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An Empirical Study on the Role of the Courts in Environmental Protection in India, Bangladesh and Ireland: Bridging the Gaps between Academics and Practitioners

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ABSTRACT

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 much influence do academic writings have in judicial pronouncements? Existing literature shows that there are various determining factors behind judicial decision-making. With the development of legal scholarship on the environment, it is important to see how far judicial decision-making is getting the benefit of that research. It is also important to know how environmental academics and practitioners are viewing the stance taken by the courts in environmental litigations. This research applies socio-legal methods, particularly qualitative research, based on data gathered through semi-structured interviews of judges, lawyers, academics, and researchers from India, Bangladesh, and Ireland to understand how they view the roles of the courts in environmental matters and how far the understandings of legal norms and writings of academics are reflected in environmental judicial decision making. 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. This research adopts Thornberg's informed grounded theory and in addition constant comparative method of data analysis is applied in analysing the collected data. Acknowledging the polycentric and interdisciplinary nature of environmental problems and considering the gaps accrued from collected data this paper provides recommendations to bridge the gaps between academics and practitioners.

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Introduction

The judiciaries of South Asia, particularly the Indian Courts in the past three decades, have not only opened its doors to public-spirited citizens and expanded the meanings of fundamental rights but also have transformed itself, by exercising its public interest jurisdiction, into an arena that hosts political, social, and economic battles. Judges of the apex courts have adopted an activist approach and liberalised the rule of locus standi, permitted wide use of epistolary jurisdiction, designed innovative solutions, direct policy changes, catalysed law-making, reprimand officials, and enforce orders.[1] The Supreme Court of Bangladesh has also shown activism and has handed down directions to set up committees, adopted both a legislative as well as a policy-making role.[2] However, the apex court of Bangladesh has been criticised for assuming the role of a legislator without much benevolent consequences[3] and a majority of the orders either took years to be implemented or were even disregarded by the government departments.[4]

On the other hand, the Irish judiciary has remained restrained in recognising the unenumerated right to the environment. Although in FIE v Fingal County Council,[5] 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", the Supreme Court in the Climate Case Ireland[6] took the view that such a right could not be derived from the Constitution. However, in the same judgment, the Supreme Court determined that the National Mitigation Plan was unlawful and should be quashed.[7]

It is clear that there are differences in the standings of the courts of India, Bangladesh, and Ireland regarding environmental protection although there are similarities in the legal systems,[8] constitutional features,[9] and colonial history.[10] It is important to note that in the last two decades the Irish Supreme Court has retreated from the high watermark of activism that it reached in the 1960s and 1970s to a more restrained one.[11] 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.[12] The active engagement of the Indian Supreme Court especially in environmental matters has grown since the 1980s.[13] In Bangladesh, with the emergence and development of Public Interest Environmental Litigation (PIEL) in the mid-90s, the judiciary became active in relaxing the rules of locus standi and interpreting the constitutional rights in a liberal manner.[14]

1 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.

2 Bangladesh Environmental Lawyers Association (BELA) v Bangladesh (2008) WP No. 7260 HCD.

3 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.

4 Md. Awal Hossain Mollah, "Rule of Law and Good Governance in Bangladesh: Does Judicial Control Matter?" (2014) 2(7) Intercontinental Journal of Human Resource Research Review 7.

5 (2017) IEHC 695.

6 Friends of the Irish Environment (FIE) v The Government of Ireland (2020) IESC 49.

7 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) <https://www.irishtimes.com/opinion/supreme-court-ruling-a-turning-point-for-climate-governance-in-ireland-1.4323848>.

8 India, Bangladesh, and Ireland all follow the Common Law legal system.

9 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.

10 All these countries 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. Kate O'Malley, Ireland, India and Empire: Indo-Irish Radical Connections, 1919-64 **(**Manchester University Press 2008).

11 Eoin Daly, "Reappraising Judicial Supremacy in the Irish Constitutional Tradition" in

12 Venkat Iyer, "The Supreme Court of India" in Brice Dickson (ed), *Judicial Activism in Common Law Supreme Courts* (Oxford University Press 2007) 126

13 Geetanjoy Sahu, "Implications of Indian Supreme Court's Innovations for Environmental Jurisprudence" (2008) 4(1) Law, Environment and Development Journal 1.

