the central government and to state governments for the conservation and regulation of the sandalwood plant.

In *Centre for Environmental Law, World Wide Fund-India v Union of India*,[175] it was declared by the Court that the endangered Asiatic lions, found only in Gujarat's Gir forests, be provided a second natural habitat at Madhya Pradesh's Kuno wildlife sanctuary. In this case, the Court adopted an ecocentric approach to save the Asiatic Wild Lion for 'species best interest standard'.[176] In *Animal Welfare Board of India v A. Nagaraja*[177] a traditional bull-taming event in Tamil Nadu, as well as traditional bullock cart races in Maharashtra, were declared illegal by the Court. In *Orissa Mining Corporation* v *Ministry of Environment & Forest*[178] the Court directed that a proposed bauxite mining project in Orissa's forests could not proceed without endorsement from local tribal village assemblies. This judgment is different from the four other judgments mentioned above as it does not involve animals or plants, and does not explicitly mention ecocentric or anthropocentric approaches. However, the underlying legal logic, meta-structure, and major premises of this judgment are nonetheless similar to the other four judgments. The judgments pronounced by the Indian Supreme Court are no doubt trendsetters. However, a careful reading of the judgments gives the impression that the judges were clear about the moral rights of non-human life but were uncertain about how to best translate the moral rights to enforceable legal rights in the context of a largely anthropocentric constitutional and legal order existing in India.[179]

A few years after the change in approach from anthropocentric to eco-centric by the Indian Supreme Court, the High Court of the Indian state of Uttarakhand granted legal rights to the ecosystem in a ruling on 30 March 2017.[180] The Court stated:

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[174] [2012] 4 SCC 362.
[175] [2013] 8 SCC 234.
[176] Satish C. Shastri, *Environmental Law* (Eastern Book Company 2015) 17.
[177] [2014] 7 SCC 547.
[178] [2013] 6 SCC 476.
[179] Abhayraj Naik, 'Law's Nature' (Speaking Through Judgments: A Symposium on the Courts as Thinking Working Institutions, September 2019).
[180] Writ Petition (PIL) No.140 of 2015 (HC).

> We, by invoking our parens patriae jurisdiction, declare the Glaciers including Gangotri & Yamunotri, rivers, streams, rivulets, lakes, air, meadows, dales, jungles, forests wetlands, grasslands, springs and waterfalls, legal entity/ legal person/juristic person/juridical person/moral person/artificial person having the status of a legal person, with all corresponding rights, duties and liabilities of a living person, in order to preserve and conserve them. They are also accorded the rights akin to fundamental rights/legal rights.[181]

Certain personnel including the Chief Secretary, State of Uttarakhand, Advocate General, State of Uttarakhand were declared the persons in *loco parentis* as the human face to protect, conserve and preserve all the Glaciers. They were given the responsibility to uphold the status of Gangotri & Yamunotri, rivers, streams, rivulets, lakes, air, meadows, dales, jungles, forests wetlands, grasslands, springs, and waterfalls in the State of Uttarakhand and also to promote their health and wellbeing.[182] However, in this case, the Court essentially based its judgment upon the Hindu notion of deities as juristic persons. The Indian court's effort to protect the vanishing glaciers is based on and carries religious overtones since both the rivers and glaciers are considered sacred sites to many Hindus.[183] The decision of the Uttarakhand High Court was overturned by the Supreme Court in July 2017.[184] An eco-centric approach has also been adopted by the National Green Tribunal (1.2.7).

The High Court Division of the Supreme Court of Bangladesh in a Writ Petition[185] filed by the Human Rights and Peace for Bangladesh (HRPB) challenging the legality of earth-filling, encroachment and construction of structures along the banks of river Turag, declared the river Turag as a 'living entity'. The Court also said that the status will be applicable for all the rivers of the country. The Court declared that:

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[181] *Lalit Miglani v State of Uttarakhand & others* [2015] Writ Petition (PIL) No.140 (HC).
[182] ibid.
[183] Omair Ahmad, 'Indian court awards legal rights of a person to entire ecosystem' *The Third Pole* (India, 03 April 2017).
[184] 'India's Ganges and Yamuna Rivers Are 'Not Living Entities' *BBC News* (London, 7 July 2017) <https://www.bbc.com/news/world-asia-india-40537701> accessed 26 June 2019.
[185] Writ Petition No. 13989 of 2016 (HCD).

> In pursuance of the doctrine of public trust, the State shall perform responsibilities of a trustee in respect with all the rivers, sea, mountains, forests, lakes, ponds, and other receptacles of water within the territory of the State; National River Protection Commission is the legal guardian of all the rivers of the country and will take necessary measures to protect all the rivers of the country.[186]

The High Court Division verdict not only recognized rivers as legal entities but also outlined a detailed mechanism to implement the rights of rivers. The following directions are noteworthy:

- The National River Conservation Commission (NRCC) was declared as the *Person in Loco Parenties* of all rivers of Bangladesh for protecting them from pollution and encroachment.

- Direction was given for taking steps for necessary amendment of the National River Conservation Commission Act 2013.

- Bangladesh Bank (the central bank of Bangladesh) has been directed to issue notification prohibiting sanction of loans to the land grabbers.

- The Ministry of Education was directed to take steps so that an hour-long class is taken once in two months in all government and private academic institutions to raise awareness regarding the rivers.

- The Director General, Bangladesh Television and all the privately owned television channels were directed to air hour long national, international documentaries on river, nature and environment every Friday. [187]

The Appellate Division of the Supreme Court of Bangladesh upheld the decision of the High Court Division.[188]

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[186] ibid.
[187] *The Human Rights and Peace for Bangladesh (HRPB) v Bangladesh and others* Writ Petition No. 13989 of 2016 (HCD).
[188] Mari Margil, 'Bangladesh Supreme Court Upholds Rights of Rivers' <https://mari-margil.medium.com/bangladesh-supreme-court-upholds-rights-of-rivers-ede78568d8aa?> accessed 20 May 2020.

Although it is clearly an interesting development that recognizes the dire situation the world's rivers several concerns have been raised regarding giving legal rights to the rivers. One is regarding the real implication of the directives.[189] The other concerns are that the ruling could hurt the poor fishing and farming communities that depend on the rivers; the ruling might make riverside communities more vulnerable to eviction because fishermen and farmers who have traditionally lived by rivers, but do not have legal rights to do so, become vulnerable to eviction.[190] Keeping in view the above decision of the Supreme Court of India that overturned the decision of the Uttarakhand High Court, concerns have been expressed regarding the judgment of the Supreme Court of Bangladesh as many rivers in Bangladesh traverse more than one country, particularly India. Since India has not granted legal rights to rivers it is difficult to determine how Bangladesh would legally protect the rivers from environmental harm.[191]

According to one commentator, since the regulators are also involved in corruption to legalize the filling of river and wetlands it was up to the court to come up with such a strong judgment.[192] However, he also pointed out the complex challenges involved in implementing such an order as it lacks collaborative approach and as the necessary stakeholders were not consulted before reaching a judgment.[193] This judgment is important as it demonstrates how the court can take a lead when the other organs of the state are taking inadequate steps. However, it is important to consider the issue of

[189] Law Desk, 'Rivers Are Now Legal Persons' *The Daily Star* (Dhaka, 05 February 2019).
[190] Rina Chandran, 'Fears of Evictions as Bangladesh Gives Rivers Legal Rights' *REUTERS* (Bangkok, 04 July 2019). <http://www.reuters.com/article/us-bangladesh-landrights-rivers/fears-of-evictions-asbangladesh-gives-rivers-legal-rights idUSKCN1TZ1ZR> accessed 12 July 2019.
[191] Sigal Samuel, 'This Country Gave All Its Rivers Their Own Legal Rights' <www.vox.com/future-perfect/2019/8/18/20803956/bangladesh-rivers-legal-personhood-rights-nature> accessed 10 October 2019.
[192] The same was done by the Constitutional Court of Colombia in 2016 in deciding that the Atrato River has also legal rights and has specific rights to protection, conservation, maintenance, and restoration. Observing the poor condition of the river, the Court was of the opinion that the only option to protect the river was to grant rights of nature to the river. The court provided a framework and timeline and required the national government, government departments, and the municipal governments, concerned universities, NGOs, research institutes, and community representatives to recognize the rights of the river, develop a plan of action for decontamination, develop a plan of action to eradicate and neutralize illegal mining, develop a plan to recover traditional subsistence livelihoods of the afro-descendant and indigenous communities, conduct toxicological and epidemiological studies, monitor the orders of the Court and to form an Inter-Institutional Commission for Choco. The decision although was not adequately followed have two important outcomes: first, it has empowered the communities that depend on the river for their livelihoods and survival and; second, it has given them a constitutional ground and tools to defend their lands and lives. Curtis Kline, 'Recognizing the Rights of a River: Challenges and Opportunities from Colombia to Colorado' <https://sustainability.colostate.edu/humannature/rights-of-a-river-colombia-to colorado/#> accessed 11 August 2022.
[193] MS Siddiqui, 'Court Has Granted Rivers Legal Personality, State Must Uphold Their Rights' *The Financial Express* (Dhaka, 02 March 2019).

involvement of local communities and of the Indigenous nations as it has been argued that the rights of nature borrow heavily from Indigenous ecocentric legal frameworks.[194]

However, an examination of the measures for protecting the legal rights of the rivers adopted in Australia[195] and New Zealand[196] shows that a statutory right for nature can be more effective in the selected jurisdiction as a ruling by the court may lack the institutional depth. A legal right created by the court can have a blurring effect on the distinction between legal rights and human rights by conflating a legal person with a living person.[197] Moreover, the institutions which have been assigned the role of a legal guardian by the courts are part of the executive and their roles in protecting the rights of the nature (river) might create conflicts of interest.[198] This is where the collaborative approach proposed and discussed in detailed in chapter 5 can be important as it would allow the courts to notify the legislature regarding the importance of protecting nature and the legislature can enact the laws and the executive can implement those. Giving a legal right to nature in the selected jurisdictions through the legislative procedure would help the courts to protect our invaluable nature.[199]

Conclusion

Environmental justice emerged as a social movement in the USA has evolved over time and has become a major issue in the discourse of the environment. The environmental justice movement has redefined the sustainability agenda with strong social justice

[194] Mihnea Tănăsescu, 'Rights of Nature, Legal Personality, and Indigenous Philosophies' (2020) 9(3) Transnational Environmental Law 429.
[195] In the state of Victoria in Australia, the Victorian Environmental Water Reserve (EWR) acts as the legal umbrella under which all water assigned for environmental use is held. The EWR provides and maintains the necessary river flows for protecting the health of rivers, and wetlands. In 2010, the Victorian Environmental Water Holder (VEWH) was given the responsibility to make decisions for the water entitlements component of the EWR. The VEWH is a legal person with the capacity to hold water rights, it can sue and be sued, and has the power to acquire, hold or transfer property. Erin L O'Donnell and Julia Talbot-Jones, 'Creating Legal Rights for Rivers: Lessons from Australia, New Zealand, and India' (2018) 23(1) Ecology and Society 7.
[196] The Government of New Zealand and the indigenous Māori tribe negotiated a settlement agreement which was enshrined on 20 March 2017 into the Te Awa Tupua (Whanganui River Claims Settlement) Act. The Act grants legal personhood status to the Whanganui River, sets out a whole range of measures to regulate the treatment of the river and also establishes the office of "Te Pou Tupua", a guardian model with one representative from the tribe and one from the government. O'Donnell and Talbot-Jones (n 195).
[197] Erin O'Donnell, 'Institutional reform in environmental water management: the new Victorian environmental water holder' (2012) 22 Journal of Water Law 7.
[198] Erin O'Donnell and Garrick 'Environmental Water Organizations and Institutional Settings' in Avril Horne, Angus Webb, Michael Stewardson, Brian Richter, Mike Acreman (eds), *Water for the Environment: From Policy and Science to Implementation and Management* (Elsevier 2017) 421.
[199] Lidia Cano Pecharroman, 'Rights of Nature: Rivers That Can Stand in Court' (2018) 7 Resources 13.

content.[200] The discussion shows that the environmental justice scenario in the global North and the global South is not the same as contextualizing environmental justice discourse in the global South where poverty is the prime challenge raises many other concerns.[201] Although the Indian courts have contributed to the evolution of environmental jurisprudence by recognizing the constitutional right to the environment, in directing the closure or relocation of industries, prohibiting hazardous businesses, taking an ecocentric view, there has been a marked departure in the role of the courts. The courts have allowed forest lands to be converted to non-forest use by levy of compensation. Fabricated reports made by the Pollution Control Board have not been questioned by the courts. The judges of the apex court have shown an obsession with the amount of money spent on projects.[202] Two trends are visible in the judgments given by the Indian Courts: *First,* when protection of the environment is in conflict with socio-economic rights of the poor, it is the poor who usually get short shrift; *Second*, when environmental protection is in conflict with development projects undertaken by the government or large corporate entities, environmental protection gets short shrift.[203] The same kind of approach has been taken by the Bangladeshi judiciary. Although generally favorable to the environment, the Supreme Court of Bangladesh has favored big infrastructure projects undertaken by the government.[204] In most environmental cases both in India and Bangladesh, the judgments and their implementation has been delayed or broadly disregarded.[205] Despite the declaration by the Supreme Court of Bangladesh that the rivers are a legal entity, the water quality of the river system has worsened resulting in ecological harm and health risks.[206] The Irish judiciary, on the other hand, have exercised judicial passivity, showing a fidelity to the doctrine of separation of powers and have been criticized for undermining

[200] Asghar Ali, 'A Conceptual Framework for Environmental Justice based on Shared but Differentiated Responsibilities' in Tony Shallcross and John Robinson (eds), *Global Citizenship and Environmental Justice* (Rodopi 2006).
[201] Gill, *Environmental Justice in India* (n 4) 12.
[202] Benjamin (n 48).
[203] Prashant Bhushan, 'Misplaced Priorities and Class Bias of the Judiciary' (2009) 44 (14) Economic and Political Weekly 32.
[204] Staff Correspondent, 'HC Clears Way for Rampal' *The Daily Star* (Dhaka, 07 October 2013).
[205] Rohit Prajapati, 'Environment Crimes and Compensation: Are We Concerned about the Survival of the System or Human Beings?' in Vipin Mathew Benjamin (ed), *Has the Judiciary Abandoned the Environment?* (Human Rights Law Network 2010) 91; 'Worrying Delay in Implementing HC Order On Air Pollution' *The New Age* (Dhaka, 03 March 2022); Abul Hasanat, 'Environmental Courts in Enforcement: The Role of Law in Environmental Justice in Bangladesh' (2021) 21(2) Australian Journal of Asian Law *85*.
[206] Rebecca Peters, 'Protecting Rights of Rivers: Turning Intention into Action' *The Daily Star* (Dhaka, 20 November 2020).

key constitutional principles[207] and for creating restrictive access to environmental justice.[208]

Therefore, neither judicial over-activism nor judicial restraint can ensure environmental justice and new methods comprising all the organs and stakeholders are required to improve the environmental justice situation in countries either it be a country of the global North or global South. The next chapter builds on this by examining the role of the courts of the selected jurisdictions in ensuring the procedural elements of environmental justice.

[207] Cahill and Ó Conaill (n 152).
[208] Jamie McLoughlin, 'Whither Constitutional Environmental (Rights) Protection in Ireland After 'Climate Case Ireland'?' (2021) 5(2) Irish Judicial Studies Journal 26.

Chapter 3: The Procedural Elements of Environmental Justice, Role of the Courts and the Need for New Methods

Introduction

The three procedural elements identified as prerequisites for environmental justice by scholars and activists following the Stockholm Declaration 1972[1] are access to environmental information, public participation in environmental decision-making and access to justice.[2] This chapter critically examines the role of the courts of the selected jurisdictions in guaranteeing the three procedural elements of environmental justice to see how far they have been successful in ensuring environmental justice.

Procedural justice can uncover the dynamics of the inequitable bargaining powers of individuals and communities. It recognizes the need that public policy should be based on mutual respect and justice for all and that minority and low-income groups have to be incorporated into the decision-making process in a better way.[3] Effective participation can not only facilitate environmental justice but can also improve the quality of decisions. Enhanced involvement in decision-making and judicial enforcement increases the possibility for individuals to take responsibility, thereby promoting environmental citizenship.[4] The importance of public participation was initially recognized by Principle 10 of the Rio Declaration 1992:[5]

> Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their

[1] 1972 UN Conference on the Human Environment, Declaration of Principles, UN Doc. A/CONF.48/14/Rev.1.
[2] Dinah Shelton, 'Human Rights and the Environment: What Specific Environmental Rights Have Been Recognized?' (2006) 35 Denver Journal of International Law and Policy 129.
[3] Ruchi Anand, *International Environmental Justice: A North-South Dimension* (Routledge 2004) 11.
[4] Stuart Bell, Donald McGillivray and Ole W. Pederson, *Environmental Law* (Oxford University Press 2013) 315.
[5] 1992 Rio Declaration on Environment and Development, UN Doc. A/CONF.151/26/Rev.

> communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available.

Procedural rights achieved greater importance following the Rio Conference[6] and almost all treaties adopted in or after 1992 included provision for access to information and/or public participation in environmental decision making.[7]

The discussion in this chapter shows stark differences between the roles of the courts of the selected jurisdictions in ensuring the procedural rights to environmental justice. For example, in the absence of an express provision in the Constitution of India 1950 (the Indian Constitution) the Indian Supreme Court has stated '….the right to information and community participation necessary for the protection of the environment and human health is an inalienable part of Article 21.'[8] It also stated that Article 21 guaranteeing the right to life also includes the right to access justice.[9] As discussed in the previous chapter (2.1) by recognizing a constitutional environmental right the courts of India and Bangladesh have opened an avenue for the citizens to institute environmental protection proceedings. The Irish Supreme Court, on the other hand, stated that there is no constitutional right to a healthy environmental and has also denied standing to Friends of the Irish Environment (FIE) to invoke personal constitutional or human rights as it is a corporate entity.[10]

A comparative examination in this chapter shows indiscretion in environmental decision making by the courts of the selected jurisdictions resulting in environmental injustice. The Indian Supreme Court which has earned many encomiums such as the 'saviour', 'pioneer,'[11] and even 'Supreme Court for Indians'[12] for its role in protecting rights of

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[6] The United Nations Conference on Environment and Development, Rio de Janeiro, Brazil 1992.
[7] Notable are United Nations Framework Convention on Climate Change (adopted 09 May 1992, entered into force 21 March 1994) 1771 UNTS 107; United Nations Convention on Biological Diversity (adopted 05 June 1992, entered into force 29 December 1993) 1760 UNTS 79; Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (adopted 1998, entered into force 30 October 2001) 2161 UNTS 447.
[8] *Research Foundation for Science Technology and Natural Resources Policy v Union of India and Ors [*2005] 10 SCC 510, Para 42.
[9] *Anita Kushwaha v Pushap Sudan* [2016] 8 SCC 509.
[10] *Friends of the Irish Environment CLG v Ireland* [2020] IESC 49.
[11] Shubhankar Dam and Vivek Tewary, 'Polluting Environment, Polluting Constitution: Is A "Polluted" Constitution Worse Than A Polluted Environment?' (2005) 17(3) Journal of Environmental Law 383.
[12] Upendra Baxi, 'The Avatars of Indian Judicial Activism: Explorations in the Geography of (In) justice' in SK Verma and Kusum (eds), *Fifty Years of the Supreme Court of India: Its Grasp and Reach* (Oxford University Press 2000) 156.

individuals, in cases involving infrastructure development has adopted judicial self-restraint giving priority to economic development over environmental protection hindering the rights of marginalized communities.[13] Judicial overreach by the apex court in Bangladesh has impacted good governance[14] and a majority of the orders either took years to be implemented or were even disregarded by the government departments.[15] The Supreme Court of Bangladesh has assumed the role of a legislator without much benevolent consequences.[16] On the other hand, judicial restraint adopted by the Irish judiciary has undermined environmental protection.[17]

Discussion over the role of the courts in ensuring the procedural rights in this chapter is divided into *four parts.* The *first part* includes a brief exploration of the environmental regulations, notifications, and relevant legislation granting the right to information in the selected jurisdictions and examines the role of the courts in ensuring access to environmental information. The discussion shows that although the courts have attempted to extend the scope of access to information, cumbersome proceedings, bureaucratic inertia, and cost are hindering the effective exercise of this right.

In the *second part*, the relevant legislation and the role of the courts of the selected jurisdiction in ensuring public participation in environmental decision making is examined. This part shows that although the courts have engaged in activism they have also shown indiscretion and poor, disadvantaged, and marginalized communities are facing difficulties in having their voices heard and the situation is apathetic in the selected jurisdictions.

In the *third part*, judicial decisions are critically examined to see how far access to courts have been ensured through judicial activism. A critical assessment of the roles of the Indian and Bangladeshi Courts in exercising public interest litigation (PIL) jurisdiction

[13] Gitanjali Nain Gill, *Environmental Justice in India: The National Green Tribunal* (Routledge 2018) 50.
[14] Md. Mostafizur Rahman and Roshna Zahan Badhon, 'A Critical Analysis on Judicial Activism and Overreach' (2018) 23(8) Journal of Humanities and Social Science 45.
[15] Awal Hossain, 'Rule of Law and Good Governance in Bangladesh: Does Judicial Control Matter?' (2014) 2(7) Intercontinental Journal of Human Resource Research Review 7.
[16] Md. Rizwanul Islam, 'Judges as Legislators: Benevolent Exercise of Powers by the Higher Judiciary in Bangladesh with Not So Benevolent Consequences' (2016) 16(2) Oxford University Commonwealth Law Journal 219.
[17] Victoria Adelmant, Philip Alston, and Matthew Blainey, 'Human Rights and Climate Change Litigation: One Step Forward, Two Steps Backwards in the Irish Supreme Court' (2021) 13 Journal of Human Rights Practice 1.

shows problems in access, participation, effectiveness, and sustainability. A discussion over the Irish Supreme Court's decision in *Climate Case Ireland*[18] shows that it can act as a barrier for future environmental litigations. Certain earlier Irish judicial decisions are also examined to show the reluctance of the courts regarding the prohibitive cost which is one of the biggest barriers to access to justice and has placed Ireland at a low rank.[19]

The *final part* of the chapter critically examines the innovative judicial remedies adopted by the courts of India and Bangladesh to ensure environmental justice. Based on a critical analysis of activist judgments involving policy directions, innovative methods for implementation of judgments, reinterpretation of environmental laws, and creation of new institutions,[20] this part argues that judicial environmental activism by the Indian and Bangladeshi courts has impaired constitutional balances. Discussion over Irish precedents shows that judicial restraint is also hampering the rights of the citizens and undermining constitutional order.[21] Considering the challenges and concerns raised by the over-activism and passivity of the courts and the polycentric and interdisciplinary nature of environmental problems this part argues for the adoption of new methods to reach effective, sustainable, and implementable decisions for ensuring environmental justice.

[18] *Friends of the Irish Environment (FIE) v Ireland* [2020] IESC 49.
[19] Rónán Kennedy, 'Why Are Legal Costs in Ireland So High?' *RTÉ Brainstorm* <https://www.rte.ie/brainstorm/2022/0223/1282449-legal-costs-ireland-reform/> accessed 24 February 2022.
[20] Geetanjoy Sahu, 'Implications of Indian Supreme Court's Innovations for Environmental Jurisprudence' (2008) 4(1) Law, Environment and Development Journal 1
[21] Maria Cahill and Seán Ó Conaill, 'Judicial Restraint can also Undermine Constitutional Principles: An Irish Caution' (2017) 36(2) University of Queensland Law Journal 259.

Part I

1. Access to Environmental Information in the Selected Jurisdictions

Access to environmental information in a timely and user-friendly manner is important to enable effective participation in environmental decision-making and also to ensure enforcement of law. Access to information also raises awareness of environmental issues and encourages discussion around important policy choices.[22] Access to information makes it obligatory for the government to actively disseminate environmental information and to supply information on request within certain time limits to enhance the role of the public in environmental decision-making. The right to environmental information, along with the two other procedural rights can perform an instrumental role in securing the substantive right to the environment and improving the environmental justice situation.[23]

The right of access to environmental information held by public authorities is fundamental to good environmental governance.[24] As either the courts have intervened to ensure the right (especially in India) or have been called upon to determine a number of points of interpretation regarding the laws (mostly in Ireland), this part of the chapter examines the status of access to environmental information and the role of the courts in ensuring the right in the selected jurisdictions. Judicial decisions examined in this part shows how the courts have tried to ensure access to environmental information by either recognizing the right to information as a constitutional right or by giving directions to the government for effective implement of relevant laws and regulations. This part also shows both liberal and restrictive interpretation of relevant laws by the Irish Judiciary demonstrating indiscretion in the role of the courts to ensure this important element of environmental justice.

[22] Aine Ryall, 'Realising Environmental Information Rights: The Impact of the Aarhus Convention in Ireland' (2015) 4 Environmental Law and Practice Review 1
[23] Philippe Cullet, 'Definition of an Environmental Right in a Human Rights Context' (1995) 13 Netherlands Quarterly of Human Rights 25.
[24] Áine Ryall, 'Access to Information on the Environment: The Evolving EU and National Jurisprudence' (2016) 23 Irish Planning and Environmental Law Journal 3.

1.1. Access to Environmental Information in India and Role of the Courts

There was an absence of provisions ensuring access to environmental information in the earlier legislation in India. As a consequence, the public authorities were under no obligation to provide environmental information. In addition, the Official Secrecy Act 1923 acted as an obstacle in accessing environmental information.[25] However, the Indian Supreme Court in State of *Uttar Pradesh v Raj Narain and others*[26] recognized the right of people to know 'every public act, everything that is done in a public way, by their public functionaries.' This right was derived from the fundamental right to freedom of speech and expression mentioned in Article 19 of the Constitution of India. In several judgments, the Indian Supreme Court has held that in modern constitutional democracies, it is axiomatic that citizens have a right to know about the affairs of the Government elected by them.[27] Although the Indian Courts attempted to extend the access to official environmental information by the citizens[28] on certain occasions the Supreme Court of India has also recognized that in the public interest the right may have to be curtailed.[29]

At present, in India, the legal obligation to disclose environmental information is imposed by the Water (Prevention and Control of Pollution) Act 1974 (the Water Act) and Air (Prevention and Control of Pollution) Act 1981 (the Air Act). The Environmental Impact Assessment Notification 2006 (EIA Notification 2006) issued under the Environment (Protection) Act 1986 (the EP Act) requires all information about the proposed project to be made available publicly before commencing construction until a final decision is reached.[30]

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[25] Jona Razzaque, *Public Interest Environmental Litigation in India, Pakistan and Bangladesh* (Kluwer Law International 2004) 407.
[26] [1975] 4 SCC 428 para 74.
[27] *S. P. Gupta v Union of India* [1982] AIR SC 149; *Ministry of Information and Broadcasting, Government of India v Cricket Association of Bengal* [1995] 2 SCC 161.
[28] It was decided by the Bombay High Court in *Bombay Environmental Action Group v Pune Cantonment Board* [1987] Writ Petition No. 2733 of 1986 that an environmental action group is entitled to a restricted right to information and right to inspection provided the right is exercised *bona fide.* The concerned environmental action group has to pay the requisite fees also. The right to information was extended by the court to include not only social action groups but all persons residing within the area.
[29] *Dinesh Trivedi, MP and Ors v Union of India and Ors* [1997] 4 SCC 306.
[30] Shibani Ghosh, 'Demystifying the Environmental Clearance Process' (2013) 6(3) National University of Juridical Sciences Law Review 433.

India has a Central Information Commission (CIC)[31] and State Information Commissions (SICs)[32] established under the Right to Information Act 2005 (RTI Act 2005). Observing a huge backlog[33] mostly due to the shortage of members in the CIC, the Indian Supreme Court passed an Order dated 15th Feb 2019 directing the Central and State governments to fill-up existing vacancies within 6 months and to start filling up a particular vacancy 1 to 2 months before the date on which the vacancy is likely to occur.[34] As a result of non-compliance, the Indian Supreme Court passed two subsequent orders dated 16 December 2019 and 07 July 2021 directing the Central and State governments to appoint information commissioners in CIC and SICs without any effect.[35] This reflects NV Ramana CJ's statement, speaking extra-judicially, that there is a growing tendency by the executive to disregard and disrespect their orders.[36] However, the decisions by the Indian Supreme Court also shows that the courts have taken several initiatives to ensure access to information.

However, the right to information legal framework in India has been utilized with some success in environmental litigations.[37] The High Court of Delhi set aside an environmental clearance (EC) granted to a mining project based on evidence revealed under the RTI Act 2005.[38] The RTI Act 2005 has been used in litigation to establish the ambit of the Right to Information Frameworks in relation to environmental clearances.[39] This has mostly been possible because the Indian Courts have always shown an intention to extend the access of the citizens to official environmental information.[40] Nonetheless,

[31] Section 12 of the RTI Act 2005.
[32] Section 15 of the RTI Act 2005.
[33] A total of 32,147 RTI appeals were pending with the CIC as of 06 December 2021. ('Over 32,000 RTI Appeals Pending With Central Information Commission: Govt' *Hindustan Times* (India, 16 December 2021).
[34] Writ Petition (Civil) No. 436 of 2018.
[35] Asian News International, 'SC Directs Centre, States to File Report Regarding Appointment of Information Commissioners in CIC' *The New Indian Express* (India, 07 July 2021).
[36] Dhananjay Mahapatra, 'CJI: Executive's Tendency to Ignore Court Orders a Worry' *The Times of India* (India, 27 December 2021).
[37] UNEP, *An Assessment of Access to Information, Public Participation and Access to Justice in Environmental Decision-Making in Asia-Pacific: Technical Briefing Paper prepared for Expert Meeting on Human Rights and the Environment* (2021) 18.
[38] *Utkarsh Mandal v Union of India* [2009] SCC OnLine Del 3836.
[39] *Shibani Ghosh v Ministry of Environment and Forests*, Decision No. CIC/SG/C/2011/001398/16936 (Order of the Central Information Commission, 18 January 2012).
[40] Shibani Ghosh, 'Procedural Environmental Rights in India Law' in Shibani Ghosh (ed), *Indian Environmental Law: Key Concepts and Principles* (Orient BlackSwan 2019) 55.

instead of the initiatives adopted by the Indian Supreme Court the record shows a poor status of implementation of the right to information.[41]

1.2. Access to Environmental Information in Bangladesh and Role of the Courts

Article 39 of the Constitution of Bangladesh guarantees freedom of expression as a fundamental right. Although freedom of expression does not expressly include the right to seek and receive information, the Preamble of the Right to Information Act 2009 (the RTI Act 2009) declares the right to information as an inalienable part of freedom of expression.[42] A broad right to access to environmental information on request is recognized in national law.[43] It has been argued that there are instances of defying laws by public authorities who also chase general people for the alleged violation of the law just to justify their own development projects.[44]

Although the RTI Act 2009 has been utilized by activists[45] and local communities to hold authorities accountable there are areas that need to be improved such as improving the capacity of the officials tasked with providing information. However, the issues regarding lack of record-keeping, insufficient resources, and lack of infrastructure are also important matters which need improvement.[46]

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[41] The CIC is currently carrying a pendency of 15-18 months. The CIC has also been returning a growing number of appeals since 2015 using the deficiency in documentation ground under Rule 9 of the Right to Information Rules 2012 (RTI Rules 2012). For every two cases the CIC registers, it is returning one appeal on the ground of inadequate documentation. For example in 2020 the total number of appeals and complaints registered with the CIC was 15,129 and it has returned a total of 9,006 appeals and complaints. Undoubtedly, such returns of appeals discourage applicants and go against the objective of the RTI 2005. Data collected from the CIC dashboard also shows that of the 28,350 cases that were returned by the CIC between June 2018 and October 2020 for deficiencies in documentation, about 77% were not refiled. This is definitely a deep concern for an institution that is meant to democratize information. It has been criticized that the RTI Act 2005 although promised a new era in transparency in government functioning is dying slowly but certain death because the executive is letting go of no chance to hasten the process. Data shows that less than 45% of the applications received the information they had sought. Maneesh Chhibber, 'In 15 Years, RTI Has Gone from Indian Citizens' Most Powerful Tool to An Act On Life Support' *The Print* (India, 24 June 2020).

[42] Supti Hosssain, 'Right to Access Information' *The Daily Star* (Dhaka, 10 November 2020).

[43] It is required under the Forest Act 1927 to inquire and settle all private claims when restrictions are to be imposed when the status of a public forest is changed by means of reclassifying it as a reserved or protected forest. The Agricultural and Sanitary Improvement Act 1920 and the Embankment and Drainage Act 1952 guarantees the rights of local populations and interested parties in the areas of the proposed project to examine and raise objections to the project under consideration

[44] A.T.M Afzal, 'Country Representation: Bangladesh' (The Regional Symposium on the Role of the Judiciary in Promoting the Rule of Law in the Area of Sustainable Development, Colombo, July 1997).

[45] In the *State v Government of Bangladesh and Ors* [2010] Suo Motu Rule No. 19 of 2010, precocious documents were obtained by Bangladesh Environment Lawyers' Association (BELA) by using the RTI Act 2009.

[46] UNEP, *An Assessment of Access to Information, Public Participation and Access to Justice in Environmental Decision-Making in Asia-Pacific* (n 35).

The apex court in Bangladesh has intervened to ensure the right to access to information. Due to lack of sufficient notice and lack of providing information, in the *Slum Dwellers Case*[47] the Court intervened to protect the poor slum dwellers from being evicted without first being given notice as a matter of constitutional propriety. However, the HCD went on to pass the following directives:

● A master guideline or pilot projects should be developed by the government for resettlement;
● Slum-dwellers can be evicted only in phases and in accordance with the ability of individuals to find alternative accommodation;
● Reasonable notice has to be served before eviction.

However, despite the order of the HCD, the Government evicted 14,674 families (approximately 88,044 individuals) from 8 to 11 August 1999[48] showing executive inertia in complying with judicial decisions.

1.3. Access to Environmental Information in Ireland and Role of the Courts

Compared to India and Bangladesh, the situation of access to environmental information in Ireland is relatively different because in Ireland the right to access to environmental information is guaranteed under national, European Union (EU), and international law.

The EU and the 27 member states including Ireland[49] are among the Parties to the Aarhus Convention.[50] As a result of the constitutional arrangements of Ireland, the impact of the Aarhus Convention on the Irish legal order has arisen primarily due to Ireland's obligations as a Member State of the EU,[51] and the Aarhus Convention can be invoked in Ireland by reference to Ireland's obligation under EU law. Ireland has an obligation to implement

[47] *Aio o Salish Kendro (ASK) v Bangladesh* [1999] 19 BLD 488 (HCD).
[48] ESCR <https://www.escr-net.org/caselaw/2006/ain-o-salish-kendra-ask-v-government-and-bangladesh-ors-19-bld-1999-488>.
[49] Ireland signed the Aarhus Convention in 1998 and ratified it in June 2012.
[50] Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (adopted 1998, entered into force 30 October 2001) 2161 UNTS 447.
[51] The EU has been a party to the Aarhus Convention since 2005.

Directive 2003/4/EC[52] which is the EU directive designed to give effect to the information rights under the Aarhus Convention in the Member States.[53]

To aligning Irish access to information law more faithfully with Directive 2003/4/EC, the European Communities (Access to Information on the Environment) Regulations 2007[54] was amended in 2011,[55] in 2014[56] and in 2018.[57] The current provisions are found in the European Communities (Access to Information on the Environment) Regulations 2007 to 2018 (the AIE Regulations).[58] In addition to this, there is also domestic legislation allowing access to information for every person.[59]

The Office of the Commissioner for Environmental Information (CEI) established under the AIE regulations reviews decisions of public authorities on appeal by applicants if they are not satisfied with the outcome of their application for access to environmental information following an internal review.[60] The decisions by the CEI may be challenged by way of judicial review proceedings. Although most disputes are resolved in the Office of the CEI, certain cases involving important points of interpretation of legal principles proceed to litigation. This is where the question of access to the court arises as the high cost of litigation in Ireland is a concern.[61]

As per Article 9(4) of the Aarhus Convention, the review procedure must not be prohibitively expensive. In Ireland, although there is no charge for an internal review of a decision by a public authority, it costs €50 to take an appeal to the CEI.[62] However, to align Irish law with the obligation imposed by the Aarhus Convention, a special cost

[52] Council Directive 2003/4/EC of 28 January 2003 on Public Access to Environmental Information [2003] OJ L 41/26.
[53] Áine Ryall, 'Realizing Environmental Information Rights: The Impact of the Aarhus Convention in Ireland' (2015) 4 Environmental Law and Practice Review 1.
[54] SI 2007/133.
[55] European Communities (Access to Information on the Environment) (Amendment) Regulations 2011, SI 2011/662.
[56] European Communities (Access to Information on the Environment) (Amendment) Regulations 2014, SI 2014/615.
[57] European Communities (Access to Information on the Environment) (Amendment) Regulations 2018, SI 2018/309.
[58] Access to Information on the Environment (AIE) <https://www.gov.ie/en/organisation-information/1e52cb-access-to-information-on-the environment-aie/> accessed 15 January 2022.
[59] The Freedom of Information Act 2014 (the FOI Act) gives every person the right to access official records held by Government Departments or other public bodies. The Planning and Development Act 2000 (PDA) in Section 38 makes it obligatory to make certain documents available for inspection and purchase by the public within 3 working days of reaching a decision in respect of a planning application.
[60] Commissioner for Environmental Information <https://www.ocei.ie/> accessed 17 January 2022.
[61] Ryall, 'Realizing Environmental Information Rights' (n 53) 1.
[62]<https://www.citizensinformation.ie/en/environment/environment_and_the_law/access_to_environmental_information.html#l62fd2> accessed 10 January 2022.

rule for certain categories of environmental litigation has been introduced in Ireland by the Environment (Miscellaneous Provision) Act 2011.[63]

However, despite the Environment (Miscellaneous Provision) Act 2011, it is still not always perfectly clear when cost protection will be found to apply to proceedings, or to what extent. This issue has been explored by the Irish High Court in *O'Connor v The County Council of the County of Offaly*.[64] The Court in determining that judicial review proceedings are not implicitly excluded from the terms of the Miscellaneous Provision Act decided that the key determinant for cost protection is not the form of the proceedings, but the nature of the relief claimed.[65] However, in *Heather Hill Management Company CLG and Anor v An Bord Pleanála*[66] the Irish Court of Appeal, while overturning an earlier liberal interpretation by the Irish High Court, decided that the protective costs order available under Section 50B of the PDA will only apply to the issues and grounds of challenge that relate to environmental matters and not to others such as grounds relative purely to planning points.

A liberal approach has been adopted by the Irish Supreme Court[67] and High Court[68] in defining environmental information. In *Minch v Commissioner for Environmental Information,*[69] the CEI refused access to a report on the ground that the information must fall within one of the categories in Article 3(1) of the AEI regulations in order to become environmental information. The High Court in overturning the decision of the CEI stressed that, in interpreting and applying the AIE Regulations, a purposive or teleological approach has to be taken. It was further stressed by the High Court that in interpreting the AIE regulations, objectives of the Aarhus Convention and Directive 2003/4 have to be considered. This decision by the High Court was welcomed as it was expected to provide

[63] According to the Act of 2011, in proceedings to which Section 3 of the Act is applicable, each party (including any notice party) shall bear its own costs and the court has the discretion to award costs in favor of the applicant where there is a successful legal challenge.
[64] [2020] IECA 72.
[65] Zoe Richardson and Gráinne O'Callaghan, 'Cost Protection in Environmental Litigation' <https://www.fieldfisher.com/en-ie/locations/ireland/ireland-blog/cost_protection_in_environmental_litigation> accessed 12 January 2021.
[66] [2021] IECA 259.
[67] In *National Asset Management Agency v Commissioner for Environmental Information* [2015] IESC 51 the Supreme Court decided that AIE regulations had to be examined in their international and EU context and have to be interpreted in light of the scope and meaning of the relevant provisions of Directive 2003/4/EC and the Aarhus Convention.
[68] In *Right to Know CLG v Commissioner for Environmental Information* [2021] IEHC 353 the High Court decided that a bundle of emails in the possession of Radió Teilifís Éireann was '*environmental information*' for the purposes of the AIE regulations.
[69] [2016] IEHC 91.

valuable guidance regarding the definition of environmental information in subsequent cases resulting in a greater degree of certainty.[70] The decision by the Irish High Court was later upheld by the Court of Appeal.[71]

Although the above judgments were encouraging in ensuring access to information, the High Court limited the jurisdiction of the Commissioner to enforce EU environmental law, including Directive 2003/4/EC in *An Taoiseach [the Prime Minister] v Commissioner for Environmental Information*.[72] The matter for consideration before the High Court was whether the CEI had jurisdiction to determine whether the AIE regulations were inconsistent with Directive 2003/4/EC and if so, to disapply any conflicting provisions of national law. It was decided by the High Court that it is the jurisdiction of the High Court only to disapply national law provisions and the CEI has acted *ultra vires* in purporting to do so while determining an appeal. This decision by the Irish High Court goes against the principle established by the Court of Justice of the European Union (CJEU) in *Fratelli Costanzo SpA v Comune di Milano*.[73] It was decided by the CJEU that national authorities are under the same obligation as national courts to apply directly affective EU law and to refrain from applying any conflicting provisions of national law. The above judgments show inconsistency in the approach of the Irish judiciary to ensure access to information in Ireland. In addition to that, high costs inhibiting the implementation of the right to access to information in Ireland[74] are causing Irish laws and practices to fall short of the benchmark set by the Aarhus Convention.[75]

The above discussion shows that although the two South Asian courts have shown activism access to environmental information is restricted due to government inertia and cumbersome proceedings. On the other hand, high cost and inconsistency in judicial decisions by the Irish courts have caused ineffective access to environmental information.

[70] Áine Ryall, 'Access to Information on the Environment: The Evolving EU and National Jurisprudence' (2016) 23 Irish Planning and Environmental Law Journal 3.
[71] [2017] IECA 223
[72] [2010] IEHC 241.
[73] Case C-103/88 *Fratelli Costanzo SpA v Comune di Milano* EU:C:1989:256.
[74] Dublin City University, School of Law and Government, *Environmental Justice in Ireland: Key Dimensions of Environmental and Climate Injustice Experienced by Vulnerable and Marginalized Communities* (2022) 27.
[75] Ryall 'Realizing Environmental Information Rights' (n 53) 1.

Part II

2. Public Participation in Environmental Decision Making in the Selected Jurisdictions

Effective participation is the condition precedent to ensure equal recognition and effective distribution.[76] Exercising the procedural environmental rights give citizens a sense of empowerment because it would allow them to have some engagement with the decision-making which would eventually affect them.[77] Public participation can also increase the public trust in government decision-making and can reduce the chances of litigation challenging the decisions and actions taken.[78] However, to achieve environmental justice it is not enough to ensure just participation. Rather the participation process has to be planned in such a way that can ensure a fair outcome.[79]

Although there are statutory laws guaranteeing the right to participate in environmental decision-making, implementation of the right has a poor status in the selected jurisdictions. The courts have intervened to ensure the right but in many cases, they have either violated the constitutional principles or impaired the balance between rights, or exhibited double standards.

2.1. The Right to Public Participation and Role of the Courts in India

A right that is intrinsically linked to the right to information is the right to participate in decision-making.[80] In the absence of any express provision guaranteeing the right to participate in the Indian Constitution, the right to public participation has been declared as an inalienable part of Article 21 of the Constitution of India by the Supreme Court of

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[76] David Schlosberg, 'Reconceiving Environmental Justice: Global Movements and Political Theories' (2004) 13(3) Environmental Politics 517.
[77] Joshua C. Gellers and Christopher Jeffords, 'Procedural Environmental Rights and Environmental Justice: Assessing the Impact of Environmental Constitutionalism' (2015) Human Rights Institute University of Connecticut Economic Rights Working Paper No. 25 <https://media.economics.uconn.edu/working/HRI25.pdf> accessed 30 December 2021.
[78] Razzaque, *Public Interest Environmental Litigation in India, Pakistan and Bangladesh* (n 25) 410.
[79] Robert R. Kuehn, 'A Taxonomy of Environmental Justice' (2000) Aboriginal Policy Research Consortium International 307.
[80] Lavanya Rajamani and Shibani Ghosh, 'Public Participation in Indian Environmental Law' in Lila Barrera-Hernandez (eds) *Sharing the Costs and Benefits of Energy and Resources Activity: Legal Change and Impact on Communities* (Oxford University Press 2016) 393, 395.

India.[81] The importance of public hearing has been described by the Indian Courts in several decisions.[82] In addition to being a constitutional right recognized by the Indian Courts, the right to participate in environmental decision-making is also a statutory right.[83]

The Indian Courts not only recognized the importance of public participation in environmental decision-making but also has emphasized and laid down detailed directions to ensure effective participation. Showing judicial activism, detailed directions regarding the publication of notice,[84] holding of public hearings,[85] and the place of holding a public hearing[86] have been pronounced by the Indian Courts. However, despite consistent guidelines, instructions, and directives, the procedures have not yet been followed fairly and adequately.[87] As a result, there have been orders for holding post-decisional public hearings over the failure to follow the guidelines provided by the Gujarat High Court and Delhi High Court of India.[88]

There are several cases where the National Green Tribunal (NGT) has struck down the proposed project's environmental clearance or kept it in abeyance because public consultation was not carried out properly.[89] However, there are also decisions where the courts have overlooked the issue of absence or inadequate public consultation holding them as mere procedural oversight, not affecting the substantive decision.[90] The later cases show the departure of the Indian judiciary from the protection of the environment.[91]

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[81] *Research Foundation for Science Technology and Natural Resources Policy v Union of India and Ors* [2005] 10 SCC 510, Para 42.
[82] *Ministry of Information and Broadcasting v Cricket Association of Bengal* [1995] 2 SCC 161; *Alaknanda Hydro Power Co Ltd v Anuj Joshi* [2013] Civil Appeal No. 6736 (SC); *S. Nandakumar v The Secretary to Government of Tamil Nadu Department of Environment and Forest and Ors* [2010] SCC OnLine Mad 3220.
[83] The two principal avenues for public participation in environmental regulation in India are provided under the Environment (Protection) Act 1986 (the EP Act) and the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006 (the Forest Rights Act). The EIA Notification 2006 also requires public consultation in certain categories of projects. Very limited opportunities for public participation are provided under the Water Act and the Air Act. C.M. Abraham and Armin Rosencranz, 'An Evaluation of Pollution Control Legislation in India' (1986) 11 Columbia Journal of Environmental Law 101.
[84] *Centre for Social Justice v Union of India* [2000] AIR Guj 71 (HC); *Samarth Trust v Union of India* [2009] WP (Civil) No 9317 of 2009 Del (HC).
[85] *Osie Fernandes v Ministry of Environment & Forests* (Judgment 30 May 2012).
[86] *Utakrsh Mandal v Union of India* [2009] WP (Civil) No 9340 of 2009, High Court of Delhi.
[87] M.P. Ram Mohan and Himanshu Pabreja, 'Public Hearings in Environmental Clearance Process; Review of Judicial Intervention' (2016) 51(50) Economic and Political Weekly 68.
[88] *Padmakar Vinayak Deshmukh v Union of India* [2010] PIL 78/2010 Bom (HC).
[89] *Debadityo Sinha and Ors v Union of India and Ors* Appeal No. 79/2014 (Judgment 21 December 2016); *Save Mon Region Federation and Ors v Union of India and* Ors (Judgment 14 March 2013).
[90] *Lower Painganga Dharan Virodhi Sangharsha Samiti v State of Maharashtra* (Judgment 10 March 2014); *Balachandra Bhikaji Nalwade v Union of India* [2009] SCC OnLine Del 2990.
[91] Vipin Mathew Benjamin (ed), *Has the Judiciary Abandoned the Environment?* (Human Rights Law Network 2010) 2.