Hence, it is important to explore how and why despite significant legal and constitutional similarities, India, Bangladesh, and Ireland (the selected jurisdictions) have gone in quite different directions in protecting the right to the environment. A wide range of studies[15] 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 characteristic of judges and litigants, quality and objectivity of pleadings, judges' personal characteristics, and emotional reactions of judges. Although some empirical research has been done in India, regarding the functioning and decision making of the Supreme Court,[16] and to identify the interlinkages between judicial efficiency and socioeconomic factors,[17] research on understanding the views of the academics and practitioners regarding the role of the courts in environmental matters remains inadequate. Recognising environmental protection as one of the biggest contemporary challenges[18] it is important to find out the viewpoint of academics and practitioners regarding the role of the courts in environmental matters.

Environmental problems are multifaceted, polycentric, and involve interdisciplinary and complex technical issues.[19] The Supreme Court of India has expressed similar views.[20] Considering the importance of academic writings in providing both technical and legal information, arguments, and opinions that are pertinent to the environmental judicial decisions[21] and with the growing development of academic research and writing on environmental issues,[22] it is important to see how far the understanding and positions of academics are reflected in environmental judicial decisions and whether environmental judicial decision making is getting the benefit of environmental legal scholarship. In this regard, knowing the views of judges is very significant because often the written judgement provides little insight into how a judge arrived at a decision.[23]

Therefore, this research applies the socio-legal methods particularly qualitative research, based on data gathered through semi-structured interviews from the selected jurisdictions to find out the similarities and differences in perspectives and understanding of legal norms by judges, lawyers, academics, and researchers based in the east (India and Bangladesh) and the west (Ireland). Data has been collected with the following objectives:

[14] Jona Razzaque, Public Interest Environmental Litigation in India, Pakistan, and Bangladesh (Kluwer 2004) 58.

[15] 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 University 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); 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).

[16] 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 Sudhir Krishnaswamy (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.

[17] Varsha Aithala, Rathan Sudheer and Nandana Sengupta, "Justice Delayed: A District-Wise Empirical Study on Indian Judiciary" (2021) 12 Journal of Indian Law and Society 106.

[18] Stuart Bell and others, Environmental Law (Oxford University Press 2013) 3.

[19] Elizabeth Fisher, "Environmental Law as "Hot" Law" (2013) 25(3) Journal of Environmental Law 347.

[20] 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) 2 SCC 718, the Supreme Court of India acknowledging the complexities and uncertainties underpinning the scientific evidence presented before the court in environmental cases emphasised the necessity of establishment of an environmental court in India where environmental experts and technically qualified persons are embedded in the judicial process. Gitanjali Nain Gill, "The National Green Tribunal: Evolving Adjudicatory Dimensions" (2019) 49(2-3) Environmental Policy and Law 153.

[21] Michel Bastarache, "The Role of Academics and Legal Theory in Judicial Decision-Making" (1999) 37(3) Alberta Law Review 739.

[22] Philippe Cullet & Sujith Koonan (eds), Research Handbook on Law, Environment and the Global South (Edward Elgar 2019).

[23] Timothy J Capurso, "How Judges Judge: Theories on Judicial Decision Making" (1998) 29(1) (2) University of Baltimore Law Forum 4.

i. To find out how the practitioners and academics in the selected jurisdictions view the roles of the courts in environmental matters;

ii. How far the understanding of legal norms, and writings of the academics and other stakeholders are reflected in environmental judicial decision-making;

iii. To see if there is any gap between the academics and practitioners and, if any, to inform the expectation of the practitioners from the academics and vice versa and to bridge the gap between the academia and practice to develop a well-informed and robust environmental jurisprudence.