2.2. Public Participation in Environmental Decision-Making in Bangladesh

Although there are several statutes providing the right to participate in environmental decision-making,[92] public participation in environmental issues in Bangladesh is extremely limited. There are numerous reasons behind such a lack of public participation. *First*, Bangladesh, as an overpopulated country, has been facing several social problems where the majority of the population is struggling for their survival and has less interest to act as protectors of the environment; *Second*, the relevant environmental laws and policies do not provide increased opportunity for participation in the environmental development process and; *Third*, there is a lack of environmental awareness and citizens have not been assertive about their environmental rights to a great extent.[93]

Public participation in development projects in Bangladesh permits very restricted access for public participation.[94] However, the development projects funded by the World Bank, Asian Development Bank, and other foreign organizations where public participation is required would involve mass participation.[95] A recent study shows that there is still no significant influence of public participation in EIA. Public participation in government-run projects such as the Rampal coal-based thermal power plant project and Jamuna multipurpose bridge were carried out towards the end of an EIA exercise. The stakeholders, therefore, have a very limited ability to contribute and question the legitimacy of such proposed projects. This process of neglect systematically overlooks stakeholders' concerns, critics, and suggestions.[96] Although known as pro-environment,

[92] The Forest Act 1927, the Agricultural and Sanitary Improvement Act 1920, and the Embankment and Drainage Act 1952.
[93] S M Daud Hassan, 'Public Participation in Environmental Law in Bangladesh' (1999) 4 (2) Asia Pacific Journal of Environmental Law 163.
[94] Research shows that one of the tribes, the Garo communities living in the District Madaripur, was not given an opportunity to participate in the decision-making process of the Forest Department (FD) eco-park project. However, later due to strong opposition by Garos, the government agencies decided to engage Garos in the process of revising the original eco-park plan. The FD did not follow a fair procedure in the selection of participants which resulted in the continuity of the movement by the Garo community. Non-recognition of participation rights and resistance of the Garos ultimately forced the government to abandon the project for an indefinite period of time. Farid Ahmed, 'Exploring Avenues of Public Participation for Environmental Justice in the Context of Bangladesh' (2018) 63(1) Journal of the Asiatic Society of Bangladesh 1.
[95] Forestry Sector Project in Bangladesh (July 1996); SEIA of the Islam Cement Project in Bangladesh (July 1995); Bangladesh Small Scale Water Resources Development Sector Project (May 1995); Sundarbans Biodiversity Conservation Project in Bangladesh (May 1998).
[96] Md Arif Hasan, Md Nahiduzzaman and Adel S. Aldosary, 'Public Participation in EIA: A Comparative Study of the Projects Run by Government and Non-governmental Organizations' (2018) 72 Environmental Impact Assessment Review 12.

the Supreme Court of Bangladesh also has allowed development-induced initiatives of the government.[97]

The poor status of public participation in environmental decision-making can also be seen in the implementation of judicial pronouncements. In *Dr Mohiuddin Farooque v Bangladesh (FAP 20 case)*,[98] although the High Court Division of the Supreme Court of Bangladesh directed the concerned authorities to involve and consult local people in important development decisions and laid down instructions to ensure that no serious damage be caused to the environment by the project, the decision was not implemented.[99]

2.3. Public Participation in Environmental Decision-Making in Ireland

Ireland is under obligation both from domestic law[100] and EU directive[101] to ensure public participation in decision making. It was stated in *Commission v Ireland*[102] that necessary measures have to be adopted by all the Member States to ensure that development consent together with an environmental assessment is done regarding projects likely to have significant environmental effects. The public participation requirements in Ireland have been refined and expanded considering the evolving EU requirements.[103]

Although the objective of the Planning and Development Act 2000 (PDA) is to support and achieve sustainable development through active participation, in most cases the government initiatives have been broadly restrained to mere media announcements and distribution of information leaflets.[104] Failures in the part of the local authorities to engage

[97] Writ Petition No. 10937 of 2013 (HCD).
[98] [1996] Bangladesh Supreme Court Report 27.
[99] Ridwanul Hoque, 'Taking justice seriously: judicial public interest and constitutional activism in Bangladesh' (2006) 15(4) Contemporary South Asia 399.
[100] Extensive public participation requirements in Ireland for decision-making in land use planning decisions have been imposed by the Planning and Development Act 2000.
[101] The right to public participation being the second pillar in the Aarhus Convention has been implemented by the European Union through Directive 2003/5/EC of 2003 amending Council Directive 91/414/EEC to include Deltamethrin as Active Substance [2003] OJ L 8/7.
[102] Case C-215/06 para 49 (2) (1).
[103] Yvonne Scannell, 'Public Participation in Environmental Decision–Making in Ireland. The Good, the Bad and the Ugly' in Gyula Bándi (ed) *Environmental Democracy and Law* (Europa Law Publishing 2014).
[104] Anna Davies, 'Waste Wars – Public Attitudes and the Politics of Place in Waste Management Strategies' (2003) 36 Irish Geography 77.

with the public has also been identified.[105] Due to high submission costs,[106] it has been difficult for low-income, migrant, and disadvantaged communities in getting their voices heard. This has resulted in constrained public participation in environmental decision-making.[107] Surprisingly, the imposition of a fee of €20 has been held by both the Supreme Court of Ireland[108] and the European Court of Justice (ECJ)[109] to be not in violation of the right of access to justice.

However, a strict approach has been adopted by the Irish Courts in enforcing procedural requirements requiring public participation in planning applications and other environmental authorization procedures. In *Marshall v Arklow UDC*,[110] planning permission was invalidated because the public notice on the site of the proposed development was kept for less than 14 days as is required under Article 20 of the Planning and Development Regulations 2001. Two provisions of the PDA, Sections 177C(2)(a) and 177D(1)(a) have been struck out by the Irish Supreme Court for being in breach of the EIA Directives in *McQuaid Quarries* case.[111]

The above discussion shows that public participation in environmental decision-making is in a poor state in the selected jurisdictions. Although the courts have shown activism in ensuring procedural rights, in certain instances they have practiced meek administration of justice causing environmental injustice and violation of constitutional principles.

More complexities in the role of the courts in ensuring access to environmental justice is demonstrated in the following discussion showing the need for better methods to address the problems.

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[105] Bernadette Connaughton, *The Implementation of Environmental Policy in Ireland: Lessons from Translating EU Directives into Action* (Manchester University Press 2019).
[106] According to Article 29(1) (a) of the Planning and Development Regulations 2001, SI No. 600 of 2001 as amended by article 10 of the Planning and Development (No. 2) Regulations 2007, on payment of the prescribed fee of €20 any person or body is permitted to make a submission or observation in writing to the appropriate planning authority regarding planning permission submitted under Section 32 of the PDA.
[107] DCU Report (n 74) 28.
[108] *Fallon v An Bord Pleanála* [1991] WJSC-SC 1911.
[109] Case C-216/05 *Commission v Ireland*. In this case, the ECJ allowed the Member States the discretion to fix how public participation rights might be exercised. The judgment also stated that the fees for doing so cannot be fixed at a level so as to prevent the EIA directive from being fully effective.
[110] [2004] IRL 313 (HC).
[111] *An Taisce v An Bord Pleanála* [2020] IESC 39.

Part III

3. Access to the Courts

The third procedural component of environmental justice is the right to have adequate access to justice for enforcing environmental law or seeking redress in resolving environmental disputes. This right allows individuals, affected communities, environmental activists, and non-governmental organizations (NGOs) to challenge decisions by public authorities violating environmental rules and regulations.[112] Environmental justice can only be ensured if there is an effective way of accessing justice to enforce the right to access to environmental information and participation in decision-making.[113]

The courts are the only institution in the state machinery that allows people to hold government, agencies, corporations, and individuals accountable for any violation of their fundamental rights guaranteed under the constitution.[114] However, the path to court is never easy and is strewn with hurdles making it difficult for individuals to access the forum to defend their rights. Difficulties have been faced by citizens to prove a violation of right, damage caused and the causation link between the breach of the duty to perform and the damage done. Considering these difficulties, judges have emerged as a protector of the environment, particularly in South Asia. In an attempt to expand access to environmental justice, the judges have relaxed several procedural norms to ensure easy access to the court, introduced the concept of public interest litigation (PIL),[115] and enhanced the power of the citizens over the public authorities.[116]

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[112] Bell, McGillivray and Pederson (n 3) 336.
[113] Madhuri Parikh, 'Public Participation in Environmental Decision Making in India: A Critique' (2017) 22(6) Journal of Humanities and Social Science 56.
[114] Gitanjali Nain Gill, 'Access to Environmental Justice in India: Innovation and Change' in Jerzy Jendroska (ed), *Procedural Environmental Rights: Principle X in Theory and Practice* (Intersentia 2018) 209.
[115] PIL originated in the USA and was initiated by a few judges of the Indian Supreme Court as a method to redress public grievances. The concept has been accommodated in India, Pakistan, and Bangladesh differently taking into account the socio-economic aspect of the notion. Razzaque, *Public Interest Environmental Litigation in India, Pakistan and Bangladesh* (n 25) 35-36; In the language of Bhagwati J in *People's Union of Democratic Rights v Union of India* [1982] AIR 1473 (SC) 'Public Interest Litigation is essentially a co-operative effort on the part of the petitioner, the State or public authority, and the Court to secure observance of the constitutional or legal rights, benefits and privileges conferred upon the vulnerable section of the community and to reach social justice to them.'; The four characteristics of PIL identified by Jamie Cassels are: i) Liberalization of *locus standi*; ii) Procedural and remedial flexibility; iii) Continuous judicial supervision and; iv) Creative and active interpretation of legal and fundamental rights. Jamie Cassels, 'Judicial Activism and Public Interest Litigation: Attempting the Impossible?' (1989) 37 The America Journal of Comparative Law 493.
[116] Emeline Pluchon, 'Leading from the Bench: The Role of Judges in Advancing Climate Justice and Lessons from South Asia' in Tahseen Jafry (ed), *Routledge Handbook of Climate Change* (Routledge 2019) 139.

In the absence of any express provision in the constitutions recognizing the right to the environment, the judiciaries of India and Bangladesh have contributed to environmental constitutionalism.[117] Indian courts have been proactive in promoting the right to a healthy environment by broadly interpreting its powers under Articles 32[118] and 226[119] of the Constitution of India. The Bangladesh judiciary has also assumed an impressive role through liberal interpretations of procedural rules regarding standing. However, unlike India where PIL was primarily initiated by the judges, in Bangladesh PIL has been a result of the efforts of legal activists and NGOs.[120] In the recently decided *Climate Case Ireland*,[121] the Irish Supreme Court denied standing to Friends of the Irish Environment (FIE) as it is a corporate entity to invoke personal constitutional or human rights. In that case, the Supreme Court also pointed out that *actio popularis*[122] is not permitted under Irish constitutional law.[123]

The following discussion critically examines the positions taken by the three judiciaries in terms of allowing access to the courts showing that neither excessive judicial activism nor judicial restraint can ensure environmental justice.

3.1. Access to Courts in Environmental Matters in India

In the absence of any prescribed test on the standing issue in the Indian Constitution the 'aggrieved person' test was followed by the Indian Courts till the 1970s. This approach was dependent on the individual's own injury or legal grievances. Subsequently, the Indian Courts adopted the liberal 'sufficient interest' test.[124] The liberal approach to the

[117] Environmental constitutionalism recognizes the idea that environment as a subject requires constitutional protection. Erin Daly and James R. May, 'Introduction to Environmental Constitutionalism' in Erin Daly, Louis Kotze, James R. May & Caiphas Soyapi (eds), *New Frontiers in Environmental Constitutionalism* (United Nations Environment Programme 2017) 5.
[118] The fundamental right to approach the Supreme Court of India for the enforcement of fundamental rights is recognized in Article 32 of the Constitution of India.
[119] Article 226 recognizes the constitutional right to approach High Courts for the enforcement of fundamental rights or any other legal rights.
[120] Muhd. Rafiqauzzaman, 'Public Interest Litigation in Bangladesh: A Case Study' (2002) 6 (1&2) Bangladesh Journal of Law 127.
[121] *Friends of the Irish Environment (FIE) v Ireland* [2020] IESC 49.
[122] 'A right resident in any member of a community to take legal action in vindication of a public interest' Oxford Public International Law <https://opil.ouplaw.com/view/10.1093/law-mpeipro/e1167.013.1167/law-mpeipro-e1167> accessed 15 January 2022.
[123] Owen McIntyre, The Irish Supreme Court Judgment in Climate Case Ireland: 'One Step Forward and Two Steps Back' (IUCN, 28 August 2020) <https://www.iucn.org/news/world-commission-environmental-law/202008/irish-supreme-court-judgment-climate-case-ireland-one-step-forward-and-two-steps-back> accessed 08 February 2022.
[124] Razzaque, *Public Interest Environmental Litigation in India, Pakistan and Bangladesh* (n 25) 286.

standing rule was first adopted by the Supreme Court of India in *S.P. Gupta and Ors v President of India and Ors*.[125] The Supreme Court decided:

> In public interest litigation undertaken for the purpose of redressing public injury, enforcing public duty, protecting social, collective, 'diffused' rights and interests, or vindicating public interest, any citizen who is acting bona fide and who has sufficient interest has to be accorded standing.[126]

Since then cases have been brought before the Supreme Court and the High Courts on a variety of issues involving social, economic, political, and environmental relevance. It was stated by the Supreme Court in *Bandhua Mukti Morcha v Union of India*[127] that standing has been enlarged to allow access to justice to large sections of the public to whom so far it had been a matter of despair. The liberal approach adopted by the Indian Courts on standing encouraged PIL, which has been used as a tool by the judiciary for marketing constitutionalism.[128] In India, PIL was encouraged to lend voice to the marginalized and disadvantaged communities and individuals who were finding the formal judicial process difficult to navigate.[129] PIL became a tool to challenge government actions and inaction and redress public wrong or injury, although no specific damage was caused to an individual or a determinate class of persons.[130]

To remove the barriers to access to the Court, the Supreme Court of India relaxed several procedural norms and observed that it is not required to adhere to the traditional rule of *locus standi*.[131] Cases have been brought by individual/s adversely affected by an administrative wrong,[132] or by person/s alleging to whom the Government owes a public duty.[133] There are also several cases where the Courts have exercised epistolary

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[125] [1982] AIR 149 (SC).
[126] *S.P. Gupta and Ors v President of India and Ors* [1982] AIR SC 149 para 67.
[127] [1984] AIR 803 (SC).
[128] Shyam Divan, 'Public Interest Litigation' in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution* (Oxford University Press 2016) 662.
[129] Upendra Baxi, 'Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India' (1985) 4 Third World Legal Studies 107.
[130] Clark D. Cunningham, 'Public Interest Litigation in Indian Supreme Court: A Study in the Light of American Experience' (1987) 29(4) Journal of the Indian Law Institute 494.
[131] *Municipal Council, Ratlam v Vardichand and Ors* [1980] 4 SCC 162.
[132] *Kinkri Devi v State of Himachal Pradesh* [1987] SCC OnLine HP 7.
[133] *Dr B.L. Wadhera v Union of India and Ors* [1996] 2 SCC 594.

jurisdiction.[134] There are also instances where the Indian Courts have taken cognizance of issues on their own motion based on newspaper reports.[135]

3.1.1. PIL in Environmental Matters in India

The question of citizen standing was involved in most of the leading environmental cases in the 1980s and the Supreme Court of India took the leading role in widening *locus standi* in the closure of limestone quarries in the Dehradun region of India,[136] in the installation of safeguards at a chlorine plant in Delhi.[137] At the behest of public-spirited individuals and to protect the Taj Mahal from air pollution in *M.C. Mehta v Union of India (Taj Trapezium Case)*[138] the Court has passed a series of directions spanning over two decades including banning coal-based industries in the vicinity of Taj Mahal, closing 230 factories, requiring 300 factories to install pollution control devices. The Supreme Court was moved by public-spirited citizens to pass orders to address the air pollution in Delhi including mandating the conversion of public transport in Delhi from conventional fuel to Compressed Natural Gas.[139] The Court also took up the task of protecting the forests and wildlife of India.[140] In *M.C. Mehta v State of Orissa*[141] in response to a writ petition filed to protect the health of thousands of people who were suffering from pollution from sewage being caused by the Municipal Committee, the Orissa High Court issued a writ of mandamus even though the petitioner was a mere visitor to the locality.

3.1.2. Refusal of Standing and Exhibiting Double Standards

Although the Indian Courts have been very active in relaxing the rules on standing and accepting PILs there are instances where the courts refused or restricted the granting of standing particularly in cases involving political rivalry, personal enmity. In *Chhetriya*

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[134] The Court accepted letters written to the court as writ petitions such as *Upendra Baxi (I) v State of Uttar Pradesh* [1983] 2 SCC 308; *M.C. Mehta v Union of India* [1987] 1 SCC 395.
[135] *M.C. Mehta v Kamal Nath and Ors* [1997] 1 SCC 388.
[136] *R.L. & E. Kendra, Dehradun v State of U.P.* [1985] AIR 652 (SC).
[137] *M.C. Mehta and v Union of India* [1987] AIR 1086 (SC).
[138] [1997] 2 SCC 353
[139] *M.C. Mehta v Union of India (Delhi Vehicular Pollution Case)* [2001] 3 SCC 756.
[140] In *TN Godavarman Thirwnulkpad v Union of India* [1997] AIR 1223 (SC).
[141] [1992] AIR Ori 225 (HC).

Pardushan Mukti Sangharsh Samiti v State of UP and other[142] the Court decided against a letter alleging that smoke and effluents from the mills and plants were causing environmental pollution and diseases. The Court was of the view that the petition was *mala fide* and arose out of enmity between the parties. In *Subash Kumar v State of Bihar*,[143] the petition was rejected by the Court on the ground that the petitioner did not act *bona fide* in approaching the Court. Undoubtedly, the courts were trying to prevent malicious prosecution and to ensure the rule of law by preventing cases based on political rivalry.

However, in addition to refusing cases based on political or personal rivalry, the Indian courts have shown reluctance to accept petitions against large-scale development projects or even hotels and housing colonies. It has already been discussed in chapter 2 (1.1.2) that although otherwise proactive in ensuring the right to participate in environmental decision-making, the Indian courts have been restrained in their approach to large development projects. The same problem can be identified in terms of access to justice for environmental issues. In *Dahanu Taluka Environmental Protection Group and another v B.S.E.S. Co. and other*,[144] the Court decided not to intervene, holding that the issues involved in the case were matters within the jurisdiction of the executive and legislator. The Court again displayed its deferential attitude in *Banwasi Seva Ashram v State of Uttar Pradesh.*[145] In this case the Court lifted the ban on the dispossession of a tribal community in the area required for a power plant. The Delhi Ridge was ordered to be cleared by the Supreme Court in *M.C. Mehta v Union of India.*[146] Following the Order, all structures including temporary housing for poor comminutes were removed. The Supreme Court applied a double standard by saying nothing when on the same ridge five-star hotels and shopping malls were constructed without any environmental clearance. In *Tata Housing Development Company v Goa Foundation*,[147] the court in allowing the construction of a housing building even went against the report of the expert committee appointed by the court itself because the expert committee marked the land as forest

[142] [1990] AIR 2060 (SC).
[143] [1991] 1 SCC 598.
[144] [1991] 2 SCC 539.
[145] [1987] AIR 374 (SC).
[146] [2004] 12 SCC 118.
[147] [2003] 7 SCALE 589

land. However, the court relied on the reports of other private experts submitted by the Tata Housing Development Company.[148]

In addition to the above restraint measures, the Supreme Court has introduced PIL screening by a PIL cell based on certain guidelines, and only selected letters are placed before the courts.[149] In *State of Uttaranchal v Balwant Singh Chauful and Ors*[150] the Indian Supreme Court directed all High Courts to formulate rules properly encouraging the genuine PIL and discouraging PILs with oblique motives. Such streamlining of PILs through rule-making steps has been criticized as it might affect the flexibility in the procedure that is inherent in the PIL mechanism.[151]

3.1.3. Flaws in the Indian PIL System

Although highly regarded by many, the Indian PIL process has some inherent flaws.[152] An examination of judicial decisions in the exercise of public interest environmental jurisdiction by the Indian courts show four major problems: 'access, participation, effectiveness, and sustainability.'[153]

Restrictive Access to Environmental Justice: There are instances when the PIL mechanism has been used by the court to restrict access to justice rather than increase accessibility.[154] Important stakeholders have not been given the opportunity to express their opinion where decisions were made touching them.[155] For example, in the *Municipal Solid Waste Management Case*[156] and in the *Delhi Vehicular Pollution Case*,[157] issues that were dealt with by the courts had direct implications on the poor. The first case involved solid waste produced in the slums and the second involved those city dwellers

[148] Prashant Bhusan, 'Supreme Court and PIL: Changing Perspectives under Liberalization' (2004) 39(18) Economic and Political Weekly 1770.
[149] Supreme Court of India <https://main.sci.gov.in/pdf/Guidelines/pilguidelines.pdf> accessed 09 February 2022.
[150] [2010] 3 SCC 402, para 181.
[151] Ghosh (n 40).
[152] Usha Ramanathan, 'In the Name of the People: The Expansion of Judicial Power' in Mayur Suresh and Siddharth Narrain (eds), *The Shifting Scales of Justice: The Supreme Court in Neo-liberal India* (Orient BlackSwan 2014).
[153] Lavanya Rajamani, 'Public Interest Environmental Litigation in India: Exploring Issues of Access, Participation, Equity, Effectiveness and Sustainability' (2007) 19 (3) Journal of Environmental Law 293.
[154] Ghosh (n 40).
[155] Anuj Bhuwania, *Courting the People: Public Interest Litigation in Post-Emergency India* (Cambridge University Press 2016) 101.
[156] *Almitra Patel v Union of India* [1998] AIR 993 (SC).
[157] *M.C. Mehta v Union of India* [2001] 3 SCC 756.

who rely on public transport. In both cases, the processes set by the Courts left narrow avenues for the participation of the poor and relevant stakeholders.[158] Rajamani has also pointed out the concerns regarding litigation costs. To pursue litigation effectively, the continuous presence of the litigant and a 'heavyweight' counsel is required. All these obstacles result in making the Court accessible in theory and not in practice for the poor and illiterate. In most cases, PILs are filed on behalf of them but not by them. This is ironic as even after five decades of opening its gates for the poor by the Supreme Court, it is still the poor who are suffering the most.[159]

Restricted Participation: The Indian courts are perceived as consisting of middle-class intellectuals and are more sympathetic to the middle class rather than the poor resulting in excluding the poor from the court systematically.[160] The Indian Supreme Court in *M.C. Mehta v Union of India*[161] ordered the closure of tanneries for polluting the river Ganga.

Tanneries are significant to the Indian economy because they generate export earnings and provide employment opportunities especially for people of the economically weaker sections of society. However, sustenance of tanneries is becoming increasingly difficult because of the alarming levels of environmental pollution caused by various tanning operations and practices. Taking note of the facts that the leather industry releases large amounts toxic chemicals and acidic effluents concentrated with heavy metal Chromium, Cadmium, Lead, Arsenic, Cobalt, Copper, Iron, Lead, Zinc, Manganese into the Ganges, Venkataramiah J, held that the State was under a constitutional duty to protect and improve the environment and to safeguard the forests and wildlife of the country. In the opinion of the Court, it was a fundamental duty of every citizen to protect and improve the natural environment including forests, lakes, rivers and wildlife, and have compassion for all living creatures. The court though has taken a bold stance towards the protection of the fragile environment by creating a high standard of accountability for the concerned statutory bodies was unable to take into consideration the possible unemployment of

[158] The Court set up a Committee in the *Municipal Solid Waste Management Case* involving seven high-ranking functionaries and bureaucrats. In the *Delhi Vehicular Pollution Case*, the Environment Pollution (Prevention and Control) Authority (EPCA) set up by the Court includes three bureaucrats, an NGO, and a representative of the Automobile industry. The Committees did not consult all stakeholders and no avenues for wider public consultation were explored. Rajamani (n 153).
[159] ibid.
[160] ibid.
[161] *M.C. Mehta v Union of India & Ors* [1988] AIR 1115 (SC).

thousands of workers as they were not represented.[162] This thesis argues that all necessary stakeholders should be involved in environmental decision making to reach to a sustainable and implementable decision to ensure environmental justice.

In a later decision by the Indian Supreme Court in *Vellore Citizens' Welfare Forum v Union of India* (*Tanneries case*), the Court considered the principle of sustainable development, heard all the necessary parties and pronounced judgment covering all the aspects. It was directed by the Court that an authority be constituted by the Central Government to find viable solutions to the problem. This authority was to be conferred with all the requisite powers. The authority was to perform three functions. *First*, the authority would, with the help of expert opinion, and after giving opportunity to the concerned polluters, assess the loss to the environment in the affected areas, as well as identify the individuals who have suffered because of the pollution and thereby assess the compensation to be paid to the said individuals. *Second*, the authority would have to determine the compensation to be recovered from the polluters as cost of reversing the damaged environment after laying down a just and fair procedure for completing the exercise. Fines that were collected were to be accredited to an Environment Protection Fund, which was to be utilised for compensating the affected persons and also for restoring the damaged environment. *Third*, the authority so created could direct the permanent closure or relocation of the industry in case it evaded or refused to pay the compensation. It was also stated that the authority so created, was to be headed by a retired judge of the High Court and have members, preferably with expertise in the field of pollution control and environment protection. The authority, acting in consultation with expert bodies, was also to be empowered to frame schemes for reversing the damage caused to the environment by pollution. Noting the importance of the matter, the Supreme Court further requested the Chief Justice of the Madras High Court, to constitute a Special Bench called the 'Green Bench', to deal with the case, and other environmental matters.[163]

[162] K. Sriram & Sundip Biswas, Tannery Files": Tracing the SC Verdicts on India's Polluting Tanneries <https://www.ebc-india.com/lawyer/articles/718.htm#Ref17> accessed 20 August 2022.
[163] ibid.

In *Almitra Patel v Union of India,*[164] the judge showed unblinking disfavor towards slums by holding that among various other factors, slums were responsible for the solid waste problem in Indian cities.[165] The underlying intention behind these decisions was not wrong rather the way the court intervened created controversies. A solution to this problem is discussed and illustrated in chapter 5 through cases such as the *Four Rivers Case*[166] where the court ensures the active participation of necessary stakeholders in decision-making. Chapter 6 shows how courts can ensure the implementation of judicial decisions without taking on the roles of other organs.

Lack of Effectiveness: One of the major lacunae in the exercise of public interest environmental jurisdiction in ensuring environmental justice is the inability to devise an effective solution to a problem involved in the case. In *Municipal Solid Waste Management Case*,[167] the Court-appointed Committee prepared a report[168] which subsequently was the basis for adopting the Municipal Solid Waste (Management and Handling) Rules (MSW Rules) 2000. Lack of understanding of the problem both by the Court and the Committee resulting in anomalies in the MSW Rules has been identified by experts. It has been argued by NGOs that there is no mechanism in the MSW Rules that would promote recycling or minimize waste.[169] In addition, the incineration technology of waste processing permitted by the MSW Rules has been argued to be ill-suited to conditions prevailing in India. Incineration technology is a source of dioxins that are linked to cancer, damaging immune system, reproductive and developmental problems.[170] The directions and orders by the Court in *Delhi Vehicular Pollution Case*[171] also raise concerns as to the effectiveness of the orders and directions because although the Supreme Court took note of slight improvement in air pollution level in Delhi[172] the air quality of Delhi is

[164] [1996] WP No. 888 of 1996. In this case, a series of orders, directions, and judgments have been delivered by the Court from 1996 to 2007.
[165] Usha Ramanathan, 'Illegality and the Urban Poor' (2006) 41 Economic and Political Weekly 3193.
[166] *Human Rights & Peace for Bangladesh & Others v Government of Bangladesh* [2009] 17 BLT 455 (HCD).
[167] *Almitra Patel v Union of India* [1998] AIR 993 (SC).
[168] Order dated 15 February 2000.
[169] Rajamani (n 153).
[170] Neil Tangri, 'Waste Incineration: A Dying Technology' (2003) <https://www.no-burn.org/wp-content/uploads/Waste-Incineration-A-Dying-Technology.pdf> accessed 16 June 2022.
[171] *M.C. Mehta v Union of India* [2001] 3 SCC 756.
[172] Press Trust of India, 'Delhi pollution: SC takes note of 'slight' improvement in air quality' *Business Standard* (New Delhi, 10 December 2021).

still terrible.[173] It was reported that in November 2018, air pollution levels in Delhi reached 20 times the recommended World Health Organisation's safe limits for air pollution.[174]

Lack of Sustainability: The involvement of the apex court in the day-to-day management of issues such as solid waste, CNG conversion, and cleaning of rivers leads to criticisms as to how far this is sustainable. There is also concern as to whether the judiciary is merely substituting judicial governance for executive governance.[175] The endless judicial oversight in PIL cases has been criticized to be unsustainable for several reasons. With a total of 70,852 pending cases before the Supreme Court[176] the practice of continuous judicial oversight in PILs would hamper the functioning of the judicial system. The continuous judicial oversight has resulted in a rather reactive administration. The panic created by the threat of contempt proceedings has not helped government officials to function freely and the growth of a responsible and independent bureaucracy has been restricted by judicial activism.[177] Judicial governance becomes a crutch for the executives. An unhealthy and pressure-ridden relationship of dependency has been created by the overarching judicial oversight. A tremendous strain has been placed on the resources of the government in following the orders and directions of the courts.[178] Similar views have been expressed by interviewees during the qualitative research and discussed in detail in chapter four of the thesis. However, the complexities described above can be avoided if courts adopt a collaborative approach as discussed in chapter 5. In lieu of doing it all by itself courts could impose positive obligation on the state organs. Courts can take the role of a facilitator in pointing the gaps in the legislation to the legislature and in helping the executive to implement the laws by creative interpretation of laws.[179]

It is acknowledged that PIL has been an invaluable tool in addressing executive inaction and played a role in empowering the citizens of India. It has been argued by the supporters of PIL that it is critical to compensate for legislative and executive inertia and

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[173] 'Delhi Smog: Schools and Colleges Shut as Pollution Worsens' *BBC News* (India, 17 November 2021) <https://www.bbc.com/news/world-asia-india-59258910> accessed 10 February 2022.
[174] BBC News, 'Delhi Panic Over Toxic Air Ahead of Indian Festival Diwali' *BBC News* (India, 05 November 2018).
[175] Manoj Mate, 'The Rise of Judicial Governance in the Supreme Court of India' (2014) 33 Boston University International Law Journal 101.
[176] Supreme Court of India <https://main.sci.gov.in/statistics> accessed 10 February 2022.
[177] Shyam Divan, 'A Mistake of Judgment' *Down to Earth* (India, 30 April 2002).
[178] Rajamani (n 153).
[179] Ioanna Tourkochoriti, 'What is the Best Way to Realize Rights?' (2019) 39(1) Oxford Journal of Legal Studies 209.

the courts serve as guardians of political, social, economic, and environmental rights.[180] However, as the above discussion shows, although aimed at the poor and marginalized, many Indians are still unable to access the courts and the exercise of PILs have created much controversy as it suffers from the problems of lack of access and participation and lacks effectivity and sustainability. According to Sathe, the degradation of the environment or government lawlessness cannot be entirely prevented by the court, and 'its actions in these areas are bound to be symbolic.'[181]

3.2. Access to Courts in Environmental Matters in Bangladesh

As discussed above, none of the relevant provisions[182] in the Indian Constitution mention any specific test for standing. Compared to that, the Constitution of Bangladesh in Article 102[183] mentions the 'aggrieved person' test to decide whether the petitioner, either an individual or a group has standing in PIL. Although attempts were made soon after the independence to solve the problem of standing in the courts through the writ jurisdiction, the courts of Bangladesh adopted a restrictive approach regarding the standing issue and justified that by indicating the differences between the Constitution of Bangladesh and the Constitution of India.[184] For the first time, standing was granted to a plaintiff in a PIL in *Kazi Mukhlesur Rahman v Bangladesh and Others.*[185] After 1990, the courts in Bangladesh started to perceive their roles rather differently and formally embraced PIL. This is why PIL in Bangladesh is termed a post-democratic transition phenomenon. Compared to Indian judges, judges in Bangladesh were optimally instrumental in the process of the much-laboured birth of PIL in Bangladesh. The position adopted by Bangladeshi judges has been criticized because of the unwillingness to break away from colonial legal thinking.[186]

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[180] Avani Mehta Sood, 'Gender Justice through Public Interest Litigation: Case Studies from India' (2008) 41 Vanderbilt Journal of Transnational Law 833.
[181] S. P. Sathe, 'Judicial Activism: The Indian Experience' (2001) 6 Washington University Journal of Law and Policy 29.
[182] Article 32 and 226 of the Constitution of India.
[183] According to Article 102(1) of the Constitution of Bangladesh 'the High Court Division on the application of any person aggrieved, may give such directions or orders to any person or authority, including any person performing any function in connection with the affairs of the Republic, as may be appropriate for the enforcement of any of the fundamental rights conferred by Part III of this Constitution.'
[184] Razzaque, *Public Interest Environmental Litigation in India, Pakistan and Bangladesh* (n 25) 289.
[185] [1974] 26 DLR 44 (SC).
[186] Ridwanul Hoque, *Judicial Activism in Bangladesh: A Golden Mean Approach* (Cambridge Scholars Publishing 2011) 140.

After a long-fraught jurisprudential battle, the first case where PIL was formally allowed involved an environmental issue. The case was *Dr. Mohiuddin Farooque v Bangladesh*[187] also known as the *FAP Case.* In that case, Bangladesh Environmental Lawyers Association (BELA) was granted standing to challenge an ongoing flood-control project. Initially, standing to BELA was refused by the High Court Division (HCD) of the Supreme Court (SC) of Bangladesh.[188] However, on appeal, the Appellate Division (AD) allowed standing to BELA to proceed with the case and sent back the Case to the HCD. Although the HCD refused to interfere with the ongoing project as the project involved foreign aid, by this case the judges of the apex court of Bangladesh revealed their consciousness that the Constitution of Bangladesh has not resulted from a negotiated settlement with a former colonial power.[189]

3.2.1. PIL in Environmental Matters in Bangladesh

Following the development brought through the FAP Case,[190] the number of PIL cases began to rise after 2000 in Bangladesh. In most of these PILs right based claims have been made concerning environmental justice issues. This is where the standings of Bangladeshi Courts and Irish Supreme Court are different as the later has refused FIE's right-based claim in the Climate Case Ireland. The Court declared the conversion of open space into housing plots,[191] occupation of public parks,[192] and construction of commercial buildings[193] to be unlawful on the ground of violation of fundamental rights of the people living in the vicinity and causing harm to their health. In *Dr. Mohiuddin Farooque v Bangladesh (Vehicular Pollution Case*),[194] the Court issued an eight-point directive to improve the air pollution situation prevailing in Dhaka City. In *Dr. Mohiuddin Farooque v Bangladesh* (Industrial Pollution Case),[195] the Court directed the relevant state officials to adopt sufficient anti-pollution measures within a stipulated period. Policy-making activism

[187] [1997] 49 DLR 1 (SC).
[188] *Dr. Mohiuddin Farooque v Bangladesh* [1994] Writ Petition No. 998 of 1994.
[189] Hoque, *Judicial Activism in Bangladesh* (n 181) 143.
[190] *Dr. Mohiuddin Farooque v Bangladesh and others* [1997] 49 DLR 1 (AD).
[191] *M. Saleem Ullah v Bangladesh* [2003] 23 BLD 58 (HCD).
[192] *Giasuddin v Dhaka City Corporation* [1997] 17 BLD 577 (HCD).
[193] *Sharif Nurul Ambia v Dhaka City Corporation* [2007] 15 BLT 305 (AD).
[194] [2003] 55 DLR 613 (HCD).
[195] [2003] 55 DLR 69 (HCD).

is visible in the judgment of the HCD in *Prof. Nurul Islam & Other v Bangladesh (Cigarette Advertising Case)*.[196] In the absence of any law prohibiting tobacco advertising, the HCD imposed a ban on tobacco advertising in print and electronic media. In the eyes of the Court, such a prohibition was in-built in the constitutional right to life provided under Article 31 of the Constitution, and no enabling legislation was required.

The growing trend of judicial environmental activism in Bangladesh has stimulated legal and environmental activists to challenge various government actions and inactions under the umbrella of the flourishing right to the environment. There has been a trend of tailoring traditional non-environmental rights claims as PIL and this has been done because the Bangladeshi courts have been spontaneous and made assertive interventions in many cases involving environmental matters. The subject matters of several PILs brought before the Court support the contention. In *Khushi Kabir v Bangladesh*[197] a decision by the government to allocate certain lands to a Member of the Parliament for shrimp cultivation was challenged alleging that it would damage the surrounding environment. In *BELA v Bangladesh*[198] the principal ground of the petition was the protection of social rights of a sizable number of unregulated workers working in the hazardous ship-breaking industry. In both cases, the Court was proactive in issuing provisional protective injunctions. This shows how a (negative) civil right which is the constitutional right to life (discussed in chapter 2 (2.1.2) has been extended by judicial intervention in Bangladesh to areas traditionally considered to be non-enforceable. [199] Another example of the expansion of the right to life to embrace the right to a healthy environment is the *Slum Dwellers Case*.[200] In its decision the Court approvingly quoted *Olga Tellis v Bombay Municipal Corporation*[201] from the Supreme Court of India.

It is interesting to note that although not many examples of using *suo motu* jurisdiction by the Higher Judiciary in Bangladesh are available, the Special Magistrates appointed under Section 5 of the Environment Courts Act 2010 (ECA 2010) exercise *suo motu*

[196] [2000] 52 DLR 413 (HCD).
[197] [2000] Writ Petition No. 3091 of 2000 (HCD).
[198] [2003] Writ Petition No. 2911 of 2003.
[199] Hoque, *Judicial Activism in Bangladesh* (n 181) 147.
[200] *Aio o Salish Kendro (ASK) v Bangladesh* [1999] 19 BLD (HCD) 488.
[201] [1986] AIR 180.

jurisdiction in taking cognizance of environmental offences. The Special Magistrates have passed orders directing the Department of Environment (DoE) to take steps against harms caused by brick kilns, remove illegal dams to ensure the natural flow of water, and protect rivers from pollution.[202] Although this is a relief against the bureaucratic provision of filing environmental cases through the DoE,[203] concerns exist as ECA 2010 does not empower the Special Magistrates to exercise *suo motu* jurisdiction.[204]

3.2.2. Problems with PIL in Bangladesh

Although PIL has the capacity to ensure the accountability of the government for its failure to protect the environment,[205] in Bangladesh it is suffering broadly from similar problems to India.[206]

There is a lack of accessibility for the poor due to its elitist character undermining the focus on social justice and socio-economic empowerment of the poor and disadvantaged.[207] There were protests by workers in the ship-breaking industry against a national import policy requiring all vessels destined for recycling in Bangladesh to have a pre-cleaning certificate.[208] The alleged policy was the result of the Supreme Court judgment in *BELA v Bangladesh*[209] showing that neither the judgment not the policy has taken into consideration the views of stakeholders. The rights groups or organizations who have been behind the most PILs are driven by limited resources and their own internal agenda-setting interests. On the other hand, the decisions in PILs are not well reasoned or are extremely brief in analyzing rights, duties, and justice issues and are not largely informed by scientific evidence. The courts have failed to engage the public officials in the court-directed reform activities and have mostly relied on its contempt

[202] Masrur Salekin, 'Restricted Access to Environmental Justice' *The Business Standard* (Dhaka, 27 January 2022).
[203] According to Section 7 of the ECA 2010, no claim for compensation shall be considered by the Environment Court (EC) except on the written report of an Inspector of the DoE. It is stated in Section 6(3) that no Special Magistrate shall take cognizance of an offence except on the written report of an Inspector of DoE.
[204] Md. Khaled Miah, 'Effective Functioning of Environment Court' *The Daily Star* (Dhaka, 25 August 2015).
[205] Altafur Rahman, 'Public Accountability through Public Interest Litigation' (1999) 3(2) Bangladesh Journal of Law 161.
[206] Md. Saiful Karim, Okechukwu Benjamin Vincents, and Mia Mahmudur Rahim, 'Legal Activism for Ensuring Environmental Justice' (2012) 7 (1) Asian Journal of Comparative Law 13.
[207] Naim Ahmed, *Public Interest Litigation in Bangladesh: Constitutional Issues and Remedies* (BLAST 1999) 25.
[208] Liz McCarthy, 'Bangladesh Shipbreaking Protest Condemned as Fake' *Lloyed's List* (Bangladesh, 23 February 2010).
[209] [2008] Writ Petition No. 7260 (HCD).

jurisdiction to ensure executive compliance.[210] In most cases judicial decisions in environmental cases have not been properly implemented.[211] The vulnerability of judicial activism is best illustrated by the *Tannery case*,[212] discussed in detail in chapter 2 (1.1.2).

However, all the deficiencies in the PIL practice in Bangladesh do not make it a failure. It is true that it is because of PIL that the environmental laws and policies in Bangladesh are gradually taking a pro-people shape and have seen some development. One such example can be the *Vehicular Pollution Case*.[213] As a result of the direction of the Court, the government gradually withdrew polluting two-stroke scooters from Dhaka City and replaced them with CNG-run vehicles. Although the government continued to evict the slum-dwellers following the Order of the apex court in *Slum Dwellers Case*[214] following another PIL, *Hasina Begum v Bangladesh*[215] the government took some steps for the rehabilitation of slum dwellers.[216]

PIL does not work in isolation. It is much needed for the success of PIL to have a collaborative effort between various actors. There is a necessity for dedicated and specialist lawyers, time, commitment, and capacity to work on such issues by judges, legal aid, and legal support from the government. To make PIL successful, strong networking and consultation among civil society organizations, constant interaction between the organs of the state, a collaboration between the government agencies, a trained judiciary, and supportive media are important.[217]

3.3. Access to Courts in Environmental Matters in Ireland

In Ireland judicial review of administrative action is the standard recourse for environmental litigation led by citizens. There have been fundamental changes in the law

[210] Hoque, *Judicial Activism in Bangladesh* (n 181) 168-172.
[211] In *FAP Case* [1997] 49 DLR (AD) 1, the decision given by the court was not properly implemented. No compensation has been paid to the affected people. Although another writ petition was filed in *BELA v Bangladesh and others* [2001] Writ Petition No. 1691 of 2001 and the HCD gave direction, no compensation was realized for those affected by the project.
[212] *Bangladesh Environmental Lawyers Association (BELA) v Bangladesh and others* Writ Petition No. 1430 of 2003.
[213] *Dr. Mohiuddin Farooque v Bangladesh* [2003] 55 DLR 613 (HCD).
[214] *Aio o Salish Kendro (ASK) v Bangladesh* [1999] 19 BLD 488 (HCD).
[215] [2003] Writ Petition No. 567 of 2003.
[216] Under a housing project around 2600 families were promised BDT 200,000 (€ 2000 approximately).
[217] Rafiqauzzaman (n 120).

regarding standing in judicial review in the last four decades.[218] The evolution regarding standing began with the Rules of the Superior Courts.[219] In Order 84, Rule 20(4) it is mentioned that 'the Court shall not grant leave unless it considers that the applicant has a sufficient interest in the matter to which the application relates.' Thus, an application for judicial review had to pass through the 'sufficient interest' test. The standard followed here was established by the Supreme Court in *Cahill v Sutton*.[220] In that case, the Supreme Court refused standing to the plaintiff to challenge the constitutionality of the statute of limitations as he failed to establish that he was directly affected by the law. However, the Supreme Court made it clear that the rules of standing can be expanded for someone who is not in a position to assert adequately for her/their constitutional rights. This part of the decision was followed in later Irish cases.[221] However, the general principle established by *Cahill v Sutton*[222] is that it is required for an individual to show that a decision by an administrative body has or will adversely affect her interests.[223]

Regarding environmental matters, Section 50 of the Planning and Development Act 2000 (the PDA) provides for a judicial review procedure applicable to decisions made and acts done by planning authorities. Generally, the courts have shown reluctance to interfere with the planning decisions taken by planning authorities, An Bord Pleanála, or the Environmental Protection Agency (EPA). Decisions that are unconstitutional or not in compliance with legislative requirements will only be invalidated by the courts. The courts have been following the restrictive decision in terms of overturning a decision on merit made in *O'Keeffe* v *An Bord Pleanála*.[224] Since the standard set in *O'Keeffe* v *An Bord Pleanála*[225] is practically impossible to satisfy, in practice no Irish court would invalidate an environmental decision on the ground of unreasonableness.[226] In addition, compared to traditional judicial review this judicial review procedure has a stricter time limit, notice requirement. In the judicial review provided under the PDA 2000, the right to appeal to

[218] Dáire McMullin, '"I'm Still Standing" - Ireland and the Wide Access to Justice Requirements in the Aarhus Convention' Trinity College Law Review <https://trinitycollegelawreview.org/im-still-standing/> accessed 22 February 2022.
[219] SI 1986/15.
[220] [1972] IR 269 (SC).
[221] *The Society for the Protection of Unborn Children (Ireland) Limited v Diarmuid Coogan & Ors, Defendants* [1988] IR 734 (SC); *Irish Penal Reform Trust Limited & Ors v the Governor of Mountjoy Prison & Ors* [2005] IEHC 305.
[222] [1972] IR 269.
[223] Garrett Simons, *Planning and Development Law* (Round Hall 2007) 598.
[224] [1993] 1 IR 39 (SC).
[225] ibid.
[226] Yvonne Scannell, *Environmental and Land Use Law* (Thomson Round Hall 2006) 221.

the Supreme Court is also very limited.[227] One of the most significant differences in the judicial review procedure under the PDA 2000 was the use of the term 'substantial interest'.[228] 'Substantial interest' received restrictive interpretation by the Irish High Court in certain judgments.[229] However, to remain in compliance with Article 9 of the Aarhus Convention,[230] the 'substantial interest' words were replaced by 'sufficient interest' through Section 20 of the Environment (Miscellaneous Provisions) Act 2011.[231]

3.3.1. PIL in Environmental Matters in Ireland

The loser pay rule is inhibiting PIL in Ireland. In addition to that, the absence of provision for class action, multi-party litigation, rules regarding standing, and non-justiciability of socio-economic rights is obstructing the development of PIL in Ireland.[232]

In Ireland, although standing in environmental cases continues to attract debate, any amendment brought to the law of standing will have little effect because of the high cost of litigation and the absence of civil legal aid.[233] Judicial review in Ireland has been termed 'notoriously slow and expensive'.[234] In this regard, and also to explore the role of the Irish Courts in terms of allowing access to environmental justice, it is important to discuss the judgment given by the Irish Supreme Court in *Climate Case Ireland.*[235] The Supreme Court dismissed the contention by FIE that the reason behind it taking the case was to reduce the risk of the costs for an individual. This contention has been classified as only a 'suggestion' by FIE as 'no real explanation was given as to why an individual or individuals could not brought these proceedings instead of FIE.'[236] The Court added,

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[227] Simmons (n 223).
[228] According to Section 50 (4) (iv) of the PDA 2000, 'leave shall not be granted unless the High Court is satisfied that there are substantial grounds for contending that the decision is invalid or ought to be quashed and that the applicant has a substantial interest in the matter which is the subject of the application.'
[229] *Murphy v Wicklow County Council* [1999] IEHC 61; *Lancefort Ltd. v An Bord Pleanála* [1999] 2 IR 270 (SC).
[230] According to Article 9(1) of the Aarhus Convention, a review process must be accessible by any person seeking to enforce the right to information under Article 4 of the Aarhus Convention. According to Article 9(2), the public concerned with a sufficient interest or who maintain impairment of a right must have access to a review procedure through which they can challenge both the substantive and procedural legality of any decision, act, or omission that is subject to the public participation requirement under Article 6 of the Aarhus Convention.
[231] McMullin (n 218).
[232] Larry Donnelly, 'Unused Potential in Public Interest Litigation' *The Irish Times* (Dublin, 10 September 2012).
[233] DCU Report (n 75).
[234] Rónán Kennedy, 'Access to Justice under Irish Environmental Impact Assessment Law: Case C-427/07 Commission v Ireland European Court of Justice (Second Chamber), 16 July 2009 [2010]' (2010) 12(2) Environmental Law Review 140.
[235] *Friends of the Irish Environment (FIE) v Ireland* [2020] IESC 49.
[236] [2020] IESC 49 [7.22].

'[t]here does not seem to be any practical reason why FIE could not have provided support for such individuals in whatever manner it considered appropriate.'[237] This stand by the Irish Supreme Court has been criticized as disappointing because the issues regarding financial barriers to right-based litigation in Ireland raise concerns under the Aarhus Convention and the Court has failed to appreciate the argument by FIE that the seriousness of climate change justifies an exceptional approach to standing.[238] The reluctance of the Irish judiciary to deal with the prohibitive costs issue can be seen in *Friends of Curragh Environment v An Bord Pleanála*[239] where Kelly J remarked that it is unclear whether reference has been made to fees for case filing or fees of lawyers in the Directive 2003/32/EC.[240] In *Sweetman v An Bord Pleanála,*[241] Clarke J was of the view that, the court's discretion to award costs against a loser party, or even to award costs in his favor, implied that there were no 'substantial grounds for the contention that the level of exposure which a party might have to costs in the Irish judicial review context is unreasonable.'[242]

In this regard, the approach taken by the Irish High Court in *Climate Case Ireland*[243] was commendable as it applied a common-sense approach to standing because the issue raised in the case was of environmental concern and of a constitutional nature that would impact the public at large. On the contrary, the finding of the Irish Supreme Court was that since FIE did not itself enjoy the personal right to life and bodily integrity it does not have the standing to maintain this aspect of the case.[244] The view expressed by the Supreme Court in *FIE* is that Irish standing rules are 'flexible but not infinitely so.'[245] The Court was dismissive of the immense stake involved in climate change for the public and the specialist expertise FIE possesses.[246]

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[237] [2020] IESC 49 [7.22].
[238] Rónán Kennedy, Maeve O'Rourke and Cassie Roddy-Mullineaux, 'When Is a Plan Not a Plan?: The Supreme Court Decision in "Climate Case Ireland"' (2020) 27(2) Irish Planning and Environmental Law Journal 60.
[239] [2006] IEHC 243.
[240] Rónán Kennedy, 'Access to Justice under the Aarhus Convention and Irish Judicial Review' (2008) 10(2) Environmental Law Review 139.
[241] [2007] 2 ILRM 328.
[242] *Sweetman v An Bord Pleanála* [2007] 2 ILRM 328 at 351 (HC).
[243] [2019] IEHC 747.
[244] Orla Kelleher, 'A Critical Appraisal of Friends of the Irish Environment v Government of Ireland' (2021) 30 Review of European Community and International Environmental Law 138.
[245] [2020] IESC 49 [7.19].
[246] Adelmant, Alston, and Blainey (n 17).

In *Climate Case Ireland*[247] the Supreme Court in addition to *Cahill v Sutton*[248] reviewed two other cases where claims were brought by the plaintiffs on behalf of others. It was held in *The Society for the Protection of Unborn Children (Ireland) Limited v Diarmuid Coogan & Ors* [249] that an NGO can assert a right on behalf of unborn children because it is impossible for an unborn to bring a litigation. The other case is *Irish Penal Reform Trust*[250] where the treatment of prisoners with psychiatric conditions was challenged by an NGO and two former prisoners. Standing was granted to the NGO to argue in that case on behalf of non-party prisoners because it was not possible for the prisoners to assert their constitutional rights. *Re Digital Rights Ireland*[251] was also considered by the Supreme Court where standing was granted to an NGO to assert the rights of a significant portion of the population of Ireland. A distinction was drawn by the Supreme Court with *Re Digital Rights Ireland*[252] because in that case, the company had asserted its own rights rather than the rights of others.[253] It was concluded by the Supreme Court that the case brought by FIE was 'a far cry' from *The Society for the Protection of Unborn Children (Ireland) Limited v Diarmuid Coogan & Ors*[254] and *Irish Penal Reform Trust*.[255] This standing by the Court suggests that the two cases were treated by the Court as narrow precedents rather than as illustrations of a more general rule. Considering the seriousness of the threat posed by climate change, the approach adopted by Irish Supreme Court regarding the standing and applying the Cahill test is deeply problematic. The Court seemed to have failed to acknowledge the magnitude of the climate change problem.[256] The ruling by the Irish Supreme Court represents a major setback and will be a barrier for future litigation as the individuals run the risk of bearing the potential costs for bringing a case in their own name.[257]

[247] *Friends of the Irish Environment (FIE) v Ireland* [2020] IESC 49.
[248] [1972] IR 269.
[249] [1989] IR 734 (SC).
[250] *Irish Penal Reform Trust Limited & Ors v the Governor of Mountjoy Prison & Ors* [2005] IEHC 305.
[251] [2010] 3 IR 251 (HC).
[252] [2010] 3 IR 251 (HC).
[253] Kennedy, O'Rourke and Roddy-Mullineaux (n 233).
[254] [1989] IR 734 (SC).
[255] *Irish Penal Reform Trust Limited & Ors v the Governor of Mountjoy Prison & Ors* [2005] IEHC 305.
[256] Adelmant, Alston, and Blainey (n 17).
[257] Jamie McLoughlin, 'Whither Constitutional Environmental (Rights) Protection in Ireland After 'Climate Case Ireland'?' (2021) 5(2) Irish Judicial Studies Journal 26.

Part IV

4. Judicial Adventurism and Judicial Restraint Undermining Constitutional Principles

The examination of judicial decisions pronounced in environmental cases in the selected jurisdictions shows that the Courts of India and Bangladesh by relaxing the traditional barriers to access to justice and through judicial activism have attempted to ensure access to information, public participation, and access to the courts in environmental matters. Although in some instances the courts were successful there are several instances where the decisions were ineffective and unsustainable. The decisions given in the PIL cases have been criticized for being unable to sensitize the executive or the legislature to act with greater enthusiasm in environmental issues. Rather the judicial decisions have retarded the possible evolution of a responsible bureaucracy.[258] Judicial decisions examined in part I, II, and III showed that the judiciaries were unable to provide long-term judicial oversights resulting to sustainable solutions.[259]

In addition, the roles adopted by the judiciaries have created controversy as the courts have assumed the roles of the legislature and the executive and made laws, adopted policies, and created methods and institutions for the implementation of its decisions. Based on a study of a wide range of cases from the selected jurisdictions, chapters 2 and 3 argue that the role of the courts in protecting the environment has transformed from judicial activism to adventurism, which impairs constitutional checks and balances. The thesis also demonstrates cases where the courts have shown a disparity in exercising judicial power hindering the rights of poor, disadvantaged, and marginalized communities. The arguments made in this part corroborate the arguments made in the previous three parts of this chapter and the argument made in the previous chapter and argue that the courts must withdraw from adventurism or passivity. In contrast with the Indian and Bangladeshi courts, the Irish courts have exercised judicial restraint and in doing so

[258] Shubhankar Dam, 'Green Laws for Better Health: The Past that Was and the Future that May Be – Reflections from the Indian Experience' (2003-2004) 16 Georgetown Environmental Law Review 593.
[259] Armin Rosencranz and Michael Jackson, 'The Delhi Pollution Case: The Supreme Court of India and the Limits of Judicial Power' (2003) 28 Columbia Journal of Environmental Law 223.

undermined constitutional principles[260] and restricted access to environmental justice. With this background, this part argues that the courts should be proactive and avoid over-activism or judicial passivity and assume the role of a 'partner in a constitutional collaboration.'[261]

The following discussion includes a compilation of those cases argued through this thesis where the nature of orders would easily drive the point of usurpation home and undermined constitutional orders.

The courts in India have diluted the statutory function of the executive in appointing expert committees on environmental issues.[262] There are also instances where either the court acted inconsistently in not appointing a committee or did not follow the report of the committee.[263] However, the Indian judiciary has denied any usurpation of powers and relied on Order XXVI of the Code of Civil Procedure and Order XLVI of the Supreme Court Rules, 1966 for its power to appoint committees or commissions.[264]

In the *Kanpur Tanneries Case*,[265] the Court ordered the Central Government to direct all the educational institutions throughout India to teach for one hour a week a lesson relating to the protection and improvement of the natural environment including forests, lakes, rivers, and wildlife in the first ten classes, and also ordered the Central Government to have textbooks written for the same purpose and distribute them to the educational institutions free of cost. The judgment also asked the Government of India and the Governments of the States and of the Union Territories to consider organizing cleanliness week in every city, town, and village throughout India at least once a year to increase awareness amongst people.[266] It appears that in a single judgment the Court adopted the roles of several Ministries of the Government of India.

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[260] Cahill and Ó Conaill (n 21).
[261] Aileen Kavanagh, *Constitutional Review under the Human Rights Act* (Cambridge University Press 2009) 407.
[262] A special committee was created to monitor air quality and traffic congestion [1998] 9 SCC 93; the court directed the Archaeological Survey to set up an automatic monitoring system [1998] 3 SCC 381.
[263] *Dahanu Taluka Environment Protection Group and others v Bombay Suburban Electricity Supply Company Limited and others* [1991] SCC 542.
[264] Sahu (n 20).
[265] *M.C. Mehta v Union of India* [1988] AIR 1031 (SC).
[266] ibid 554.

The Indian Courts have also been inconsistent in terms of allowing PILs and ordering damages. As a mark of discerned activism in *Ranauk International v IVR Construction Ltd. and Others*,[267] the court ordered that 'any interim order which stops the project from proceeding further must reimburse all the cost to the public in the case ultimately the litigation started by such an individual or body fails.'

It is clear from these case studies that the actions and initiatives of the Indian courts have undermined the check and balance system enshrined in the Indian Constitution. What is more alarming is that the judicial power has surged ahead and the presence of this can be felt everywhere in Indian governance.[268] As outlined in the introductory chapter, this thesis does not question the underlying intention of the Indian apex court judges as they may have been trying to safeguard the environmental right by filling the vacuum left by the environmental negligence of the legislature and the executive, but it argues that it would be dangerous for the constitutional balance to continue such a role. Since the Indian Constitution suggests that each organ of the state has its own assigned roles and premises,[269] the continuous intrusion in the affairs of the other organs and government institutes will have a long-term effect on the country's institutional development also.[270]

The courts in Bangladesh have also shown over-activism in cases involving environmental issues. In the *Vehicular Pollution Case*[271] the directives given by the Court were very enthusiastic and included policy issues:

- Month-long publicity to the Court directives in print and electronic media on two consecutive days in a week was ordered;
- The concerned authorities were directed to submit periodic reports stating the progress in the implementation of the direction to ensure compliance;
- An immediate withdrawal of the exemption of motorcycles from the requirement of a certificate of fitness under the Motor Vehicle Ordinance, 1983;

[267] [1998] (6) SCALE 456.
[268] Sahu (n 20).
[269] This is discussed in detail in Chapter 5 (3.1.1).
[270] Dam and Tewary (n 11).
[271] *Dr. Mohiuddin Farooque v Bangladesh* [2003] 55 DLR 613 (HCD).

- The adoption and installation of appropriate technology for providing a correct certificate of fitness;
- Providing lead-free and unadulterated petroleum to all the petroleum filling stations within Dhaka City;
- All imported motor vehicles to be fitted with catalytic converters.

On the other hand, the restrained attitude of the Irish Supreme Court in the recent *Climate Case Ireland*[272] has always been exhibited by the Irish judiciary although those cases are not directly related to the environment. Certain self-imposed limitations have been adopted by the Irish Judiciary on the three constitutional mechanisms provided under Articles 26, 34, and 50 of the Irish Constitution by which the Judiciary may review legislation passed by Parliament. The deference showed by the Court to legislative output in *Collins v Minister for Finance*[273] in allowing the executive to poach legislative responsibility as a ministerial privilege has undermined the doctrine of separation of powers and the supremacy of the Irish Constitution. The decisions in *Hanafin v Minister for the Environment*[274] and in *Jordan v Minister for Children*[275] show that the Irish Courts were reluctant to impose legal consequences on the government for illegal interference with a referendum campaign and thereby undermined constitutional principles.[276]

4.1. The Need for New Methods

The foregoing case studies from the selected jurisdictions raise several questions from legal, institutional, theoretical, and practical perspectives. It is evident that on many occasions the overenthusiasm or apathetic role of the courts in environmental matters has severely dented the constitutional requirement of separation of powers and infringed the independence of the judiciary resulting in violation of rule of law. This trend has also contributed to a polity that is becoming consistently reliant on the judiciary for remedying not only environmental but also all kinds of problems.[277] For example, a Writ Petition has

[272] *Friends of the Irish Environment (FIE) v Ireland [2020]* IESC 49.
[273] [2016] IESC 73.
[274] [1996] 2 IR 321.
[275] [2015] IESC 33 (SC).
[276] Cahill and Ó Conaill (n 21).
[277] Hans Dembowski, *Taking the State to Court: Public Interest Litigation and the Public Sphere in India* (Oxford University Press 2001).

been filed by a doctor before the High Court Division of Bangladesh Supreme Court praying for an order to allocate her an office room with a wash facility. As a result of the failure to do that, a contempt proceeding has been issued by the HCD against the hospital authority.[278] The Indian and Bangladeshi courts have gone far in protecting the right to the environment and handed down judgments dealing with air, water, climate change, and education as well as implementation issues.[279] Unelected judges have assumed power in places even where the constitution did not provide it.[280] Observing the poor implementation of its directions and orders, the Indian judiciary has come up with the innovative approach of continuing mandamus[281] in *Vineet Narrain v Union of India and Others*,[282] but again this is in contradiction to the constitutional mandate because it is the responsibility of the executives to implement the judgments.[283]

Considering the extent of judicial novelty, it would have been preferable to say that the environments in India and Bangladesh are well protected and the right to the environment is well guarded. Unfortunately, the performance of India is relatively poor on almost all metrics in protecting the environment.[284] According to the 2022 Environmental Performance Index, India ranks at the bottom, Bangladesh is ranked 177, and Ireland is ranked 24 out of 180.[285]

In comparison, the Irish judiciary has displayed a restrained approach in *Climate Case Ireland*.[286] Although the Supreme Court declared the National Mitigation Plan 2017 to be unlawful, the view of the Court that a right to the environment might not add any additional protection over and above the established right to life and bodily integrity has been disappointing.[287] The Irish Government has been very reluctant to use its statutory authority in adopting active policy and in taking action against polluters, resulting in the

[278] TBS Report, 'BSMMU violates High Court Order, Not Allotting Female Doctor an Office Room' The Business Standard (Dhaka, 07 March 2022).
[279] The HCD in Bangladesh has directed the government authorities to demolish all illegal brick kilns situated in four districts within 15 days. 'HC Orders Demolish of Illegal Brick Kilns in 5 Dists' *The Daily Sun* (Dhaka, 02 March 2022).
[280] Mahajan Niyati, 'Judicial Activism for Environmental Protection in India' (2015) 4(4) *International Research Journal of Social Sciences* 7.
[281] This method allows the Supreme Court to closely monitor the implementation of orders and directions.
[282] [1997] SCALE 656.
[283] Article 162 of the Constitution of India 1950.
[284] Aarti Betigeri 'Choking Points: India's Environmental Crisis' <https://www.lowyinstitute.org/the-interpreter/choking-point-india-environment-crisis> accessed 01 October 2019.
[285] Environmental Performance Index 2022 <https://epi.yale.edu/downloads/epi2022report06062022.pdf> accessed 15 June 2022.
[286] *Friends of the Irish Environment (FIE) v Ireland [2020] IESC 49.*
[287] McIntyre (n 124).

failure of Ireland to reduce its emission of greenhouse gases, thereby breaching human rights obligations.[288] Amongst the EU countries, Ireland's performance on climate action in response to global warming has been ranked as the worst. According to the Climate Change Performance Index (CCPI) 2022, Ireland (46th) is in the group of very low performers.[289] The findings of the Supreme Court in the *Climate Case Ireland*[290] have been retrograde and additional obstacles have been introduced through that for future litigation.[291]

It is clear that neither judicial over-activism, which in fact violates constitutional balance and weakens the other organs and institutions, nor the restrained approach allowing reluctance by the government authorities resulting in accelerated degradation of the environment is helping to protect environmental rights and ensure environmental justice. In addition, the multifaceted, polycentric, and complex technical nature of environmental problems makes it difficult for judges to understand the problem and reach a robust decision.[292] The Supreme Court of India has also expressed a similar view.[293] Compared to the courts, the regulators possess an informational advantage, and intervention by the court may be effective only to the extent they act as a remedy to executive apathy. The Indian and Bangladeshi experience in PIL cases shows that the judiciary does not have adequate expertise and information to set cost-effective environmental standards. It is up to the executive to come up with more sustainable solutions in the long run. The judiciary alone is not enough and legislative, regulatory, and enforcement mechanisms are required to achieve sustainable environmental solutions.[294] To have a lasting impact on the orders given by the apex court, political will along with budgetary allocation at the local, municipal, and national levels is necessary.[295] Although a successful day in a court

[288] Kevin O'Sullivan 'Climate Change: Ireland Failing on "Human Rights Obligations", Says UN' *The Irish Times* (Dublin, 31 October 2018).
[289] Climate Change Performance Index <https://ccpi.org/ranking> accessed 15 February 2022.
[290] *Friends of the Irish Environment (FIE) v Ireland* [2020] IESC 49.
[291] Adelmant, Alston, and Blainey (n 17).
[292] Elizabeth Fisher, 'Environmental Law as "Hot" Law' (2013) 25(3) Journal of Environmental Law 347.
[293] In judgments given in *M.C. Mehta v Union of India* [1986] 2 SCC 176, the *Indian Council for Enviro Legal Action v Union of India* [1996] 3 SCC 212 and in *AP Pollution Control Board v M V Nayudu* [1999] AIR 812 (SC) the Supreme Court of India acknowledging the complexities and uncertainties underpinning the scientific evidence presented before the court in environmental cases emphasized the necessity of establishment of an environmental court in India where environmental experts and technically qualified persons are embedded in the judicial process.
[294] Michael G. Faure and A.V. Raja, 'Effectiveness of Environmental Public Interest Litigation in India: Determining the Key Variables' (2010) 21 Fordham Environmental Law Review 239.
[295] Niyati (n 280).

is very likely to prompt a political response, it is important to have a political strategy to ensure that response is favorable to the litigant.[296]

The discussion on the role of the courts in the selected jurisdictions in ensuring environmental justice in chapters two and three demonstrates the need to adopt new methods for ensuring environmental justice. Based on qualitative socio-legal and doctrinal research, this thesis proposes judicial pro-activism in adopting a collaborative approach as methods that can 'best capture the process towards realizing rights.'[297] Adopting judicial pro-activism would help judges to maintain the delicate line between judicial excessiveness and judicial passivity and strike a balance between the need for socio-legal changes and the importance of legal stability.[298] Both these methods were suggested by interviewees with twenty-six suggesting the adoption of collaboration between the organs of the state for ensuring environmental justice (3.4.2).

Conclusion

The discussion in this chapter and the previous chapter demonstrate that to remedy the lack of initiatives and actions by the government to protect the environments, the courts have intervened. Although in some instances that has brought positive results but in many places not much improvement has been achieved. It is argued in this thesis that the judiciary should not usurp the power and function of the other organs and institutions, but rather help in promoting strong governance and constitutionalism. It is high time for the courts to stand back and see how the environment can really be protected without impairing constitutional mandates. Data collected through empirical research and analyzed in chapter four also demonstrates that the interviewees preferred a balanced and environmentally sensitive approach from the judiciary in environmental protection. An analysis of the views of academics and practitioners gathered through thirty-two semi-structured interviews and discussed in detail in the following chapter shows that there are

[296] Garry F. Whyte, 'The Efficacy of Public Interest Litigation in Ireland' in Tiyanjana Maluwa (ed), *Law, Politics and Rights: Essays in Memory of Kader Asma*l (BRILL 2013) 252.
[297] Tourkochoriti, (n 179).
[298] Aharon Barak, *The Judge in Democracy* (Princeton University Press 2006).

gaps between academics and practitioners and a lack of environmental jurisprudential development in the selected jurisdictions.

Chapter 4: An Empirical Study of the Role of the Courts in Environmental Protection

Introduction

This chapter uses data collected through semi-structured interviews by applying socio-legal methods, particularly qualitative research on judges, lawyers, academics, and researchers from the selected jurisdictions to understand how they view the roles of the courts in environmental matters and how the understandings of legal norms by judges, and the legal and political culture of a country are reflected in environmental judicial decision making.

The discussions in chapters two and three demonstrate that despite the similarities in their legal systems[1] and constitutional features[2] there are differences in the approaches of the courts of India, Bangladesh, and Ireland regarding environmental protection. It is important to note that in the last two decades, the Irish Supreme Court has stepped back from the high watermark of activism that it reached in the 1960s and 1970s to a more restrained one.[3] On the other hand, the functioning of the Indian judiciary has been informed by a high degree of judicial activism starting in the late 1970s.[4] The active engagement of the Indian Supreme Court especially in environmental matters has grown since the 1980s.[5] In Bangladesh, with the emergence and development of public interest

[1] India, Ireland, and Bangladesh all follow the Common Law legal system.
[2] India, Bangladesh, and Ireland all have written constitutions and follow a similar format with constitutional supremacy, separation of powers, rule of law, democracy, independence of the judiciary and the fundamental rights incorporating a bill of rights. All the three constitutions incorporated unenforceable directive principles of state policy. The directive principles of state policy in the Constitution of India had been borrowed from the Constitution of Ireland. Masrur Salekin, 'Unenumerated Environmental Rights in a Comparative Perspective: Judicial Activism or Collaboration as a Response to Crisis?' (2020) 25(6) Environmental Liability - Law, Policy and Practice 260.
[3] Eoin Daly, 'Reappraising Judicial Supremacy in the Irish Constitutional Tradition' in Laura Cahillane, James Gallan and Tom Hickey (eds), *Judges, Politics and the Irish Constitution* (Manchester University Press 2017) 29.
[4] Venkat Iyer, 'The Supreme Court of India' in Brice Dickson (ed), *Judicial Activism in Common Law Supreme Courts* (Oxford University Press 2007) 126.
[5] Geetanjoy Sahu, 'Implications of Indian Supreme Court's Innovations for Environmental Jurisprudence' (2008) 4(1) Law, Environment and Development Journal 1.

litigation (PIL) in the mid-90s,[6] the judiciary became active in relaxing the standing and interpreting the constitutional rights in a liberal manner.[7]

From the point of view of this thesis, it is important to explore how and why despite significant legal and constitutional similarities the judiciaries of the selected jurisdictions have gone in quite different directions in protecting the right to the environment.[8] A wide range of studies[9] have been carried out revealing that a written judgment does not only reflect what an individual judge thinks. Rather there are various other factors that influence judicial decision making such as the legal and political culture of a country, demographic characteristics of judges and litigants, quality and objectivity of pleadings, judges' personal characteristics, emotional reactions, and reaction to mechanisms of accountability by judges. Although some empirical research has been done in India regarding the functioning and decision making of the Supreme Court,[10] and to identify the interlinkages between judicial efficiency and socioeconomic factors,[11] research remains to be done in understanding the views of the academics and practitioners regarding the roles of the courts in environmental matters. In this regard, knowing the view of judges is very significant because little pertinent insight revealing how a judge arrives at a decision is disclosed in a written judgment.[12]

[6] The first PIL in Bangladesh was based on noise pollution due to election canvassing, *BELA v The Election Commission and others* [1995] 47 DLR (HCD).
[7] Jona Razzaque, *Public Interest Environmental Litigation in India, Pakistan, and Bangladesh* (Kluwer 2004) 58.
[8] In *Subhash Kumar v State of Bihar* [1991] AIR 420 (SC), the Supreme Court of India declared the right to live in a healthy environment as a fundamental right. The Supreme Court of Bangladesh recognized the right to the environment in *Dr. M. Farooque v Bangladesh* [1997] 49 DLR 1 (SC). It has been declared by the Supreme Court of Ireland in *Friends of the Irish Environment v The Government of Ireland* [2020] IESC 49 that it would not derive an environmental right from the Constitution.
[9] Brian M Barry, *How Judges Judge: Empirical Insights into Judicial Decision-Making* (Routledge 2021); Gregory C. Sisk, Michael Heise, & Andrew P. Morris, 'Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning' (1998) 73(5) New York Law Review 1377; Lee Epstein, William M Landes, and Richard A Posner, *The Behavior of Federal Judges* (Harvard University Press 2013); Daniel Kahneman, *Thinking Fast and Slow* (Farrar, Straus & Giroux 2011); Terry A Maroney, 'The Persistent Cultural Script of Judicial Dispassion' (2011) 99(2) California Law Review 629; Andrew J. Wistrich, Jeffrey J. Rachlinski & Chris Guthrie, 'Heart versus Head: Do Judges Follow the Law or Follow Their Feelings?' (2015) 93(4) Texas Law Review 855; Jeffrey J. Rachlinkski and Andrew J. Wistrich, 'Judging the Judiciary by the Numbers: Empirical Research on Judges' (2017) 13 Annual Review of Law and Social Science 203.
[10] Aparna Chandra, William H.J. Hubbard, and Sital Kalantry, 'The Supreme Court of India: An Empirical Overview of the Institution' in Gerald N. Rosenberg and others (eds), *A Qualified Hope: The Indian Supreme Court and Progressive Social Change* (Cambridge University Press 2019); George Gadbois, 'Supreme Court Decision Making' (1974) 10 Banaras Law Journal 1; Nick Robinson, 'A Quantitative Analysis of the Indian Supreme Court's Workload' (2013) 10 Journal of Empirical Legal Studies 570.
[11] Varsha Aithala, Rathan Sudheer & Nandana Sengupta, 'Justice Delayed: A District-Wise Empirical Study on Indian Judiciary' (2021) 12 Journal of Indian Law and Society 106.
[12] Timothy J. Capurso, 'How Judges Judge: Theories on Judicial Decision Making' (1998) 29(1) (2) University of Baltimore Law Forum 5.

Therefore, this research applies socio-legal methods, particularly qualitative research, using data gathered through semi-structured interviews from the selected jurisdictions to discover the similarities and differences in perspectives and understanding of legal norms by judges, lawyers, academics, and researchers based in the selected jurisdictions. Data has been collected with the following objectives:

i. To find out how practitioners[13] and academics[14] in the selected jurisdictions view the roles of the courts in environmental matters;
ii. To acquire a deeper understanding of how practitioners and academics think about various environmental, institutional, constitutional, social, economic and political issues, and to highlight common patterns of similarities and differences in their respective worldviews in order to develop methods for ensuring environmental justice;
iii. To see how far the understanding of legal norms, and writings of the academics and other stakeholders are reflected in environmental judicial decision making;
iv. To see if there is any gap between the academics and practitioners and to inform the expectation of the practitioners from the academics and vice versa to bridge the gap between the academia and the practice world;
v. To work out solutions, tools or methods to ensure better environmental protection with a focus on the judicial organ in social transformation.

By applying the constant comparative method of data analysis,[15] this chapter shows that there are some similarities in the views of the academics and practitioners irrespective of their geographical location. However, analyzed data shows differences between the perspectives of the interviewees compared to their respective national courts. An interesting finding is that retired judges take a rather different stand compared to their

[13] The practitioner group includes current and retired judges, lawyers, and environmental activists.
[14] The academic group is comprised of faculty members who are teaching and researching Environmental Law and Constitutional Law
[15] In the constant comparative method of data analysis, data are grouped together on a related dimension and that dimension with a tentative name becomes a category. In this method, the objective is to identify patterns in the data and the patterns are arranged in relationship to each other in building a grounded theory. Sharan B. Merriam and Elizabeth J. Tisdell, *Qualitative Research: A Guide to Design and Implementation* (4th edn, Jossey-Bass) 201.

own judgments. This finding supports what Lawrence Baum[16] concluded two decades ago when he stated that 'despite all the progress that scholars have made, progress that is accelerating today, we are a long way from achieving truly satisfying explanations of judicial behavior.'[17]

Considering the importance of academic writings in providing both technical and legal information, arguments, and opinions that are pertinent to the environmental judicial decisions[18] and with the growing development of academic research and writing on environmental issues,[19] this chapter finds that not much adherence has been given to legal scholarship, particularly in the global South in judicial orders and decisions resulting in a clear disjunction between the academics and practitioners. This chapter, while acknowledging that there are differences of purpose, perspective, and methodology between judicial reasoning and legal scholarship[20] argues that such gaps between the academics and practitioners are required to be bridged in order to ensure environmental justice. It is suggested through data analysis and literature review that judges need to place their judgments in a wider legal context and the best way they can do it is by referring to the work of academics.[21]

Discussion in this paper is divided into *three parts*. The *first part* briefly explains the research methodology adopted and applied in collecting data. A brief description is also included to describe the three different stages of the research and the challenges involved in the study.

The *second part* starts with exploration and analysis of data showing the perspectives of the interviewees regarding the roles of the judiciaries of the selected jurisdictions. Considering the views of practitioners and academics, this part demonstrates that neither

[16] Lawrence Baum, *The Puzzle of Judicial Behavior* (University of Michigan Press 1997).
[17] Jeffrey J. Rachlinkski and Andrew J. Wistrich, 'Judging the Judiciary by the Numbers: Empirical Research on Judges' (2017) 13 Annual Review of Law and Social Science 203.
[18] Michel Bastarache, 'The Role of Academics and Legal Theory in Judicial Decision-Making' (1999) 37(3) Alberta Law Review 739.
[19] Philippe Cullet (ed), *Research Handbook on Law, Environment and the Global South* (Edward Elgar 2019).
[20] Robert French, 'Dialogue of the Hard of Hearing' (2013) 87 Australian Law Journal 96.
[21] Lord Burrows, 'Judgment-Writing: A Personal Perspective' (Annual Conference of Judges of the Superior Courts in Ireland, May 2021) <https://www.supremecourt.uk/docs/judgment-writing-a-personal-perspective-lord-burrows.pdf> accessed 25 October 2021.

the activist role of the South Asian judiciaries nor the restrained role of the Irish judiciary has met the expectation of the practitioners or the academics.

The *third part* includes data showing inadequate development of environmental jurisprudence and the impact of colonialism particularly in the two South Asian countries. Collected data also shows the decolonized trend followed in Ireland. In this part an exploration of the gaps and divergences between the academics and the practitioners is followed by data showing the expectations of academics from the practitioners and vice versa. Certain recommendations arising from the analyzed data to bridge the gaps between academics and practitioners and to develop better methods and fora to overcome environmental challenges are also discussed here.

Part I

1. Research Method

Qualitative semi-structured interviews (total thirty-two, twelve academics and twenty practitioners, from the selected jurisdictions) have been used to build a picture of how the academics and practitioners view the role of the courts in environmental protection. However, it can only provide a limited picture of the overall complexity of the view regarding the roles of the courts which may vary from jurisdiction to jurisdiction, and from profession to profession. There is also the risk of error in the empirical research itself or in its analysis. This possibility was reduced by reflection on the data gained from interviews, and reliance on the existing literature from the social sciences on the proper analysis of data.

1.1. Integrating Fieldwork

There are three stages that the research went through: *first*, a wide-ranging literature review and examination of judicial decisions of the selected jurisdictions to see the role of the selected judiciaries in matters of environmental protection. It explored case studies to find out the gaps and missing links to the full and effective achievement of environmental justice. The essential enquiry that drove this review was 'how the courts are intervening in various environmental issues and what are the implications of those?' This raised issues regarding the overuse of judicial powers by the courts violating the constitutional mandates, unwillingness of other organs in protecting the environment, lack of adequate legal texts protecting the environment, lack of coordination among the state organs and institutions, and among practitioners and academics. The existing literature focused on these questions made it increasingly obvious that answering the questions raised in a satisfactory fashion would require empirical research.

In the *second* phase, the focus was on contacting prospective interviewees. Professional contacts were used to make contact with practitioners and academics from India, Ireland, and Bangladesh. Several academic conferences were attended to identify and meet

academics and practitioners working in the field of environment. In addition to the formal interviews, time was spent visiting law schools and courts in the selected jurisdictions. Through the help of my supervisor, a number of practitioners from Ireland including retired judges and environmental and constitutional practitioners were contacted.

The *third* phase was a detailed analysis of the data collected through thirty-two interviews.

1.2. Choosing Settings and Contexts

The empirical component of the research that underpins this thesis is semi-structured interviews[22] with judges, lawyers, activists, and academics representing different jurisdictions and organizations. No particular individual is identified, as the interviews were conducted with a guarantee of anonymity, and some identifying details are omitted in the extracts used. Where extracts are used or references are made, the interviewees are referred to by a code such as 'AC04', which means 'interview with academic or researcher, number 4', or 'PT10', which means 'interview with a practitioner, number 10'.

Efforts were made to access a representative range of lawyers, academics, and judges from the selected jurisdictions. A total of 32 interviews were conducted. It is difficult to know what number of interviews is sufficient for a project of this kind[23] but 32 seems to be a reasonable number for a study involving such groups. The academics interviewed from each jurisdiction were selected based on their expertise in the research areas which include environmental law, environmental justice, development, social science, constitutional law and governance etc. The practitioners were selected from each of the jurisdictions based on their expertise in environmental matters.

Ethical approval was obtained from the NUI Galway Research Ethics Committee after satisfying the Committee that adequate measures would be in place to maintain the

[22] The interviews included questions related to the concern and role of the judicial organ in environmental protection, expected and actual contribution of judges, lawyers, academics, and stakeholders in ensuring environmental justice, environmental and climate litigation, judicial decision making, influence and use of legal scholarships in judicial decisions, the implication of socio-political-legal culture, recommendations regarding the better implementation of judicial decisions in environmental cases, and separation of powers.
[23] Sarah Elsie Baker and Rosalind Edwards, 'How Many Qualitative Interviews is Enough?' (2012) <http://eprints.ncrm.ac.uk/2273/4/how many interviews.pdf?> accessed 15 October 2021.

confidentiality and anonymity of the participants. The application directly addressed the fact that the interviewees would include judges and included measures to meet the particular needs of this specialised group of experts. All interviews were conducted on the basis of fully informed consent, confirmed in advance by the provision of a short description of the study together with a consent form to be signed by the interviewee.

The interviews were semi-structured, proceeding from a set of questions. Based on the research questions, a set of initial research questions and a template for semi-structured interviews were developed. The interview questions are listed in Appendix 1. In most cases, I preferred not to provide the questionnaire in advance to avoid any premeditated answers from the interviewees. However, in some cases (particularly during the interviews with judges) I had to provide the questionnaire in advance to demonstrate that I was not going to ask any question which would compromise the judicial sanctity and to prove that my research proposal meets the terms of engagement. However, in most cases, the set of questionnaires (except the interviews with the sitting judges) was supplemented by more probing (and unprovided) questions which were raised as seemed appropriate during the discussion. All the interviews began with simple issues,[24] to help settle the interview process.[25] However, with the progress of the interview more complex issues were raised. Care was taken throughout the interview to allow the participants to express their personal views and understandings openly. This allowed space for both the interviewer and interviewee to explore issues at length as necessary, rather than constraining the discussion to predetermined categories and questions.

Conducting these types of elite interviews raises its own challenges.[26] All the interviewees are busy professionals and I had to travel to meet them to avoid any ethical implications. However, as a result of travel restrictions imposed due to the Covid-19 pandemic, I also had to postpone certain visits and eventually, some of the interviews were conducted online either using Zoom, Google Meet, or Microsoft Teams. Fortunately, all the interviewees were very supportive, encouraging, and were open in terms of expressing their views based on their experiences. It seemed that all the interviewees enjoyed

[24] Michael McConville and Wing Hong Chui, *Research Methods for Law* (Edinburgh University Press 2007) 76.
[25] Beth L Leech, 'Asking Questions: Techniques for Semistructured Interviews' (2002) 35(4) PS: Political Science and Politics 665.
[26] Joel D Aberbach and Bert A Rockman, 'Conducting and Coding Elite Interviews' (2002) 35(4) PS: Political Science and Politics 673.

sharing their experiences and views about the topic of discussion. All were very generous with their time, and there were few of the problems that can be encountered in this type of fieldwork.[27]

The purposes of interview analysis were *first,* to find the views of the practitioners and the academics regarding the roles of the courts in environmental issues; *second*, to acquire deeper knowledge about the views of the academics and the practitioners about their roles and expectations from the stakeholders; and *third*, to identify and develop methods which would help judges to encounter the challenges in dealing with critical environmental problems which could be used as the basis for further doctrinal and empirical research.

1.3. Ensuring Quality

Qualitative research is an umbrella term. According to Paton, there are sixteen theoretical traditions.[28] According to Creswell, there are five approaches including narrative research, phenomenology, grounded theory, ethnography, and case study.[29] Thus, it is difficult to reach a conclusion 'as to how to classify the baffling numbers of choices or approaches to qualitative research.'[30]

This research, although does not fully follow grounded theory (GT),[31] applies the constant comparative method of data analysis because it can be used 'whether or not the researcher is building a grounded theory.'[32] GT, originally developed by Glaser and Strauss, argues for the literature review to be conducted at the very end of data analysis to keep the researcher free and open to discover and to avoid contamination of any new idea with pre-existing concepts.[33] This research follows Thornberg's alternative of informed grounded theory[34] because the literature review was mostly done before

[27] Jeffrey M Berry, 'Validity and Reliability Issues in Elite Interviewing' (2002) 35(4) PS: Political Science and Politics 679.
[28] Michael Quinn Patton, *Qualitative Research and Evaluation Methods* (Sage 2015).
[29] John W. Creswell, *Qualitative Inquiry & Research Design* (Sage 2013).
[30] Merriam and Tisdell (n 15) 201.
[31] In grounded theory 'theory development does not come "off the shelf," but rather is generated or "grounded" in data from participants'. John W Creswell, *Qualitative Inquiry and Research Design: Choosing Among Five Approaches* (Sage 2007) 63.
[32] Merriam and Tisdell (n 15) 32.
[33] Barney G. Glaser and Anselm L Strauss, *The Discovery of Grounded Theory: Strategies for Qualitative Research* (Aldine 1967).
[34] 'Informed grounded theory [which] refers to a product of a research process as well as to the research process itself, in which both the process and the product have been thoroughly grounded in data by GT methods while being informed by existing research

commencing empirical research. The reasons behind adopting informed grounded theory was that the literature review helped to developed theoretical understanding[35] and also imposed a certain shape on the discussions which ensued through the semi-structured questions.

literature and theoretical frameworks.' Robert Thornberg, 'Informed Grounded Theory' (2012) 56(3) Scandinavian Journal of Educational Research 243.

[35] Catherina Bruce, 'Questions Arising about Emergence, Data Collection, and Its Interaction with Analysis in a Grounded Theory Study' (2007) 6 International Journal of Qualitative Methods 51.

Part II

2. Views of Academics and Practitioners on the Role of the Courts

The data collected and analyzed shows that:

i. The views of the majority of the academics and practitioners regarding the role of the courts in environmental protection are similar irrespective of their geographic location and the socio-economic-political differences between the selected jurisdictions;
ii. The perspectives of the interviewees are relatively opposite to the roles of their respective national courts and;
iii. A majority of the interviewees preferred a court that follows constitutional mandates, bases their judgments on technical lawyerly grounds, sound reasoning, and academic writing rather than a court that is reactionary or too activist, or too restrained in its approach.

First, it appears that ten out of the twelve academics and ten out of the twenty practitioners participating in the qualitative research prefer a judiciary that follows a more conventional route rather than an activist judiciary. Even among the ten practitioners who have stated that they would like to see an active judiciary in environmental matters, the six practitioners from Ireland preferred the court to strike a balance between activism and reaction and asked for consistency in following the constitutional notions. In the language of one of the Irish practitioners:

> *I think it's important that the courts should be willing to engage with new developments wherever they come and not be afraid of the consequences of an activist interpretation of the Constitution. I suppose the Supreme Court should act in a balanced way because it should not get too far ahead of the people or lose legitimacy. I think also if you're too far behind the people you can lose your legitimacy as well. There is a balance to be struck between activism and reaction.* (PT18)

Among the ten practitioners who preferred a more conventional role by the courts, nine are from the east and only one is from the west (Ireland). The nine practitioners from the east have stated that there are problems in the over-interventionist role of the courts. They have also mentioned that such a role by the court leads to aberration as eventually policy is something which cannot orderly be made in courts. In the language of one practitioner from Bangladesh:

> *Actually, it seems very unfair to me that the Court has become so much pro-environment in its approach and sometimes ignores the probable legitimate right of the other side. In several cases, I witnessed that the respondents (the alleged polluter) were not even allowed to place their case before the court and were criticized for coming with such matters. The judges have taken the view that they must play the leading role.* (PT07)

The majority of the academics (ten) expressed a view similar to the views expressed by the practitioners supporting a conventional role by the courts. In the language of one academic from India:

> *Courts must ensure that they make the rights meaningful and effective. Passing a judgment or propagating that I am an environmentalist is not enough. When the Supreme Court steps in to see how the environment is protected that is a problem. Because if it goes wrong we do not have a remedy.* (AC04)

The above positions of the academics who have been researching and writing on environmental law and practitioners who have been leading various environmental cases before their respective country courts show that they are relatively skeptical about the role of the activist courts in environmental protection. A review of legal scholarship also shows that by adopting an activist role in environmental matters the courts have not only

deviated from the usual adjudication function of the court[36] but also has encroached into the domain of other organs,[37] and violated constitutional balance of powers.[38]

Second, only four out of the thirteen practitioners from the east have stated that they prefer an activist judiciary. All these four practitioners are from Bangladesh, which means that none of the practitioners participating in the interviews from India expressed a view supporting the activist role of the courts in protecting the environment. This is clearly opposite to the role of the activist judiciary in India.[39]

As mentioned above, six out of the seven practitioners from Ireland are in favor of a proactive role of the courts in environmental matters. There is also literature by leading Irish scholars supporting an active role by the judiciary.[40] It is important to note that the Irish judiciary has shifted its role, from an activist in the 1960s and 1970s to a more restrained one in the last two decades[41] and 'the tide of judicial lawmaking has somewhat receded in recent years in Ireland.'[42]

It is interesting to see the view expressed by an Irish judge who preferred to follow a restrained role in his judgments:

> *In individual cases, depending on the facts judges are able to give decisions that could be regarded as friendly to the environment. Obviously, common law has*

[36] Sahu (n 5).
[37] Shubhankar Dam and Vivek Tewary, 'Polluting Environment, Polluting Constitution: Is a "Polluted" Constitution Worse Than a Polluted Environment?' (2005) 17 (3) Journal of Environmental Law 383.
[38] Shubhankar Dam, 'Lawmaking beyond Lawmakers: Understanding the Little Right and the Great Wrong (Analyzing the Legitimacy of the Nature of Judicial Lawmaking in India's Constitutional Dynamic)' (2005) 13 Tulane Journal of International and Comparative law 109); Videh Upadhyay, 'Changing Judicial Power: Courts on Infrastructure Projects and Environment' (2000) 35(43/44) Economic and Political Weekly 3789; Kapil Dev Sood, 'Strengthening the Rule of Law by the Supreme Court' in Lalit Bhasin (ed), *The Constitution of India: Celebrating and Calibrating 70 Years* (Law & Justice Publishing 2020) 199.
[39] In *TN Godavarman Thirwnulkpad v Union of India* [1997] AIR 1223 (SC) a thirty-point guideline was handed down by the Court. In that case, taking the role of the executive, the Court also appointed a high-powered committee to oversee the strict and faithful implementation of the orders of the Court. Armin Rosencranz and Sharachchandra Lélé, 'Supreme Court and India's Forests' (2008) 43(5) Economic and Political Weekly 11; In *M.C. Mehta v Union of India* [1998] 6 SCC 63, directions by the Court were ordered to restrict plying of commercial vehicles, including fifteen-year-old taxis, and restriction on plying of goods vehicles during the daytime. Orders to convert a city bus fleet in New Delhi to CNG were also made in that case. Armin Rosencranz and Michael Jackson, 'The Delhi Pollution Case: The Supreme Court of India and the Limits of Judicial Power' (2003) 28 Columbia Journal of Environmental Law 223.
[40] Fiona de Londras, 'In Defence of Judicial Innovation and Constitutional Evolution' in Laura Cahillane, James Gallan and Tom Hickey (eds), *Judges, Politics and the Irish Constitution* (Manchester University Press 2017) 9; Maria Cahill and Sean Ó Conaill, 'Judicial Restraint Can Also Undermine Constitutional Principles: An Irish Caution' (2017) University of Queensland Law Journal 259; Emma Keane, 'Judicial "Discovery" of Unenumerated Rights' (2010) 28 Irish Law Times (ns) 177.
[41] Desmond M. Clarke, 'Ireland: A Republican Democracy, A Theocracy, or A Judicial Oligarchy?' (2012) 30 Irish Law Times (ns) 1; Tom Hickey, 'Revisiting Ryan v Lennon to Make the Case Against Judicial Supremacy (and for a New Model of Constitutionalism in Ireland)' (2015) 53(1) The Irish Jurist (ns) 125; David Gywnn Morgan, *A Judgement Too Far: Judicial Activism and The Constitution* (Cork University Press 2001); William Binchy, 'The Supreme Court of Ireland' in Brice Dickson (ed), *Judicial Activism in Common Law Supreme Courts* (Oxford University Press 2007) 169.; Eoin Daly (n 3).
[42] Ronan Keane, 'Judges as Lawmakers: The Irish Experience' (2004) 4(2) Irish Judicial Studies Institute Journal 1.