By applying the constant comparative method of data analysis,[24] this paper shows that there are some similarities in the views of the academics and practitioners irrespective of their geographical location. However, analysed data shows differences between the perspectives of the academics and practitioners including judges compared to their respective national courts. An interesting finding is that the retired judges have taken a rather different stand than what was reflected in their own judgements while in office. This finding is supported by the argument that the situation is still the same as what Lawrence Baum[25] concluded two decades ago stating 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".[26]

Data collected and analysed shows that the gaps between academics and practitioners are affecting the development of environmental jurisprudence, particularly in the two South Asian countries. It transpires from the collected data that despite significant developments in legal scholarships, particularly in the global South not much consideration has been given to those in judicial orders and decisions. This research, while acknowledging that there are differences of purpose, perspective, and methodology between judicial reasoning and legal scholarship, 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[27] 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.[28]

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 view of practitioners and academics, this part reveals that neither the activist role of the South Asian judiciaries nor the restraint role of the Irish judiciary has met the expectations of the practitioners or the academics.

The third part includes data showing the lack of development of environmental jurisprudence and the impact of colonialism particularly in the two South Asian countries. Collected data also shows the decolonisation trend followed in Ireland. In

[24] 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.

[25] Baum (n 15) xi.

[26] 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.

[27] According to Robert French, there are several advantages of referring to legal scholarship. Such as, substantive support can be gathered in support of a proposition decided by a judge. Academic articles provide useful analysis of earlier cases helping the court to maintain consistency in decision making. Robert French, "Dialogue of the Hard of Hearing" (2013) 87 Australian Law Journal 96.

[28] "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. I would do that even before looking at my skeleton argument. And the reason for that is that the books paint a detached overall picture in the sense that they present the law free of the knowledge of this particular dispute. In my view, judges ought to insist on being shown the academic work relevant to the legal issue in the case". Lord Burrows, "Judgment-Writing: A Personal Perspective" (Annual Conference of Judges of the Superior Courts in Ireland, 20 May 2021) <https://www.supremecourt.uk/docs/judgment-writing-a-personal-perspective-lord-burrows.pdf>.

this part, the gaps and divergences between the academics and the practitioners are explored in detail. This part includes data showing the expectations of academics from practitioners and vice versa and also includes certain recommendations to bridge the gaps between academics and practitioners.

PART I

Research Methodology

Qualitative semi-structured interviews (a total of thirty-two (twelve academics and twenty practitioners) from the selected jurisdictions)[29] were used in order to build a picture of how the academics and practitioners view the role of the courts in environmental protection. 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 people on the ground. 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.

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 has been done to see how the respective judiciaries have reacted in matters of environmental protection. Literature review revealed issues regarding the overuse of judicial powers by the courts, unwillingness of other organs in protecting the environment, lack of adequate legal texts protecting the environment, and lack of coordination 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 and academic contacts have been used to reach out to practitioners and academics from India, Ireland, and Bangladesh. I also attended several academic conferences to identify and meet academics and practitioners working in the field of environment. In addition to the formal interviews, time was spent attending conferences, speaking to individuals there, visiting law schools and courts in the selected jurisdictions.

The third phase entailed detailed analysis of the thirty-two interviews conducted.

Choosing Settings and Contexts

The empirical component of the research that underpins this paper are semi-structured interviews[30] with judges, lawyers, and academics representing different jurisdictions and organisations. Respondents are not identified by name, as the interviews were conducted with a guarantee of anonymity, and some identifying details have been omitted in the extracts used. All interviewees were given codes and 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 thirty-two interviews have been conducted. It is difficult to

[29] From India, six practitioners and five academics were interviewed. From Bangladesh, seven practitioners and seven academics were interviewed. From Ireland, seven practitioners were interviewed. Among the practitioners six are judges both current and retired.

[30] 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.

know what number of interviews is sufficient for a project of this kind[31] but thirty-two seems to be a reasonable number for a study involving such groups. The academics interviewed were selected based on their expertise in my research area, which includes environmental law and justice, constitutional law, governance, and separation of powers. The practitioners were selected from each of the jurisdictions based on their expertise in environmental matters. Interviewees include retired and sitting judges. 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 and returned by the interviewee.

All the interviews began with simple issues,[32] to help settle the interview process.[33] 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 in an uninterrupted and open manner.