> *been developed by judges and not by the parliament and it is also possible in environmental matters.* (PT20)

Third, ten out of the twelve academics from the east have criticized the courts of the South Asian countries for their activist role and for thinking far away from the reality of life. These ten academics preferred to use the term 'proactive' rather than activist judiciary. They have also assigned reason for their standing by mentioning that being proactive is better than being reactive or over-active. One academic has stated that even the most active judge will not say that he or she is doing activism. In her language:

> *Judiciaries should not be very conservative in their approach. When I talk from a developing country perspective, I would say a proactive judiciary is very helpful. I am not saying that the judiciary has to perform the functions of the other organs of the state but I mean to say that the judiciary should find innovative means within the system to bring a change.* (AC01)

The views shared by six Irish practitioners show that they would like to see a proactive court for environmental protection which places its judgments in a wider legal context and based on technical lawyerly grounds following the constitutional parameters. One practitioner from Ireland has rationalized her standing in favor of a proactive judiciary because she thinks that this can increase public awareness regarding environmental matters. In her words:

> *I really encourage climate litigation and the role of the courts. And to be honest, even if it's not successful, I think it has a role in increasing public awareness and placing pressures on our governments to do things about it.* (PT14)

Based on the collected data this part argues that the expectations from the courts are not adequately met because neither the academics nor the practitioners support the idea of an activist judiciary or the meek administration of justice. There appears to be a gap between the courts and the perspective and expectations of the stakeholders related to justice delivery system.

Sixteen practitioners (representing both east and west) have suggested that although the courts can play a big role in environmental protection there are other stakeholders also and it must be a joint effort to make it successful. Ten academics have expressed the same view that the courts alone cannot cause social transformation, but it can lead the transformation where others can join.

The gaps between the perspectives of the academics and the practitioners with the actual roles of the courts in the selected jurisdictions are explored in more detail in the following part which shows that such gaps are resulting in a lack of development of environmental jurisprudence and requires to be bridged to develop a robust environmental jurisprudence.

Part III

3. Impacts of Gaps between Academics and Practitioners

This part explores the data showing how the divergences identified in part II between academics and practitioners are impacting judicial decision-making and how the gaps can be bridged based on the learnings and experiences of the environmental academics and practitioners. The analyzed data shows that interviewees believe that the major reasons behind the inadequate development of environmental jurisprudence particularly in the two South Asian countries are colonialism, lack of sensitivity, and the dearth of collaboration between academics and practitioners. Revealing the gaps and divergences between academics and practitioners (particularly judges) certain recommendations are made in this part to bridge the gaps between academics and practitioners.

3.1. Inadequate Development of Environmental Jurisprudence

According to ten academics, environmental cases were not progressively built on jurisprudence robust or adequate enough to influence post facto actions. Using the example of the Indian and Bangladeshi judiciaries, these academics stated that certain decisions from the courts have been very good but those have not built jurisprudence such as the absolute liability principle has not been applied elsewhere.[43] Five academics commented that although it was a right move by the courts to identify the right to the environment the decisions do not have a sound jurisprudential basis.

Lack of consistency in decision making[44] and applying international legal principles have been identified as an outcome of lack of jurisprudential development by one academic. She (AC02) said that the principle of sustainable development has been interpreted to achieve a balance between environmental protection and economic development but in

[43] Although environmental principles such as sustainable development, polluter pays and precautionary principles have been recognized in India but there is inconsistency in their application. Nupur Chowdhury, 'Constitutionally Shackled: The Story of Environmental Jurisprudence in India' in Michelle Lim (ed), *Charting Environmental Law Futures in the Anthropocene* (Springer 2019) 159.

[44] Although otherwise active in protecting the environment, the Supreme Court of India in *ND Jayal and Another v Union of India and Ors* [2004] SCC 9, even on the face of obvious non-compliance regarding environmental impact assessment, preferred to focus on the economic gains from the projects. Nupur Chowdhury, 'Sustainable Development as Environmental Justice: Exploring Judicial Discourse in India' (2016) 26 & 27 Economic & Political Weekly 84.

India, every development project has been regularized by saying that India is a developing country. In the language of another environmental academic:

> *It would have been better to pay more attention to statutory evaluations because India has got a very robust statutory framework such as the Air Pollution Act, Water Pollution Act, Wildlife Protection Act, Environmental Protection Act. Instead of looking at the statutory remedies, the Indian Courts have expanded Article 21 of the Indian Constitution to include the right to environment. This reads very well but is ineffective on the ground. There has been a regularization of irregularity mode kind of jurisprudence.* (AC05)

This statement is supported by writings of leading environmental academics stating that innovative constitutional remedies provided by the apex courts in environmental cases are an impediment in the development of other statutory remedies. [45]

The application of the polluter pays principle by the Indian Supreme Court in the *Godavarman Case*[46] was used as an example by one academic to criticize the role of the Court in not understanding the consequence of such decisions. As per the Supreme Court decision, if anyone wants to use the forest for non-forest purposes, they have to pay money. The eventual result was that non-forest use has been permitted in exchange for the payment of money. Although a lot of money has been collected, it has regularized irregularities. It appears from an analysis of the collected data that five academics think that such a situation could have been avoided if there was coordination between academics and courts or at least if courts would have taken expert advice from legal scholars.

The observations of the academics regarding the insufficient development of environmental jurisprudence in the South Asian countries get support from the statements of thirteen practitioners (including sitting and retired judges). The view of the practitioners is that in most environmental cases judges deal on a piecemeal basis and does not always consider the overall picture. A critical examination of the role of the Indian

[45] Chowdhury (n 43).
[46] *T. N. Godavarman v Union of India* [1997] AIR 1228 (SC).

Supreme Court in the *Delhi Pollution Case,*[47] shows that the solutions developed by the Court were at best short-term.'[48] According to one practitioner:

> *Judges do not have enough time to get in-depth knowledge and understanding because of case load. There is not enough concerted effort to understand and get to the problem and understand the field context. Most of the lawyers arguing in environmental cases also do not have the contextual knowledge. The view of the lawyers is that from the judgments it appears that the court does not always have the whole picture in mind.* (PT05)

However, eight practitioners and all the academics said that judges cannot be blamed exclusively. They see limitations in the roles of judges because judges normally decide the case when the case is brought before the court. They put more responsibility on the lawyers as they are the ones who can bring environmental issues before the courts. In this regard, one academic (AC08) from India believes that taking every issue to the court is a big problem as the court is not equipped to handle every issue. She referred the *Delhi Pollution case*[49] where the Supreme Court of India has asked to set up smog towers[50] and mentioned it might happen that millions will be invested to set up something which has no scientific basis.

The tendency of bringing every possible issue to the courts has been criticized by one practitioner from the east by stating that:

> *It shows that we are not mature as a democracy. We couldn't sufficiently institutionalize rule of law and constitutionalism in our democracy. That's why we have to go to court for the enforcement of our rights even if it is too little.* (PT07)

[47] *M.C. Mehta v Union of India* [1998] 6 SCC 63.
[48] Lord Carnwath, 'Judges and the Common Laws of the Environment—At Home and Abroad' (2014) 26 Journal of Environmental Law 177.
[49] *M.C. Mehta v Union of India* [1998] 6 SCC 63.
[50] Shivam Patel, 'The Supreme Court Has Brought "Smog Towers" Back in the News. What Are They?' *The Indian Express* (India, 31 July 2020).

One practitioner from Ireland who thinks that the courts should not be activist but should play a proactive role in protecting the environment has expressed his position in the following language:

> *There are issues that cannot be imposed by the courts. I think there is a limit to how the judiciary can bring changes because obviously they're not elected or are politicians. Policy formulation is not their area. But I think they must ensure that fundamental rights are upheld. That's their job.* (PT13)

It appears from the analyzed data that the issue of inadequate development of environmental jurisprudence has been identified and criticized as a major problem by the participants. This leads to the following discussion where the gaps and divergences between the academics and practitioners will be discussed to inform each of the groups of the expectation of the other. This chapter argues that such an attempt might help to bridge the gaps between academics and practitioners. However, the discussion acknowledges the point made by Richard A. Posner.[51]

3.2. Disjunction between Theory and Practice

Whereas the above discussion shows inadequate development in environmental jurisprudence, the following discussion explores the data showing more clear disjunctions between the two groups. Since a literature review[52] also shows that the disjunction between academics and practitioners is not unique only in environmental matters or in the global South, an attempt made based on analyzed data to spell out the expectations of the academics from the practitioners and vice versa in order to build up a better environmental justice system is also relevant for other legal areas.

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[51] 'Academics like to tell the judiciary that it should be more restrained or more freewheeling - more deferential to other branches of government or less so; that it should cling to the 'original meaning' of the Constitution or adopt the concept of a 'living,' evolving, Constitution; that it should be left activist or right activist, Brennan activist or Roberts activist. The judges have their own, strongly held views on such matters. They do not want their job description written by law professors.' Richard A. Posner, 'The Judiciary and the Academy: A Fraught Relationship' (2010) 29 University of Queensland Law Journal 13.

[52] Harry T. Edwards, 'The Growing Disjunction between Legal Education and the Legal Profession' (1992) 91 Michigan Law Review 34; Judith S. Kaye, 'One Judge's View of Academic Law Review Writing' (1989) 39 Journal of Legal Education 313; Posner (n 51).

The data collected through qualitative research shows that all the twelve academics find it difficult to see the reflection of their works in judicial decisions. They consider it as a failure of both judges and lawyers for not being able to consider relevant academic writings. One academic from India has criticized judges for their uninformed colonial attitude towards legal scholarship. In her language:

> *The problem in developing countries which is different from the developed world is that judges do not give importance to the local academics. There is a colonial tendency to give preference to Western scholars by judges. The Indian judges are reluctant to quote the judgments of Pakistan, Bangladesh, or Sri Lanka. This is very conservative on the part of the judges.* (AC04)

However, the trend of following the colonial legacy is not only prevalent in court practices[53] but also in drafting legislation and law making process.[54]

Collected data shows that Ireland has taken a somewhat different route in terms of following English law, compared to the South Asian countries. The decolonization trend followed by the Irish judiciary can be experienced from the statement of another Irish practitioner:

> *In my early years as a barrister Ireland had only been an independent country for thirty years. We also inherited the common law system like India. The number of Irish cases at that time was very few. Irish judges those days have been brought up with English law. When they were deciding cases they would only apply the English Law. But that started to change and a number of judges started asking for Irish case references in lieu of English court decisions. If we say no, the judges even ask to find one. Although the law schools played a very conservative role in*

[53] The judges of the Supreme Court of India appear to be more in favor of the relics of Colonial past 'My Lord' and 'Your Lordship'. It was reported that the then Chief Justice of India S A Bobde objected to a petitioner addressing judges as 'Your Honour" mentioning that 'when you call us Your Honour, you either have the Supreme Court of United States or the Magistrate in mind. We are neither.' 'Explained: In CJI's Objection to 'Your Honour', A Renewed Debate on Court Etiquette' *The Indian Express* (India, 4 March 2021). Ireland has ended the British practice of addressing judges as 'my lord' or 'your lordship' following a decision of the Superior Courts Rules Committee in 2006. In Ireland judges of the Supreme Court and the High Court are addressed simply as 'Judge'. Carol Coulter, 'Manner of Addressing Judges in Court to Change' *The Irish Times* (Dublin, 10 April 2006).

[54] Arpeeta Shams Mizan, 'Continuing the Colonial Legacy in the Legislative Drafting in Bangladesh: Impact on the Legal Consciousness and the Rule of Law and Human Rights' (2017) 5(1) International Journal of Legislative Drafting and Law Reform 10.

> *the early days in using only English textbooks. Lately, things started to change and more and more Irish textbooks began to appear. That eventually impacted the Irish Courts. Now it is being taken for granted that when there is any case, the judges will expect Irish case references and references from Irish textbooks. They would definitely be interested to know what is happening in England but that is the second thing. This has totally changed from the early days.* (PT20)

Based on the Irish experience, this chapter argues that the judges of the South Asian countries should break away from colonial legal thinking as this will help them to avoid the trend of deferring the deciding powers to the executive.

The individualistic approach[55] of judges has been criticized by all the academics and fifteen practitioners (except the judges involved in the study).

The collected data shows that all the academics and twelve practitioners have criticized the role of the lawyers. According to one practitioner although lawyers have a huge role in ensuring environmental justice they could not influence the way they are supposed to do because there is an absence of a body of lawyers who are specially trained in this field.

On the other hand, fifteen practitioners (representing the selected jurisdictions) have stated that the academics are far away from the practical world and criticized the academics for not being able to contribute significantly to judicial decisions. In the language of one practitioner:

> *The problem with academics is that the academics are teaching theory without understanding the practice. Practice should be a part of teaching theory. Unless the problems in practice are integrated with theory, theory can also not be taught properly.* (PT01)

[55] Judicial activism by the Irish judiciary seems to be more dependent on individual judge's receptiveness and personal characteristics as is evident from the regime of Cearbhall Ó Dálaigh CJ well complimented by Brian Walsh J. Morgan, *A Judgment Too Far?* (n 41).

As mentioned earlier the disjunction between academics and practitioners is not new.[56] It was reported in May 2011 that John G. Roberts, Jr., Chief Justice, Supreme Court of the United States has stated, 'What the academy is doing, as far as I can tell . . . is largely of no use or interest to people who actually practice law.'[57]

Environmental problems being multifaceted,[58] this chapter argues that the gaps between academics and practitioners need to be bridged. This chapter, therefore, attempts to summarize data showing the expectations of the academics from the practitioners and vice versa and includes certain recommendations.

3.3. The Expectation of the Academics from the Practitioners and Vice Versa

Although there are divergences between academics and practitioners, these two groups are important to each other. Legal scholars share their discourse with judges and there are judges who are also willing to cite scholarly articles in support of positions they have already decided to adopt.[59] Considering the gaps between the academics and practitioners and bearing in mind the importance to bridge the gaps, the collected data has been analyzed to find out the suggestions made by the participants which would help to bridge the gaps between the two groups. The suggestions include: i. Sensitization of judges, lawyers, court staff, and academics, ii. Responsibility of lawyers to make a good case, iii. Publishing more for judges, and iv. Increased use of comparative jurisprudence.

3.3.1. Environmental Sensitization

It is expected by not only all the academics involved in the study but also by a dozen practitioners that judges, lawyers, and court staff should be more sensitive regarding environmental issues. The absence of environmentally literate and sensitive judges has made environment courts in Bangladesh non-functional.[60] It was stated by six practitioners (including four judges) that all judges should be made environmentally

[56] 'At the same time that legal scholarship has become more specialized, the judiciary has become more professionalized, and this has further operated to drive the two branches of the legal profession apart' Posner (n 51).
[57] Adam Liptak, 'Keep Those Briefs Brief, Literary Justices Advise' *New York Times* (New York, 21 May 2011)
[58] Elizabeth Fisher, 'Environmental Law as "Hot" Law' (2013) 25(3) Journal of Environmental Law 347.
[59] Edward L. Rubin, 'The Practice and Discourse of Legal Scholarship' (1988) 86 Michigan Law Review 1.
[60] Masrur Salekin, 'Collaborative Environmental Governance: The Role of the Law Commission Bangladesh' (2021) Special Edition Law Commission Bangladesh 126.

sensitive as it is not sure who will be appointed in the environmental courts or tribunals. According to one practitioner:

> *I think a yearly short training is needed for judges to make them conscious about the environment and this has to be a continuous process. The Bar Council can take this agenda for the new lawyers like they have to take part in a hundred hours training which should be continued. In that way, both judges and lawyers can play a significant role in environmental matters.* (PT03)

According to another practitioner (PT01), since there is a lack of mainstream attempt to train judges and lawyers on environmental law and policy, a national center for environmental law and policy is very much required.

One academic (AC06) suggested that not only do judges have to be equipped but also the bench officers and lawyers appearing before the court have to be equipped as well. Another academic thinks that there needs to be sensitivity about environmental protection amongst academics because there might be academics who are teaching environmental law without being sensitive to the subject. In her words:

> *Sensitization takes place at two levels; one within own self (how sensitive you are) and secondly, sensitizing the present generation which then they can impart their values to the future generations. From an academic perspective, the contents of writings are very important because through writing they can influence others' actions.* (AC01)

3.3.2. Lawyers Should Make a Good Case

Eight academics and six practitioners (particularly judges) stated that lawyers have the responsibility to make a good case before the court. One academic (AC03) stated that in environmental cases, lawyers have to work doubly hard to make sure that the pleading is extensive and supported by adequate evidence. She further added that lawyers have an important role in terms of hand-holding their clients. Clients in environmental cases are very passionate. The clients might know a lot about the alleged issue but they might not be able to channel that into a legal argument.

One academic (AC02) stated that after the Bhopal incident the courts in India became very active on environmental issues and that had happened because of some spirited lawyers. Lawyers have facilitated other activists to go to the court and seek court's intervention in environmental matters. It is expected by another academic (AC07) that environmental lawyers need to understand in environmental cases that these are not only environmental issues but also social issues.

3.3.3. Legal Scholarship for Judges

Five academics stated that India has a number of environmental academics who are working and writing on environmental issues but environmental academics' works have not been recognized by the courts to a great extent. Four academics from Bangladesh also stated that the general trend is that the courts are very reluctant to use legal scholarships although the courts in Bangladesh relied heavily on precedents from India. It appears from interviews with Irish practitioners that in several cases the Irish judges have quoted Irish precedents and also, legal writing of scholars although the tendency to refer to comparative jurisprudence is very low. This thesis, therefore, argues that more initiatives should be taken by legal scholars to publish more on environmental issues and practitioners should increasingly consult environmental legal scholarship.

3.3.4. Use of Comparative Jurisprudence

All the twelve academics stressed the need for using legal scholarship and precedents both from domestic and comparative jurisdictions. Five academics from India stated that there have been important developments in other South Asian countries but the Indian courts have been reluctant to take cognizance of the development. According to them, considering the fact that the other countries of the Indian sub-continent have almost similar climatic issues, it would be very relevant to quote the writings from those countries. Three practitioners from Ireland stressed that although the Irish judiciary has always been

reluctant to use comparative jurisprudence[61] to tackle complex environmental problems, judges should do so. One academic has cautioned that use of comparative jurisprudence should be between the comparable.

3.4. Suggestions for Developing a Robust Environmental Jurisprudence

To develop a robust environmental jurisprudence and for ensuring environmental justice twenty-two interviewees have suggested establishing a specialized environmental court and twenty-six interviewees have opined to have a collaborative approach among the organs of the state. Collaboration between academics and practitioners and between academics of the east and the west has been suggested as a means to develop a robust environmental jurisprudence.

3.4.1. Establishing Specialized Environmental Court or Tribunal

Establishing a specialized environmental tribunal has been suggested by ten academics and twelve practitioners not only as a means to better protect the environment but also to ensure better access to justice, public participation, stakeholder involvement, and expert consultation. According to one practitioner:

> *Many of the issues resolved by the courts should not have gone to court. The court is not equipped to deal with many of those issues. Perhaps a compromise solution is to go to a tribunal kind of a forum that has expert members and has more time to deal with the issue.* (PT03)

The success of the NGT[62] has been referred by the participants while suggesting establishing a stronger institution in the form of a specialized environmental tribunal. The composition of NGT benches consisting of judicial members and expert members has been praised in the following language by one academic:

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[61] Binchy (n 41).

[62] The National Green Tribunal (the NGT) of India established under the National Tribunal Act 2010 has been described as one of the fully functional environmental tribunals with comprehensive jurisdiction. Gitanjali Nain Gill, *Environmental Justice in India: The National Green Tribunal* (Routledge 2017) 209.

> *Judges sitting on the bench of the NGT are very clear. There is common sense regarding protecting the environment. The NGT judges are not against development. They are more in support of sustainable development. The principle of collegiality works very well. The benefit NGT has currently is the existence of the experts sitting along with the judges. It has reduced the dependency on outside committees. The experts are sitting with the judges to decide the matters.* (AC05)

According to one practitioner:

> *NGT is a better forum since it has the space, time, and has the framework to get to the root of the case and give a solution.* (PT01)

The expert members better understand the complex environmental issues and also have specialist knowledge on environmental matters which judges and lawyers lack.[63] A forum such as the NGT can increase the possibility of research sharing between the practitioners and the academics and can be successful in ensuring public participation through stakeholder consultation procedure.[64]

In addition to the interviewees from India, a total of eight participants from Bangladesh and five practitioners from Ireland also think that the NGT model can be used in other countries like Bangladesh or Ireland to improve the quality of environmental decision-making.[65] In the language of one interviewee from Ireland:

> *I think the NGT model is an effective model to move it along with its limitations. It is capable of doing great good. It has far-reaching powers. In a sense, it's not restricted by the confines of conventional laws or legal procedures in there for its*

[63] Gill, *Environmental Justice in India* (n 62) 148.
[64] The NGT is equipped to deal with environmental disputes involving multi-disciplinary issues and can offer greater plurality for environmental justice. Gitanjali Nain Gill, 'Environmental Justice in India: The National Green Tribunal and Expert Members, Transnational Environmental Law' (2016) 5(1) 175.
[65] It is relevant to note here that among the selected jurisdictions, only India has a fully functional environmental tribunal. Although Bangladesh established an environmental court (EC) in 2000 it has not been successful. Ireland is yet to establish a specialized environmental court. George Pring and Catherine Pring, *Environmental Courts & Tribunals: A Guide for Policy Makers* (UN Environment Programme, 2016) 1. In the Programme for the Irish Government 2020, a commitment has been made regarding establishing a dedicated Planning and Environmental Law List as a separate division of the High Court. Programme for Government: Our Shared Future <https://www.gov.ie/en/publication/7e05d-programme-for-government-our-shared-future/> accessed 10 August 2021. In early 2023, a new division of the High Court is to be established to deal with planning and environmental issues. Harry McGee, 'New Court to Deal with Planning Issues to be Established' *The Irish Times* (Dublin, 28 April 2022).

> *powers are untrammeled to a great extent. The NGT model is something that can be taken to other countries effectively.* (PT10)

In light of the suggestion made by the participants and considering the importance of a strong and independent institution to protect the environment this thesis examines the features of the NGT in chapter six to see whether the NGT has been able to ensure environmental justice.

3.4.2. Collaboration among the State Organs and Stakeholders

In response to questions as to what should be the role of the courts in environmental protection and how environmental justice can be ensured ten academics and sixteen practitioners suggested adopting a collaborative approach between the organs of the state. 'Collaboration' was not raised by the interviewer; the interviewees (both from the east and the west) spontaneously suggested it as a method for ensuring environmental justice. Twelve interviewees used the term 'collaboration' whereas the others indicated the same idea using terms such as 'participatory decision-making', 'concerted effort', and 'consultative approach'. Eighteen interviewees expressed the view that the courts are placed in a better position to initiate collaboration as they are independent and can ensure accountability and enforcement.

Four practitioners (two from the east and two from the west) have said that such an approach might hamper the constitutional balance and also might risk the independence of the judiciary.

One practitioner from Bangladesh used the example of river land grabbing to explain the necessity of collaboration in the following language:

> *The court cannot take all the burden because the court has no police, no administering power. The court should provide a direction when there is a serious violation of law, but ultimately the administration should come forward.*

> *Collaboration among the court and the administration can better serve the purpose.* (PT06)

This view has been reflected in the statement of another practitioner, who not only opined in favour of collaboration but also has given an example of a case in which the court has practically adopted the collaborative approach:

> *There has to be some form of collaboration between the various branches or organs of the state if you are to make progress towards the common good. It has to be. Saif Kamal's case is a very good example of how in a case you can come up with an effective solution within a short time through collaboration between the branches. Collaboration, in that case, was made under judicial supervision.* (PT07)

One practitioner (PT09) has stated that it is always better to discuss matters with stakeholders before giving judgments and he referred to the *Four Rivers Case*[66] where the judge summoned all the concerned departments and officials to discuss issues before passing the judgment.

Four academics and three practitioners from India mentioned the successful implementation of the collaborative approach by the National Green Tribunal (NGT) to support their views that collaboration might bring better outcomes in environmental cases. In the language of one academic:

> *The NGT has ensured participatory decision-making in several cases by summoning various government ministries and departments. Examples of such cases include Yamuna River case, Ganga River case, and Air Pollution cases. These initiates by the NGT has ensured scientifically driven judgments reflecting the interests, expectations, and plans of stakeholders to produce decisions that support sustainable development recognizing wider public interests.* (AC01)

According to three academics, one of the biggest problems in South-Asian countries is the lack of inter-agency or inter-institution coordination or collaboration. One of the

[66] *Human Rights & Peace for Bangladesh & Others v Government of Bangladesh* [2009] 17 BLT 455 (HCD).

academics from India used the example of waste management issues where one department is in charge of the landfill, one department owns the land on which the landfill is, and there is a third department that will give the clearance. If the court directs one department to clear up the landfill this is not going to help. The government has to take responsibility to streamline the process. The court cannot take the responsibility to figure out who is responsible. According to her:

> *The court should just ask the government to figure out the problem of fumes coming out from a landfill. So it is the responsibility of the executives to streamline the accountability part.* (AC03)

Two academics believe that the collaboration process should not start from the judiciary as how much the judiciary can interfere is ingrained in the system and once the judiciary interferes with such issues it will just explode. One of the practitioners (PT01) from India suggested that it is not ideal to formulize the collaborative theory. According to him, collaboration might dilute the dignity of the organs. According to one practitioner (PT14) from Ireland, the courts would be reluctant to engage in stakeholder consultation before passing any judgment because of the issue of separation of powers contained in the constitution.

Considering the importance given to the issue of collaboration by a majority of the interviewees, this thesis explores the theory of collaboration in chapter five. The cases referred by the interviewees are also analyzed to see how the courts have played a part in the joint enterprise of governance. Considering the criticisms shared by the interviewees the issue of whether a collaborative approach between the organs of the state violates the doctrine of separation of powers will also be explored in that chapter.

Conclusion

This chapter analyzed qualitative data to see how the academics and practitioners view the roles of the courts of the selected jurisdictions in environmental matters. Although the analyzed data shows similarities between the academics and practitioners, it also reflected clear divergences between the role of the courts and the views of the academics

and practitioners. The collected data also shows that there are gaps between the academics and practitioners (especially judges) impacted by a post-colonial attitude by the South Asian judges. This chapter argues and shows through data analysis that such gaps between the academics and practitioners have caused inadequate development of environmental jurisprudence. Based on the decolonization trend followed by the Irish counterparts, it is argued that judges, academics, and law schools should take initiatives and academics should write more on environmental issues directing judges. It is suggested that lawyers should make a good case before the court and that judges should show more sensitivity towards environmental issues and should consult academic writings and experts before judicial decision making. This chapter argues that collaboration among academics from the east and the west and between judges and between judges and academics would improve the quality of environmental judicial decision-making. Increased stakeholder consultation and expert consultation through forums such as the NGT can play a role in sustainable and implementable judicial decision-making. Based on the collected and analyzed data, this chapter lays the foundation for the discussion in the following two chapters where the theory of collaboration and the functionality of the NGT will be examined to see how far a collaborative approach and a specialized environmental tribunal can help ensuring environmental justice.

Chapter 5: Collaborative Constitutionalism and Judicial Pro-Activism: Courts as Partners in Environmental Protection

Introduction

It has been identified through discussions in chapters two and three that the courts although have imposed positive obligations on the states by recognizing the right to a healthy environment are also facing challenges to strike a balance between excessive judicial activism and judicial passivity and between the right to the environment and other human rights. In many instances the courts of the two South Asian countries have shown adventurism and entered into the domain of other organs infringing constitutional mandates and/or in majority cases the orders of the courts have not been implemented or the implementation has been delayed extensively. On the other, an analysis of judicial decisions by the Irish courts shows that their restrained approach has narrowed access to environmental justice allowing the Government to remain reluctant in combating environmental challenges including climate change. The other challenges and concerns arising from the role of the courts in environmental matters reveal that judicial decisions are generally reactive rather than proactive[1] and there is a lack of expertise and information before the courts restricting them to reach to a comprehensive solution to an environmental problem.[2] Judicial activism by the Indian courts has been criticized as inconsistent reflecting the uneven competences of the bench.[3]

Thus, this thesis demonstrates that the judicial branch alone cannot solve the environmental crisis by itself by using judicial activism as a tool. To reach sustainable and

[1] Shubhankar Dam, 'Green Laws for Better Health: The Past that Was and the Future that May Be – Reflections from the Indian Experience' (2003-2004) 16 Georgetown Environmental Law Review 593.
[2] George Pring & Catherine Pring, 'The Future of Environmental Dispute Resolution' (2012) 40(1-3) Denver Journal of International Law and Policy 482.
[3] Ayesha Dias, 'Judicial Activism in the Development and Enforcement of Environmental Law: Some Comparative Insights from the Indian Experience' (1994) 6 Journal of Environmental Law 243.

effective decisions in environmental matters and to properly implement decisions, the courts need the support of legislative, regulatory, and enforcement mechanisms.[4] Arguing that there needs to be a collaborative effort by both the legal and the political branches of the state for ensuring environmental justice and recognizing the importance of the judiciary for promoting compliance with and the implementation and enforcement of environmental laws,[5] this chapter develops the methods of judicial pro-activism in adopting a collaborative approach by the courts in environmental matters.

The rationale behind proposing the theory of collaboration as a response to the environmental crisis comes from both doctrinal[6] and empirical research. An analysis of the qualitative data collected through empirical research[7] shows that ten academics and sixteen practitioners stated that collaboration among the organs of the state is important to ensure environmental justice as it can ensure better access to justice and ensure participation in decision making. Collaboration if is well designed and can be appropriately applied has the capacity to create opportunities for ensuring stakeholder engagement in environmental decision-making in a meaningful way.[8]

Recognizing that collaboration, though important, is a relatively new idea in environmental jurisprudence,[9] it is important to provide a roadmap for judges which would help them to play a proactive role in adopting a collaborative approach to reach a robust judicial decision in environmental matters. With this aim, the discussion of the collaborative method in this chapter broadly based on the works of Eoin Carolan,[10] Aileen Kavanagh,[11] and Christopher Ansell[12] also explore judicial decisions where the courts of the selected jurisdictions have adopted a collaborative approach.

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[4] Michael G. Faure and A.V. Raja, 'Effectiveness of Environmental Public Interest Litigation in India: Determining the Key Variables' (2010) 21 Fordham Environmental Law Review 239; Md. Saiful Karim, Okechukwu Benjamin Vincents, and Mia Mahmudur Rahim, 'Legal Activism for Ensuring Environmental Justice' (2012) 7 (1) Asian Journal of Comparative Law 13.
[5] 'The Johannesburg Principles on the Role of Law and Sustainable Development' (2003) 15(1) Journal of Environmental Law 107.
[6] Ioanna Tourkochoriti, 'What is the Best Way to Realize Rights?' (2019) 39(1) Oxford Journal of Legal Studies 209.
[7] A total of 32 interviews have been completed in three jurisdictions. The data analyzed is discussed in Chapter 4.
[8] Gregg B. Walker, Susan L. Senecah, and Steven E. Daniels, 'From the Forest to the River: Citizens' Views of Stakeholder Engagement' (2006) 13(2) Human Ecology Review 193.
[9] The Proceeding of the Fourth ASEAN Chief Justices' Roundtable on Environment, *Role of the Judiciary in Environmental Protection*, Philippines (2015) <https://www.adb.org/publications/4th-asean-chief-justices-roundtable-environment-proceedings> accessed on 12 April 2022.
[10] Eoin Carolan, 'Dialogue Isn't Working: The Case for Collaboration as a Model of Legislative– Judicial Relations' (2016) 36 Legal Studies 209.
[11] Aileen Kavanagh, *Constitutional Review under the Human Rights Act* (Cambridge University Press 2009).
[12] Christopher Ansell, *Pragmatist Democracy: Evolutionary Learning as Public Philosophy* (Oxford University Press 2011).

The discussion in this chapter shows that there are *three forms of collaboration* where the courts can act as partners in the joint enterprise of governing with other organs. *First*, courts can act as a facilitator in collaboration and allow the other organs and stakeholders to work collaboratively to realize rights. In this role, judges can contribute as a mediator between the legislature and the executive by facilitating communication. Judges can indicate the legislature to the gaps emerged in the application of laws that must be filled.[13] *Second*, collaboration can take the form of participatory decision making and courts can adopt adjudicatory stakeholder consultation procedure and engage monitoring committees as has been successfully adopted by the National Green Tribunal (NGT).[14] The collaborative approaches adopted by the NGT will be examined in chapter six. *Third*, the courts can adopt the remedy of suspended declaration of invalidity to achieve a just solution through a constructive engagement between the organs of the state.[15] The judicial decisions discussed in this chapter although broadly related to non-environmental areas provide excellent examples of judicial pro-activism in adopting a collaborative approach and can help judges to adopt the two methods proposed in this thesis.

The discussion in this chapter is divided into *three parts*. The *first part* defines collaboration and discusses the features of collaboration to support the argument of this thesis in proposing collaboration as a response to the environmental crisis. The importance of the courts in law-making and policy formulation is recognized and discussed to articulate how the courts can play a proactive role in the joint enterprise of governing in upholding rule of law.

Part two discusses the three forms of collaborative constitutionalism based on instances from the selected jurisdictions where either the courts have acted as partners in constitutional collaboration or exercised stakeholder consultative procedure or adopted the remedy of suspended declaration of invalidity thereby enhancing the separation of powers system. Discussion in this part supports the argument of the thesis that, although collaboration is a theory proposed by Western scholars, it can be successfully adopted

[13] Tourkochoriti (n 6).
[14] Gitanjali Nain Gill, 'Mapping the Power Struggles of the National Green Tribunal of India: The Rise and Fall?' (2020) 7 Asian Journal of Law and Society 85.
[15] Eoin Carolan, 'The Relationship between Judicial Remedies and the Separation of Powers: Collaborative Constitutionalism and the Suspended Declaration of Invalidity' (2011) 46(1) Irish Jurist (ns) 180.

by countries based in the Eastern part of the world. Case studies in this part also show that collaboration can enhance participation in decision making and ensure access to information and access to justice by involving all the stakeholders in decision making.

Part three discusses the challenges of collaborative constitutionalism. The discussion in this part is divided into *three sections*. The first section includes a brief exploration of the doctrine of separation of powers as enshrined in the Constitutions of the selected jurisdictions. The discussion shows that none of the Constitutions of India, Bangladesh, or Ireland has adopted the 'pure' or rigid separation of powers which strictly follows the articulation of the doctrine by Maurice Vile,[16] rather they have the 'partial' version emphasizing the significance of checks and balances within the constitution.[17] Building on the discussion in the first section, the second section critically examines whether the various forms of collaboration discussed in part II are in tandem with the doctrine of separation of powers because it is argued that separation of powers is 'a universal criterion of constitutional government'.[18] The third section discusses the other plausible challenges that might be brought against collaboration. The discussion in this part ends with certain recommendations to overcome the challenges and successfully implement a collaborative approach.

[16] 'The government should be divided into three branches or departments, the legislature, the executive, and the judiciary. To each of these branches, there is a corresponding identifiable function of government, legislative, executive, or judicial. Each branch of the government must be confined to the exercise of its own function and not allowed to encroach upon the functions of the other branches. Furthermore, the persons who compose these three agencies of government must be kept separate and distinct, no individual being allowed to be at the same time a member of more than one branch. In this way, each of the branches will be a check to the others and no single group of people will be able to control the machinery of the State.' Maurice Vile, *Constitutionalism and the Separation of Powers* (Oxford University Press 1967) 13.

[17] Nick Barber, 'Prelude to the Separation of Powers' (2001) 60 Cambridge Law Journal 59.

[18] Vile (n 16) 97; Eoin Carolan, *The New Separation of Powers: A Theory of the Modern State* (Oxford University Press 2009) 18; Aileen Kavanagh, 'The Constitutional Separation of Powers' in David Dyzenhaus and Malcolm Thorburn (eds), *Philosophical Foundation of Constitutional Law* (Oxford Scholarship Online 2016) 221.

Part I

1.1. Defining Collaboration

According to Christopher Ansell, collaboration signifies the potential for 'fruitful conflict' between different organs. In that form, collaboration tends to facilitate and develops knowledge, understanding, and capacity of the organs who has opposing perspectives and also divergent interests. Collaboration is not a method that is used to reduce conflicts between the legal and political branches of the state. Rather collaboration is a technique that can help to structure conflict in a way that would be 'productive' and not 'merely antagonistic'. Collaboration involves all the organs having different perspectives resulting in producing a decision involving mutual engagement of different organs, superior to a decision that might have been achieved by a single organ acting by itself.[19] In this perspective, in collaborative processes, the parties have the amenity to constructively explore their divergences to reach a solution by looking beyond their restricted vision.[20]

Collaboration implies the coordinated institutional effort between the branches of state in the service of good governance. Kavanagh uses the term 'joint enterprise of governing' to explain that in a collaborative approach the state organs will not act as solitary entities confined to one single function but rather as constituent parts of a joint enterprise where each of the organ has its own role to play and they work together. In a joint enterprise, the organs will be independent but also will remain interdependent in various ways.[21]

Collaboration allows each organ to engage with the other in decision-making on its own terms. Such engagement is subject to the respective organ's internal security which would create an overlapping system of collaborative competencies.[22] Collaboration has the capacity to ensure that no single organ gets supremacy and supports the idea of overlapping checks and balances critical to a democratic constitution based on the rule of law.[23]

[19] Ansell, *Pragmatist Democracy* (n 12) 168.
[20] Barbara Gray, *Collaborating: Finding Common Ground for Multiparty Problems* (Jossey-Bass 1989) 5.
[21] Kavanagh, 'The Constitutional Separation of Powers' (n 18) 221.
[22] Carolan, *The New Separation of Powers* (n 18) 183.
[23] Carolan, 'Dialogue Isn't Working' (n 10) 209.

However, O'Flynn has cautioned not to give the label of collaboration to every conduct involving more than one organ or even any form of working together by all the organs.[24] His voice has been echoed by Carolan who mentioned that collaboration is not a label for any conduct which involves more than one party. A term which broadly carries almost the similar meaning as collaboration is 'dialogue' and it is important to differentiate these two terms because collaboration is a distinct concept compared to dialogue.[25]

Dialogue, according to Jeff King, is the process when the three branches of the state collaborate in order to promote commonly accepted public values.[26] Dialogue refers to those cases where some legislative actions have been taken as a consequence of striking down a law by judicial decision for lack of compliance with the Canadian Charter of Rights and Freedom. In a dialogical approach, the general trend is that the legislation will be amended by the legislature following a decision of invalidation of the legislation by the court.[27]

This thesis prefers collaboration over dialogue in environmental matters because collaboration has the capacity to provide 'a more descriptively and normatively appropriate account of constitutional power relations.' The problem with dialogue theory is that it promotes a view that overlooks the importance of institutional differences[28] which is inevitable in complex environmental problems. It has been demonstrated in chapters two and three how the courts are facing challenges to strike a balance between environmental rights and other rights and also between conflicting claims. This thesis argues that without the aim of reaching a collective decision or solving problems and conflicts,[29] dialogue lacks desirability as a method to encounter environmental problems which involve intrinsic and irreconcilable tensions. On the other hand collaboration can provide a trinity of voice including three interdependent markers of access, standing, and influence to the stakeholders. The trinity of voice that can be achieved through

[24] Janine O'Flynn, 'The Cult of Collaboration in Public Policy' (2009) 68 Australian Journal of Public Administration 112.
[25] Carolan, 'Dialogue Isn't Working' (n 10) 209.
[26] Jeff King 'Institutional Approaches to Restraint' (2008) 28 Oxford Journal of Legal Studies 409.
[27] Peter W. Hogg and Allison A. Bushell, 'The Charter Dialogue between Courts and Legislatures (or Perhaps the Charter of Rights Isn't Such a Bad Thing After All)' (1997) 35(1) Osgoode Hall Law Journal 75.
[28] Carolan, 'Dialogue Isn't Working' (n 10) 209.
[29] Luc B. Tremblay 'The Legitimacy of Judicial Review: The Limits of Dialogue between Courts and Legislatures' (2005) 3 International Journal of Constitutional Law 617.

collaboration can offer a template for (1) evaluating the efficacy of individual cases of stakeholder engagement, (2) designing of collaborative processes, and (3) diagnosing and treating troubled processes or escalated disputes.[30]

1.2. Features of Collaboration

Conscious of the definitional dilemmas with collaboration which poses the challenge of over-identifying and over-selling the idea,[31] this thesis proposes and develops collaboration as a method that can help the courts to overcome a majority of the challenges faced in ensuring environmental justice because of the following features of the method:

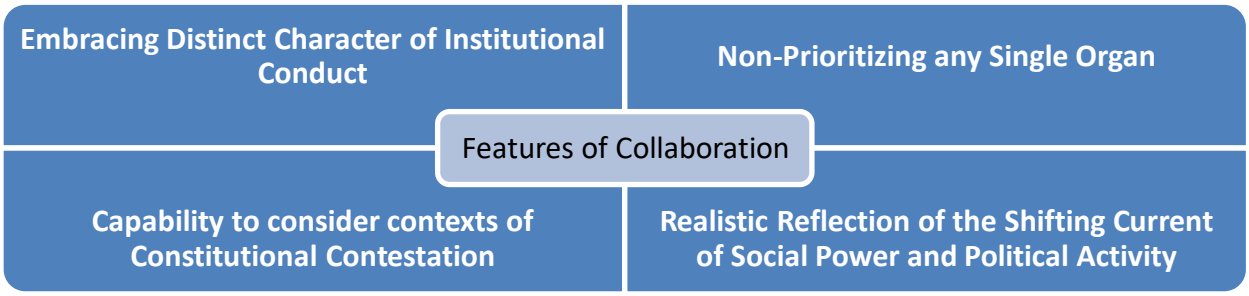

Figure 1.2: Features of Collaboration

1.2.1. Embracing Distinct Character of Institutional Conduct

Collaboration has the capacity to embrace the distinct character of various institutional conduct and the processes are derived from institutional differences. One of the prerequisites of collaboration is the presence of distinct perspectives grounded on various types of processes and diverse knowledge bases. Diversity is one of the critical factors for fashioning collaboration. The driving force behind the collaborative process is the 'conflictual friction' resulting from the overlapping objectives of the participants. Collaboration does not require any compromise or concession in the diversified perspectives of the institutions. Rather, institutional diversity and legitimacy are welcomed and acknowledged by collaborative processes. In this way, collaboration has the capacity

[30] Susan L. Senecah, 'The Trinity of Voice: The Role of Practical Theory in Planning and Evaluating the Effectiveness of Environmental Participatory Processes' in Stephen Depoe and others (eds), *Communication and Public Participation in Environmental Decision Making* (State University of New York Press 2011) 13.
[31] Carolan, 'Dialogue Isn't Working' (n 10) 209.

to offer a framework for handling constitutional contestation integrating diversified societal interests.[32] Collaboration would allow the legislature to decline to enact legislation following unpopular and controversial judicial pronouncements. Support of this contestation can be found from the American examples where the legislature consciously declined to enact legislation in response to the Supreme Court's decision in *Miranda v Arizona*,[33] although the legislature enacted law aiming to pursue the same policy objective articulated in the judgment.[34]

1.2.2. Non-Prioritizing any Single Organ

The way collaboration sees differences has the potential value of not giving priority to any particular institutional perspective. That implies that no single institution will be the favorite in collaborative processes.[35]

1.2.3. Capability to consider contexts of Constitutional Contestation

Since collaboration is not tied to a specific vision of institutional dynamics, it is more capable of considering the contexts which are working as the basis of constitutional contestation. As a result of this, collaboration can be applied to a multi-actor, multi-process system that has close proximity to the reality of constitutional government of modern times.[36]

1.2.4. Realistic Reflection of the Shifting Current of Social Power and Political Activity

As collaboration accepts the value of diversity, it has the capacity to eschew the chance of reaching a single authoritative resolution of an issue that would be applicable to all times. By doing this, collaboration tends to realistically reflect the changing social power and political activity. Collaboration encourages arguments to be made within each

[32] ibid.
[33] [1966] 384 US 436.
[34] Kent Roach, 'Dialogue or Defiance: Legislative Reversals of Supreme Court Decisions in Canada and the United States' (2006) 4 International Journal of Constitutional Law 347.
[35] Carolan, 'Dialogue Isn't Working' (n 10) 209.
[36] ibid.

institution and to test ideas and views. The facility with collaboration is that it acknowledges that institutional positions are not monolithic as they are the creation of dynamic social and political processes which remain prone to modifications in those dynamics.[37]

In addition to the above, the following features of collaboration makes it a significant strategy for ensuring environmental justice:

● Collaboration encourages mutual learning and fact-finding;

● It resembles principled negotiation, focusing on interests rather than positions;

● It allocates the responsibility for implementation across many parties;

● The conclusions is collaboration are generated by participants through an interactive, iterative, and reflexive process;

● It is often an ongoing process, and;

● It has the potential to build individual and community capacity in such areas as conflict management, leadership, decision-making, and communication.[38]

1.3. The Normative Implication of the Theory of Collaboration

According to Habermas modern law should assume the role of being the primary medium of social integration in modern society. All laws possess characteristic coercive powers. Once under law, people are forced to conform their behavior to its prescription or prohibition. The law exercises, in the first place, this coercive power because of its claim to the power of enforcement. Laws have the power to extract obedience or compliance from its subjects. Pushed to the extreme, the use of this power of law can even lead to violence. Secondly, the law also has the effect of conditioning and uniformalizing behavior

[37] ibid.
[38] Steven E. Daniels and Gregg B. Walker, *Working through Environmental Conflict: The Collaborative Learning Approach* (Praeger 2001).

since it aims at making behavior conform to the law's prescription. This as an example where established institutions could represent a fusion of facticity and normative validity.[39]

In the past, normative conflicts were resolved by having recourse to sacred traditions or metaphysical doctrines. Even then, such resolutions had proven problematic in some cases because of their coercive or violent "effects." Habermas proposes that the best approach to resolving conflicts in modern societies is through the exercise of communicative power. He claims that this 'power' has a more unifying effect that is mainly due to the consensus-achieving force of communication. Communicative power aims at reaching mutual understanding and consequently empowers people to act in concert.[40]

Law and power reinforce each other. Law borrows its coercive character from power and at the same time bestows on it the legal form that provides power with its binding character. These two codes require their own perspective. Law requires a normative perspective and power an instrumental one. Laws, policies and decrees have need of normative justification but they also function as instruments for and constraints upon the reproduction of power. It is by virtue of the power law possesses that it is able to extract obedience from its subjects. As power alone cannot grant law its legitimacy in modern society, law must derive its validity from another source. Habermas claims that the validity of law emanates from the consent of the very same subjects it governs. Thus it is imperative that we distinguish between communicatively generated power and administratively employed power. Legitimation of law through communicative power yields a normative approach to law. Once law has been adjudicated, the normative 'action-upon-itself' character of law bestows upon it a self-programming circulation of power. The administration rides on this peculiar characteristic of law in steering the behavior of the voting public, preprogramming the executive branch and legislature and functionalizing the judiciary.'[41] That is why the communicative power has to cut into the administrative power so that the latter self-programming circulation of power is not unabatedly perpetuated. For this, participatory democracy based on the rights of

[39] Jürgen Habermas, Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy (William Rehg tr, Massachusetts Institute of Technology 1996) 22, 23.

[40] ibid.
[41] ibid.

individuals and guided by reasoned discourse remains the best hope in contemporary politics and this where the collaborative approach is significant because it allows laws to emanate from the consent of the very same subjects it governs.

In modern society, law derives its validity from the consent expressed by the people governed through the exercise of communicative power. Habermas points out that legitimate lawmaking is itself generated through a specific procedure of 'public opinion-and-will-formation.' Communicative power, he claims, is also the source of political power. No modern law possesses prior legitimacy or validity. No law is to be considered a norm prior to being subjected to the people's communicative power. It is the rational process of 'public opinion-and-will-formation' that legitimizes the particular law in question and gives it its normative value. It is vital for citizens to participate in this discursive activity where they engage in public argumentation. This exercise promotes universalizable interests because it heavily relies on the force of the better argument. It is the communicative power that ultimately creates the law as it gives both legitimate and normative powers to such laws.[42]

1.4. A Proactive Role of the Courts in the Joint Enterprise of Governing

In a democratic society, a deliberative and representative body is needed in the form of a legislature in order to make rules for the community. Along with the legislature, an independent body (the courts) is also needed to resolve disputes regarding the rules and to settle confusion about the application and scope of the rules. Although the courts in common law systems have the power to make rules and develop doctrines, this is limited compared to the law-making power of the legislature. Generally, 'judicial law-making is piecemeal, incremental and interstitial.'[43] Lord Devlin has described the courts as a 'crippled lawmaker' due to the limited nature of law-making power of the courts and as in most cases courts make laws to fill in the gaps in the existing legislation or to resolve

[42] ibid.
[43] Aileen Kavanagh, 'The Role of Courts in the Joint Enterprise of Governing' in Nicholas Barber, Richard Ekins and Paul Yowell (eds), *Lord Sumption and the Limits of the Law* (Hart 2016) 121.

disputes.[44] According to John Gardner, if judges are developing or making a new law they have to rationalize their actions by showing the reasons for doing that.[45]

However, although the courts have certain institutional limitations, independence is the central value of the courts as an institutional actor because it allows them to apply the law in a fair and impartial manner by resisting political pressure.[46] In a democratic state independence of the judiciary is a *sine qua non* for maintaining rule of law.[47] It means that the courts have the power to perform a meaningful supervisory role vis-à-vis the other organs of the state. Any legislation passed will be examined by the courts to see if it is constitutional. By doing this the courts are making the governments answerable to the courts for the lawfulness of its acts. The legislature has the capacity to hold the government accountable for any matter whereas the court can hold the government accountable for violations of law.[48] The judiciary has the jurisdiction to bring back Parliament and the executive from constitutional derailment and give necessary direction to follow the constitutional course.[49] However, the Supreme Court of India in *Ugar Sugar Works Ltd. v Delhi Administration & Ors*,[50] stated that unless a policy is arbitrary or *mala fide* or unfair, the court should not interfere in the exercise of its judicial review power.

Although the responsibility of a judge is to understand, apply, interpret and implement the laws which have been laid down by the legislature and is expected to respect the constitutional demarcation of powers and act with comity towards the legislature, it is also expected that a judge should not only mechanically declare what the law requires without any role for judicial creativity.[51] An active interpretative role is sometimes assumed by the

[44] Lord Devlin, 'Judges and Lawmakers' (1976) 39 Modern Law Review 1.
[45] John Gardner, 'Legal Positivism: 5 ½ Myths' (2001) 47 American Journal of Jurisprudence 199.
[46] Independence of the judiciary is one of the basic features of the Constitutions of the selected jurisdictions. The independence of the Supreme Court and also the Subordinate Courts have been guaranteed by several provisions of the Indian Constitution. Venkat Iyer, 'The Supreme Court of India' in Brice Dickson (ed), *Judicial Activism in Common Law Supreme Court* (Oxford University Press 2007) 121. For guardianship of the Constitution and for the establishment of rule of law, the Constitution of Bangladesh incorporated provisions to ensure the independence of the judges. Mahmudul Islam, *Constitutional Law of Bangladesh* (Mullick Brothers 2012) 22. Article 35(2) of the Constitution of Ireland provides that '[a]ll judges shall be independent in the exercise of their judicial functions and subject only to this constitution and the law.' The most important feature of the separation of power enshrined in the Constitution of Ireland is the separation of the judicial organ. David Gwynn Morgan, *The Separation of Powers in the Irish Constitution* (Round Hall 1997) 200.
[47] BN Srikrishna, 'Judicial Independence' in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the India Constitution* (Oxford University Press 2016) 349.
[48] Kavanagh, 'The Role of Courts in the Joint Enterprise of Governing' (n 43) 121.
[49] *Shah Abdul Hannan v Bangladesh* [2011] 16 BLC 386.
[50] [2001] 3 SCC 635.
[51] Lord Reid, 'The Judge as Lawmaker' (1997) 63 Arbitration 180.

courts when they adopt legislative measures to deal with changing social needs and by that way, courts are giving effect to legislation in new circumstances. By doing this the courts are helping the legislature to implement the law over time.[52] It is the parliament that enacts the laws but it is for the courts to tell the nation what those laws mean.[53] The courts can give creative interpretation to legal provisions leading to recognition of new rights. A proactive and creative role by judges is a necessity if the society has to grow and develop morally.[54] According to Joseph Raz:

> There is also active participation by judges in implementing the law by integrating disparate legislative measures into the broader backcloth of fundamental legal principles and doctrines. They knit together ongoing legislation with background principles in a way that produces a coherent whole. By reducing or eliminating potential conflict between different aspects of the law, they help to ensure coherence in the law, whilst also helping to uphold core legal values which form the stable framework of the law.[55]

The role of judges in a collaborative enterprise is not that of an assistant to carry out mundane, mechanical tasks, rather they are capable of performing their own distinct tasks in a joint endeavor. The expertise and legitimacy of the courts are something that should be respected by the other organs of the state. Courts by virtue of their composition and decision-making process are well-placed to make important contributions to the collaborative enterprise. One way judges are doing this is by simultaneously interpreting and applying the law to individual cases showing respect to the constitutional role of the legislature and ensuring that fundamental principles which protect the liberty of the individual are sustained.[56] The courts being designed to ensure stability, certainty, and coherence in the law can make another significant contribution to the collaborative

[52] Dimitrios Kyritsis, 'Constitutional Review in Representative Democracy' (2012) 22 Oxford Journal of Legal Studies 297.
[53] *BLAST v Bangladesh* [2007] 15 BLT 156.
[54] P.N. Bhagwati, 'The Role of the Judiciary in the Democratic Process: Balancing Activism and Judicial Restraint' (1992) 18 Commonwealth Law Bulletin 1262.
[55] Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Clarendon Press 1995) 376.
[56] Kavanagh, 'The Role of Courts in the Joint Enterprise of Governing' (n 43) 121.

enterprise by integrating ongoing legislation into the stable framework of fundamental legal doctrine.[57]

In adopting a pro-active role, judges on one hand have to show respect to the constitutional power of the legislature by applying the laws enacted by the legislature following the legislative intent and on the other, have to play a role in developing the law by updating it to meet the requirements of changing circumstances by interpreting the statutes in the light of new circumstances. Due to the dual context, judges have to face a choice between 'conservation and innovation'. The challenge for the court is to strike a balance between legal certainty, stability, and values of equity and justice. However, although judges have various doctrines and tools at their disposal for regular maintenance of the law, the use of such tools require careful consideration and judges should not use them if they are unsure about their goodness. If it appears that the damage to legal certainty and stability would be grave and the consequence of the decision is also uncertain, it would be a responsible decision by a judge to stick with the legal *status quo* and expect the legislature to intervene in order to amend the legislation through using legislative techniques of enacting law coupled with political technique of garner popular support for the proposed amendment.[58]

[57] Raz (n 55) 54.
[58] Kavanagh, 'The Role of Courts in the Joint Enterprise of Governing' (n 43) 121.

Part II

2. Developing the Idea of Collaboration

To construct the idea of collaboration this part discusses instances from the selected jurisdictions showing the various forms of collaboration adopted by the courts acting proactively. Three forms of collaboration have been identified: *First,* where the courts have acted as a partner and facilitated collaboration among the organs; *Second*, a collaborative approach by the courts in adopting the remedy of suspended declaration of invalidity, and; *Third*, collaboration in the form of participatory decision making. An examination of the proactive role of the National Green Tribunal (NGT) of India (2) shows that participatory decision-making in environmental cases has been exercised in two forms: i. Stakeholder consultative adjudicatory process; and ii. Establishing monitoring mechanism. The different forms of collaboration have been examined in this part to develop the collaborative approach for ensuring environmental justice.

2.1. Courts Acting as a Facilitator in Collaboration

This form of collaboration finds support in the writings of Aileen Kavanagh who sees 'collaborative enterprise' as something where different institutions are contributing at different times to make different aspects of the law in a way respectful of the contribution of the other institutions. However, Kavanagh has also made the cautionary statement that neither enacting legislation nor initiating large scale policy changes are the jobs of judges.[59] Tourkochoriti argues that the right collaboration between the law-making body and the courts can assist to uncover the substantive meaning of the general will which is important for realizing rights and along with the legislature judges can also play a role by contributing their insights to the process. Tourkochoriti views the courts as a contributor to improving the decision making of elected representatives without necessarily

[59] ibid.

substituting their own decisions and supports the view of Durkheim[60] who holds that courts and legislatures express and influence the collective consciousness.[61]

The following discussion includes case studies where the collaborative approach has been adopted by the courts and they have played a proactive role as a partner in collaboration and facilitated decision-making, policy formulation, and adoption of legislation by the appropriate bodies.

One of the most recent and significant examples of judicial pro-activism in adopting the collaborative approach is *Saif Kamal's Case*[62] in which a writ petition was filed before the High Court Division (HCD) of the Supreme Court (SC) of Bangladesh under Article 102 of the Constitution of Bangladesh,[63] seeking to ensure emergency medical service to the victims of accident by hospitals and clinics.

The Court directed the Respondents to show cause as to why the failure to ensure emergency medical services to critically injured persons by the hospitals and clinics, either government or private should not be declared to be without lawful authority and violative of the fundamental rights guaranteed in the Constitution. In the same order, the HCD also handed down a set of directions that have formed the basis of successive orders leading to the formulation of guidelines for ensuring emergency medical services to persons injured in accidents and security of the Good Samaritan 2018. An examination of the impugned judgment shows that the adoption of the guidelines has been possible and reflected a collaborative effort by the parties and the Court. However, the Court had to monitor the progress and compliance and there have been occasions on which the Court had to issue show cause for contempt on the concerned Respondents following their failure to submit reports on time.

Initially, Respondent No. 1, Ministry of Health and Family Welfare (MoH&FW) formed a four-member Special Committee comprising doctors, representatives from the MoH&FW,

[60] Émile Durkheim, *The Division of Labor in Society* (first published 1893, WD Halls tr, The Free Press 1997).
[61] Tourkochoriti (n 6).
[62] *Syed Saifuddin Kamal v Bangladesh and others* [2018] 70 DLR 833 (HCD).
[63] Article 102 of the Constitution of Bangladesh authorizes the High Court Division to issue directives on the application of any person aggrieved and against any person or authority for the enforcement of the fundamental rights enshrined in Part III of the Constitution.

and the Directorate General of Health Services (DGHS) for drafting the guidelines. Subsequently, a Core Committee was formed by Respondent No. 1 to formulate the guidelines. Members of the Core Committee were also from MoH&FW and DGHS. Respondent No. 1 submitted the first draft of the guidelines on 09.08.2017 eliciting a broad set of recommendations placed by the Petitioners as an outcome of an expert consultation taking place earlier. The Petitioners also placed before the Court a set of recommendations which were the outcome of two expert consultations held under the auspices of Petitioner No. 2, Bangladesh Legal Aid and Services Trust (BLAST), a non-governmental organization (NGO) and participated by relevant stakeholders. From the judgment, it transpires that the expert consultations involved medical practitioners who contributed to a great extent regarding concepts and expansion of specialized services to be provided by service providers. According to Syed Refaat Ahmed J, the expert consultations helped to refine the core concepts and developed the guidelines in various respects.

Pursuant to the Order of the Court, two consultation sessions were organized by the Ministry of Health and Family Welfare to review the recommendations of the Petitioners. In the consultation meetings representatives from MoH&FW, Attorney General's Office, Doctors, Lawyers representing the Petitioners, and NGO representatives were present. After consideration and incorporation of recommendations made by the stakeholders, the finalized text was submitted before the Court. Emphasis on the collaborative approach adopted and implemented in this case is evident from the following statement of Syed Refaat Ahmed J:

> Additionally, and by way of abundant caution and prudence, and as reflected in this Court's Order of 03.07.2018, this Court reminded all stakeholders concerned that the process of finalization of the guidelines would always be a consultative and participatory exercise, as had been the case thus far, to its satisfaction and as attested to by the information already brought on record. As stressed at the very initial stages, this Court in reiteration highlighted that the parties concerned, including Respondent No. 2, Ministry of Roads and Highways, would coordinate

> their activities and efforts towards such finalization process and revert to this Court within an assigned time with the text of the finalized draft.[64]

The Court gave judicial sanction to the guidelines and stated that 'the guideline in its entirety be deemed enforceable as binding by judicial sanction and approval pending appropriate legislative enactments incorporating entrenched standards, objectives, rights, and duties.'[65]

The judgment is a good example of collaboration showing how the Court can play a proactive role as a partner and as an independent organ that can facilitate the formulation of law, policy, or guidelines. This case also demonstrates how adopting a collaborative approach by the court can ensure active participation of the necessary stakeholders. It is very clear from the orders of the court that not only the parties but also doctors, NGOs and all concerned departments and authorities were involved in developing the guidelines.

However, although the Court left the discretion to issue directions for implementation of the guidelines to the appropriate authority the judgment raises concern regarding the justiciability of giving judicial sanction to the guidelines. The judgment in *Saif Kamal's Case*[66] is a good improvement compared to the Indian Supreme Court's decision in *Vishaka v State of Rajasthan*.[67] In the absence of domestic law in India addressing sexual harassment in the workplace, Verma J formulated a detailed sexual harassment guideline based on the Convention on Elimination of All Forms of Discrimination against Women (CEDAW). The decision has been criticized because the Court has 'made law', a province exclusively reserved for the legislature and the Court does not have the power to make law binding upon all citizens of India.[68]

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[64] *Syed Saifuddin Kamal v Bangladesh and others* [2018] 70 DLR 833, 844 (HCD).
[65] ibid, 849.
[66] ibid.
[67] [1997] 6 SCC 241.
[68] Lavanya Rajamani, 'Public Interest Environmental Litigation in India: Exploring Issues of Access, Participation, Equity, Effectiveness and Sustainability' (2007) 19 (3) Journal of Environmental Law 293.

An example of adopting the collaborative approach to ensure participation of necessary stakeholders by the Indian Supreme Court is *Nipun Saxena v Union of India*.[69] The Supreme Court has stated that

> It would be appropriate if the National Legal Services Authority (NALSA) sets up a Committee of about 4 or 5 persons who can prepare Model Rules for Victim Compensation for sexual offenses and acid attacks taking into account the submissions made by the learned Amicus. The learned Amicus as well as the learned Solicitor General have offered to assist the Committee as and when required. The Chairperson or the nominee of the Chairperson of the National Commission for Women should be associated with the Committee.[70]

In furtherance of the direction, a committee was set up by NALSA comprising Additional Solicitor General, Secretary, Ministry of Women and Child Development, Additional Secretary, Ministry of Home Affairs, Member Secretary and Director from NALSA, Joint Secretary, Department of Legal Affairs, Ministry of Law and Justice, Joint Secretary National Commission for Women, a representative from the Centre for Child Rights, and counsels representing the parties. After drafting Part-II of the Victims Compensation Scheme, the Committee invited suggestions from different stakeholders. After considering the suggestions on the draft, the Committee finalized the Compensation Scheme for Women Victims/Survivors of Sexual Assault/other Crimes and it was submitted before the Supreme Court of India. The other stakeholders were also heard and all additional suggestions received during the hearing were also incorporated. A final Scheme was prepared by the Committee and filed before the Supreme Court of India. After hearing NALSA and the Amicus Curiae the submitted Scheme was accepted by the Supreme Court. The Supreme Court directed all the State Governments to implement the Scheme. It was added by the Supreme Court that although nothing should be taken away from this Scheme it can be amended by adding new things.[71]

[69] [2019] 13 SCC 715.
[70] ibid, Order dated 10 August 2018.
[71] ibid.

This pro-active role adopted by the Indian Supreme Court demonstrates that collaboration has the capacity to capture the process towards realizing rights and sees the court as a helping institution to the legislature whose role is important in realizing rights.[72]

2.2. Collaboration in the Form of Suspended Declaration of Invalidity

In addition to the above two forms, collaborative constitutionalism can also take the form of a suspended declaration of invalidity[73] and can be helpful in developing effective instruments of institutional governance which would eventually improve the separation of power system.

The *Kinsella Case*[74] is a useful illustration of the advantages of the remedy of suspended declaration of invalidity. The basis of the application was that the confinement of the alleged prisoner in a padded cell was in contravention of his constitutional rights. Although the contention that the constitutional right of the application has been violated was accepted by the High Court, it was declared that that does not make the detention unlawful. It was observed by Hogan J that continued detention in a similar condition will 'constitute an unlawful detention.' That particular judgment gave the concerned prison authorities an opportunity to redress the matter which has been pointed out by the applicant and endorsed by the Court. It has been recorded in the postscript to the judgment that the imprisoned applicant was moved to another prison following the decision. It is clear from the judgment that this was the kind of collaborative approach expected by the court. This particular decision showcased inter-institutional respect which is at the centre of the doctrine of separation of powers.[75] In the language of Hogan J:

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[72] Tourkochoriti (n 6).
[73] Carolan, *The New Separation of Powers* (n 18); Eoin Carolan, 'A Dialogue-Oriented Departure in Constitutional Remedies: The Implications of NHV v Minister for Justice for Inter-Branch Roles and Relationships' (2017) 40 Dublin University Law Journal 191; Eoin Carolan, 'Leaving Behind the Commonwealth Model of Rights Review: Ireland as an Example of Collaborative Constitutionalism' (2016) <https://ssrn.com/abstract=2916378 or http://dx.doi.org/10.2139/ssrn.2916378> accessed 25 May 2021. David Kenny, 'The Separation of Powers and Remedies: The Legislative Power and Remedies for Unconstitutional Legislation in Comparative Perspective' in Eoin Carolan (ed), *The Irish Constitution: Perspectives and Prospects* (Bloomsbury 2012) 191.
[74] *Kinsella v Governor of Mount Joy Prison* [2011] IEHC 235.
[75] Carolan, 'The Relationship between Judicial Remedies and the Separation of Powers' (n 15) 180.

> The proposed solution—i.e. upholding the claim of a violation of a constitutional right but giving the authorities an opportunity to remedy this breach—is also perhaps the one which is the most apt having regard to the principles of the separation of powers, given that the onerous duty of actually running the prisons rests with the executive branch…. The present case may yet prove to be an example of a constructive engagement of this kind between the executive and judicial branches which achieves a just solution in line with appropriate separation of powers concerns without the immediate necessity for a coercive or even a declaratory court order.[76]

Another example of the similar approach adopted by the Irish judiciary can be seen in *Blake v Attorney General*.[77] In that case two suggestions were made by Finlay CJ commenting obiter. He asked the Oireachtas (Parliament) to rapidly respond to the decision given by the court by incorporating legislation. He also suggested the courts react slowly to allow the Oireachtas to address the statutory void that was caused by the declaration of invalidity by the court which would affect the interests of third parties until the time remedial legislation is enacted.[78] According to Denham J:

> … [A] suspended declaration is in aid of organised society as it enables the legislature to address the issue. It also enables dialogue in the community as to the best way to proceed.[79]

The recent decision of the Supreme Court of Ireland in *NHV v Ministry for Justice & Equity*[80] where the Court decided to defer a prospective declaration of invalidity is also an example of suspended declaration of invalidity.[81]

The remedy of suspended declaration of invalidity has been adopted by the Bangladesh Supreme Court in the *13th Amendment Case*.[82] In that case although the Supreme Court

[76] *Kinsella v Governor of Mount Joy Prison* [2011] IEHC 235.
[77] [1982] IR 117 (SC).
[78] Carolan, 'The Relationship between Judicial Remedies and the Separation of Powers' (n 15) 180.
[79] *A v Governor of Arbour Hill* [2006] 4 IR 88 (SC).
[80] [2017] IESC 35.
[81] Carolan, 'A Dialogue-Oriented Departure in Constitutional Remedies' (n 73) 191.
[82] *Abdul Mannan Khan v Government of Bangladesh and others* [2011] 64 DLR 169 (AD).

of Bangladesh declared the Constitution (Thirteenth Amendment) Act 1996, it void stated that the parliament was at liberty to bring necessary amendments excluding the provisions of making the former Chief Justices of Bangladesh or the judges of the Appellate Division as the head of the Non-Party Caretaker Government.

2.3. Collaboration in the Form of Participatory Decision-Making

Case analysis from India shows that the development of statutory remedies has been impeded due to the preliminary pursuit of constitutional remedies by the apex court. To develop a robust environmental jurisprudence, environmental remedies are required to be made accessible to the people and should evolve 'in much greater consultation with stakeholders rather than devised *suo motu* by the Courts in a top-down fashion'.[83] The exercise of participatory decision-making under the auspices of the court can best be seen in the functioning of the National Green Tribunal (NGT). The NGT has adopted a collaborative approach in several cases[84] by applying stakeholder consultative adjudicatory process and establishing monitoring committees.

Collaboration in the form of stakeholder consultation was also prevalent in the first case brought through pubic interest litigation (PIL) in Bangladesh, *Dr Mohiuddin Farooque v Bangladesh (FAP 20)*.[85] The High Court Division of the Supreme Court of Bangladesh directed the concerned authorities to involve and consult local people in important development decisions. In the *Four Rivers Case*[86] the apex court in Bangladesh have taken the initiative to consult the stakeholders before pronouncing judgment. The Court directed the presence of the Chairman, Bangladesh Inland Water Transport Authority, Director General of Land Record and Survey Department, Director General of Department of Environment, Managing Director of Dhaka Water Supply and Sewerage Authority (WASA), Executive Officer of Dhaka City Corporation and the Deputy

[83] Nupur Chowdhury, 'Constitutionally Shackled: The Story of Environmental Jurisprudence in India' in Michelle Lim (ed), *Charting Environmental Law Futures in the Anthropocene* (Springer 2019) 159.
[84] *K. K. Singh v National Ganga River Basin Authority* (Judgment 16 October 2014); *Manoj Mishra v Union of India* (Judgment 13 January 2015); *Vardhaman Kaushik v Union of India* (Judgment 7 April 2015).
[85] [1996] Bangladesh Supreme Court Report 27.
[86] *Human Rights & Peace for Bangladesh & others v Government of Bangladesh & others* [2009] 17 BLT 455 (HCD).

Commissioners of Dhaka, Narayanganj, Gazipur, and Munshiganj to hear their views and to clarify certain issues. This case is an example of involving and engaging public officials in reform activities directed by the court for ensuring proper implementation. The judgment in this case paved the way for the enactment of the National River Conservation Commission Act 2013 and establishment of the Commission in 2014.[87]

The above-discussed forms of collaboration are helpful for judges because these will help them to uphold the constitution and rule of law and at the same time allow them to overcome the challenges they face in bridging the gaps between law and society.[88] Undoubtedly, due to their expertise in law and decision-making process, the courts are good at resolving disputes. But broadly they have limited access to information and are less well-equipped compared to the legislature or the government to assess the wider consequences for the society as a whole. Collaborative constitutionalism will help the courts to overcome this information gap and to support and contribute to improving the elected representatives' decision-making.[89]

[87] Imtiaz Ahmed Sajal, 'Strengthening the National River Conservation Commission of Bangladesh' *The Daily Star* (Dhaka, 15 October 2019).
[88] Aharon Barak, *The Judge in Democracy* (Princeton University Press 2006).
[89] Tourkochoriti (n 6).

Part III

3. Challenges of Collaborative Constitutionalism

This thesis proposes collaborative constitutionalism as a method to help the courts to strike a balance between judicial over-activism and judicial passivity and to maintain the constitutional balance of powers. The principal criticisms brought against the over-activism or judicial passivity of the courts in environmental matters is that they have violated the constitutional doctrine of separation of powers and breached their constitutional obligation to do justice. [90] This thesis proposes judicial pro-activism and collaboration as solutions to these concerns. Conscious of the fact that the principle of separation of powers is the backbone of the constitutional systems of the selected jurisdictions,[91] this part examines whether collaborative constitutionalism is in line with the doctrine of separation of powers. This part also examines other plausible objections that might be brought against collaboration, including failure to enforce the constitutional provisions, an inclination of the court in adopting collaboration to defuse the political controversy, collaboration can undermine the power of judicial review, the absence of positive order might allow the political organs to avoid responsibilities and the distrust existing between the state organs.

The discussion in this part is divided into *three sections*. The *first section* deals with the doctrine of separation of powers as enshrined in the constitutions of the selected jurisdictions. The *second section* critically examines whether collaborative constitutionalism is in conflict with the doctrine of separation of powers. The *third section* deals with other plausible challenges of collaboration.

[90] Ridwanul Hoque, *Judicial Activism in Bangladesh: A Golden Mean Approach* (Cambridge Scholars Publishing 2011) 253.
[91] AK Sikri, 'Foreword' in Salman Khurshid, Sidhart Luthra, Lokendra Malik, and Shruti Bedi (eds), *Judicial Review: Process, Powers, and Problems: Essays in Honour of Upendra Baxi* (Cambridge University Press 2020) xii.

3.1. Separation of Powers in the Constitutions of the Selected Jurisdictions

The rationale for considering the doctrine of separation of powers at length in this thesis comes from the fact that despite various criticisms,[92] it is still considered to be a dominant criterion of constitutional government[93] and all the constitutions of the selected jurisdictions have incorporated the doctrine albeit in a 'partial' form.

The notion of separation of powers has been defined in the scholarships in various ways.[94] Maurice Vile formulated a definition of the 'pure' theory of the division of powers. According to Vile, in order to keep political freedom, the state apparatus need to be separated into the legislator, executive, and judicial powers with each having a separate state function and one organ is not authorized to interfere with the function of other organs.[95] In addition to the 'pure' theory of separation of powers, there is also the theory of checks and balances. Fundamentally, the checks and balances system means partial separation of functions thereby allowing each state organ to have partial control over the other organs by means of the assigned legal instruments. In this system, no strict separation of functions exists between the three organs of the state, rather there is a set of rules and principles restricting the concentration of powers in the hands of a single organ.[96]

Perhaps it was Aristotle who first identified the trilogy of the powers of the state- 'deliberative (legislative), magisterial (executive) and judicial' although he did not suggest that the powers should be vested into three different branches.[97] John Locke advocated the separation between legislative and executive powers although without giving any emphasis on having separate judicial power. Montesquieu, who is known as the father of the modern doctrine of separation piloted the institutional separation of powers. According

[92] The concept of separation of powers being articulated in the eighteenth century is criticized as archaic and anachronistic. Peter Strauss, 'The Place of Agencies in Government: Separation of Powers and the Fourth Branch' (1984) 84 Columbia Law Review 573.
[93] Separation of power is considered to be the very 'essence of constitutionalism.' Eric Barendt, 'Separation of Powers and Constitutional Government' (1995) Public Law 599.
[94] Piotr Mikuli and Grzegorz Kuca, 'The Separation versus the Cooperation of Powers in the Contemporary Democratic State' (IXth World Congress of Constitutional Law, Oslo 2014).
[95] Vile (n 16).
[96] Barendt (n 92).
[97] Hilaire Barnett, *Constitutional & Administrative Law* (Routledge 2006).

to Montesquieu, the most significant part of the separation doctrine is judicial separation because it can guard the government against its own lawlessness and can ensure rule of law.[98]

The following discussion includes the status of the doctrine of separation of powers in the constitutions of the three selected jurisdictions.

3.1.1. Separation of Powers in the Constitution of India

According to the separation of powers doctrine enshrined in the Constitution of India (the Indian Constitution) although the legislature, executive, and the judiciary have been recognized, the different kinds of power are not expressly vested in the three organs of the state (except vesting executive powers in the President[99] and governors[100]). The Indian Constitution does not provide an equal separation of powers among the three organs of the state and dominant power has been given to the executive.

Under the Indian Constitution, there is an absence of real separation between the executive and legislative authorities rather there is a functional overlap between the three organs of the state.[101] A range of powers is exercised by the executive and some of which include both judicial and legislative functions. On the other hand, the legislature and the judiciary also do not limit themselves only to legislative and judicial functions.[102] The Prime Minister, who is the head of the government, is responsible to the Lower House of Parliament along with her cabinet. This has been described as implying a fusion of the executive with the legislature.[103] Subject to judicial review the plenary power to legislate is with the Parliament and State legislators.[104] In addition to that, the Constitution has empowered the legislature to exercise judicial power regarding the impeachment of

[98] Baron De Montesquieu, *The Spirit of Laws* (Thomas Nugent tr, the Colonial Press 1899).
[99] Article 53 of the Constitution of India 1950.
[100] Article 154 of the Constitution of India 1950.
[101] HM Seervai, 'The Position of the Judiciary under the Constitution of India' (Sir Chimanlal Setalvad Lectures, University of Bombay, 1970).
[102] Ruma Pal, 'Separation of Powers' in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the India Constitution* (Oxford University Press 2016) 253.
[103] Walter Bagehot, *The English Constitution* (Oxford University Press 1873) 42.
[104] Article 245 of the Constitution of India 1950.

judges,[105] and contempt of legislature.[106] Legislatures have the capacity to change the basis of a judicial decision affecting it to be nullified.[107] Bruce Ackerman has lauded the Indian separation of powers and described it as 'the most promising framework for future development of the separation of powers.'[108]

The executive in furtherance of its responsibility for the formulation of government policy predominates the legislative process by initiating the bills and with a majority in Parliament or the State legislatures.[109] The power of the executive to make law under Articles 73 and 162 of the Constitution is coextensive with the Parliament and the State legislatures and the executive orders under these Articles have the same efficacy as an act of the Parliament or State legislatures.[110] The legislative power of the executive covers a broad spectrum and is exercised especially when there is no legislation covering the area.[111] Article 123(2) expressly mentioned that an ordinance promulgated under Article 123 shall have the same force and effect as an Act of the Parliament.[112] The emergency provisions under the Constitution provides the most egregious form of legislative power to the executive.[113]

The judicial powers exercised by the executive are of a vast array such as the executive has the power to decide whether a Member of a House of Parliament has been disqualified or not.[114] The executive has the right to advise the President or Governor to grant pardon to or modify the punishment inflicted by the Court on a convicted person.[115]

As a check on the seemingly unbridled power of the executive and legislature, wide powers of judicial review have been given to the Supreme Court and the High Courts to test whether any action taken by those two organs violates the constitutional

[105] Articles 124(5) and 217 of the Constitution of India 1950.
[106] Article 194(3) of the Constitution of India 1950.
[107] *Vodafone International Holdings BV v Union of India* [2012] 6 SCC 613.
[108] Bruce Ackerman, 'The New Separation of Powers' (2000) 113(3) Harvard Law Review 633.
[109] *Ram Jawaya Kapur v State of Punjab* [1955] AIR 549 (SC).
[110] *Indra Sawhney v Union of India* [1992] Supp (3) SCC 217.
[111] *Ram Jawaya Kapur v State of Punjab* [1955] AIR 549 (SC).
[112] Article 123(2) of the Constitution of India 1950.
[113] Under Article 356 when upon receipt of a report from the Governor of the State, the President makes a proclamation dissolving the State Assembly, she will not only assume all the functions of the government of that state but also may declare that the legislative powers of the State shall be exercised by or under the authority of Parliament.
[114] Article 103 of the Constitution of India 1950.
[115] Articles 72 and 161 of the Constitution of India 1950.

provisions.[116] The Constitution has conferred the right to move the Supreme Court to enforce the fundamental rights contained in Part III of the Constitution. The Indian Supreme Court and the High Courts have the widest power of judicial review compared to other jurisdictions.[117] Under Article 142 of the Constitution, the judiciary has issued binding directives in the absence of appropriate legislation.[118]

3.1.2. Separation of Powers in the Constitution of Bangladesh

The Constitution of the People's Republic of Bangladesh (the Constitution of Bangladesh) adopted by the Constituent Assembly on 4 November 1972 was inspired by the Indian Constitution. It was also inspired by the Constitution of Ireland although 'vicariously' through the Indian experience. The incorporation of the social, economic, and cultural rights as non-justiciable fundamental principles of state policy and differentiation between enforceable and unenforceable rights was also influenced by the Indian Constitution. The influence of the Indian Constitution is also prevalent in the separation of powers doctrine as enshrined in the Constitution of Bangladesh.[119]

The Constitution of Bangladesh does not have an absolute division of powers albeit executive powers are vested in the executive and legislative powers in the Parliament. The judicial power is vested in the judiciary. The constitutional arrangement of separation of powers is only applicable in the sense that no one organ can transgress the constitutional limit or encroach into the domain of the other organ. However, the executive has the power to legislate and the Parliament can cause a fall of the government and impeach the President. The judiciary has certain legislative powers and can make rules while the Parliament can adjudicate certain disputes. However, the judiciary cannot in the name of interpretation of the constitution and the laws create a new law or amend an existing law.[120] The Parliament has the authority to amend a law retrospectively within certain limits so as to extinguish the foundation of a judicial decision although it is not

[116] Articles 32 and 226 of the Constitution of India 1950.
[117] *Union of India v Raghubir Singh* [1989] 2 SCC 754.
[118] *Vishaka v State of Rajasthan* [1997] 6 SCC 241.
[119] Ridwanul Hoque, 'The Founding and Making of Bangladesh Constitution' in Kevin YL Tan and Ridwanul Hoque (eds), *Constitutional Foundings in South Asia* (Hart 2021) 91.
[120] Mahmudul Islam, *Constitutional Law of Bangladesh* (Bangladesh Institute of Law and International Affairs 1995) 90.

authorized to set aside a judgment handed down by a court of law or declare a judgment invalid.[121]

Article 22 of the Constitution expressly provides for the separation of the judiciary from the executive and complete freedom has been provided to judges in the performance of their functions.[122] Under Article 102(1) the High Court Division of the Supreme Court is empowered to enforce fundamental rights incorporated in Part III of the Constitution and under Article 102(2), judicial review power is conferred regarding non-fundamental rights matters. The objective underlying conferring the judicial review power to the Supreme Court is to help establish a balance among the different branches of the state. The doctrine of the separation of powers as enshrined in the Constitution of Bangladesh has been well explained by the Supreme Court in *Mohammad Tayeeb and another v Government of the People's Republic of Bangladesh*,[123] in the following language:

> Our Constitution stipulates [the] separation of powers. The Parliament or the House of the Nation enacts laws for the State, the executive government implements those laws and the Judiciary ensures that the Parliament enacts laws within the bounds of the Constitution and the government implements those according to law. The works and functions of the executive government [are] most extensive. Anything and everything leaving aside the functions of the Parliament and the Judiciary falls within the domain of the Executive. This is the view of the Supreme Court of India and we also hold the similar view.[124]

3.1.3. Separation of Powers in the Constitution of Ireland

The way separation of powers has been incorporated in the Constitution of Ireland (the Irish Constitution) represents a limited separation of functions between the executive and the legislature and separation has been subverted by the 'principle of government

[121] *Mofizur Rahman v Bangladesh* [1982] 34 DLR 321.
[122] Article 94(4) of the Constitution of Bangladesh.
[123] [2015] 23 BLT 10 (AD).
[124] ibid.

responsibility to the Dáil,' albeit David Gwynn Morgan has described the separation of powers, although in a qualified form, 'as the skeleton of the Irish Constitution.'[125] Ireland has a fused executive-legislative with the executive very much in control. Therefore there exists two rather than three state institutions, the judiciary and the political organs.[126] However, the only exception to the fused executive-legislative system is the law-making power given to the Oireachtas.[127] But, again although Article 15.2.1° operates to bar 'law-making' by the executive branch or anyone else other than the legislature, the laws are substantially designed and drafted by the State departments before they are brought to the Houses of the Oireachtas. On the other hand, some major areas of the law such as tort and equity are almost entirely judge-made. Although the courts have been very serious about the application of Article 15.2.1° regarding delegated legislation, case law has not received the attention of the court.[128]

The Irish Constitution empowers the Supreme Court of Ireland to strike down any act of the Oireachtas and executive measures if those are in violation of the Constitutional provisions.[129] The judicial review power made judges the ultimate guardian of the Constitution and the judiciary has the final say if there is any disagreement regarding any of the provisions of the Irish Constitution.[130]

Apart from Article 15.2.1° which has been inspired by the separation of powers doctrine another important feature of separation of powers in Ireland is the attempt to have a 'strong independent judiciary.' Article 34.1 reads thus: 'Justice shall be administered in courts established by law by judges.' This provision is particularly important because it restricts the legislature and the executive to interfere with the functioning of a court. This provision allowed the court to strike down an act of the Oireachtas that purported to settle the result of a pending court case.[131]

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[125] David Gwynn Morgan, 'The Separation of Powers in Ireland' (1988) 7 Saint Louis University Public Law Review 257.
[126] David Gwynn Morgan, 'Judicial-O-Centric Separation of Powers on the Wane?' (2004) 39(1) The Irish Jurist (ns) 142.
[127] According to Article 15.2.1°, '[t]he sole and exclusive power of making laws for the state is hereby vested in the Oireachtas: no other legislative authority has the power to make laws for the state.'
[128] Morgan, 'Judicial-O-Centric Separation of Powers on the Wane?' (n 126) 142.
[129] Article 34 of the Constitution of Ireland 1937.
[130] Stephen Brittain, 'The Case for an Originalist Approach to Constitutional Interpretation in Ireland' (2010) 13(1) Trinity College Law Review 71.
[131] *Buckley v Attorney General* [1950] IR 67 (SC).

In *People (DPP) v Finn*,[132] Keane CJ threw some light on the separation of powers concept as enshrined in the Irish Constitution:

> Since under Article 15.2.1° of the Constitution the sole and exclusive power of making laws for the State is vested in the Oireachtas, it was for the legislature alone to determine which authorities other than the President should exercise that power. It would seem to follow that the remission power, despite its essentially judicial character, once vested under the Constitution in an executive organ, cannot, without further legislative intervention, be exercised by the courts.[133]

3.2. Constitutional Separation of Powers and Collaborative Constitutionalism: Conflict or Congruence?

Collaborative constitutionalism has the capacity to underpin the two important elements of separation of powers i.e. division of labour component and the checks-and-balances component. Kavanagh has argued that there are various forms and degrees of separation of powers and all of those do not preclude coordination or joint action between the organs. Albeit distinct and independent, the organs have to work together and are interdependent in various ways as they should take account of the acts and decisions of other organs when they are adjudicating or legislating. By doing this, each of the organs makes a necessary contribution to the joint enterprise. For example, although the legislature enacts laws, it is the judiciary that has to decide what those laws mean and can fill in the gaps in the legislation by interpreting the relevant legislation. The court has the capacity to integrate particular statutory provisions into the broader fabric of legal principles. This is how lawmaking is seen in a collaborative enterprise and this is very much in line with the constitutional separation of powers ensuring checks and balances. In collaborative constitutionalism, the way each of the organs can contribute different elements 'reflect their particular institutional structures, skills, competence, and legitimacy.[134]

[132] [2001] 2 IR 25 (SC).
[133] ibid.
[134] Kavanagh, 'The Constitutional Separation of Powers' (n 18) 221.

The collaborative methods have the capacity to address the democratic and institutional concerns raised against the limited institutional capacity of the judicial organ of the state. Considering the restricted view of the courts caused by the traditional bilateral and adjudicative character of the judicial process it is argued that the remedy of suspended declaration of invalidity might give a safer passage to the innocent third parties who were to suffer for declaring legislation unconstitutional. This is also convenient for the courts as designing a positive remedy would require constant monitoring which the courts are not institutionally equipped to do. In addition to that, the remedy of suspended declaration of invalidity has the capacity to address certain intrinsic questions a court might be tangled with. Such as, if the court is aware of the likely adverse consequences of its decision, should it ignore those and issue the declaration? Should a court go on to formulate a remedy eventually replacing an unconstitutional policy with a constitutional one? The remedy of suspended declaration of invalidity has the potential to reserve the tasks of formulating political or positive measures for the political organs thereby increasing inter-institutional mutual respect.[135]

The collaborative method of governance conforms to Jeremy Waldron's 'collective action structure',[136] which sees the separation of powers as not just a principle informing distribution of powers and division of responsibilities but focuses on the relationships between the three organs when they carry out their distinct roles in the joint enterprise. Collaborative constitutionalism requires inter-institutional comity because the delicate balance between the institutions can only be maintained by mutual respect between them. This requirement of reciprocal respect between the organs of the state is an important feature of any constitutional system based on the separation of powers. In addition to that, collaborative constitutionalism is in tandem with separation of powers because it asks the organs to exercise some self-restraint when appropriate and to ensure that they remain within their jurisdiction and also requires the organs not to trespass into the domain of other organs. However, in this dimension, collaboration goes beyond checks and balances because it includes more positive forms of inter-institutional interaction.

[135] Carolan, 'The relationship between judicial remedies and the separation of powers' (n 15) 180.
[136] Jeremy Waldron, 'Authority for Officials', in Lukas H. Meyer, Stanley L. Paulson, and Thomas W. Pogge (eds), *Rights, Culture, and the Law: Themes from the Legal and Political Philosophy of Joseph Raz* (Oxford University Press 2003) 45.

Mutual supervision takes place against the broader backdrop of mutual respect and support. In some contexts, the interaction between the branches will be supervisory, where the goal is to check, review, and hold the other to account. At other times, the interaction will be a form of cooperative engagement where the branches have to support each other's role in the joint endeavor.[137]

Collaborative constitutionalism can also rectify the unconstitutional and undemocratic judicial remedies which interfere in matters that come within the jurisdiction of other state organs. By this, collaboration supports the idea rooted in the constitutions of the selected jurisdictions that in a democracy, political issues should be determined by the elected representatives. The base of collaborative constitutionalism is more accurate in terms of the reality of contemporary governance because in modern states decision-making is a multi-stage and ongoing process where 'the notion of any institution having the final word is almost always meaningless'.[138]

3.3. Other Plausible Challenges to Collaboration

There are several objections that can be brought against the various forms of collaboration, such as:

i. Failure to Protect the Constitution;
ii. Politicization of Judicial Decisions;
iii. Challenge regarding who should be included in collaboration and how;
iv. Issues regarding distrust among the state organs; and
v. The problem with not imposing positive obligation.

The following discussion examines the plausible challenges to collaboration and also shows how the challenges can be responded to and propose certain recommendations to overcome the challenges.

[137] Kavanagh, 'The Constitutional Separation of Powers' (n 18) 221.
[138] Carolan, 'The Relationship between Judicial Remedies and the Separation of Powers' (n 15) 180.