Although, this study does not fully follow grounded theory (GT),[34] it applies the constant comparative method of data analysis because it can be used "whether or not the researcher is building a grounded theory".[35] This approach, as mentioned above, although inspired by GT, does not follow its methods in a strict fashion. Literature review for the research was mostly done before commencing the empirical research. In addition, a certain shape was imposed on the discussions which ensued through the semi-structured questions. The approach is akin to Thornberg's alternative informed grounded theory approach.[36]

[31] Sarah Elsie Baker and Rosalind Edwards, "How Many Qualitative Interviews is Enough?" National Centre for Research Methods Review Paper (2012) <http://eprints.ncrm.ac.uk/2273/4/how_many_interviews.pdf>.

[32] Mike McConville and Wing Hong Chui, Research Methods for Law (Edinburgh University Press 2007) 76.

[33] Beth L Leech, "Asking Questions: Techniques for Semi-Structured Interviews" (2002) 35(4) PS: Political Science and Politics 665.

[34] 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.

[35] Merriam and Tisdell (n 24) 32.

PART II

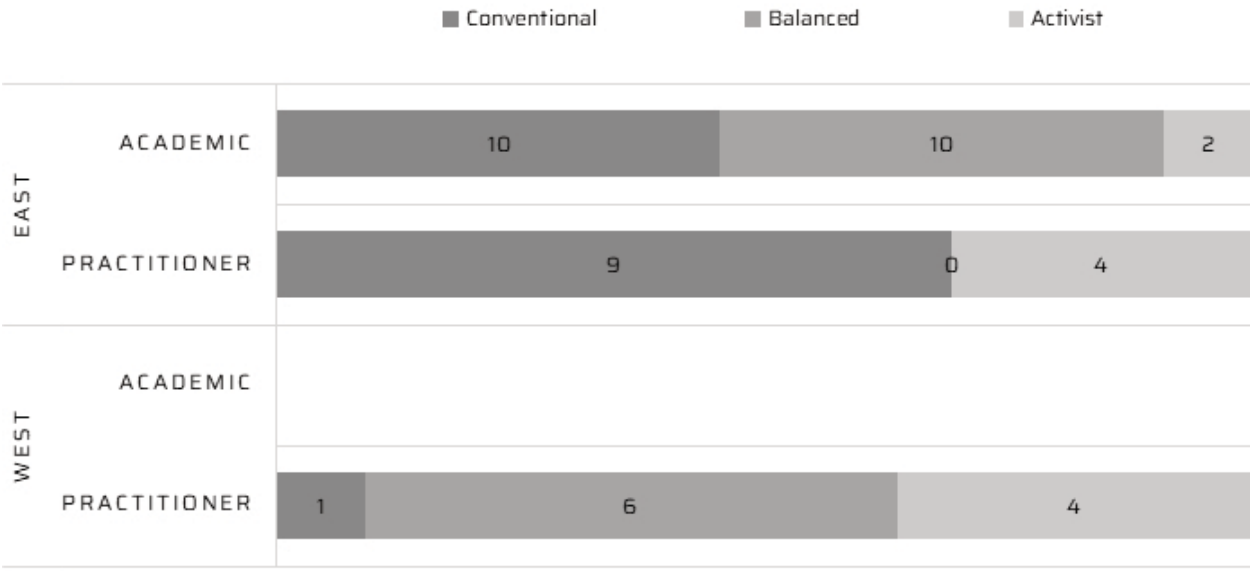
In this part of the paper, qualitative data showing the views of the academics and the practitioners representing the selected jurisdictions is explored and analysed with the aim of understanding how they see the roles of the courts in environmental protection.

Views of Academics and Practitioners on the Role of the Courts in Environmental Protection

The data collected and analysed shows that: (i). The views of the majority of the academics and practitioners are similar regarding the role of the courts in environmental protection irrespective of the socio-economic-political differences among the selected jurisdictions; (ii). The views expressed by the interviewees are different compared to the stance taken by 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, and academic writing rather than a court that is reactionary or too activist or too restraint in its approach (See graph 1).