3.3.1. Failure to Protect the Constitution

A major objection against collaboration in the form of a suspended declaration of invalidity can be that it embodies an abdication of the constitutional duty imposed upon the courts to protect and enforce the constitution. By suspending a declaration of invalidity the court is actually perpetuating a situation that has been determined to be violative of the constitution. Therefore, it would be a contravention of the constitution, if a court has to maintain the 'unconstitutional status quo'.[139]

This challenge can be responded based on the rights and interests of third parties and the public good. There are certain situations regarding conflict of interests that require a more nuanced response from the courts. Carolan argues that 'where the rights and interests of innocent third parties or of the public good are at stake, the strict, immediate and widespread application of a declaration of invalidity may not necessarily provide the most proportionate or appropriate balancing of constitutional values.' This objection should not serve as a bar to the adoption of the suspended declaration of invalidity remedy but rather requires a cautionary use of the remedy subjecting it to strict constraints. Such a remedy would provide an extra avenue to the court's ability to enforce the constitution because the remedy allows the court to use that when there is no other remedy available.[140]

3.3.2. Politicization of Judicial Decisions

Collaboration might make the courts vulnerable to politics. The intermediate character of the remedy makes it an 'attractive political option' because judges might be minded to adopt the remedy in cases with an objective to limit or defuse any future political issues or there might be direct or indirect political pressure on the judiciary to adopt the remedy in cases where they would have made an immediate declaration. Additionally, the

[139] Bruce Ryder, "Suspending the Charter" (2003) 21 Supreme Court Law Review 267.
[140] Carolan, 'The Relationship between Judicial Remedies and the Separation of Powers' (n 15) 180.

availability of such a remedy would definitely encourage increased political calls for its use in a wide range of cases. This situation can be handled by making the use of the remedy constitutionally confined to only certain situations, such as environmental matters. The reasons for such restricted approach also need to be clearly explained, articulated, and rigorously enforced.[141]

3.3.3. Who should be Included in Collaboration and How?

In order to produce a collaborative decision superior to one that may have been achieved by a single institution, it is crucial to mutually engage different institutions with differing perspectives in a way that facilitates fruitful conflict. But collaboration does not simply occur and it is important to design processes that would promote and produce collaborative outcomes. It has been pointed out in Part I that to encourage mutual learning which characterizes effective collaboration it is not sufficient to bring the parties together rather an environment needs to be created which would encourage interaction leading to mutual learning between the parties. This has been argued to be the greatest challenge in using 'collaboration as an over-arching model of institutional interaction.'[142] Since collaboration is required to be capable of providing a specific template that would organize the relationship between different institutional decisions it is vitally important to understand who should be included in collaboration and how they should be included because wider inclusion has the potential to generate significant deliberation and learning. Appropriate inclusion can also increase 'discursive representation'[143] and can foster procedural justice.[144]

In order to achieve a substantially better, widely supported, robust and innovative process and solution, it is necessary to have a wide inclusion of stakeholders and insights from different sectors. Inclusion in collaboration is a significant issue as it can increase the

[141] ibid.
[142] Carolan, 'Dialogue Isn't Working' (n 10) 209.
[143] Dryzek & Niemeyer, 'Discursive Representation' (2008) 102(4) American Political Science Review 481.
[144] Sylvia Nissen, 'Who's In and Who's Out? Inclusion and Exclusion in Canterbury's Freshwater Governance' (2014) 70(1) New Zealand Geographer 33.

opportunity for participation for stakeholders resulting in having a democratic atmosphere. On the other hand, if key stakeholders are not included it can undermine the efficiency, efficacy, effectiveness, and legitimacy of the collaborative process. Failure to include key stakeholders would abandon valuable knowledge and resources resulting in a higher possibility of refusal to cooperate by dissatisfied stakeholders in downstream implementation. The importance of understanding inclusion in collaboration is evident from the fact that wider inclusion of actors might also give rise to problems such as higher transaction costs, diminishing the quality of deliberation causing muddy negotiations. It is also argued that for collective problem solving larger groups are generally not suitable.[145] According to Nowell, the higher the number of actors, the higher would be the number of uncooperative participants.[146] In this regard, the procedure followed in the NGT can be a good example as it has included all the required stakeholders in the exercise of stakeholder consultative adjudicatory process.

3.3.4. Distrust among the State Organs

Trust has been described as the 'grease' that helps the gears of collaboration to turn.[147] The effective participation by the stakeholders in the collaborative process are directly affected by the trust factor as it gives them the opportunity to understand their risk and vulnerability due to participation in collaboration. Along with creating opportunities, collaboration also poses risks for the stakeholders not only in terms of potential loss of their time and resources but also the mounting pressure to commit to a position that is at odds with their own agenda. It is very important to manage the collaborative process in good faith.[148] Undoubtedly, a history of past conflict increases the legacy of distrust among the institutions which could create barriers for stepping into collaboration.[149]

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[145] Christopher Ansell and others, 'Understanding Inclusion in Collaborative Governance: A Mixed Methods Approach' (2020) 39(4) Policy and Society, 570.
[146] Branda Nowell, 'Out of Sync and Unaware? Exploring the Effects of Problem Frame Alignment and Discordance in Community Collaboratives' (2010) 20(1) Journal of Public Administration Research and Theory 91.
[147] Christopher Ansell & Alison Gash, 'Collaborative Governance in Theory and Practice' (2008) 18(4) Journal of Public Administration Research and Theory 543.
[148] Jurian Edelenbos and Erik-Hans Klijn, 'Trust in Complex Decision-making Networks: A Theoretical and Empirical Exploration (2007) 39(1) Administration & Society 25.
[149] Bing Ran and Huiting Qi, 'Contingencies of Power-sharing in Collaborative Governance' (2018) 48(8) American Review of Public Administration 836.

Interdependency between the stakeholders can have a motivating impact to take part in collaborative governance.[150] According to Thomson and Perry, it is unlikely for the institutions to participate in collaboration unless they perceive 'high interdependence'.[151]

Incentives or disincentives play an important role in decisions to participate in the collaboration. The purpose of the collaborative approach is also an important catalyst to influence participants.[152] In addition to that, the pro-active role by the court and the ability of the courts to provide both coercion and incentive for compliance with environmental regulations[153] can be effective.

Facilitative leadership plays the role of a moderator and is a key thing for adequately managing collaborative processes. This is where the independent character of the courts can influence the other organs to participate in the collaborative approach. The factor of inclusion can attract and retain commitment for collaboration among stakeholders by ensuring authentic and constructive dialogue between the stakeholders and can build a capacity for joint action.[154]

3.3.5. Problems with not Imposing Positive Obligation

Critical problems might arise if no positive obligation is imposed on the executive through judicial pronouncements. One of the principal challenges of not imposing a positive obligation on the executive through judicial decisions can be evidenced from several cases in Bangladesh. In *Ain O Salish Kendro (ASK) v Bangladesh (Slum Dwellers case)*,[155] the HCD of the SC of Bangladesh passed an order to give notice as a matter of constitutional propriety before evicting slum dwellers. In *Bangladesh Society for Enforcement of Human Rights v Bangladesh*,[156] the HCD decided that the arbitrary, sudden, and fanciful evictions of hundreds of sex workers were tantamount to the

[150] Ansell & Gash (n 147).
[151] Ann Marie Thomson and James L. Perry, 'Collaboration Processes: Inside the Black Box' (2006) 66(s1) Public Administration Review 20.
[152] Ansell and others (n 145).
[153] Kenneth J. Markowitz and Jo J.A. Gerardu, 'The Importance of the Judiciary in Environmental Compliance and Enforcement' (2012) 29 Pace Environmental Law Review 538.
[154] Carey Doberstein, 'Designing Collaborative Governance Decision-making in Search of a "Collaborative Advantage"' (2016) 18(6) Public Management Review 819.
[155] [1999] 19 BLD 488 (HCD).
[156] [2001] 53 DLR (HCD).

deprivation of their livelihood, and thus their constitutional right to life. In the first case, the Court directed the Government to arrange alternative shelters and in the later the Government was ordered to formulate its promised rehabilitation schemes compatibly with human dignity in providing educational, moral and socio-economic facilities to dismantle prostitution-facilitative factors. These decisions are of the nature of enlightening the executive regarding its duty to increase social justice and ensure minimum necessities of life to the citizens without imposing any specific positive obligation.[157] However, despite constitutional guarantees against forced evictions and the direction of the HCD towards the Government to provide proper notice and rehabilitation measures before displacement, every year a number of slums are demolished and their residents are evicted.[158] In 2004 a rehabilitation project commenced in Dhaka for the construction of 111 six-storied buildings for slum people who lost their shelters in eviction drives. Surprisingly, in 2015 the Government decided to abandon the plan for the construction of the remaining buildings. The project not only shows a major failure on the part of the Government but also a failure of the justice system as the directions have not been followed at all.[159]

In the *Saif Kamal Case*,[160] the High Court Division of the Supreme Court of Bangladesh had to issue a contempt of court rule on 18 August 2020 against the Secretary, Ministry of Health and Family Welfare (MoH&FW), and the Director-General of the Directorate General of Health Services (DGHS) for not complying with its judgment to ensure emergency medical services for road accident victims.[161] In addition to that, there is Government inertia in the dissemination of the guideline vide publication in the official gazette and through print and electronic media. No step has yet been taken to adopt legislation ensuring the rights of the road accident victims and to protect Good Samaritans.[162]

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[157] Ridwanul Hoque, 'Taking Justice Seriously: Judicial Public Interest and Constitutional Activism in Bangladesh' (2006) 15(4) Contemporary South Asia 399.
[158] Md. Ashraful Alam & Shalina Akhter, 'Slum Eviction in Bangladesh: Seeking Solutions' *The Daily Star* (Dhaka, 21 April 2012).
[159] Tanbir Uddin Arman, Abu Hayat Mahmud, 'Rehabilitation of Slum Dwellers: Taking the Right Approach' *Dhaka Tribune* (Dhaka, 03 March 2017).
[160] *Syed Saifuddin Kamal v Bangladesh and others* [2018] 70 DLR 833 (HCD).
[161] Staff Correspondent, 'Contempt of Court Rule Issued Against Health Secy, DG of DGHS' *The Daily Star* (Dhaka, 19 August 2020).
[162] Rashna Imam, 'Governmental Inertia in Ensuring Emergency Medical Services' *The Daily Star* (Dhaka, 16 November 2020). A review of the Bangladesh Gazette indicates that any guidelines are yet to be published.

Conclusion

The judiciary should be proactive in adopting a collaborative approach as it may bring substantial benefit in all areas and in particular in environmental protection because the different forms of collaboration would allow the courts to move beyond the traditional remedies and develop a more carefully calibrated response to environmental cases. The above discussion establishes that collaborative constitutionalism is consistent with the nature of contemporary government, constitutional checks and balances and can increase mutual respect between the organs. Collaboration has the capacity to respond to debates about institutional supremacy in advancing a solution by acknowledging the interdependent way of working of the institutions of modern states and applying that insight to appropriate cases. Collaboration among the organs of the state reduces competition between the powers and ensures participatory decision-making.

However, there are limitations to the concept and in its application. There is ambiguity as to why an institution that has a strong view on an issue should be obliged to take account of the position of the other. Such as, should the court which has sufficient reasons to come to a decision that there is a clear violation of a constitutional provision, amend its view and position because of a 'grudging legislative response'?[163] This can be rationalized by mentioning that the diversified institutional inputs put forward by different institutions can bring valid alternative perspectives to shared problems. Saying this, it should be added that the recognition of alternative recommendations will mandate a degree of inter-institutional balance and respect. Keeping in view all the criticisms and objections that may be brought against collaboration, this thesis argues on the basis of the discussion made above that it is capable to enhance the accountability of the organs and can work better with more and more applications.

The specific application of the collaborative approach in environmental cases is discussed in the following chapter where it is demonstrated how the NGT has adopted the collaborative approach in dealing with environmental issues. This also shows that an

[163] Carolan, 'Leaving Behind the Commonwealth Model of Rights Review' (n 73).

environmental court and tribunal (ECT) can provide various other advantages including better access to justice, greater expertise, efficiency, visibility, reduced litigation cost, uniformity in environmental decision making, prioritization of cases, better public participation and increased public confidence.[164] Recognizing the various benefits an ECT can offer and based on qualitative data the following chapter also proposes that the NGT can be used as a model in establishing and developing a specialized Environmental Court.

[164] George Pring and Catherine Pring, 'Twenty-first Century Environmental Dispute Resolution – Is There an "ECT" in Your Future?' (2015) 33(1) Journal of Energy & Natural Resources Law 10.

Chapter 6: The National Green Tribunal Model: Environmental Justice through Collaboration

Introduction

This chapter examines the features of the National Green Tribunal of India (the NGT) to see whether it fulfills the requirements of a successful environmental court and tribunal and how far it has been effective in ensuring the elements of environmental justice discussed in chapters two and three. The impetus to examine the functionality of the NGT comes from the qualitative data collected through thirty-two semi-structured interviews where ten academics and twelve practitioners stated that the NGT is an ideal forum to resolve environmental disputes and seven interviewees stated that the NGT has successfully adopted a collaborative approach to ensure participatory decision-making.[1] Through a critical examination of the functionality of the NGT, this chapter argues that the NGT has successfully adopted a collaborative approach and can be used as a model for improving the existing environmental courts in Bangladesh and for establishing a specialized environmental court for Ireland.

The development of new international and national environmental laws and principles, the recognition of the linkage between human rights and environmental protection, the threat of climate change, and public dissatisfaction with the existing general judicial forums prompted many countries to establish environmental courts and tribunals (ECTs[2]). ECTs are considered to have the potential to build operative, accountable and inclusive institutions at all levels essential for ensuring access to justice and improving the environmental rule of law crucial for achieving the sustainable development goals (SDGs) 2030 set up by the United Nations (UN). According to a study by George Pring and

[1] This is discussed in detail in chapter 4 (3.4.1).
[2] A judicial or administrative body specialized in resolving environmental, natural resources, land use development, and related disputes. George Pring and Catherine Pring, *Greening Justice: Creating and Improving Environmental Courts and Tribunals* (The Access Initiative 2009) 3.

Catherine Pring in 2016,[3] there were more than 1200 environmental courts and tribunals functioning in 44 countries and as of 1 March 2018, there are nearly 1,500 ECTs in countries around the world.[4]

Among the long list of countries that have established ECTs this chapter performs a critical analysis of the features, functionality, and challenges of the NGT[5] and the Environment Court (EC) of Bangladesh.[6] In addition to the qualitative research result mentioned above, the NGT has been selected because leading literature[7] shows that India is not only unique among the South Asian countries[8] in having a fully functional ECT but also one of the countries[9] having a comprehensive environmental tribunal. The NGT has greatly impacted and expanded environmental jurisprudence in India and has adopted an ecological approach.[10] In addition, the NGT's innovative features attempting to involve all the organs of the state in the decision-making process merits discussion from the perspective of the thesis because it has ensured distributive justice, participation and access to environmental information, and access to justice.[11] On the other side,

[3] George Pring and Catherine Pring, *Environmental Courts & Tribunals: A Guide for Policy Makers* (UN Environment Programme 2016) 1.
[4] Don C Smith 'Environmental Courts and Tribunals: Changing Environmental and Natural Resources Law Around the Globe' (2018) 36(2) Journal of Energy & Natural Resources Law 137.
[5] The National Green Tribunal in India was established by the National Tribunal Act 2010.
[6] A specialized environmental court system in Bangladesh was introduced in pursuance of the Environment Court Act 2000. The Environment Courts Act 2010 has replaced the Act of 2000.
[7] Gitanjali Nain Gill, *Environmental Justice in India: The National Green Tribunal* (Routledge 2017); Pring and Pring, *Environmental Courts & Tribunals* (n 3) 1; Ceri Warnock, *Environmental Courts and Tribunals: Powers, Integrity and the Search for Legitimacy* (Hart Publishing 2020).
[8] Environmental tribunals in Pakistan have been described to be rarely visible due to their lack of functionality and limited jurisdiction. The environmental tribunals have failed to address environmental concerns in a comprehensive manner. (Martin Lau, 'The Role of Environmental Tribunals in Pakistan: Challenges and Prospects.' (2018) 20(1) Yearbook of Islamic and Middle Eastern Law Online 1. Environment courts in Bangladesh are non-functional and extremely dependent on the executive. Access to environmental justice has been denied and it has failed to achieve its goals. Md. Ahsan Habib, 'Reflections on Environmental Adjudication Regime of Bangladesh' (2015) Bangladesh Law Digest <https://bdlawdigest.org/bangladesh-environment-court-act-2010.html> accessed 7 February 2021. Sri Lanka, Nepal, Bhutan, Maldives, and Afghanistan do not have a specialized environmental court or tribunal. Pring and Pring, *Environmental Courts & Tribunals* (n 3).
[9] The New South Wales Land and Environment Court (NSWLEC) is regarded as the role model for ECTs and is recognized as 'one of the most visionary and successful, based on its innovations, best practices and advising of other ECs around the world.' George Pring and Catherine Pring, *The ABCs of the ECTs: A Guide for Policy Makers for Designing and Operating a Specialized Environmental Court or Tribunal* (UN Environment Programme 2016) 20-21. The NGT model has been heavily influenced by the NSWLEC model and the NSWLEC was described as an 'ideal' model for India in *A.P. Pollution Control Board v Professor M.V. Nayudu* (I and II) [1999] 2 SCC 718 and [2001] 2 SCC 62. The other successful ECTs are the Environment Court of New Zealand, the Environment and Lands Tribunals of Ontario, the Planning and Environment Court of Queensland, and the Environment, Resources and Development Court of South Australia. Brian J. Preston, 'Characteristics of Successful Environmental Courts and Tribunals' (2014) 26 Journal of Environmental Law 365.
[10] Gitanjali Nain Gill, 'The National Green Tribunal: Evolving Adjudicatory Dimensions' (2019) 49 (2-3) Environmental Policy and Law 153.
[11] The New South Wales Land and Environment Court (NSWLEC) adopted a collaborative approach but that was regarding identifying and use of external resources necessary to achieve the goal of court excellence. Success regarding implementing its initiatives for improvement has been achieved through collaboration with the Judicial Commission, Department of Environment, Department of Planning, Australasian Legal Information Institute, other courts in New South Wales, and with professional partners. Joanne Gray and Brian J Preston, 'Achieving Court Excellence-The Need for a Collaborative Approach' (2017) 8(1) International Consortium for Court Excellence Newsletter 1.

although Bangladesh established specialized environmental courts (ECs) well before the NGT, they have not been successful and have been criticized for not being able to ensure access to environmental justice.[12]

This chapter, acknowledging the argument that any ECT model needs to be 'carefully tailored to local conditions and integrated thoughtfully[13] into the national legal and judicial system',[14] examines the environmental justice systems of India and Bangladesh because they have similarities from the constitutional perspectives and have almost similar environmental, social and economic situations.[15] Although this chapter does not include a detailed discussion of the environmental justice system of Ireland because Ireland does not have a specialized environmental court,[16] proposes that the best practices of an ECT discussed here can be useful as the idea of establishing a specialized environment court in Ireland has some momentum.[17] In this context, this chapter sees the NGT model through the lens of the functional method of comparative legal studies because functionality can offer better solutions through the command of legal materials.[18]

The discussion in this chapter is divided into *four parts*. In the *first part*, an analysis of the salient features of the NGT is carried out to see how far the required characteristics of a successful ECT identified by Preston[19] are successfully embedded in the NGT. This part also examines if the NGT has the credibility to be used as a model to improve

[12] Gill, *Environmental Justice in India* (n 7) 28-29.
[13] One such example is the New South Wales Land and Environment Court (NSWLEC) model which had an influential contribution to the establishment of the NGT. Although the NSWLEC was described as an 'ideal' model it was not cloned in India. Transposition occurred to suit the particular socio-legal culture and context and system prevailing in India. Usha Tandon, 'Environmental Courts and Tribunals A Comparative Analysis of Australia's LEC and India's NGT' in Mahendra Pal Singh (ed), *The Indian Yearbook of Comparative Law* (Oxford University Press 2016) 477.
[14] Áine Ryall, 'A Framework for Exploring the Idea of an Environmental Court for Ireland' (2015) 22(3) Irish Planning and Environmental Law Journal 87.
[15] Ridwanul Hoque, 'The Founding and Making of Bangladesh Constitution' in Kevin YL Tan and Ridwanul Hoque (eds), *Constitutional Foundings in South Asia* (Hart 2021) 91.
[16] Ryall, 'A Framework for Exploring the Idea of an Environmental Court for Ireland' (n 14) 87.
[17] Kevin O'Sullivan, 'Urgent Need for Dedicated Environment Court in Ireland, Symposium Told' *The Irish Times* (Dublin, 21 Jan 2021). The Irish Government has taken the decision to establish a new division of the High Court in early 2023 to deal with planning and environmental issues. Harry McGee, 'New Court to Deal with Planning Issues to be Established' *The Irish Times* (Dublin, 28 April 2022).
[18] Julie De Coninck, 'The Functional Method of Comparative Law: "Quo Vadis"?' (2010) 74 The Rabel Journal of Comparative and International Private Law 318.
[19] Brian Preston identified twelve characteristics required for the successful operation of an ECT which are: 1. Comprehensive and centralized jurisdiction; 2. Independence from the other branches of the state and impartiality; 3. Environmentally literate judges and members; 4. Ability to develop environmental jurisprudence; 5. Multi-door courthouse; 6. Scientific and technical specialization; 7. Ability to ensure access to justice; 8. Flexibility and innovation; 9. Better court administration; 10. Value-adding function; 11. Responsive to environmental problems and; 12. Unifying ethos and mission. Preston, 'Characteristics of Successful Environmental Courts and Tribunals' (n 9).

environmental rule of law and ensure distributive justice, right of recognition, ecological justice, access to information, participation, and access to environmental justice. The NGT features that are examined in this part include:

- Composition of judicial and expert members;
- Initiatives to ensure access to justice;
- Speedy and cheap resolution of disputes;
- Comprehensive jurisdiction;
- Independence;
- Developing environmental jurisprudence;
- Pragmatic problem-solving approach by going beyond the 'courtroom door'; and
- Application of international legal principles;
- Ensuring ecological justice.

The discussion shows that the NGT model complies with all the requirements of a successful ECT identified by Preston except the provision for resolving environmental disputes through ADR, the value-adding function, and the requirement to have environmentally literate judges. However, none of the NGT features comes without an issue or a controversy created either by the text of the NGT Act or by the NGT.

In the *second part*, through exploring the NGT's innovative features (stakeholder consultative adjudicatory procedure and monitoring mechanisms), it is examined whether the NGT model can be used as an example of collaboration among state organs. Discussion over the NGT decisions shows that the theory of collaboration proposed by western scholars has been successfully applied through pro-activism by the NGT judges. This part also demonstrates that by adopting a collaborative approach the NGT has been able to ensure participatory decision-making, access to information, and access to justice.

In the *third part*, the major challenges faced by the NGT are examined with an aim to improve the NGT model. A critical examination of the NGT reveals that although the NGT has the potential to ensure access to justice, public participation, and access to information, there are certain drawbacks and challenges associated with it. The chapter shows that the NGT has also created several controversies by overstepping its jurisdiction by adopting judicial review power, using epistolary jurisdiction, and trespassing into the

domain of other organs. The NGT is also facing the challenges of lack of infrastructure and non-implementation of its orders and judgments.

The *final part* of this chapter is divided into three sections. The first section provides a brief overview of the functional method of comparative law to provide a theoretical basis for using the NGT as an example for Bangladesh and Ireland. The second section includes an examination of the environmental court system prevailing in Bangladesh to give a clear picture of why an improved model of ECT is significant for ensuring environmental justice and how access to environmental justice in Bangladesh is restricted. The third section briefly explores the situation regarding a specialized environmental court in Ireland and argues based on the functionality method that the NGT model can be used as an example as the discussions in parts I, II and III show that the NGT model has all the potentials to ensure better access to justice, public participation and achieving environmental rule of law.

Part I

1.1. The Rationale and Background to the Establishment of the NGT

It has been demonstrated in chapters two and three that although as a response to the systematic inequalities, corruption, and the ineffectiveness of both political leadership and administrative authorities, the courts in India adopted an activist role to protect the interests of the disadvantaged in various environmental matters, which has not changed the scenario greatly.[20] The lack of technical expertise of judges and lawyers to fully appreciate and adjudicate environmental disputes, the rapid growth in the number of petitions, unrealistic orders and decisions from the courts, personality-driven adjudication rather than institutionalized adjudication and the issue of creeping jurisdiction have been obstructing the goal to achieve environmental justice in India.[21] The complexities and uncertainties underpinning the scientific evidence presented before the Supreme Court made it concerned and prompted it to lay the foundation for environmental courts.[22] In cases such as *M.C. Mehta v Union of India*,[23] the *Indian Council for Enviro Legal Action v Union of India*,[24] *AP Pollution Control Board v M V Nayudu*[25] the Supreme Court of India expressed its support for the establishment of an ECT and stated that the real benefit of an environmental court can accrue provided environmental experts and technically qualified persons are embedded in the judicial process.[26]

As a result of the pronouncements by the Supreme Court of India in the above-mentioned cases and following the recommendations made by the Law Commission of India,[27] the Indian Parliament adopted the National Green Tribunal Act (NGT Act) which came into force on 18 October 2010 and the Tribunals became fully functional on 4 July 2011. The principal branch is situated in Delhi with other regional branches in Bhopal (Central Zone), Pune (Western Zone), Kolkata (Eastern Zone), and Chennai (Southern Zone). The NGT

[20] Lavanya Rajamani 'Public interest litigation in India: Exploring Issues of Access, Participation, Equity, Effectiveness and Sustainability' (2007) 19(3) Journal of Environmental Law 293.
[21] Geetanjoy Sahu, 'Implications of Indian Supreme Court's Innovations for Environmental Jurisprudence' (2008) 4(1) Law, Environment and Development Journal 1.
[22] Gill, *Environmental Justice in India* (n 7) 42, 57, 209.
[23] [1986] 2 SCC 176.
[24] [1996] 3 SCC 212.
[25] [1999] 2 SCC 718.
[26] Gill, 'The National Green Tribunal: Evolving Adjudicatory Dimensions' (n 10) 153.
[27] In the 186th Report the Law Commission of India stated that an environmental tribunal would reflect the commitments undertaken by India in global meetings. Law Commission of India, *186th Report on Proposal to Constitute Environment Courts* (2003) 50.

benches are co-equal benches and there is no hierarchy between them. The five benches are situated based on geographical jurisdictions.[28]

1.2. Salient Features of the NGT

The NGT is a quasi-judicial body and is different from a normal court in respect of composition, jurisdiction, expertise, etc. Whereas all types of disputes can be adjudicated by the courts, the NGT has the authority to enforce laws on administrative agencies.[29] This section critically examines the salient features of the NGT such as the unique composition involving expert members, independence of the NGT, steps taken to ensure access to justice, jurisdictional expansion, the pragmatic problem-solving approach and attempts to craft a balance between environmental protection and economic development by applying international legal principles to see how far the NGT has been able to ensure distributive justice, right to recognition, ecological justice, and the procedural elements of environmental justice concept.

1.2.1. Composition of Judicial and Expert members

One of the strong features of the NGT Act is that it allows the NGT to be composed of judicial members and scientific experts. The multifaceted and multi-skilled body formed under Section 4 of the NGT Act allows a coherent and effective institutional mechanism to adjudicate not only complex legal but also scientific and technical issues in a consistent manner while simultaneously reshaping the approach to environmental problem-solving. This comes as a solution to the pre-existing problem when the Supreme Court judges had to face difficulties due to a lack of expertise in dealing with technical issues. The composition of the NGT involving the expert members is creating new environmental jurisprudence.[30] However, specialization, which is one of the indispensable features of

[28] Shibani Ghosh, 'Understanding the National Green Tribunal' <https://cprindia.org/news/5400> accessed 16 September 2021.
[29] Sridhar Rengarajan, Dhivya Palaniyappan, Purvaja Ramachandran, and Ramesh Ramachandran, 'National Green Tribunal of India—An Observation from Environmental Judgements' (2018) 25 Environmental Science and Pollution Research 11313.
[30] Gill, *Environmental Justice in India* (n 7) 74.

successful ECTs,[31] is not fully complied with by the NGT Act. Although according to Section 5, the judicial members of the Tribunal including the chair, have to be sitting or retired judges of the Supreme Court, High Court Chief Justices or High Court judges but it is nowhere mentioned in the NGT Act that the judicial members have to be environmentally literate.[32]

1.2.1.1. Expert Members in the NGT

The importance of experts is widely recognized in academic literature.[33] Science is an important element in environmental decision making. Hence appropriate solutions to technical or complicated environmental problems can be provided by scientific experts.[34]

The centrality of the scientific experts in the decision-making process has contributed to the development of environmental jurisprudence which does encompass both legal doctrines and scientific knowledge. This has helped the NGT to come up with innovative judgments which have the capacity to go beyond the courtroom door.[35]

One example of the use of expert knowledge is *J R Chincham v State of Madhya Pradesh*,[36] where the NGT used scientific expertise to help affected communities to regenerate degraded forests. *Asim Sarode v Maharashtra Pollution Control Board*[37] identifies the use of scientific input by experts in a judgment that develops a scientifically-based approach to used-tyre disposal. Since the experts identified the absence of notified emission standards for clamp-type traditional brick kilns by regulatory authorities, the NGT in *Sonyabapu v State of Maharashtra*,[38] directed the state board to formulate and

[31] Brian J Preston, 'Benefits of Judicial Specialization in Environmental Law: The Land and Environment Court of New South Wales as a Case Study' (2012) 29 Pace Environmental Law Review 396.
[32] Section 5 of the NGT Act.
[33] Monika Ambrus and others (eds), *The Role of 'Experts' in International and European Decision-Making Processes: Advisors, Decision Makers or Irrelevant Actors?* (Cambridge University Press 2014) 173; K. Anders Ericsson and others (eds), *The Cambridge Handbook of Expertise and Expert Performance* (Cambridge University Press 2006).
[34] Steinar Andresen (eds), Science and Politics in International Environmental Regimes: Between Integrity and Involvement (Manchester University Press, 2000); A. Gupta, 'Science Networks' in Frank Biermann and Philipp Pattberg (eds), *Global Environmental Governance Reconsidered* (The MIT Press 2012) 69; Robin Feldman, *The Role of Science in Law* (Oxford University Press 2009).
[35] Gill, 'The National Green Tribunal: Evolving Adjudicatory Dimensions' (n 10) 153.
[36] Judgment 8 May 2014.
[37] Judgment 6 September 2014.
[38] Judgment 24 February 2014.

notify emissions standards for the kilns under the provisions of the relevant legislation within a period of four months.

The NGT is vested with the power of merit review[39] where the technical experts can work as the primary decision-maker. The experts can undertake technical in-depth scrutiny involving both law and technical evaluation underpinning the decision. However, the NGT received critical comments from the Supreme Court of India in 2019 due to its failure to conduct a merit review adequately in discharging its adjudicatory function regarding technical evaluation in the grant of environmental clearance.[40]

While acknowledging experts' contribution in reaching environmental decisions, it is also important to note that there are instances where either the expert opinion was erroneous or was not followed in the decision making by the NGT.[41] In *Manoj Misra v Delhi Development Authority (DDA)*[42] a petition was filed to stop the destruction of the Yamuna Flood Plains and its impact on the environment. It was surprising to see that while the initial compensation determined by the Expert Committee was INR 1.2 billion that was reduced later to INR 280 million as the expert committee calculated the amount that would be required to bring the compacted soil to its former state. The NGT ordered the respondent (Art of Living Foundation) to deposit an amount of INR 50 million, out of that INR 2.5 million would have to be deposited in advance as a pre-condition for hosting the event. The decision by the expert committee has been criticized as there was no scientific approach or objective criteria employed in making the recommendation. Further, the first observation was made on visual assessment which is the last thing expected from a body of experts dealing with the environment and how it is impacted by pollution and degradation. No pre-event baseline survey or any post-event base-line survey was done to. Astonishingly, the expert committee did not take into consideration another report completed in 2013 by the same members of the Expert Committee. The earlier report was

[39] A series of NGT judgments have approved that the NGT is vested with the power to do merit review under the NGT ACT. *Rajeev Suri v DDA* [2021] SCC Online SC 7; *Mahendra Pandey v Union of India* (Judgment 8 December 2017). [39] The capacity to do merit review is one of the most significant powers of the NGT as opposed to only judicial review. Under the writ jurisdiction of the High Court or Supreme Court, the courts are generally concerned with the decision-making process and not the merit of the decision. As a merit court, the NGT has the capacity to make primary decisions and therefore can undertake an in-depth scrutiny into not just law but also the technical basis of a particular decision. Ritwick Dutta, 'Law of the Judgle' *The Hindu* (India, 07 June, 2016).
[40] *Hanuman Laxman Aroskar v Union of India* [2019] SCC OnLine 441, para 148.
[41] In *Manoj Misra v Delhi Development Authority (DDA)* (Judgment 07 December 2017).
[42] Judgment 07 December 2017.

also submitted to the NGT at that time ("*Restoration and Conservation of River Yamuna*"). The reduction of the compensation amounts also goes to show that there is no clear methodology adopted by the tribunal for quantitative assessment of environmental damages. There are criticisms that the presence of high dignitaries at the event prompted the NGT to reduce the compensation amount by such a great magnitude.[43]

1.2.2. Initiatives for Ensuring Access to Justice

One of the most important procedural elements of environmental justice concept is access to justice (3). In line with the aim of the NGT Act to provide effective access to judicial proceedings and the broad and liberal interpretation of 'standing' given by the Supreme Court of India in cases involving environmental issues,[44] an expansive interpretation of the term 'aggrieved person'[45] has been adopted by the NGT.[46] In *Jan Chetna v Ministry of Environment and Forests (MoEF*),[47] the term 'aggrieved person' was discussed by the NGT stating that:

> ... the expression aggrieved person cannot be considered in a restricted manner. A liberal construction and flexible interpretation should be adopted. In environmental matters, the damage is not necessarily confined to the local area where the industry is established. The effects of environmental degradation might have far-reaching consequences going beyond the local areas. Therefore, an aggrieved person need not be a resident of the local area. Any person whether he is a resident of that particular area or not, whether aggrieved or not, can approach this Tribunal. In such a situation, it is necessary to review the credentials of the applicants/appellants as to their true intention or motives.[48]

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[43] Diganth Raj Sehgal, 'Case analysis of the Art of Living Foundation: environmental compensation' <https://blog.ipleaders.in/case-analysis-art-living-foundation-environmental-compensation/> accessed 03 February 2021.
[44] *State of Uttranchal v Balwant Singh Chaufal* [2010] 3 SCC 402; In *re Noise Pollution* AIR [2005] 3136 (SC).
[45] Section 18 of the NGT Act provides a long list of persons who can file an application or an appeal before the NGT. The list authorizes any aggrieved person to file an application for a grant of relief or compensation or settlement of a dispute.
[46] Gill, *Environmental Justice in India* (n 7) 75.
[47] Judgment 9 February 2012.
[48] *Jan Chetna v Ministry of Environment and Forests (MoEF)* (Judgment 9 February 2012 para 21-22).

There are several other judgments where the NGT took the same liberal approach in interpreting 'aggrieved person' and gave a wide connotation and any person directly or indirectly affected or even interested is permitted to ventilate grievance in an application or appeal.[49] In its attempt to promote access to justice the NGT even encouraged indigent and illiterate litigants to plea in their vernacular language so that they can easily share their grievances.[50]

The above discussion shows that the initiatives by the NGT has ensured the procedural elements of environmental justice because an easy access to the court can ensure access to information and increase the possibility of participatory decision-making.

1.2.2.1. Exercising *Suo Motu* Power

One issue which has created controversy is the self-declared expansion of powers by the NGT to exercise *suo motu*[51] jurisdiction. The controversy has initially created by the NGT Act by not incorporating any express provision allowing the NGT to exercise this important power. Although in *Baijnath Prajapati v MoEF*,[52] the NGT hold that 'it is mentionable that we are not conferred with *suo motu* powers,' it changed its position in 2014 and claimed *suo motu* power on the basis of the larger public interest and environmental protection.[53] The High Court of Madras restrained the NGT Chennai Bench from initiating *suo motu* proceedings stating that the NGT is not a substitute for the High Court and has to function within the four corners of the NGT Act. Although the Supreme Court of India has recently validated the exercise of *suo motu* power by the NGT,[54] the exercise of the *suo motu*

[49] *Vimal Bhai v Ministry of Environment and Forests* (Judgment 14 December 2011); *Goa Foundation v Union of India* (Judgment 18 July 2013); *Amit Maru v MoEF* (Judgment 1 October 2014).
[50] Gitanjali Nain Gill, 'Mapping the Power Struggles of the National Green Tribunal of India: The Rise and Fall?' (2020) 7 Asian Journal of Law and Society 85.
[51] Latin for on its own motion. When an action is taken by a court on its own account and not as a result of a party asking or making a motion to move the court.
[52] Judgment 20 January 2012.
[53] Unscientific evacuation of accumulated waste leading to environmental pollution and health problems, *Tribunal on its Own Motion v State of Kerala* [2014] SCC Online NGT 6763; Attempts made to destroy Kovalam estuary, *Tribunal on its Own Motion v Secretary, MoEF* [2013] SCC Online NGT 1083; Increased vehicular traffic in Himachal Pradesh, *Court on its Own Motion v State of Himachal Pradesh* Judgment 6 February 2014; Groundwater contamination in water-supply lines and bore-wells in Delhi, *Tribunal on its Own Motion v Government of NCT*, Delhi Judgment 19 June 2015.
[54] *Municipal Corporation of Greater Mumbai v Ankita* Sinha [2021] SCC OnLine SC 897.

power by the NGT remains a controversial issue as it can become a tool of jurisdictional over-reach.[55]

While validating the exercise of *suo motu* power by the NGT, the Supreme Court stated that it is vital for the wellbeing of the nation and its people to have a flexible mechanism to address issues related to environmental damage so that a better legacy can be left for the future generations. The Court further added that the NGT can hardly afford to remain a mute spectator when no-one knocks on its door and the hands-off mode for the tribunal, when faced with exigencies requiring immediate and effective response, would debilitate the forum from discharging its responsibility.[56]

The use of *suo motu* powers, however, is criticised for allowing the courts to undertake 'heroic interventions' that often infringe upon the powers of the legislature and the executive.[57] Hence, exercise of the *suo motu* power by an ECT should be a balanced one and should be used based upon judicial discretion. For exercising *suo motu* power it is important that the power is expressly provided by the relevant legislation[58] and judges should follow certain guidelines. Proper training if judges in this regard is important which has been discussed in detail in chapter 7.

1.2.2.2. E-Filling and the Use of Technology

In an attempt to ensure access to justice, the NGT has introduced an e-filling system being operative from 18 September 2019 with the launch of a new website. Now the petitioners can file petitions from any place at their convenience. Although this step was encouraged by NGT's aim to ensure access to justice but has also proved to be of great support during the Covid-19 pandemic. The new website allows online payment of court fees and also allows the respondent to file her response as and when sought by the court.

[55] Nupur Chowdhury and Nidhi Srivastava, 'The National Green Tribunal in India: Examining the Question of Jurisdiction' (2018) 21(2) Asia Pacific Journal of Environmental Law 190.
[56] Press Trust of India, 'NGT Vested With Suo Motu Power in Discharge of Functions, Says SC' *The Business Standard* (New Delhi, 07 October 2021).
[57] Gauri Kashyap, 'Should the National Green Tribunal Have Suo Motu Powers?' <https://www.scobserver.in/journal/should-the-national-green-tribunal-have-suo-moto-powers/> accessed 24 August 2022.
[58] For instance, The Karnataka Land Reforms Act, 1961 explicitly mentions the limited *suo motu* powers of the Land Tribunal.

The NGT has also adopted technology to facilitate video-conferencing and a user-friendly website has been developed to provide detailed information about cases.[59] However, there are certain drawbacks to this newly adopted system. There are instances when video-conferencing has been cancelled without any prior notice being served to the litigants or insufficient time was offered for a hearing.[60]

1.2.3. Independence

A very important element for the effective functioning of a tribunal is its independence. It has been stated by leading academics that an attempt has been made by the NGT Appointment Rules[61] to minimize the executive influence in the selection process and to promote transparency, accountability, neutrality and independence in the functioning of the NGT.

The statutory provisions in the NGT Act provide a high benchmark in terms of ensuring a transparent appointment process; for example, the central government has to appoint the chairperson of the NGT in consultation with the Chief Justice of India.[62] In order to ensure independence, the NGT Act also specifically provides the tenure, remuneration and other facilities of the Chairperson, Judicial Member and Expert Member of the Tribunal.[63]

However, despite all these precautions, there were criticisms when the current chairperson was appointed within hours of his retirement as a Supreme Court judge. The appointment of the current chairperson was even questioned in the parliament of India as a reward for supporting the government's policy whilst sitting as a Supreme Court judge.[64] More controversy has been created by the recent appointment of two serving officers of the Ministry of Environment, Forest and Climate Change (MoEFCC) as Expert Members

[59] The National Green Tribunal <https://greentribunal.gov.in/> accessed 09 September 2021.
[60] Geetanjoy Sahu, 'Whither the NGT?' *Down to Earth* (Delhi, 23 September 2019) <https://www.downtoearth.org.in/blog/environment/whither-the-national-green-tribunal--66879> accessed 07 September 2021.
[61] The NGT (Manner of Appointment of Judicial and Expert Members, Salaries, Allowances and other Terms and Conditions of Service of Chairperson and other Members and Procedure for Enquiry) Rules 2010 and 2012.
[62] Section 6 of the NGT Act.
[63] Sections 7, 8 & 9 of the NGT Act.
[64] 'Congress Raises the Issue of Appointment of Justice Adarsh Kumar Goel as NGT Chairman in Lok Sabha' *The New Indian Express* (India, 26 July 2018).

of the NGT. The appointment order dated 02 September 2019 stated that they will be appointed for a period of three years with effect from the date of assumption of the charge of the post, or until further orders, whichever is earlier. This implies that the expert members will hold office for a period at the pleasure of the government. This will hamper the independence of the NGT and it is apprehended that no strong decisions will come from members whose role is at the mercy of the government.[65]

1.2.4. Comprehensive Jurisdiction of the NGT

The capacity of the NGT to ensure distributive justice and access to justice has been possible due to the NGT's original, appellate,[66] and special jurisdiction[67] in relation to environmental matters. The original jurisdiction is provided under Section 14 which empowers the NGT to entertain original applications covering civil cases involving substantial environmental questions[68] that arise from enactments specified in Schedule I.[69]

Besides being empowered by the NGT Act, the NGT has expanded its jurisdictional ambit by not only adjudicating disputes in strict compliance with the statutes in Schedule I of the NGT Act but through expansive rationale and innovative judgments. The trend of interpreting severe and complex environmental damages by NGT as socio-centric, rather than individual-centric, puts a serious burden on the public authorities to address the environmental problems. In addition to that, the NGT by handing down orders makes it

[65] Ritwick Dutta, 'Woes of the National Green Tribunal: Are the Recent Appointments Unconstitutional?' <https://www.barandbench.com/columns/new-appointments-national-green-tribunal-unconstitutional-judicial-independence> accessed 04 October 2021

[66] Section 16 of the NGT Act.

[67] Section 15 of the NGT Act empowers the NGT with special jurisdiction to order relief and compensation to victims of pollution and other environmental damage arising under the enactments specified in Schedule I.

[68] The substantial question relating to the environment must be one not previously settled and should have a material bearing on the case. Although the substantial questions relating to the environment have been classified by Section 2(m) of the NGT Act there are several pronouncements where NGT has delineated its jurisdiction by defining and expanding the term substantial question relating to the environment.

[69] Schedule I include the following Acts: 1. The Water (Prevention and Control of Pollution) Act 1974; 2. The Water (Prevention and Control of Pollution) Cess Act 1977; 3. The Forest (Conservation) Act 1980; 4. The Air (Prevention and Control of Pollution) Act 1981; 5. The Environment (Protection) Act 1986; 6. The Public Liability Insurance Act 1991; 7. The Biological Diversity Act 2002.

obligatory for the public authorities to take a positive approach by abandoning their denial mode and moving to an acceptance-of solution mode.[70]

1.2.5. Development of Environmental Jurisprudence

The ability of the NGT to contribute to the development of environmental jurisprudence is best illustrated by the regular flow of cases. Data collected from the NGT Website shows that since inception a total of 37,766 cases have been filed in the NGT and the NGT has disposed of 35,405 cases with a pending list of 2,361.[71] The statistics is an evidence of the fact that the NGT has been successful in ensuring access to environmental justice and this has protected the rights of the disadvantaged and poor.

The reasons behind the constant flow of cases are the comprehensive jurisdiction, technical and scientific specialization of the NGT and that has no doubt enabled the NGT to develop numerous precedents in different areas of environmental justice. Environmental jurisprudence by the NGT has been developed by preserving the link between life and a healthy environment and by successfully placing human rights within environmental discourse.[72]

1.2.6. Application of International Legal Principles

One distinctive feature of the NGT Act is that it specifically mentioned the names of the leading international principles to be followed by the NGT while passing any order or decision or award. While deciding any substantial environmental question the NGT is mandated to apply the principles of natural justice,[73] sustainable development, the precautionary principle, and the polluter pays principle.[74] These principles have been described as the very foundation of the determinative process before the NGT and has

[70] Gill, *Environmental Justice in India* (n 7) 95, 112.
[71] The National Green Tribunal <http://www.greentribunal.gov.in/> accessed 16 June 2022.
[72] Gill, *Environmental Justice in India* (n 7) 205.
[73] Section 19 of the NGT Act.
[74] Section 20 of the NGT Act.

helped the NGT to ensure distributive justice, right to recognition, and also ecological justice.[75]

The NGT attempted to strike a balance between environmental protection and economic development in the *POSCO case*[76] by adopting the principle of sustainable development:

> We have kept in mind the need for industrial development, employment opportunities created by such projects that involve huge foreign investment, but at the same time we are conscious that any development should be within the parameters of environmental and ecological concerns and satisfying the principles of sustainable development and precautionary measures.[77]

To maintain ecological justice and considering that irreparable loss would occur within the rich and rare biodiversity of the Western Ghats and cause restrictions in habitat connectivity and the corridor values of the forest, the NGT applied the precautionary principle in *Janajagrithi Samiti v Union of India*[78] and directed the defendant not to fell trees nor destroy the biodiversity in the 8.3km stretch belonging to Baller reserve forest of Western Ghats.

To ensure distributive justice the polluter-pays principle has been applied by the NGT in *Raghunath v Maharashtra Prevention of Water Pollution Board,*[79] against chemical industries that were not treating their industrial effluents adequately and discharging those in open areas resulting in groundwater pollution. However, the NGT has been criticized for adopting the polluter pays principle and allowing polluters to pollute. One such instance is the *Manoj Misra v Delhi Development Authority (DDA)*.[80] A huge cultural event was staged at the ecologically fragile Yamuna floodplains in New Delhi attended by more than three million people. Considering the extreme environmental consequence of the event a petition was brought before the NGT. In an interim order, the NGT ordered the respondents to pay compensation of INR 5 Crore (€500,000). In the final judgment the

[75] *Manoj Mishra v Union of India & Others* (Judgment 13 January 2015).
[76] *Prafulla Samantray v Union of India* (Judgment 30 March 2012).
[77] ibid.
[78] Judgment 7 March 2012.
[79] Judgment 24 March 2014.
[80] Judgment 07 December 2017.

respondent AOL Foundation was held liable for the damages caused to the Yamuna floodplains. Astonishingly, although the petition included a prayer for the cancellation of the event as it would destroy and degrade the ecologically fragile environment of the Yamuna Floodplains, the NGT adopted a *fait accompli* approach.[81]

1.2.7. Ecocentric Approach by the NGT

The NGT has adopted an ecocentric approach. In *Tribunal on its Own Motion v Secretary of State*[82] the NGT has recognised this approach by reiterating the Supreme Court judgment in *Centre for Environment Law, WWF-I v Union of India*.[83] In the language of the NGT:

> Anthropocentrism is always human interest focused thinking that nonhuman has only instrumental value to humans, in other words, humans take precedence and human responsibilities to non-human are based on benefits to humans. Eco-centrism is nature-centred, where humans are part of nature and non-humans have intrinsic value. In other words, human interest does not take automatic precedence and humans have obligations to non-humans independently of human interest. Eco-centrism is, therefore, life-centred, nature-centred where nature includes both humans and non-humans. Article 21 of the Constitution of India protects not only the human rights but also casts an obligation on human beings to protect and preserve a species becoming extinct, conservation and protection of environment is an inseparable part of right to life.[84]

There are other cases also where the NGT has adopted an ecocentric approach.[85] In *Forward Foundation v State of Karnataka*[86] the NGT recognizing the environmental and ecological impact of a project restraint the respondents from creating any third-party interests or parting with the possession of the property in question or any part thereof, in favour of any person. The plea that construction was nearing completion and huge

[81] Sehgal (n 43).
[82] Judgment 4 April 2014.
[83] [2013] 8 SCC 234.
[84] *Tribunal on its Own Motion v Secretary of State (*Judgment 4 April 2014) paras 32, 33.
[85] *Sudeip Shrivastava v State of Chattisgar*h (Judgment 24 March 2014).
[86] Judgment 7 May 2015.

amounts of the respondents' money, including investments made by various land and other purchasers, was at stake was rejected by the NGT. It observed: 'We are not impressed with this contention at all. The respondents have started the construction even prior to the grant of environmental clearance and instigated the public to invest money. They cannot be permitted to take advantage of their own wrong.' The NGT also stated that:

> ...wetlands are amongst the most productive ecosystems on the earth, and provide many important services to human society. However, they are also ecologically sensitive and adaptive systems. 'Free' services provided by wetlands are often taken for granted, but they can easily be lost as wetlands are altered or degraded in a watershed.[87]

These judgments reflect the ecological justice approach adopted by the NGT by not compromising the ecological impact, especially where resources are non-renewable.[88]

1.2.8. Pragmatic Problem Solving Approach

Problem-solving is very central to this tribunal, and to solve problems the NGT looks beyond the traditional remedies that are available because they want to solve the issue rather than linger on for years to come.[89] The NGT observed:

> We cannot and must not overlook the fact that a substantial environmental dispute or question relating to the environment, under the enactments under Schedule-I, of the NGT Act, 2010, needs determination by taking a pragmatic view. This kind of litigation is not adversarial in nature. The *lis* is not between the parties. The jurisdiction available to NGT, is, therefore inquisitive, investigative and if so required research-oriented. [90]

[87] *Forward Foundation v State of Karnataka* (Judgment 7 May 2015) para 56.
[88] Gill, *Environmental Justice in India* (n 7) 86.
[89] Gill, *Environmental Justice in India* (n 7) 163.
[90] *Ramdas Janardan Koli v Secretary, MoEF* (Judgment 27 February 2015).