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 activist judiciary in environmental matters, six practitioners from Ireland preferred the court to strike a balance between activism and reaction and asked for consistency in following the constitutional notions. To quote one of the practitioners from Ireland:

[36] "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 literature and theoretical frameworks". Robert Thornberg, "Informed Grounded Theory" (2012) 56(3) Scandinavian Journal of Educational Research 243, 249.



Graph 1: Preferences on Role of Courts

> *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 one is from the west. The nine practitioners from the east have shared a common view that there are problems in the over-interventionist role of the 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 criticised for coming with such matters. Judges have taken the view that they must play the leading role.* (PT07)

The majority of the academics (ten) expressed similar views as expressed by the practitioners supporting a conventional role for 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 reveal that they are relatively skeptical about the role of activist courts in environmental protection. The following discussion includes data showing that the views shared by practitioners and academics are contrary to the

views held by the judiciary in their respective jurisdictions. .

Secondly, 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 similar view supporting the activist role of the courts in protecting the environment. This is contrary to the role of the activist judiciary in India.[37]

As mentioned above, six out of the seven practitioners from Ireland are in favor of a proactive though balanced role of the courts in environmental matters. This is interesting because literature review illustrates that the Irish judiciary has shifted from an activist role in the 1960s and 1970s to a more restrained one in the last two decades[38] and "the tide of judicial lawmaking has somewhat receded in recent years in Ireland".[39] However, there is also legal scholarship that supports the view taken by the majority of the Irish practitioners. [40] 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 been developed by judges and not by the parliament and it is also possible in environmental matters.* *(PT20)*

Thirdly, ten academics from the east have criticised the courts particularly of the South Asian countries for their activist role. They preferred a balanced approach by the courts. Even the two academics (from India) who though expressed their support for a proactive role of the courts in environmental protection were very cautious in describing how they view the proactive role of the courts. Both the academics preferred the term "proactive judiciary" compared to "activist judiciary". They have also assigned reason for their standing by mentioning that being proactive is better than being reactive and even the most activist judge will not say that he or she is doing activism. In the language of one academic from India:

> *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 practitioners from Ireland show that they would like to see a proactive court for environmental protection which places its judgments in a wider legal context and is based on technical lawyerly grounds following the constitutional parameters.

Based on the collected data this part argues that the expectations from the courts are not ad-

[37] In TN Godavarman Thirumulpad v Union of India (1997) AIR SC 1223 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 the Godavarman Case, the tendency of the Supreme Court to establish public bodies to directly oversee enforcement of its orders has been described as a trespass into "executive turf". Nupur Chowdhury, "From Judicial Activism to Adventurism — The Godavarman Case in the Supreme Court of India" (2014) 17 Asia Pacific Journal of Environmental Law 177; In MC Mehta v Union of India (1998) 6 SCC 63, directions by the Court were ordered to be implemented 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(2) Columbia Journal of Environmental Law 223.

[38] Desmond M Clarke, "Ireland: A Republican Democracy, A Theocracy, or A Judicial Oligarchy?" (2011) 29 Irish Law Times (ns) 81; 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 125; David Gwynn 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; Daly (n 11) 29.

[39] Ronan Keane, "Judges as Lawmakers: The Irish Experience" (2004) 4(2) The Irish Judicial Studies Journal 1.

[40] Fiona de Londras, "In Defence of Judicial Innovation and Constitutional Evolution" in Cahillane, Gallen and Hickey (eds) (n 11) 9; Maria Cahill and Sean Ó Conaill, "Judicial Restraint Can Also Undermine Constitutional Principles: An Irish Caution" (2017) University of Queensland Law Journal 259.

equately met because neither academics nor practitioners support the activist role adopted by the South Asian judiciaries or the restraint role adopted by the Irish judiciary. The discussion in the following part shows the gaps between the perspectives of academics and practitioners and argues that these gaps need to be bridged to develop a robust environmental jurisprudence.

PART III

This part explores the data showing how the divergences identified in part II between academics and practitioners are impacting environmental judicial decision-making and how the gaps can be bridged based on the learnings and experiences of the environmental academics and practitioners.