In *K D Kodwani v District Collector*,[91] the NGT emphasized the need to consider the translocation of trees as an alternative to felling. Again in *Tulsi Advani v State of Rajasthan,*[92] the NGT recognized the translocation of trees following the principle of sustainable development. In *J R Chincham v State of Madhya Pradesh,*[93] the NGT urged to motivate the forest communities so that they can identify themselves with the development and protection of forests from which they derive benefits.

The NGT's working procedure includes certain unique features such as stakeholder consultation, investigative procedure, and collegiality. The stakeholder consultative adjudicatory procedure is discussed in the second part under the heading of collaborative approach adopted by the NGT.

1.2.8.1. Investigative Procedure

In the investigative procedure, the expert members inspect the affected areas and examine the prevailing conditions. In the *Yamuna Case*,[94] the NGT formed a committee comprising government officials from various ministries and government departments and also university professors to conduct inspections and visit all or any of the places that they consider it appropriate. The investigative procedure has been approved by the Supreme Court of India in *MoEF v Nirma Ltd*.[95] There are several cases where the NGT practiced this pragmatic step to compare and contrast contradictory claims, positions, and reports filed by the parties.[96] No doubt, adoption of the investigative procedure gives the NGT the opportunity to have first-hand information which helps it to reach to an effective and well-grounded decision. The investigative procedure has also been adopted to ascertain the amount of compensation to be recoverable from polluting industries.[97] By

[91] Judgment 25 August 2014.
[92] Judgment 19 February 2015.
[93] Judgment 8 May 2014.
[94] *Manoj Mishra v Union of India & Others* (Judgment 13 January 2015).
[95] Civil Appeal No 8781–83/2013, 4 August 2014.
[96] In *Forward Foundation v State of Karnataka* (Judgment 10 September 2015), the expert members were directed to visit the site in question to gain an informed interpretation of facts and the actual situation at the site and place their findings before the Tribunal; In *Krishna Kant Singh v National Ganga River Basin Authority* (Judgment 16 October 2014) the expert members were directed to visit and inspect the site to assess the adequacy and appropriateness of all anti-pollution measures taken by the industries.
[97] *V. Manickam v The Secretary, Tamil Nadu Pollution Control Board & Ors*, Original Application No 51 of 2015.

adopting the investigative procedure the NGT has also ensured the right to access to information and public participation.

1.2.8.2. Collegiality in NGT Decision Making

Collegiality is an important process that produces a principled judgment by facilitating communication between judges of different perspectives and philosophies to have constructive influence.[98] Collegiality is a sophisticated combination of rules, leadership skills, mutual trust, and a shared belief in common goals. Strong and positive collegiality can promote judicial independence in ensuring that each person's intellectual and judicial strengths are reflected in judicial decisions.[99]

The combination of the NGT benches involving legally qualified judges and scientific and technical experts as joint decision-makers is an excellent framework to exercise collegiality where an individual judge can improve his personal position by technical reasoning informed by an expert. Deliberation, which is one of the most valued components of collegiality, is best practiced in the working process of the NGT. The working process of NGT benches is that they always have a pre-hearing conference and a post-hearing conference. There are interactions between the judicial and expert members before passing any order. The same process is followed in writing a judgment. In the pre-writing session, the judicial members give legal opinions whereas the technical aspects are stated by the experts. After considering short notes from the experts a draft is prepared by one or two of the judicial members. There are many instances when the entire technical note has been reproduced and formed part of the judgment. Then the agreement is reached in writing between the experts and the judicial members and the judgment is finalized.[100] The technical experts even help the lawyers to understand the technical and scientific environmental issues.

[98] Harry T Edwards, 'The Effects of Collegiality on Judicial Decision Making' (2003) 151 University of Pennsylvania Law Review 1639.
[99] Gitanjali Nain Gill, 'National Green Tribunal: Judge Craft, Decision Making and Collegiality' (2014) 2 International Journal of Environment 43.
[100] Gill, *Environmental Justice in India* (n 7) 159.

It was stated in *Ramdas Janardan Koli v Secretary, MoEF*:[101]

> The purpose of having Hon'ble Experts as Members of the Bench is to render the expert's conception to the judicial decision-making process. Otherwise, for mere adversarial litigation perhaps, the Legislature might not have made such an arrangement to establish the National level Green Tribunal.

The benefit of having technical and scientific experts in an environmental tribunal is that in most cases the judges sitting in a tribunal are not scientifically trained and they may also be ill-informed of the issues by the paid scientific experts.[102] The composition of the NGT benches can counteract these challenges and can spell out innovative remedies to solve the basic environmental problem at source rather being only limited to the pre-determined legal remedies. The regular communication between the experts and the judicial members enables the reaching a qualitative and scientifically well-informed judgment to ensure environmental justice.[103]

[101] Judgment 27 February 2015.
[102] David L. Faigmann, *Legal Alchemy: The Use and Misuse of Science in the Law* (W.H. Freeman 1999).
[103] Gill, 'National Green Tribunal: Judge Craft, Decision Making and Collegiality' (n 99) 43.

Part II

2. Collaborative Approach Adopted by the NGT

The NGT in its decision-making process has availed itself of adversarial, inquisitorial, investigative, and collaborative procedures.[104] The NGT in accordance with the power provided under Section 19 of the NGT Act[105] has adopted the following innovative working methods which reflects a collaborative approach by the NGT in resolving environmental matters:

i. Stakeholder consultative adjudicatory process; and
ii. Establishing monitoring committees.

Diversified stakeholders are engaged through the stakeholder consultation process. This particular method ensures effective information sharing and allows the application of techniques that would help time-bound, clear-cut proposals facilitating effective enforcement of laws related to the environment. The adoption of stakeholder consultation ensures access to information and improves the active participation of stakeholders in decision-making through dialogue, argument, and norms for eliciting factual realities and expert knowledge in order to respond to environmental problems. [106]

This part analyses various NGT decisions where the above-mentioned innovative working procedures have been adopted to find out how the NGT has implemented the idea of collaboration in reaching environmental decisions.

2.1. Stakeholder Consultative Adjudicatory Process

Initiatives have been adopted by the NGT intending to ensure public participation in the decision-making process, which is one of the procedural elements of environmental justice. The stakeholder consultative procedure is an innovative problem-solving

[104] Gitanjali Nain Gill, 'Environmental Justice in India: The National Green Tribunal and Expert Members' (2015) 5(1) Transnational Environmental Law 175.
[105] Section 19(2) of the NGT Act empowers the NGT to regulate its own procedure.
[106] Gill, 'Environmental Justice in India: The National Green Tribunal and Expert Members' (n 104) 175.

approach that aims to promote the active participation of all parties to resolve environmental disputes. In this procedure, both internal and external experts along with the stakeholders are consulted to reach a solution. These consultations take place within NGT premises and stakeholders are invited to participate under the jurisdiction, procedures, and chairing of the NGT.[107]

The perception of the judges in the NGT is that issues having wider ramifications and public impact can be better handled and resolved when stakeholders are brought together with the technical experts of the tribunal for eliciting the views of all concerned – government, scientists, NGOs, the public and the NGT. A concerted effort and positive participation from all stakeholders is essential for delivering the desired results in environmental issues.[108] It is argued that the stakeholder consultation process will provide a greater element of consent rather than opposition to a judgment. The consultative process is a stride forward to ensure scientifically-driven judgments reflecting the interests, expectations, and plans of various stakeholders to produce decisions that support sustainable development and recognize the wider public interest. The stakeholder consultative approach has been described as a very helpful exercise for not only understanding the problems and challenges but also finding the best possible solution.[109] There are several instances[110] where the NGT has adopted the stakeholder consultative adjudicatory process involving open dialogue with interested parties. The stakeholder consultation approach has given the NGT a wide opportunity to solve environmental issues by removing the blame game attitude that existed between the government agencies as it allowed them to submit clear cut proposals and suggestions and a time frame for making changes.[111]

In *Indian Council for Enviro-Legal Action v National Ganga River Basin Authority*,[112] the NGT observed:

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[107] Gill, 'The National Green Tribunal: Evolving Adjudicatory Dimensions' (n 10) 153.
[108] *Manoj Misra v Union of India* (Judgment 13 January 2015).
[109] Gill, 'Mapping the Power Struggles of the National Green Tribunal of India' (n 50) 85.
[110] *K. K. Singh v National Ganga River Basin Authority* (Judgment 16 October 2014); *Manoj Mishra v Union of India* (Judgment 13 January 2015); *Vardhaman Kaushik v Union of India* (Judgment 7 April 2015) *and Sanjay Kulshrestha v Union of India* (Order 7 April 2015); *M.C. Mehta v Union of India & Others* (Order 10 February 2016).
[111] Gill, *Environmental Justice in India* (n 7) 167, 168.
[112] Judgment 10 December 2015.

> ... the Tribunal adopted the mechanism of 'Stakeholder Consultative Process in Adjudication' in order to achieve a fast and implementable resolution to this serious and challenging environmental issue facing the country. Secretaries from the Government of India, Chief Secretaries of the respective States, concerned Member Secretaries of Pollution Control Boards, Uttarakhand Jal Nigam, Uttar Pradesh Jal Nigam, Urban Development Secretaries from the States, representatives from various Associations of Industries (Big or Small) and even the persons having least stakes were required to participate in the consultative meetings. Various mechanisms and remedial steps for preventing and controlling the pollution of river Ganga were discussed at length. The purpose of these meetings was primarily to know the intent of the executives and the political will of the representative States who were required to take steps in that direction.[113]

This NGT pronouncement shows that by engaging all the necessary stakeholders the NGT has ensured both access to environmental information and participatory decision-making.

Swatanter Kumar J (the former Chairman of the NGT) uses the example of the *Yamuna River Case*[114] to explain the importance and processes of the stakeholder consultative process. In that case, to come up with an implementable judgment, the NGT called the Chief Secretaries of Haryana, Delhi, and Uttar Pradesh, all the Environmental Pollution Control Boards, and the Delhi Jal (Water) Board. All the stakeholders were given the opportunity of hearing to understand from them what difficulties or impediments they are going to face if the judgment was to be implemented. The impugned judgment was made available to them to know what is wrong with it. So, the NGT has invited criticism of the judgment for the purposes of knowing how well it can be implemented and what measures are required to be taken to implement it.[115] It is argued that the stakeholder consultative approach helps the NGT to deliver judgments that would reflect the actual interests, plans, and expectations of the stakeholders which would help to achieve sustainable

[113] ibid, 3.
[114] *Manoj Mishra v Union of India* NGT (Judgment 13 January 2015).
[115] Swatanter Kumar, 'Keynote Address' (Orientation Programme on Environment and Law, Delhi Judicial Academy 2014).

development.[116] In *Paryawaran Sanrakshan Sangarsh Samiti Lippa v Union of India*,[117] the rights of the villagers to be consulted regarding the construction of the Kashang Integrated Hydroelectric Project was recognized by the NGT. In furtherance of that concern, the NGT directed the MoEFCC and the concerned state government to do necessary consultation with the villagers by placing the project proposal before the Gram Sabha (Village Committee).

In the *Suo Motu Proceedings initiated based on the representation received from R. Bhaskaran J v State of Kerala,*[118] a joint committee was constituted by the NGT comprising representatives from the Central Pollution Control Board (CPCB), the State Pollution Control board (SPCB) Kerala, and the District Magistrate for preparing an action plan for the compliance of law regarding disposal of biomedical and solid waste. The NGT also directed the government to set up an expert committee and create an oversight committee to ensure effective management of environmental degradation. Another example of the collaborative approach adopted by the NGT is the recent decision in which the NGT has directed the government to formulate a standard operating procedure (SOP) for setting up authorized recycling centers to scrap the old vehicles scientifically. The NGT also ordered the MoEFCC to consult with concerned stakeholders.[119]

2.2. Establishing Monitoring Committees

The outcomes in various environmental cases and their effectiveness remain a key challenge for the NGT.[120] Reports also show that there are even failures regarding complying with the orders given by the NGT imposing penalties by implementing the polluter pays principle.[121]

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[116] Gill, 'Mapping the Power Struggles of the National Green Tribunal of India' (n 50) 85.
[117] Judgment 4 May 2016.
[118] Original Application No. 395 of 2013.
[119] 'NGT Directs Govt to Formulate Scientific Mechanism for Dismantling Old Vehicles' *The Economic Times* (India, 24 July 2019).
[120] In *Manoj Mishra v Union of India & Others* (Judgment 13 January 2015) specific deadlines were set for implementation of the judgment such as all the concerned authorities, corporations, bodies including Resident Welfare Associations were directed to clean all the 157 natural-storm water drains as identified by the Committee, within four months from the date of passing of this judgment. The NGT also directed the concerned authorities to prepare an immediate action plan required to ensure proper environmental flows throughout the year, but it transpires that the NGT had to pass repeated orders to ensure execution of its orders. India Environment Portal<http://www.indiaenvironmentportal.org.in/content/465612/order-of-the-national-green-tribunal-regarding-yamuna-river-pollution-11092019/> accessed 27 December 2021.
[121] Chandra Bhushan, Srestha Banerjee and Ikshaku Bezbaroa, 'Green Tribunal, Green Approach: The Need for Better Implementation of the Polluter Pays Principle' (2018) Centre for Science and Environment 19.

In response to the requirement to develop new strategies which can ensure the effectiveness and implementation of orders, the NGT has identified three priority areas which include solid waste management, river pollution, air pollutions and established monitoring committees to execute orders of the NGT under Section 25 of the NGT Act.[122]

The purposes of establishing the monitoring committees are: *First*, to review, monitor and implement the rules regarding the environment; *Secondly*, to formulate an action plan with deadlines; *Thirdly*, infuse accountability of authorities and; *Fourthly*, submit a regular compliance report to the NGT. The Monitoring Committees review the results of environmental monitoring studies and inform the NGT if there is any non-compliance with its orders and decisions. The Monitoring Committees ensure and encourage the participation of stakeholders in a structured forum.[123]

To deal with the problem of solid waste management, the NGT principal branch held chamber meetings with all States to assess the gravity of the situation and to grasp the constraints faced by the authorities in implementing the Solid Waste Management Rules 2016 (The Rules 2016). To oversee the implementation of the Rules 2016, the NGT established a Tribunal monitored mechanism and formed committees at the Apex Level, Regional Level, and State Level. The monitoring committee at the apex level is headed by a retired Supreme Court judge and is consist of expert members and regulators. The Apex Monitoring Committees formulate guidelines and interact with Regional Monitoring Committees headed by retired High Court Judges and comprised of experts regarding adoption of integrated plans to manage solid waste. The involvement of local responsible bodies is ensured by the State level Monitoring Committees. The Committees work to encourage public involvement in solid waste management. A quarterly report is received by the NGT about the status of the implementation of the Rules 2016. Statistics collected from various States of India show that solid waste management is going in the right direction under the monitoring mechanism established by the NGT.[124]

[122] According to Section 25(1) of the NGT Act, 'An award or order or decision of the Tribunal under this Act shall be executable by the Tribunal as a decree of a civil court, and for this purpose, the Tribunal shall have all the powers of a civil court.'
[123] Gill, 'The National Green Tribunal: Evolving Adjudicatory Dimensions' (n 10) 153.
[124] ibid.

The NGT has also established monitoring mechanism to tackle river pollution and rejuvenating the rivers. A four-member Monitoring Committee was ordered by the NGT to prepare an action plan to reduce the pollution level of the Indian rivers to a level of fitness at allow safe drinking. To oversee the execution of the directions given by the NGT it has also established Monitoring Committees headed by retired judges of High Courts for certain major Indian rivers such as Ganga,[125] Ghaggar,[126] Hindon,[127] Satluj,[128] Ami,[129] and Yamuna.[130]

Air pollution is included within the priority areas set by the NGT and in the *News Item Published by Vishwa Mohan Case*[131] all state and union territories in India were directed to prepare Action Plans for attaining the National Ambient Air Quality Standards (NAAQS). The Monitoring Committees review the results of environmental monitoring studies and inform the NGT if there is any non-compliance with its orders and decisions. The Monitoring Committees ensure and encourage the participation of stakeholders in a structured forum.[132]

Undoubtedly, the unique features of the NGT have increased the credibility of its decisions. This thesis, arguing for judges to adopt a collaborative approach in environmental matters, recommends improving the competency of judges along with ensuring the presence of technical experts on the bench to reach to a sound decision regarding when and in which cases it would be appropriate to adopt a collaborative approach. A guideline or toolkit in this regard may be developed to help judges as has been developed to help environmental litigants, NGOs, and interested citizens to access environmental justice in India.[133]

[125] *M.C Mehta v Union of India* (Order 6 August 2018).
[126] *Stench Grips Mansa's Sacred Ghaggar River* (Suo-Moto Case) Order 7 August 2018.
[127] *Doaba Paryavaran Samiti v State of U.P* (Order 8 August 2018).
[128] *Sobha Singh v State of Punjab* (Order 24 July 2018).
[129] *Meera Shukla v Municipal Corporation, Gorakhpur* (Order 23 August 2018).
[130] *Manoj Mishra v Union of India* (Order 26 July 2018).
[131] Order 8 October 2018
[132] Gill, 'The National Green Tribunal: Evolving Adjudicatory Dimensions' (n 10) 153.
[134] Snigdha Gautam and Ramisha Jain, 'National Green Tribunal and Its Disputed Jurisdiction' (2017) 11 National University of Advanced Legal Studies Law Journal 159.

Part III

3. The Challenges Associated with the NGT and Using the NGT Model

Similar to any other institution the NGT also has flaws and it is also facing a number of challenges due to external and internal factors. The following discussion analyzes the major challenges and controversies associated with the NGT so that those issues can be avoided by other countries while using the NGT model. Discussion in this part also shows how the NGT has been trying to counteract the challenges by adopting innovative initiatives and in doing so how the NGT has overstepped its jurisdiction and statutory mandate. The objective of this part is not only to examine the idea of whether the NGT model can be used as an example for other countries but also to strengthen the existing legal framework to ensure environmental justice because merely establishing a Green Tribunal does not necessarily protect the environment by itself.

3.1. Complexities Created by the Text of the NGT Act

The NGT Act created controversy by conferring certain powers on the NGT in a vague way. Such as, the NGT has been given the power to make rules for its own functioning under the NGT Act in an ambiguous manner creating the jurisdictional crisis between the NGT and the High Courts.[134]

It has been discussed in Part I that the NGT has a wide jurisdiction comprising original, appellate, and special jurisdiction in cases where there is a substantial question relating to the environment.[135] The problem is that the word ‘substantial’ is very subjective and will vary from person to person. It seems that there is a lack of a tangible method to measure the gravity of the damage to the environment and public health. Although an attempt has been made by the NGT Act to give instances[136] of what would be considered

[134] Snigdha Gautam and Ramisha Jain, 'National Green Tribunal and Its Disputed Jurisdiction' (2017) 11 National University of Advanced Legal Studies Law Journal 159.
[135] Section 14 of the NGT Act.
[136] Section 2(m) of the NGT Act.

a substantial question relating to the environment still, doubts hover as to how the word substantial is interpreted by different experts.[137]

A very intricate problem is created by the time frame for bringing an application or filing an appeal before the NGT stipulated in the NGT Act. The NGT Act prescribed in Section 14(3) that an application has to be brought within a period of six months from the date on which the cause of action for such dispute first arose. According to Section 15(3), an application seeking compensation or relief or restitution of property or the environment has to be brought within a period of five years from the date on which the cause for such compensation or relief first arose. According to Section 16 an appeal against an order or decision of the NGT has to be brought within a period of thirty days from the date on which the order or decision or direction or determination is communicated. Although the time limitation was set with a purpose such an arbitrary and limited time frame can defeat the whole purpose of establishing the NGT. Impact on the environment is a continuous process. In many cases, it might be difficult to ascertain a time frame to gauge or understand the impact on the environment.[138] Hence, it is very important to have a realistic limitation period.

3.2. Failure to Resolve Cases within Stipulated Time

NGT is mandated to resolve cases within a period of six months[139] but this rule has not been strictly followed although the NGT has resolved environmental cases much faster than India's general justice system. Delay in disposing of cases by the NGT became an issue not only because of the rapidly increasing workload but also due to some other complexities such as unavailability of resources at different NGT benches, constant rotation and transfer of judges, and often the indifferent attitude of governmental authorities to respond within a timeframe by utilizing adjournment proceedings.[140]

[137] Nivit Kumar Yadav, 'National Green Tribunal: A New Beginning for Environmental Cases?'<https://www.cseindia.org/national-green-tribunal--a-new-beginning-for-environmental-cases-2900> accessed 25 January 2021.
[138] ibid.
[139] Section 18(3) of the NGT Act.
[140] Gill, *Environmental Justice in India* (n 7) 136.

3.3. Shortage of Judicial and Expert Members

It has already been discussed in Part I of this chapter that the NGT benches are comprised of judicial members and expert members. No doubt a balanced bench is a *sine qua non* for decision-making processes. Although the NGT Act has provision for a full-time chairperson and up to twenty judicial and expert members for the NGT,[141] with not less than ten in each category, the NGT currently has six judges, including the chair, and as many experts.[142] Thus, the NGT is facing a challenge in terms of the number of both judicial and expert members as the regional benches of the NGT face the problem of having only one expert and one judicial member. The consequence of this is that the expert may not have the expertise to handle a particular environmental issue and this could result in a limited decision. To overcome this challenge the NGT has set a trend to engage external actors in investigative activities to promote a judgment securely based on and underwritten by third-party technical input. The NGT benches have exercised the power to appoint external actors in order to provide an independent and impartial scientific response to issues identified by the bench.[143] In several cases,[144] the NGT has involved even university departments and independent research bodies which shows how new, non-legal third parties are introduced to the NGT fact-finding and scientific evaluation processes. However, the ad-hoc committees those have been appointed to review and monitor the compliance of environmental laws, and submit status reports to the NGT have not only abrogated the responsibility but also have failed to meet the deadlines fixed by the relevant statute.[145]

[141] Section 4(1) of the NGT Act.
[142] The National Green Tribunal <https://www.greentribunal.gov.in/> accessed 11 April 2022.
[143] Article 4(2) of the NGT Act provides that the NGT Chairperson will have the authority to invite any person having specialized knowledge and experience in a particular case before the NGT to assist in that case.
[144] *Ashok Gabaji Kajale v M/S Godhavari Bio-Refineries Ltd* (Judgment 19 May 2015); *Subhas Datta v State of West Bengal* (Order 28 July 2015); *Paramjeet S Kalsi v MoEF* (Judgment 15 May 2015).
[145] Since 2019 the NGT has outsourced work to over 175 ad-hoc committees. Remya Nair and Neelam Pandey, 'NGT Decisions Causing Loss to Industry, Need to Look at its Mandate- Ministerial Panel' *The Print* (Delhi, 10 December 2020) <https://theprint.in/india/governance/ngt-decisions-causing-losses-to-industry-need-to-look-at-its-mandate-ministerial-panel/564194/> accessed 08 September 2021.

3.4. The Exercise of Judicial Review Power by the NGT

Apart from a number of external challenges, there are also some controversies created by the NGT itself which are hindering its smooth functioning. One such issue is the exercise of judicial review power by the NGT. In *Wilfred J v MoEF*,[146] judicial review power was exercised by the NGT to examine the constitutional validity of the delegated legislation. It stated:

> ... it will be a travesty of justice if it was to be held that the Tribunal does not have the power to examine the correctness or the constitutional validity of a notification issued under one of the scheduled acts to the NGT Act. In the absence of such power, there cannot be an effective and complete decision on the substantial environmental issues that may be raised before the Tribunal, in the exercise of the jurisdiction vested in the Tribunal under the provisions of the Act. [147]

To eliminate any controversy regarding the judicial review power of the NGT, in a recent decision the Supreme Court of India declared it would be 'fallacious to state that the NGT has the power of judicial review akin to the High Court. It is a statutory tribunal set up under NGT Act'.[148] In a recent decision, the Indian Supreme Court held that Sections 14 and 22 of the NGT Act did not oust the High Court's jurisdiction under Articles 226 and 227 of the Indian Constitution. Besides, the court held that section 22 of the NGT Act, which provides for a direct appeal to the Supreme Court, is valid.[149]

3.5. Jurisdictional Crisis between the NGT and the High Courts

There has been a jurisdictional crisis between the NGT and the High Courts of India. The crisis was mostly regarding the issue of appeals of orders and judgments given by the NGT. Although Sections 22 of the NGT Act provides that an appeal has to be brought

[146] Judgment 17 July 2014.
[147] ibid.
[148] *T N Pollution Control Board v Sterlite Industries* [2019] SCC On-Line SC 221, para 52.
[149] *Madhya Pradesh High Court Bar Association v Union of India* Writ Petition (Civil) No. 433 of 2012, Order 18 May 2022.

before the Supreme Court of India against any decision of the NGT, the Madras High Court in *Kollidam Aaru Pathukappu Nala Sangam v Union of India*,[150] held that being constitutional courts, the High Courts have jurisdiction to entertain appeals against the orders of the NGT and the jurisdiction of the High Court under Articles 226/227 is not excluded under the NGT Act. In its judgment in *Court on its Own Motion v National Highway Authority of India,*[151] the Bombay High Court held that it is a settled position of law that the High Court can exercise the power of judicial review over all the Tribunals which are situated within its jurisdiction. A different position was taken by the NGT in *Braj Foundation v Government of Uttar Pradesh*.[152] In that case the Tribunal stated, 'there is nothing to presume that the NGT is either subordinate to any High Court or under the powers of superintendence of any High Court.'

However, to remove the jurisdictional confusion and acknowledging its limited expertise in environmental issues, the Supreme Court of India, after reviewing its own environmental caseload in 2015, transferred all environmental cases either active or prospective through *Bhopal Gas Peedith Mahila Udyog Sangathan v Union of India*[153] and *T.N. Godavarman Thirumulpad v Union of India*[154] to the NGT.

3.6. Policy Formulation by the NGT

There are instances where the NGT has interfered to fill up the gaps and limitations in the policy and gave directions to the government to incorporate the same. NGT has prepared and recommended policies on bio-medical waste,[155] trans-location of trees[156] and tyre-burning and cumulative EIA.[157] Although it is argued that the policy formulation by the NGT demonstrates its willingness to recognize the greater public interest, welfare and environmental protection but raises questions as to the encroachment by the NGT in the

[150] [2014] SCC Online Mad 4928.
[151] [2015] SCC Online Bom 6353.
[152] Judgment 5 August 2014.
[153] [2012] 8 SCC 326.
[154] Supreme Court Order 5 November 2015.
[155] *Haat Supreme Wastech Limited v State of Haryana* (Judgment 28 November 2013).
[156] *K D Kodwani v District Collector* (Judgment 25 August 2014).
[157] *T Muruganandam v MoEF* (Judgment 11 November 2014).

domain of other organs.[158] This chapter argues that the NGT should be cautious about infringing on the domain of other organs as this will violate constitutional principles.

3.7. Absence of ADR Mechanism

The NGT Act does not provide for the settlement of environmental disputes through alternative dispute resolution mechanisms (ADR). ADR processes should be included to promote environmental rule of law although it needs to be carefully tailored because there exists the danger of a pressured compromise.

The above discussion revealing the challenges of the NGT has been conducted to improve the NGT model which can be used as an example by other countries in establishing or developing ECTs because the NGT has been characterized as an extremely active and effective ECT model and an outstanding example.

[158] Sudha Shrotria, 'Environmental justice: Is the National Green Tribunal of India Effective?' (2015) 17(3) Environmental Law Review 169.

Part IV

4. The NGT Model for Bangladesh and Ireland

The discussion in this part is divided into three sections:

The first section briefly discusses the principle of functionality to provide a theoretical basis for proposing the NGT as an example for Bangladesh and Ireland.

The second section demonstrates the restricted access to environmental justice in Bangladesh because of the relatively weak environment court. This part by a comparative examination between the NGT and environment court in Bangladesh includes suggestions to improve the environmental justice situation in Bangladesh.

The third section includes a brief exploration of the debate and discussion in Ireland in terms of having an environmental court. This section concludes by arguing that the NGT model can be used as an example since it has the potential to pass the benchmarks of a successful ECT.

4.1. The Functional Method of Comparative Law

According to Zweigert and Kötz, the principle of functionality can not only define the problem but also can provide advice to solve the problem within given social and economic situations. Although incomparable cannot usefully be compared, things that can fulfil the same function can be compared. The basic presumption in functionality is that almost similar problems are faced by the legal system of every society and the problems are resolved in a way that has the same or similar practical outcome.[159]

According to De Coninck, institutions are considered to be comparable as they fulfill the same or similar functions and because they also are related to the same kind of

[159] Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (Tony Weir tr, 3rd edn, Oxford University Press 1998) 15.

problems.[160] In that perspective, the principle of functionality allows looking at different systems of the world to acquire experiences from a greater variety of solutions and responses.[161]

In addition to the above, international understanding, exchange of legal ideas and reforms can also be facilitated by functionality. Functionality can also help to promote the domestic development of legal institutional rules.[162] The principle of functionality can be particularly helpful for developing countries, especially where legal, procedural and regulatory systems are not well developed or are slow to respond to socio-economic crises. The principle of functionality has also been reinforced by environmental rule of law 'being a comparable common point of reference that reflects shared purpose or *tertium comparationis*.'[163]

In line with the above discussion where institutions are considered to be comparable because they fulfill the same function and are related to the same problem, this chapter uses the experiences learned from the NGT to improve the existing environmental justice system in Bangladesh and proposes that Ireland can use the NGT as an example establishing a specialized environmental court.

4.2. Environmental Court in Bangladesh and the NGT Model

Remarkable steps were taken by the Government of Bangladesh in incorporating the Environment Courts Act (ECA) 2000[164] but an adequate result has not been achieved due to problems in implementing the legislation, executive unwillingness, lack of infrastructure, statutory limitations, and public unawareness. In addition to that, the environmental courts (EC) were not designed to make it capable to overcome traditional

[160] De Coninck (n 18).
[161] Zweigert and Kötz (n 159).
[162] Christopher A. Whytock, 'Legal Origins, Functionalism, and the Future of Comparative Law' (2009) Brigham Young University Law Review 1879.
[163] Marek Prityi and others, 'Locating Environmental Law Functions Among Legislative, Judicial, and Implementation Bodies' in Kirk W Junker (ed), Environmental Law Across Cultures: Comparisons for Legal Practice (Routledge 2020) 73.
[164] Act No. 11 of 2000

procedural drawbacks of civil or criminal courts.[165] Although under the ECA 2000 the Government was mandated to establish EC in every district of the country, only two ECs and one environmental appellate court were established. In line with its international commitments, Bangladesh Government has adopted a new Environment Courts Act 2010 (ECA 2010) which replaced the previous Act to expedite the trial of cases involving environmental offences. This new Act has certain important features, such as an alternative dispute resolution mechanism,[166] time limitations for disposal of environmental cases and appeals.[167] Although new legislation has been passed the statutory limitations in the old legislation have been carried forward to the new Act. The Environment Courts of Bangladesh are not adequately reflecting common people's aspirations vis-à-vis the Environmental Courts have failed in protecting the environmental rights of common people.[168]

The table below based on the essential characteristics of a successful ECT argued by Preston[169] shows a comparative analysis of the NGT and the ECs. The table also demonstrates the problems existing in the environmental legal regime in Bangladesh:

Twelve characteristics of a successful ECT	**The NGT**	**Environmental Courts in Bangladesh**
Comprehensive jurisdiction	It has comprehensive jurisdiction although does not have criminal jurisdiction.	ECs do not have a comprehensive jurisdiction.
Independence	The NGT is independent of the other state organs	EC is not independent and is broadly dependent on the executive.

[165] Habib (n 8).
[166] Section 18 of the ECA 2010.
[167] Sections 6(2) (c), 7(3) (c), 10(2) & (3), 14(8) & (9) of the ECA 2010.
[168] Imtiaz Ahmed Sajal, 'Common People's Access to the Environment Courts of Bangladesh: An Appraisal' (2015) Bangladesh Law Digest <http://bdlawdigest.org/environment-court-act-2010.html> accessed 8 February 2021.
[169] Preston, 'Characteristics of Successful Environmental Courts' (n 9).

Scientific and technical specialization	It has permanent expert members.	It lacks environmental, scientific, and technical expertise
Ensuring access to justice	The NGT has ensured access to justice. However, the introduction of advanced notice is hindering access to justice.	Access to environmental justice is barred by the executive authority of the DoE.
Environmentally literate judges and members	It has environmentally sensitive judges though the NGT Act does not require an environmentally literate judge.	The judges sitting in the EC have no such pre-requirements.
Developing environmental jurisprudence	The NGT has contributed to a great extent.	No such contribution has been made by the EC as the number of cases filed is very low.
Flexibility and innovation	The NGT has been very innovative in its approach.	Neither the ECA 2010 nor the EC has shown any innovation.
Better court administration	The NGT has a better court administration and a fast-track process.	It has failed to showcase this.
Responsible to environmental problems	The NGT has been very responsive.	It is yet to show any such activity.
Multi-door courthouse	The NGT Act does not provide any provision to settle disputes through ADR	The ECA 2010 has incorporated provision for resolving disputes through ADR.
Value-adding function	The NGT has not endorsed an evaluative performance framework.	It also has the absence of a feedback loop.

Unifying ethos and mission	The NGT has attempted to maintain processes that are consistently transparent, timely, and certain.	The ECs in Bangladesh are yet to have a statement of purpose showing any of these credentials.

4.2.1. Limited Jurisdiction

The environmental courts have a very limited jurisdiction caused by limited scope of the environment court, restricted access to justice, and over-dependency on the executive. They have jurisdiction to try offences under environmental law.[170] According to Section 2(c) of the ECA 2010 'environmental law' includes Bangladesh Environment Conservation Act 1995, and such other laws as may be subsequently mentioned by the Government through a gazette notification. The Government has shown reluctance to add any other law to be included in the list to expand the jurisdiction of the environmental court.[171]

From the experience of the NGT this chapter argues that wide jurisdiction should be vested in the ECs to ensure that a major spectrum of environmental jurisprudence is covered and to render effective environmental decisions.

4.2.2. Restricted Access to Justice

Environmental justice in Bangladesh is suffering most because of restricted access to justice. According to the ECA 2010, no claim for compensation[172] or cognizance[173] of an offence shall be taken by the EC except on the written report of an Inspector of the Department of Environment (DoE). These provisions act as barriers to the access to justice for the victims of environmental pollution seeking redress.[174] The consequence is

[170] Section 7(1) of the ECA 2010.
[171] Md. Sefat Ullah, 'Greening Justice in Bangladesh: A Road to Successful Environmental Court' (2017) 3(2) Green University Review of Social Sciences 101.
[172] Section 7 of the ECA 2010.
[173] Section 6(3) of the ECA 2010.
[174] Ullah (n 171).

that ECs in Bangladesh are largely inactive courts. A report shows that the total number of cases pending before the three designated ECs is 7,002 whereas only 388 of those are filed under the Bangladesh Environment Conservation Act 1995.[175] Due to the restricted access to environmental justice, the ECs in Bangladesh have the lowest case filing rate in comparison to the global statistics.[176]

The NGT model is significant here because the NGT has ensured that aggrieved parties can come before it easily without any bureaucratic barrier. However, the NGT has recently provided certain directives in *Shivpal Bhagat v Union of India* (Order 19 July 2018). According to the NGT directives which became applicable on 1 August 2018, the petitioner has a responsibility to approach the concerned authority (the respondent) first and allow them fifteen days to respond. It is incumbent on the concerned authority either to give a response to the individual or put the answer on their respective website. It is the responsibility of the petitioner to file that initial application and the response (if any) while lodging the petition before the NGT and also to mention the response in her petition. It is criticized that such a restrictive approach might hinder the real purpose behind the establishment of the NGT.[177]

4.2.3. Extreme Dependency on the Executive

The ECA 2010 made the environmental courts hugely dependent on the executive in terms of filing of cases, investigation, prosecution, and implementation. A complaint before the ECA can only be filed through the DoE which is an executive body. The DoE has the exclusive authority of investigation. No report after investigation will be submitted without the affirmation of the Director-General or his authorized personnel.[178] The prosecuting lawyer is also engaged by the DoE.[179] The DoE is working as a 'gatekeeper' representing itself as a major obstacle to access to environmental justice. Pring and Pring

[175] Asaduzzaman and Ahmed Dipto, 'Ain-Adalot Ache, Nei Mamla' *Prothom Alo* (Dhaka, 13 March 2021).
[176] Sajal (n 168).
[177] Gill, 'The National Green Tribunal: Evolving Adjudicatory Dimensions' (n 10) 153.
[178] Section 12 of the ECA 2010.
[179] Section 14 of the ECA 2010.

were informed during an interview with the DoE that there are thousands of environmental complaints which were not and will never be investigated and no report will be generated based on those which would permit a judicial filing.[180]

Keeping in mind the NGT model this chapter argues that the ECs should be given full independence to deal with the environmental issues and the dependency on the executive should be reduced to ensure environmental justice.

4.2.4. Colonial Laws Causing Delay and Higher Cost

According to the ECA 2010 in disposing of any environmental issue, the ECs are bound to follow the Code of Civil Procedure (CPC) 1908 and the Code of Criminal Procedure (CrPC) 1898,[181] whereas both these laws have been recognized as inaccessible, non-participatory, protracted, expensive, and following colonial legacy.[182]

On the other hand, it is provided under sections 19(1) and 19(3) of the NGT Act that the NGT is not bound by the procedure laid down in CPC or CrPC and the rules of the evidence contained in the Indian Evidence Act 1872. By allowing the NGT 'wiggle room' in following orthodox procedures for the sake of transcendent environment justice, the NGT Act has made environmental justice accessible and participatory.[183] Considering the success of the NGT this chapter argues that the ECs should be given independence to deal with environmental issues and the dependency on the colonial laws should be avoided.

4.2.5. Lack of Environmental Knowledge in the Bar and the Bench

Specialization is required from both the bench and bar to establish a successful ECT. Although Bangladesh has established ECs, it lacks judges with expertise in environmental issues. No environmental training or education is required for appointment as an

[180] Pring and Pring, *Greening Justice* (n 2) 1.
[181] Sections 14(1) and 14(6) of the ECA 2010.
[182] Arpeeta Shams Mlizan, 'Continuing the Colonial Legacy in the Legislative Drafting in Bangladesh: Impact on the Legal Consciousness and the Rule of Law and Human Rights' (2017) 5(1) International Journal of Legislative Drafting and Law Reform 10.
[183] Habib (n 7).

environmental court judge. In addition to the lack of environmental knowledge among the judicial members, there is no provision to engage technical experts on the bench. This is resulting in orders which are a hindrance to the protection of the environment rather an aid.[184]

The experience and example of the NGT are vital here because a special issue like the environment requires individuals with technical expertise, experience and knowledge.[185] It has been demonstrated in part I how experts are integrated into the NGT and how they are contributing by helping the judicial members in reaching a viable decision.

4.2.6. Ineffective Remedies

One of the major drawbacks of the environmental legal regime in Bangladesh is the failure to provide effective remedies. The ECs have failed to grant diverse reliefs including prerogative orders, specific performance, restitution etc.[186]

In this regard, the example set by the NGT is worth mentioning because in addition to the exercise of its original and appellate jurisdiction the NGT has been successfully exercising its special jurisdiction in not only ordering compensation for the environmental victims but also by pronouncing orders for restitution of damaged property.[187]

The above discussion shows the problems existing in the environmental justice system in Bangladesh and also shows that initiatives are required to ensure better access to environmental justice and development of necessary expertise to better handle environmental issues and safeguarding independence from other organs. Discussion in Parts I and II shows that in every respect the NGT model can be a good example for Bangladesh to achieve environmental justice.

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[184] Masrur Salekin, 'Collaborative Environmental Governance: The Role of the Law Commission Bangladesh' (2021) Special Edition Law Commission Bangladesh 126.
[185] Fisher, J Berton and Keffer, William R. 'Selection, Use and Management of Experts in Environmental Legal Practice' (1998) 33 Tulsa Law Journal 1003.
[186] Ullah (n 171).
[187] In *S K Navelkar v State of Goa* (Judgment 8 April 2015) the NGT allowed an application under Section 15 of the NGT Act for the restitution and restoration of the environment and also regarding damage to agricultural lands.

4.3. A Possible Specialized Environment Court for Ireland

Ireland does not have a specialized environmental court and different courts from the District Court to the Supreme Court deal with environmental cases. However, there are environmental tribunals in the form of An Bord Pleanála and the Aquaculture Licences Appeals Board.[188] An Bord Pleanála (Planning Appeal Board) of Ireland can only deal with land use and not environmental laws.[189] The Aquaculture Licences Appeals Board provides an independent authority for the determination of appeals against decisions of the Minister for Agriculture, Food and the Marine on aquaculture licence applications.[190] By allowing them a limited jurisdiction the ability of the Boards to make a holistic contribution to environmental governance has been curtailed.[191]

The poor situation of access to environmental justice in Ireland resulting from the following reasons has led to debate over a specialized environmental court for Ireland:

First, the absence of provision for administrative appeal in planning and environmental decision making;
Second, the high cost of litigation;
Third, no provision for civil legal aid for environmental cases;
Fourth, the long processing time of cases;
Fifth, the standard of judicial review is uncertain; and
Sixth, the lack of specialist knowledge among judges.[192]

However, it seems that the idea of a specialized environment court in Ireland surfaced on several occasions. The first was in the recommendations made in the report by the Environmental Protection Agency (EPA) Review Group in 2011.[193] The recommendation included a wider review of environmental governance in Ireland including the possibility of an ECT. The reference to an environment court came again in 2012 in a keynote

[188] Ryall, 'A Framework for Exploring the Idea of an Environmental Court for Ireland' (n 14) 87.
[189] Citizens Information <https://www.citizensinformation.ie/en/housing/planning_permission/an_bord_pleanala.html> accessed 08 September 2021
[190] Aquaculture License Appeals Board <http://alab.ie/> accessed 10 September 2021.
[191] Preston, 'Characteristics of Successful Environmental Courts' (n 9).
[192] Ryall, 'A Framework for Exploring the Idea of an Environmental Court for Ireland' (n 14) 87.
[193] Environmental Protection Agency Review Group, *A Review of the Environmental Protection Agency* (May 2011) para 1.4.6.

address delivered by the then Chief Justice of Ireland, Mrs. Justice Susan Denham.[194] The idea of a specialized environment court again came into the discussion when the Department of Environment, Community and Local Government (DECLG) initiated a public consultation on Access to Justice and Implementation of Article 9 of the Aarhus Convention in 2014. It appears that the number of submissions in response to the DECLG consultation favouring the establishment of an environment court or tribunal was significant.[195] Considering the routine destruction of the environment and recognizing the absence of expertise in the Irish court system, an urgent need for a specialized environment court providing easy access at low cost with a wide variety of remedies and sanctions has also been identified in the recent symposium organized by the Irish Climate Bar Association.[196]

The former Chief Justice of the Supreme Court of Ireland, Mr. Justice Frank Clarke speaking extra-judicially has stated that a constitutional amendment would be necessary to establish a comprehensive environmental court. He also stated that it will not be a straightforward task to create a standalone environmental court through legislation. To avoid greater complexity Clarke CJ suggested considering the option of having a 'court within a court' by the creation of a separate list within the High Court.[197]

Commitments have been made in the Program for Government 2020 to 'Establish a new Planning and Environmental Law Court managed by specialist judges and on the same basis as the existing Commercial Court model.'[198] Keeping in view the above discussion and the commitment made by the Government, it is still an on-going issue as to what would be the form of a specialized environment court in Ireland.[199] Considering the discussion made in Parts I, II, and III, the constitutional similarities between Ireland and India, and the criteria of a successful ECT argued by Brian Preston this chapter argues

[194] Susan Denham, 'Some Thoughts on the Constitution of Ireland at 75' in Eoin Carolan (ed), *Constitution of Ireland: Perspectives and Prospects* (Bloomsbury Professional 2012) 3.
[195] Ryall, 'A Framework for Exploring the Idea of an Environmental Court for Ireland' (n 14) 87.
[196] O'Sullivan, 'Urgent Need for Dedicated Environment Court in Ireland, Symposium Told' (n 17).
[197] Frank Clarke, 'A Possible Environmental Court: The Constitutional and Legal Parameters' (2015) 22(3) Irish Planning and Environmental Law Journal 96.
[198] Programme for Government: Our Shared Future <https://www.gov.ie/en/publication/7e05d-programme-for-government-our-shared-future/> accessed 10 August 2021.
[199] However, a new division of the High Court is to be established to deal with planning and environmental issues in early 2023. Harry McGee, 'New Court to Deal with Planning Issues to be Established' *The Irish Times* (Dublin, 28 April 2022).

that the NGT model can be a useful example for Ireland to ensure better access to environmental justice and protecting environmental rule of law.