Lack of Development of Environmental Jurisprudence

The lack of development of environmental jurisprudence especially in the South Asian countries was criticised by the majority of the academics and practitioners participating in the qualitative research. According to ten academics from the two South Asian countries, environmental cases were not progressively built on jurisprudence robust or adequate enough to influence post facto actions. All these ten academics have expressed the view that the courts are less interested in using scholarly articles and not all judges dealing with environmental issues have the necessary technical expertise. Using the example of the Indian and Bangladeshi judiciaries, these academics have 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.[41]

Five academics have 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.[42]

Lack of consistency in decision-making[43] and inconsistency in applying international legal principles by the South Asian courts have been identified as an outcome of lack of jurisprudential development by five academics from India and Bangladesh. One of them (AC02) said that the principle of sustainable development has been interpreted to achieve a balance between environmental protection and economic development but in India, several development projects have been regularised by saying that India is a developing country. In the language of one Indian 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, and Environmental Protection Act. Instead of looking at the statutory remedies, the Indian Courts have expanded Article 21 of the Indian Constitution*

[41] Although environmental principles such as sustainable development, polluter pays and precautionary principles have been recognised 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.

[42] In this regard, it is important to refer to the judgment of the Irish Supreme Court in FIE v Ireland (n 6), where the Court stated that there is no constitutional right to a "healthy environment" and declared that: "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. (2020) IESC 49 [8.11]. In that judgment, the Supreme Court referred to a legal scholarship, David R Boyd, The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment (UBC Press 2011) to deduce that a constitutional right to the environment has been added to the constitutions of a number of countries by explicit amendment rather than a process of judicial discovery. 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.

[43] Although otherwise proactive in protecting the environment, the Supreme Court of India while dealing with the questions of environmental clearance granted to mining projects stated that the larger interests of the nation must not suffer due to minor procedural lapses. Lafarge Umiam Mining Ltd v Union of India & Others (2011) SCC Vol (7) 338; In Narmada Bachao Andolan v Union of India (2000) SCC, SC 10 and in ND Jaypal and Another v Union of India and Ors (2004) SCC, SC 9, even on the face of obvious non-compliance regarding environmental Impact Assessment, the Supreme Court of India preferred to focus on the economic gains from the projects. Nupur Chowdhury, "Sustainable Development as Environmental Justice: Exploring Judicial Discourse in India" (2016) 51(26 & 27) Economic & Political Weekly 84.

> *to include the right to environment. This reads very well but is ineffective on the ground. There has been a regularisation of irregularity mode kind of jurisprudence.* (AC05)

The application of the polluter pays principle by the Indian Supreme Court in Godavarman Case[44] was used as an example by one Indian academic to criticise 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 compensation in the form of net present value of the forests. The eventual result was that forest has been allowed to be used for "non-forest"[45] purposes on the payment of money. Although a lot of money has been collected it has in effect led increased monetisation of forests by regularising 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 the academics and the courts or at least if the court would have taken the expert advice from the legal scholars.

The observations of the academics on the lack of development of environmental jurisprudence in the South Asian countries get support from the statements of thirteen practitioners (all from the east and including sitting and retired judges). The view of practitioners is that in most environmental cases judges deal on a piecemeal basis and does not always consider the overall picture. According to one practitioner:

> *Judges do not have enough time to get in-depth knowledge and understanding because of the 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 has stated that taking every issue to the court is a huge problem. She referred to the Delhi Pollution case[46] where the Supreme Court of India has asked to set up smog towers[Shivam Patel][47] and mentioned it might happen that millions will be invested to set up something, which has no scientific basis. The same idea has been echoed by another Indian academic in the following language:

> *If any policy is violated the courts can get involved. On the other hand, if the courts get involved in every aspect it will make things imbalance and will be a violation of the system.* (AC09)

The tendency of bringing every possible issue to the courts has been criticised by one practitioner from India in the following language:

> *It shows that we are not mature as a democracy. We couldn't sufficiently institutionalise 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)

[44] Godavarman v India (n 37). This case is an example of "continuing mandamus", whereby the Court, rather than passing final judgment, keeps on passing directions with a view to monitoring the functions of the executive. Sahu (n 13) 1.