Conclusion

By examining the salient and innovative features of the NGT, this chapter shows how the NGT has been contributing to ensuring environmental justice by allowing access to justice and public participation. After analyzing the functionality of the environmental courts in Bangladesh and exploring the current status regarding a specialized environment court in Ireland and examining the NGT in India, this chapter argues that for the optimal implementation of environmental law both Bangladesh and Ireland can follow the NGT model where the tribunal is a specialized one compromised with experts of various field along with judicial minds. The NGT has also proved that the scope of implementation of laws and decisions is much wider with the collaboration of the executives and the stakeholders. Considering the prevailing situation of the environment and the challenges with the NGT this chapter suggests that:

- A specialized ECT should be given the power to resolve environmental disputes through the application of alternative dispute resolution mechanisms.

- An ECT should act within the statutory parameters and should follow constitutional mandates. It should not formulate policy and enact laws. This thesis argues for collaboration among the organs of the state in the form of fruitful conflict to reach a decision by mutually engaging different organs and also by remaining within the respective domain of each organ.

- Special legal assistance must be introduced for the disadvantaged socio-economic groups so that they can know their right and come before the law without any limitation

Chapter 7: Recommendations and Conclusion

Introduction

This thesis has proposed and developed *judicial pro-activism* and *collaboration* as methods for ensuring environmental justice. Although the idea of collaboration in resolving environmental problems has been in place for some time now,[1] there exist substantial knowledge gaps regarding how to achieve successful collaborations when confronted with complex environmental problems.[2] Collaboration has also been described as a metaphor that can 'best capture the process towards realizing rights.'[3] It has been demonstrated that collaboration fulfills the requirement to be considered as more than a metaphor because it does not simply express the willingness to acknowledge institutional contestation but rather articulates the process to acknowledge and address the conflict by way of enhancing knowledge and understanding through promoting learning. The potential of collaboration to provide a more descriptively and normatively appropriate account of the relationship between the state organs[4] has been explored to show its relevance in dealing with environmental crises.

This thesis also uses practical examples from the selected jurisdictions and develops collaborative methods to help judges to act as a partner in facilitating collaboration and engage other stakeholders in environmental decision-making in ensuring environmental justice. It demonstrates that a collaborative approach can also generate an atmosphere to escalate decisional legitimacy and ensure compliance of decisions by the executive

[1] Talia Sechley & Michelle Nowlin, 'An Innovative, Collaborative Approach to Addressing the Sources of Marine Debris in North Carolina' (2018) 28 (2) Duke Environmental Law & Policy Forum 243; Kristin B. Dobbin and Mark Lubell, 'Collaborative Governance and Environmental Justice: Disadvantaged Community Representation in California Sustainable Groundwater Management' (2021) 49 (2) Policy Studies Journal 562; Eileen Claussen, 'Perspective: Making Collaboration a Matter of Course: A New Approach to Environmental Policy Making' (2001) 3(4) Environmental Practice 202; Nicholas Kimani, 'A Collaborative Approach to Environmental Governance in East Africa' (2010) 22(1) Journal of Environmental Law 22.
[2] Örjan Bodin, 'Collaborative Environmental Governance: Achieving Collective Action in Social-ecological Systems' (2017) Science 357.
[3] Ioanna Tourkochoriti, 'What is the Best Way to Realize Rights?' (2019) 39(1) Oxford Journal of Legal Studies 209.
[4] Eoin Carolan, 'Dialogue Isn't Working: The Case for Collaboration as a Model of Legislative–Judicial Relations' (2016) 36 Legal Studies 209.

and solicit cooperation from the legislature in lieu of the tendency of judges to foist their own versions of laws, rules and principles both on the society and the elected representatives.[5] An examination of collaboration through the lens of the doctrine of separation of powers as enshrined in the constitutions of the selected jurisdictions shows that it has the capacity to enhance the accountability of each of the organs and thereby can promote constitutional checks and balances by promoting institutional accountability.

Finding through case studies that judges are facing difficulties in balancing between judicial over-activism and judicial passivity, striking a balance between the right to environment and other rights, and maintaining constitutional balances, a balanced approach by judges has been suggested that stands between judicial excessivism and judicial restraint. Although it is very difficult to achieve this,[6] this thesis shows that exercising judicial pro-activism in adopting a collaborative approach which has the benefit of producing a decision involving mutual engagement of different organs superior to a decision that might have been achieved by a single organ acting by itself[7] can help judges to reach sustainable, well informed, effective and properly implementable decisions in environmental cases.

The novelty of the thesis extends beyond proposing and developing judicial pro-activism and collaboration as methods in ensuring environmental justice as the arguments are based on qualitative data collected through socio-legal research. This yields significant benefits over a conventional library-based, descriptive, and black letter approach as it offers an opportunity to access directly the experiences and learning of important stakeholders.

1. Summary of Findings

The discussion over the substantive and procedural elements of environmental justice in *chapters two* and *three* respectively shows that the courts of India and Bangladesh have

[5] Ridwanul Hoque, 'Taking Justice Seriously: Judicial Public Interest and Constitutional Activism in Bangladesh' (2006) 15(4) Contemporary South Asia 399.
[6] Ridwanul Hoque, *Judicial Activism in Bangladesh: A Golden Mean Approach* (Cambridge Scholars Publishing 2011) 245.
[7] Carolan, 'Dialogue Isn't Working' (n 4) 209.

played a role in environmental constitutionalism by recognizing the right to a healthy environment, expanding access to justice, and by adopting certain innovative techniques and measures. However, a critical examination of the role of the two South Asian judiciaries in environmental matters found that in uplifting environmental protection, the courts often have gone further than their constitutionally protected boundaries and transgressed the doctrine of separation of powers enshrined in the constitutions.[8] In addition, the courts have also encountered difficulties in enforcing orders, failed to contemplate the multilateral issues involved in an environmental crisis, and often violated other human rights.[9] Discussions in chapters two and three also found that access to environmental justice in Ireland is restricted due to high costs and the restrictive approach adopted by the Irish judiciary.[10]

Through examining several judicial decisions and the situations prevailing in the selected jurisdictions, this thesis demonstrates that neither judicial activism by the courts of the South Asian countries nor judicial restraint by the Irish judiciary has been able to provide proper justice to the poor, disadvantaged, and to the environment. Recognizing that environmental problems are multifaceted, complex, and involve interdisciplinary issues,[11] it has been argued that it is difficult for the judicial branch to ensure environmental justice and protect the environment working on its own. The discussions in chapter two and three identified and argued the need to adopt new methods for ensuring environmental justice.

A literature review laid the foundation for the qualitative research where data was collected through thirty-two semi-structured interviews. The empirical data collected through qualitative socio-legal research and analyzed in *chapter four* shows that a majority of the interviewees are in favour of a balanced and proactive approach by the courts in environmental matters. Gaps have been identified between judges and academics from the views expressed by the interviewees where both judges and lawyers are reluctant to refer to legal scholarship and judges have shown an unwillingness to

[8] Bharat H. Desai and Balraj K. Sidhu, 'India' in Emma Lees and Jorge E. Vinuales (eds), *The Oxford Handbook Comparative Environmental Law* (Oxford University Press 2019) 212.
[9] Emeline Pluchon, 'Leading from the Bench: The Role of Judges in Advancing Climate Justice and Lessons from South Asia' in Tahseen Jafry (ed), *Routledge Handbook of Climate Change* (Routledge 2019) 139.
[10] Dublin City University (DCU), School of Law and Government, *Environmental Justice in Ireland: Key Dimensions of Environmental and Climate Injustice Experienced by Vulnerable and Marginalized Communities* (2022) 27.
[11] Brian J Preston, 'Operating an Environment Court: The Experience of the Land and Environment Court of New South Wales' (Conference on Environmental Law, The Environmental Commission of Trinidad and Tobago, Port of Spain, July 2008).

break the colonial barriers. An analysis of collected data shows the following suggestions recommended by the interviewees to bridge the gaps between academics and practitioners and to develop a robust environmental jurisprudence: environmental sensitization of judges, lawyers, academics and court staff, responsibility of lawyers to present a good case before the court, responsibility of academics to write more legal scholarship directing judges, using comparative jurisprudence, establishing specialized environmental courts, and collaboration between organs of the state and various stakeholders.

Based on doctrinal and empirical research this thesis finds that a proactive, robust, and sensitized role in environmental matters is required from judges for ensuring environmental justice for all. *Chapter five* develops the idea of judicial pro-activism and the theory of collaboration which sees the court as a partner in the joint enterprise of governing. Examination of cases from the selected jurisdictions shows that the courts have adopted a proactive role as envisioned by Richard Posner, Bhagwati, and Aharon Barak in collaborating with other organs of the state to effectively protect the rights of the individuals. This thesis argues that judges by adopting a proactive role in *Saif Kamal's case,*[12] *Four Rivers Case,*[13] *Nipun Saxena v Union of India*,[14] *Kinsella Case,*[15] *Blake v Attorney General*,[16] *A v Governor of Arbour Hill,*[17] showed their awareness and sensitivity towards the aims and aspirations embodied by the framers of the constitutions.[18]

A discussion of the doctrine of separation of powers enshrined in the constitutions of the selected jurisdictions and the collaborative approach demonstrates that collaboration can enhance checks and balances and is in line with contemporary governance as judges can be a contributor to improve the decision-making of the legislature and help the executive in implementing environmental laws and decisions.

[12] *Syed Saifuddin Kamal v Bangladesh and others* [2018] 70 DLR 833 (HCD).
[13] *Human Rights & Peace for Bangladesh & others v Government of Bangladesh & others* [2009] 17 BLT 455 (HCD).
[14] [2019] 13 SCC 715.
[15] *Kinsella v Governor of Mount Joy Prison* [2011] IEHC 235.
[16] [1982] IR 117 (SC).
[17] [2006] 4 IR 88 (SC).
[18] Mool Chand Sharma, *Law, Justice and Judicial Power* (1st edn, Oakbridge Publishing) 23.

The examination of the functionality of the National Green Tribunal (NGT) in *chapter six* finds that the NGT judges have shown creativity in working collaboratively[19] with other organs and stakeholders, expanded judicial frontiers, and developed green jurisprudence. Based on the principle of functionality chapter six also proposes that the NGT can be used as a model for Bangladesh and Ireland in improving and establishing specialized environmental courts and tribunals.

2. Judicial Pro-Activism in Adopting a Collaborative Approach

Humanity is placed at a critical juncture due to irreversible damage to the environment and ecology. Unprecedented environmental change can be witnessed including the extinction of species, changing climate, loss of habitats, lack of freshwater, and toxicity of air and soil. Not every person or state has contributed equally to the current state of the environment. However, those who contributed less are exposed to more risks and harm. The poor and disadvantaged are paying the price for the consumption-driven lifestyle of elites.[20] Considering this imbalance as one of the hallmarks of environmental injustice, this thesis looks to the court because as an independent organ, it has a crucial role to play in ensuring rule of law, protecting, promoting, and fostering fraternity, the dignity of an individual, and protecting the environment.[21] Courts matter, because without courts, laws can be disregarded, the executive can exercise unchecked powers, and citizens have no recourse.[22] As a part of its core function, the judiciary is always faced with questions challenging the legality of laws or executive action, or inertia. Although judges are increasingly emerging as an important actor in environmental protection,[23] they are facing challenges or creating controversy. This is where this thesis is significant as it both develops theory and also provides practical outlines in the form of judicial pro-activism

[19] *K. K. Singh v National Ganga River Basin Authority* (Judgment 16 October 2014); *Manoj Mishra v Union of India* (Judgment 13 January 2015); *Vardhaman Kaushik v Union of India* (Judgment 7 April 2015) *and Sanjay Kulshrestha v Union of India* (Order 7 April 2015); *M.C. Mehta v Union of India & Others* (Order 10 February 2016).
[20] Sumudu A. Atapattu, Carmen G. Gonzalez and Sara L. Seck, 'Intersections of Environmental Justice and Sustainable Development' in Sumudu A. Atapattu and others (eds), *The Cambridge Handbook of Environmental Justice and Sustainable Development* (Cambridge University Press 2021) 1.
[21] The Proceedings of the Fourth ASEAN Chief Justices' Roundtable on Environment, *Role of the Judiciary in Environmental Protection*, Philippines (2015) <https://www.adb.org/publications/4th-asean-chief-justices-roundtable-environment-proceedings> accessed on 12 April 2022.
[22] James R. May and Erin Daly, *Global Judicial Handbook on Environmental Constitutionalism* (3rd edn, UNEP 2019) 7.
[23] Pluchon (n 9).

and collaboration for judges in ensuring environmental justice while maintaining constitutional mandates.

Collaboration with the potential of encouraging parties who can see different aspects of the same problem to constructively explore their divergences would help judges to better handle multifaceted environmental problems. For example, the *Delhi Vehicular Pollution Case*[24] can be used as an example of engaging stakeholders.[25] However, some of the complexities in that case might have been avoided if decisions were adopted after effective stakeholder consultation and through a legislative process. The Court could have played a role by passing out judgment directing the concerned authorities to take steps. The case illustrated that it was not possible for the Court to view the application of its orders beyond Delhi and to coordinate the installation of CNG fueling stations and it would have been practical if the task was planned and overseen by the Delhi Transport Corporation (DTC) in collaboration with the designated CNG supplier.[26]

Collaboration can avoid the possibility of a single authoritative resolution as it accepts the value of diversity. The interplay of different views through the prism of collaboration reduces the conflict between the politician and the judge and thereby helps to develop constitutionalism. Collaboration can play a better role by promoting learning which would allow each organ involved in the process to better understand other's positions from the

[24] *M.C. Mehta v Union of India* [2001] 3 SCC 756. Detailed discussion is in Chapter 3 (3.1).

[25] The Supreme Court of India played a central role in the changes, especially the conversion of all commercial vehicles to CNG. The court's important contribution was to push the government in two significant ways: to implement existing policies and to develop new policies to deal with air pollution. It has been argued that in 1996 and 1997, in response to direct orders of the Supreme Court, both the Delhi government and the central government finally developed action plans to curtail pollution in Delhi. In 1998 the Supreme Court directed the central government to set up a statutory committees established under Section 3(3) of the Environment Protection Act. This was called the Environment Pollution (Prevention and Control) Authority (EPCA). The Ministry of Environment and Forest (MoEF) in 1998 issued an order constituting EPCA and nominated Bhure Lal to serve as chairman, and hence EPCA is also called the Bhure Lal Committee. EPCA held its first meeting on 26 February 1998, and met once a week thereafter. It submitted progress reports to MoEF and the Supreme Court at regular intervals as well as specific reports on matters referred to it by the court. In its very first progress report, EPCA suggested additional pollution policies for Delhi (Environment Pollution (Prevention and Control) Authority, 1998a). These policies built on the action plans of the Delhi administration and MoEF, but they were bolder and more specific. Whereas the other plans talked about encouraging the use of clean fuels in public transportation, EPCA proposed to switch all taxis and autos to a clean fuel, ban all eight-year old buses except those on clean fuel, and gradually move the entire bus fleet to a single fuel— CNG. EPCA's plan was converted into a mandate by the Supreme Court in its order dated 28 July 1998. As a direct result of this order, over the course of the next four years, the commercial vehicles of Delhi were gradually converted to CNG. Progress was uneven for a variety of reasons, including the availability of CNG fueling stations, parts, and buses, and the reluctance of various key players at critical points. There were rough patches. When bus operators who had failed to order CNG buses or convert to CNG were not allowed to operate, the public expressed its concern through strikes and protests. And various high-level commissions and committees made last-minute efforts to head off the Supreme Court's orders. The court refused to reconsider its basic decision, however, and as a result had to referee such issues as which sectors had priority access to CNG supplies in case of shortages. Non-complying diesel buses were subject to fines, and by December 2002, all diesel city buses converted to CNG. Urvashi Narain and Ruth Greenspan Bell, 'Who Changed Delhi's Air? The Roles of the Court and the Executive in Environmental Policymaking' (2005) Resources for the Future 1.

[26] Armin Rosencranz and Michael Jackson, 'The Delhi Pollution Case: The Supreme Court of India and the Limits of Judicial Power' (2003) 28 Columbia Journal of Environmental Law 223.

disagreement expressed by each particular organ. Alternative remedies can be figured out by the organs by learning the positions of the others.[27]

One of the major challenges in the contemporary world is to ensure economic growth which is not detrimental to the environment. At the core of this dilemma are two human rights: the right to realize basic rights and the right to a healthy environment. As discussed in this thesis, in most environmental cases, the courts had to intervene either to ensure access to environmental information, ensure public participation, stop the building of dams, commercial buildings, high voltage grid stations, mining, implementation of flood action plans, or protection of rivers and wetlands from industrial pollution. The principal problems inherent in those orders were that either they did not respect the functions of the other organs, or were not able to understand the complexities of the environmental problems, or scientific evidence, or the decisions were not implemented because of incapacity, as well as unwillingness, on the part of the government. The mutual learning method inherent in collaboration might allow the legislature to enact appropriate laws, and there might be contributions from the courts to improve the decision-making of elected representatives in the area of social rights.[28] Courts can make the legislature aware of how the executive applies the law and the gaps in its application that must be completed through either interpretation or change in the letter of the law.[29]

3. Recommendations to Facilitate Exercising Judicial Pro-activism and Collaboration

Recognizing the critical role of the judiciary in strengthening environmental law enforcement, establishing a system based on the credible rule of law, and ensuring environmental justice, this chapter proposes the following recommendations which are important for exercising judicial pro-activism and adopting a collaborative approach by judges.

[27] Carolan, 'Dialogue Isn't Working' (n 4) 209.
[28] *Nipun Saxena v Union of India* [2019] 13 SCC 715.
[29] Tourkochoriti (n 3).

3.1. Improving Competency of Judges and Lawyers

This thesis proposes that judges play a crucial and proactive role in ensuring environmental justice. For that, it is extremely important to improve the competency of judges. In India the absence of adequate competence and judicially manageable standards for the courts has been making it difficult for judges to decide what matters should be considered by it and what not.[30] The Indian Supreme Court has itself on occasions expressed its limitations in trying to decide issues involving technical nature.[31] Continuing judicial education is *sine qua non* for improving the skills of judges.[32]

Similar to other common law countries, in Ireland also there is a lack of adequate training for judges to improve their competence on the assumption that the best lawyers are appointed as judges. The necessity of training has been pointed out by judges as they face difficulty in adjusting to the new skills required of them without training.[33] However, the challenge regarding lack of judicial understanding or competence in environmental cases is not uncommon.[34]

This thesis makes strong arguments for environmental courts and tribunals (ECTs). However, in order to maintain public trust and confidence in the ECT as the forum for resolving environmental disputes it is vital to have the presence of judges who are environmentally literate or have been trained to be so literate that they can contribute to the development of environmental jurisprudence.[35] Although the experiences from the NGT shows that integrating experts in the decision-making process has contributed to the development of environmental jurisprudence and has helped the NGT to come up with

[30] Harish Salve, 'Justice Between Generations: Environment and Social Justice' in B.N. Kirpal, Ashok H. Desai, Gopal Subramanium, Rajeev Dhavan and Raju Ramachandran (eds), *Supreme but not Infallible: Essays in Honour of the Supreme Court of India* (Oxford University Press 2004) 360.
[31] *M.C. Mehta v Union of India* [1986] 2 SCC 176; the *Indian Council for Enviro Legal Action v Union of India* [1996] 3 SCC 212; *AP Pollution Control Board v M V Nayudu* [1999] AIR 812 (SC).
[32] Pattabhi Ramarao Kovuru, 'Training Our Judges Better: How and By Whom?' (2014) 49(8) Economic & Political Weekly.
[33] Mary Carolan, 'New to the Bench: Judges to be Trained for the First Time' *The Irish Times* (Dublin, 17 September 2021); Rónán Kennedy and Laura Cahillane, 'What Irish Judges Should be Taught Before They Go on the Bench' *RTÉ Brainstorm* <https://www.rte.ie/brainstorm/2022/0323/1287972-ireland-judges-training-skills-judicial-council/?> accessed 7 April 2022.
[34] Lord Justice Carnwath, 'Judicial Protection of the Environment: At Home and Abroad' (2004) 16(3) Journal of Environmental Law 315.
[35] Brian J Preston, 'Benefits of Judicial Specialization in Environmental Law: The Land and Environment Court of New South Wales as a Case Study' (2012) 29 Pace Environmental Law Review 39.

innovative judgments,[36] the relevant legislation should be amended[37] to improve competency and place environmentally literate judges[38] to deal with environmental disputes.

It has been mentioned in the qualitative research chapter (3.3.2) that in ensuring environmental justice, it is also important that lawyers are making a good case before the court because the adequate performance of courts requires trained lawyers capable of understanding not only environmental but also social, constitutional, and all related issues.[39]

Judges and lawyers need to be trained to give them a global overview of the basic principles of environmental law and the common legal mechanisms for environmental protection. The training must help judges to situate the individual case they have to judge in a broader context of environmental law and policy. Since environmental laws and science are continuously evolving, there is also a need for continuing training for those judges who handle environmental cases on a regular basis. Training programs in environmental matters for judges have been successfully run by several countries.[40] For a better approach and capacity development judges can also see how judges in other jurisdictions are dealing with similar cases.[41] In this regard, the Judicial Council in Ireland, the Judicial Administration Training Institute Bangladesh, and the National Judicial Academy in India could establish exchange programs to improve the capacity of judges.

[36] Gitanjali Nain Gill, 'The National Green Tribunal: Evolving Adjudicatory Dimensions' (2019) 49 (2-3) Environmental Policy and Law 153.
[37] Although according to Section 5 of the National Green Tribunal Act (NGT Act), the judicial members of the Tribunal including the chair, have to be sitting or retired judges of the Supreme Court, High Court Chief Justices or High Court judges but it is nowhere mentioned in the NGT Act that the judicial members have to be environmentally literate.
[38] The Environment Courts Act 2010 does not mention that any special training or education is expected from the judges before appointing them as an environmental court judge.
[39] Hector Fix-Fierro, *Courts, Justice and Efficiency: A Socio-Legal Study of Economic Rationality in Adjudication* (Hart 2003) 26.
[40] In Indonesia, a joint certificate training program on environmental issues is run by the Supreme Court of Indonesia and the Ministry of Environment.
[41] Thomas Greiber (ed), *Judges and the Rule of Law: Creating the Links: Environment, Human Rights and Poverty* (IUCN 2006) 101.

3.2. Increased Attention by Judges to Legal Scholarship

Environmental problems are multifaceted, polycentric, and involve interdisciplinary and complex technical issues.[42] Considering the importance of academic writings in providing both technical and legal information, arguments, and opinions that are pertinent to the environmental judicial decisions[43] and with the growing development of academic research and writing on environmental issues,[44] increased attention to legal scholarship will help judges to pronounce better judgments by viewing the overall picture.[45] Obviously, lawyers have a role to play here because if they can refer the judges to more legal scholarship, it will put judges under some sort of obligation. In this regard, the example of *Climate Case Ireland*[46] is relevant, as the Irish Supreme Court had been referred to a book by Professor David Boyd.[47] However, basing its judgment only on one single textbook has received criticism because there are ample recent analysis available these days which shows that the right to the environment has received constitutional protection in over a hundred countries.[48]

3.3. Academic Collaboration and Writing for Judges

While it is the responsibility of judges to consult legal scholarship, it is also incumbent on the academics to ensure a steady line of research and publication directed toward judges. However, the development of legal scholarship can serve various other purposes than influencing judges, such as those might introduce new ideas, affect the development of

[42] Elizabeth Fisher, 'Environmental Law as "Hot" Law' (2013) 25(3) Journal of Environmental Law 347.
[43] Michel Bastarache, 'The Role of Academics and Legal Theory in Judicial Decision-Making' (1999) 37(3) Alberta Law Review 739.
[44] Philippe Cullet (ed), *Research Handbook on Law, Environment and the Global South* (Edward Elgar 2019).
[45] 'If I am ever faced with a legal problem that I do not immediately know the answer to, I turn to the books. That gives me an immediate feel for the answer…' Lord Burrows, 'Judgment-Writing: A Personal Perspective' (Annual Conference of Judges of the Superior Courts in Ireland, May 2021 <https://www.supremecourt.uk/docs/judgment-writing-a-personal-perspective-lord-burrows.pdf> accessed 25 October 2021. 'In my view, it is quite appropriate and useful to refer to the legal scholarship for a number of purposes. In some cases, a piece of academic writing provides a convenient encapsulation of a matter of history or a line of judicial decision-making which it is not necessary to set out at length in the body of the judgment. Sometimes legal scholarship provides substantive support for a proposition with which the judge or court agrees and is prepared to apply. An academic article may have undertaken a useful analysis of what earlier cases have decided.' Robert French, 'Dialogue of the Hard of Hearing' (2013) 87 Australian Law Journal 96.
[46] *Friends of the Irish Environment (FIE) v Ireland* [2020] IESC 49.
[47] David R Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (UBC Press 2011).
[48] Victoria Adelmant, Philip Alston, and Matthew Blainey, 'Human Rights and Climate Change Litigation: One Step Forward, Two Steps Backwards in the Irish Supreme Court' (2021) 13 Journal of Human Rights Practice 1.

the law and help to shift norms.[49] In this regard and to have a better impact of legal scholarships on practitioners one academic during the qualitative research has suggested the academics of the east and west to work together. In her language:

> *Collaboratively working is very important particularly among the academics of the east and the west. Since academics based in developing countries do not have the same exposure as academics based in developed countries, some sort of collaboration can help the academics from the east to play a more vital role in environmental protection. It is expected that academic collaboration might help to facilitate collaboration between the academics and judges also.* (AC01)

Thus, environmental academics should work collaboratively.[50] This collaboration could take the form of a colloquium where academics from the east and the west can join to discuss their ideas.[51] The presented papers could be published in an edited book or a special edition of a journal to share the learnings and knowledge.

3.4. Application of Alternative Dispute Resolution Mechanisms

Alternative Dispute Resolution (ADR) mechanisms in environmental matters can be a viable option for the courts to adopt. *First,* to collaborate with other stakeholders; *Second*, to strike a balance between environmental rights and other rights, and; *Third*, to reduce the backlog of cases and play a superior role in protecting the environment.

It has already been discussed that an impact of the decision of the Uttarakhand High Court or Bangladesh High Court in declaring rivers as legal entities would be the potential shutdown of the operations of industries and enterprises which are set on the banks of these rivers or the eviction of establishments build on the banks. The discussion in chapters 2 and 3 demonstrated that the Supreme Courts of India and Bangladesh did not

[49] Diane P. Wood, 'Legal Scholarship for Judges' (2015) 124 Yale Law Journal 2592.
[50] David Christian Finger and others, 'The Importance of International Collaboration to Enhance Education for Environmental Citizenship' (2021) 13 Sustainability 10326; Deana D. Pennington, Cross-disciplinary collaboration and learning (2008) 13(2) Ecology and Society 8.
[51] The author in collaboration with the Law Commission, Bangladesh already organized a 'Conference on Role of ECTs and SDG 16: Opportunities and Challenges' in May 2021 with speakers representing the global South and North.

understand certain practical realities associated with their decisions and also failed to recognize the livelihood of people that might be lost. In this regard, ADR mechanisms such as mediation[52] could provide a solution if the dispute is between local groups and big companies. Mediation, broadly similar to the collaborative approach, provides an opportunity to have all the necessary stakeholders before the court and explores the issues at stake. However, improper use of mediation can create more pollution by allowing more time to the polluting big corporations.[53] Environmental disputes are no doubt different from other social and personal disputes and special caution needs to be implemented to settle those. ADR mechanisms can allow judges to play a meaningful role in balancing the interests of the parties involved in an environmental dispute, the wider community, the environment, and also the future generations.[54]

According to Preston, one of the twelve key characteristics that are required for an environmental court or tribunal (ECT) to operate successfully is ADR.[55] Many environmental ECTs across the globe have adopted ADR.[56] A number of benefits are offered by ADR over litigation which includes the capacity to offer a win-win solution for the parties and allowing the parties greater power over the outcome of the dispute resolution process.[57] In a recent symposium organized by the Irish Climate Bar Association, the importance of using ADR mechanisms has also been identified.[58] Unfortunately, the National Green Tribunal Act does not provide for resolving environmental disputes through ADR.[59] In Bangladesh, although ADR has been included as a method to resolve environmental disputes in the Environment Courts Act,[60] it has not been applied by the courts.[61]

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[52] Mediation is a tool that allows resolving disputes efficiently, quickly, and saves costs. Participating in a mediation process does not waive the right to use the formal judicial process of dispute resolution. When the environmental problem is complex, involving multi-party and multi-layered issues, mediation can be an effective option for the court. Jona Razzaque, 'Access to Environmental Justice: Role of the Judiciary in Bangladesh' (2000) 4 (1&2) Bangladesh Journal of Law 1.
[53] ibid.
[54] Abul Hasanat, 'Environmental Courts in Enforcement: The Role of Law in Environmental Justice in Bangladesh' (2021) 21(2) Australian Journal of Asian Law 85.
[55] Brian J. Preston, 'Characteristics of Successful Environmental Courts' (2014) 26 (3) Journal of Environmental Law 365.
[56] The Environmental Court of NZ, the Resource Management and Planning Appeals Tribunal in Tasmania, and the Tribunal Ambiental Administrativo in Costa Rica.
[57] Michael King and others, *Non-Adversarial Justice* (Federation Press 2009) 91–94.
[58] Kevin O'Sullivan, 'Urgent Need for Dedicated Environment Court in Ireland, Symposium Told' *The Irish Times* (Dublin, 21 Jan 2021).
[59] Gitanjali Nain Gill, *Environmental Justice in India: The National Green Tribunal* (Routledge 2017).
[60] Section 18 of the ECA 2010.
[61] Imtiaz Ahmed Sajal, 'Common People's Access to the Environment Courts of Bangladesh: An Appraisal' (2015) Bangladesh Law Digest <http://bdlawdigest.org/environment-court-act-2010.html> accessed 8 February 2021.

To make ADR a successful tool in environmental matters in the selected jurisdictions there have to be efforts from the Government to push the practice of mediation to develop it as an appropriate means of dispute resolution and the relevant laws should be amended to allow the courts to use ADR mechanisms in environmental cases.

3.5. A Specialized Environmental Court

The discussion in chapter six confirms that a specialized environmental court or tribunal can be facilitative in exercising judicial pro-activism and collaboration in ensuring environmental justice as it can provide comprehensive jurisdiction over environmental matters along with necessary expertise. As a strong demand for a specialized environmental court in Ireland has developed,[62] it should consider establishing an environmental court as a specialized ECT can overcome the problem of lack of technical expertise and provide speedier environmental adjudication fostering consistent rulings.[63] This thesis argues that a specialized ECT based on the NGT model along with a sufficient number of benches, a required number of judicial and expert members, environmentally trained and literate judges, the statutory power to resolve disputes through ADR, availability of legal aid can be an ideal forum for judges, lawyers, activists, non-governmental organizations and litigants to ensure environmental justice countering all the challenges.

4. Recommendations to Facilitate Access to Environmental Justice

In addition to the above recommendations which would help judges to exercise judicial pro-activism in adopting a collaborative approach, it is recommended to constitutionally recognize the right to the environment, recognizing the rights of nature through legislation, and ensuring legal aid for the poor to improve the environmental justice situation of the selected jurisdictions.

[62] O'Sullivan, 'Urgent Need for Dedicated Environment Court in Ireland, Symposium Told' (n 57).
[63] Nicholas A. Robinson, 'Ensuring Access to Justice through Environmental Courts' (2012) 29(2) Pace Environmental Law Review 363.

4.1. A Constitutional Right to the Environment

The discussion in chapter 2 (2.1) shows that in the absence of any enforceable provision in the constitution, the courts of India[64] and Bangladesh[65] have recognized the constitutional right to the environment and the Irish Supreme Court has stated that there is no constitutional right to the environmental.[66] A right to a clean and healthy environment for every human being has been recognized by many nations across the globe. In at least 155 countries the right has been recognized either by constitutional amendment, legislation or judicial pronouncements.[67] Although environmental rights approaches are yet to make a strong contribution for addressing environmental justice issues,[68] there is significant literature showing that environmental rights can play a strong role to promote human and environmental rights,[69] procedural guarantees,[70] and there is a strong correlation between constitutional environmental rights and superior environmental performance at the domestic level.[71] The rights turn in climate change litigation[72] is making constitutional environmental right even more important.[73] *A* major extension of the constitutional right to the environment, as well as a new dimension to worldwide climate litigation, was provided through the *Leghari Case*[74] in Pakistan where the court decided that the national government's delay in implementing the country's climate policy framework violated citizens' fundamental rights.[75]

[64] *Subhash Kumar v State of Bihar* [1991] AIR 420 (SC).
[65] *Dr. M. Farooque v Bangladesh* [1997] 49 DLR 1 (SC).
[66] *Friends of the Irish Environment v The Government of Ireland* [2020] IESC 49.
[67] David R Boyd, 'The Right to a Healthy and Sustainable Environment' in Yann Aguila and Jorge E. Viñuales (eds), *A Global Pact for the Environment - Legal Foundations* (University of Cambridge 2019) 30.
[68] Erin Daly & James R May, 'Exploring Environmental Justice Through the Lens of Human Dignity' (2019) 25 Widener Law Review 167.
[69] Stephen Turner, *A Global Environmental Right* (Routledge 2014).
[70] James R May, 'Constitutional Directions in Procedural Environmental Rights' (2013) 28 Journal of Environmental Law and Litigation 27.
[71] Jessica Scott, 'From Environmental Rights to Environmental Rule of Law: A Proposal for Better Environmental Outcomes' (2016) 6(1) Michigan Journal of Environmental & Administrative Law 203.
[72] Jacqueline Peel and Hari M. Osofsky, 'A Rights Turn in Climate Change Litigation?' (2018) 7(1) Transnational Environmental Law 37.
[73] Brian J Preston, 'The Evolving Role of Environmental Rights in Climate Change Litigation' (2018) Chinese Journal of Environmental Law 131.
[74] *Ashgar Leghari v Federation of Pakistan* [2015] 2015] Writ Petition No. 25501/201.
[75] Masrur Salekin, 'Unenumerated Environmental Rights in a Comparative Perspective: Judicial Activism or Collaboration as a Response to Crisis?' (2020) 25(6) Environmental Liability - Law, Policy and Practice 260.

Considering the importance of a constitutional environmental right it is important that Ireland also has a constitutional right to the environment. However, a refusal by the Irish Supreme Court to recognize a derived right to a healthy environment may give rise to a civil society campaign for a referendum vote.[76] It has also been proposed that a citizens' assembly or other review mechanisms should be established by the Irish Government to consider a new legal framework for environmental rights including defining the rights of generations to come and non-humans.[77]

The discussion in chapter two (2.1) also shows that the courts of India and Bangladesh have recognized the constitutional right to the environment based only on the right to life provision contained in the constitution and this is problematic since the right to life provisions in the constitutions are largely negative in character. In this regard, reference can be made to the judgment in *Merriman v Fingal County Council*[78] where Barrett J stated that it should be recognised that there is a 'right to an environment that is consistent with the human dignity and well-being of citizens at large.'[79]

The Irish High Court judge in the *Merriman Case*[80] based the newly recognized right to the environment on several constitutional rights apart from Article 40.3.2° of the Irish Constitution,[81] such as the right to health (Art.40.3), the right to work (Art.40 or 45), the right to private property (Articles 43, 40.3.2° and 44.2.6°), and the Preamble to the Irish Constitution.[82] Relying on this Irish model, it is suggested that the Indian and Bangladeshi courts should also rely on some other constitutional provisions, such as the right to health or dignity, to cover all sorts of claims arising from environmental problems.

[76] Rónán Kennedy, Maeve O'Rourke and Cassie Roddy-Mullineaux, 'When Is a Plan Not a Plan?: The Supreme Court Decision in "Climate Case Ireland"' (2020) 27(2) Irish Planning and Environmental Law Journal 60.
[77] DCU Report (n 10) 48.
[78] [2017] IEHC 695.
[79] *Merriman & Ors v Fingal County Council & Ors* [2017] IEHC 695 [264].
[80] ibid.
[81] Article 40.3.2° of the Constitution of Ireland contains the right to life.
[82] *Merriman & Ors v Fingal County Council & Ors* [2017] IEHC 695 [263].

4.2. Recognizing the Rights of Nature

The discussion in chapter two (3) shows that the Indian judiciary has adopted an eco-centric approach stressing the intrinsic values of all naturally present things. The discussion also shows that the judiciary in Bangladesh has also endowed legal rights to rivers. The importance of an eco-centric approach has also been recognized by various international conventions.[83]

In the field of environmental law, the recognition and protection of the rights of nature is a relatively new approach. The recognition of the rights of nature implies a holistic approach to all living, non-living, and the ecosystem. Recognizing a right of nature gives the legal authority and responsibility to the states and human beings to enforce nature's right to secure nature against any unsustainable utilization.[84] However, the idea of giving a legal voice to nature is not without complications. There are some serious institutional concerns about giving standing to nature, particularly this might entail the risk of flooding the courts with meritless claims and transferring non-political disputes from the political branch to the legal branch of the state. There are also challenges as to who should speak for nature since nature is voiceless.[85] However, Stone has suggested appointing guardians in representational capacity to give nature a voice.[86] It appears from the judgments given by the courts of the Indian State of Uttarakhand[87] and the High Court Division of the Supreme Court of Bangladesh[88] that they have applied Stone's proposition and appointed various government authorities as legal guardians for the rivers.[89]

The discussion in this thesis shows that recognizing rivers as legal persons or taking an eco-centric approach by the court for the conservation of Asiatic wild buffalo,[90] or red

[83] Convention for Conservation of Antarctic Marine Living Resources 1980 (adopted 20 May 1980, entered into force 07 April 1982) 1329 UNTS 47; Convention on the Conservation of European Wildlife and Natural Habitats (adopted 19 September 1979, entered into force 01 June 1982) European Treaty Series 104; United Nations Convention on Biological Diversity (adopted 05 June 1992, entered into force 29 December 1993) 1760 UNTS 79; Convention on International Trade in Endangered Species of Wild Fauna and Flora (adopted 03 March 1973, entered into force 01 July 1975) 993 UNTS 243.
[84] Susana Borràs, 'New Transitions from Human Rights to the Environment to the Rights of Nature' (2016) 5(1) Transnational Environmental Law 113.
[85] Hope M. Babcock, 'A Brook with Legal Rights: The Rights of Nature in Court' (2016) 43 Ecology Law Quarterly 1.
[86] Christopher D Stone, 'Should Trees Have Standing?' (1972) Southern California Law Review 450.
[87] *Lalit Miglani v State of Uttarakhand & others* [2015] Writ Petition (PIL) No.140 (HC).
[88] *The Human Rights and Peace for Bangladesh (HRPB) v Bangladesh and others* Writ Petition No. 13989 of 2016 (HCD).
[89] Discussed in detail in chapter 2 (3).
[90] *T.N. Godavarman Thirumulpad v Union of India* [2012] 3 SCC 277.

sandalwood,[91] although significant, does not provide a holistic approach to protect the rights of the nature as a subject. In addition to that, the decision by the Uttarakhand High Court was overturned by the Supreme Court of India based on the contention of Uttarakhand's state government that the declaration by the High Court was legally unsustainable and uncertain as the Ganges flows into neighboring Bangladesh and concerns about river guardians being held liable for flood damage.[92] The decision given by the High Court Division of Bangladesh has also been criticized as it has made the riverside poor communities who are dependent for their livings on the rivers vulnerable to eviction.[93]

Ireland, in prioritizing economic development, has caused enormous ecological damage. Ireland's reliance on export-driven agriculture is one of the reasons behind its historically low level of ecological consciousness. Although there has been a change in ecological consciousness with the electoral success of the Green Party it is important to have more ecological attention in Ireland.[94]

Recognizing that granting legal rights to nature can help to prevent ecological degradation, increase indigenous community representation in the decision making, prevent the decline of resource availability, and preserve freshwater resources,[95] it is important to recognize the rights of nature in the selected jurisdictions. A constitutional right to nature can play a crucial role as constitutional provisions are generally firmly rooted in the legal system and having a constitutional provision can impact the overall state policy.[96] However, a constitutional right to nature will only be effective if they are given force, effect, and an independent individual or organization must be appointed to act as guardian on behalf of nature to act on its behalf, and to uphold the rights. In the

[91] *T.N. Godavarman Thirumulpad v Union of India* [2012] 4 SCC 362.
[92] 'India's Ganges and Yamuna Rivers are "Not Living Entities"' *BBC News* (India, 7 July 2017) <https://www.bbc.com/news/world-asia-india-40537701> accessed 26 June 2019
[93] Rina Chandran, 'Fears of Evictions as Bangladesh Gives Rivers Legal Rights' *REUTERS* (Bangkok, 04 July 2019). <http://www.reuters.com/article/us-bangladesh-landrights-rivers/fears-of-evictions-asbangladesh-gives-rivers-legal-rights idUSKCN1TZ1ZR> accessed 12 July 2019.
[94] Declan Fahy, 'Ecological Modernisation, Irish-Style: Explaining Ireland's Slow Transition to Low-Carbon Society' in David Robbins, Diarmuid Torney, and Pat Brereton (eds), *Ireland and the Climate Crisis* (Palgrave 2020) 131.
[95] Erin L O'Donnell and Julia Talbot-Jones, 'Creating Legal Rights for Rivers: Lessons from Australia, New Zealand, and India' (2018) 23(1) Ecology and Society 7.
[96] Articles 71 to 74 of the Constitution of the Republic of Ecuador 2008 recognize the rights of nature.

absence of such arrangements, the legal rights of nature in Ecuador have been difficult to enforce.[97]

This is where the collaborative approach can be important as it would allow the courts to notify the legislature regarding the importance of protecting nature and the legislature can enact the laws and the executive can implement those.

4.3. Legal Aid to Ensure Access to Environmental Justice

For ensuring access to justice, access to legal aid has to be made available to the community and environmental groups who wish to take legal actions in defence of the environment.[98] Discussion in chapters 2 and 3 shows that litigation cost is one of the biggest barriers for ensuring environmental justice in the selected jurisdictions. In many cases, though the lawyers do not charge their fee, there are several other expenses.[99] A comprehensive review and reform of the civil legal aid system prevailing in Ireland to incorporate issues such as eligibility criteria, areas of law covered, the functions of the Legal Aid Board and the way in which services are delivered have been suggested.[100]

However, it is not sufficient only to provide court-matters legal aid because for the poor, non-court matters legal aid is also very important.[101] For example in Bangladesh, under the Legal Aid Act 2000, legal aid is provided only to pay the fees of the lawyer appointed in a case. There is no specific rule about other expenses such as court fees, commission fees, expenses for witnesses, and incidental costs making it difficult to access the court for the poor. Poor people are also constrained by a lack of institutional skills including the lack of ability to understand and use the system. So, to ensure effective access to environmental justice, it is very important to provide legal aid in the forms of legal services,

[97] Mary Elizabeth Whittemore, 'The Problem of Enforcing Nature's Rights under Ecuador's Constitution: Why the 2008 Environmental Amendments Have No Bite' (2011) 20 Pacific Rim Law and Policy Journal 659.
[98] DCU Report (n 10) 7.
[99] Although in *Suk Das & Anr v Union Territory of Arunachal Pradesh* [1986] AIR 991 the Supreme Court has interpreted the obligation of the state to provide legal aid as a fundamental right, its availability is limited. Rhuks Ako, *Environmental Justice in Developing Countries: Perspectives from Africa and Asia-Pacific* (Routledge 2013) 74.
[100] Chief Justice's Working Group on Access to Justice *Conference Proceedings* (2021) 22.
[101] Md. Abdul Halim, 'Legal Aid and Access to Justice: Prospects and Problems' *The Daily Star* (Dhaka, 18 June 2005).

financial assistance, and legal education to facilitate better access to and more effective use of the court system.[102]

Conclusion

This thesis recognizes that it is the judiciary that has to play a vital role in the vindication of fundamental environmental rights worldwide[103] and conscious of the fact that the problems of environmental degradation or climate change cannot absolutely be resolved through a judicial order proposes that judicial pro-activism by environmentally sensitive and trained judges to effectively collaborate with other state organs and necessary stakeholders can ensure environmental justice.

This thesis shows that judicial pro-activism in adopting a collaborative approach is not only desirable but also pragmatically possible. These methods will help judges to strike a balance between over-stepping constitutional limits and judicial passivity undermining constitutional principles. No doubt, exercising judicial pro-activism to adopt a collaborative approach without hampering the constitutional balance of powers is a challenging task requiring a high degree of judicial competence and craftsmanship. It is for a judge in a particular case to find and determine the line between over-activism and judicial passivity and to decide in which case a collaborative approach is required. In this regard, the principle followed by the NGT to adopt a collaborative approach in cases of national interest can be a good starting point but it should depend on the specific case, the situation of the country, and the judicial discretion of the judge. This is where collegiality between judges both within the jurisdiction and beyond can play a role in developing a standard, which of course again must depend and vary on the socio-economic-political situation of a specific country. An important role in this regard should also be played by environmental researchers and academics by not only writing legal scholarships for judges but also in developing a culture of collaboration between them. This research has identified gaps between academics and practitioners from an environmental perspective.

[102] Michael R Anderson, 'Access to justice and legal process: making legal institutions responsive to poor people in LDCs' (2003) IDS Working paper series 178.
[103] James R May & Erin Daly, 'Vindicating Fundamental Environmental Rights' (2009) 11 Oregon Review of International Law 365.

Further research can be done to identify the gaps between legal education and practice with a broader perspective to address the disjunctions. This would help judges to write judgments with more accuracy and ensure environmental justice for all.

Appendix 1

Questionnaire

1. Environmental degradation, and particularly climate change, is getting significant media attention. Is this something that is a concern for you personally?
2. What contribution do you think lawyers can make in helping to protect the environment and achieve sustainable development?
3. Do you think courts have a role in ensuring access to environmental justice and to redress environmental injustice issues?
4. How should the political organs of the state respond to environmental crisis?
5. What is your idea about environmental justice? What are the principal challenges in ensuring environmental justice?
6. Do you consider environmental litigation/PIL as a solution to the problems?
7. How do you propose to ensure environmental justice?
8. How do you see the trend of climate litigation all over the world?
9. What is your idea about the separation of powers theory?
10. New Zealand has recently passed legislation giving limited rights to a national park and to a river. The Indian courts have given judgments which ascribe rights to glaciers. Could this idea of rights for nature be useful in your own jurisdiction?
11. What methods do you suggest to enforce court decisions in environmental cases?
12. What is your opinion regarding having a separate green bench or a separate environmental court/tribunal?

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