[45] According to the Explanation of Section 2 of the Forest (Conservation) Act 1980, "non-forest purpose means the breaking up or clearing of any forest land or portion thereof for (a) the cultivation of tea, coffee, spices, rubber, palms, oil-bearing plants, horticultural crops or medicinal plants; (b) any purpose other than reafforestation".

[46] MC Mehta v Union of India (1998) 6 SCC 63.

[47] "The Supreme Court has Brought "Smog Towers" Back in the News. What are they?" The Indian Express (New Delhi, 31 July 2020) <https://indianexpress.com/article/explained/delhi-pollution-smog-towers-supreme-court-6532833/#:~:text=The%20towers%20to%20be%20installed,the%20Chinese%20city%20of%20Xian.>.

One practitioner from Ireland who thinks that the courts should not be activists 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 collected data that the issue of lack of development of environmental jurisprudence has been identified and criticised chiefly by academics although a few practitioners also supported that view. 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.

Role of Academics and Practitioners: Disjunction between Theory & Practice

Whereas the first part of Section III shows the lack of development in environmental jurisprudence, this part explores the data showing more disjunctions between academics and practitioners. Since a literature review[48] shows that the disjunction between the academics and the practitioners is not unique only in environmental matters or in the global South, this research result will be relevant for other legal areas as well.

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 criticised judges for their uninformed colonial attitude towards legal scholarship in the following 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)

Collected data shows that Ireland has taken a somewhat different route in terms of following English law, compared to the South Asian countries.[49] The decolonisation trend followed by the Irish Judiciary can be experienced from the statement of one 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 the early days in using only English textbook. 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*

[48] Harry T Edwards, "The Growing Disjunction Between Legal Education and the Legal Profession" (1992) 91 Michigan Law Review 34; Richard A Posner, "The Judiciary and the Academy: A Fraught Relationship" (2010) 29 University of Queensland Law Journal 13; It was reported in May 2011 that John G Roberts, Jr., Chief Justice, Supreme Court of the United States have 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". Adam Liptak, "Keep the Briefs Brief, Literary Justices Advise" New York Times (New York, 21 May 2011) <https://www.nytimes.com/2011/05/21/us/politics/21court.html>.

[49] The trend of following the colonial legacy is not only prevalent in court practices but also in drafting legislation and law-making processes in India and Bangladesh. The once colonised India and Bangladesh still tend to defer the deciding powers to the executive and the government. 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.

> *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)*

This decolonisation trend can be found in judgments given by the Irish judges.[50] This is something that this research argues that both the practitioners and academics in South Asia can learn for developing and referring to their own legal texts and precedents.

The collected data shows that all the academics and twelve practitioners (six judges and six lawyers) have criticised the role of the lawyers. According to one practitioner (lawyer) from India, 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 all three selected jurisdictions) have stated that the academics are far away from the practical world and criticised the academics for not being able to contribute significantly to judicial decisions. In the language of one practitioner from India:

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

As stated in the introduction, environmental problems being multifaceted, this paper argues that the gaps between academics and practitioners need to be bridged. This paper attempts to summarise data showing the expectations of academics from practitioners and vice versa and includes certain recommendations.

The Expectation of the Academics from the Practitioners and vice versa

An analysis of the collected data shows that the interviewees have suggested: i. environmental sensitisation of judges, lawyers, court staff, and academics; ii. responsibility of lawyers to make a good case; iii. more practice-oriented academic writings; iv. establishment of a specialised environmental tribunal to improve consistency in decision making by increased consultation between judges and stakeholders, experts, and academics.

Sensitisation of Judges, Lawyers, Court Staffs, and Academics

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. It has been stated by twelve practitioners (including six judges) that all judges should be made environmentally sensitive as it is not sure who will be appointed in the environmental courts or tribunals. According to one practitioner (judge) from Bangladesh:

> *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 do this 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)*

It is expected that increased attention to legal scholarship will help judges to pronounce better judgments by viewing the overall picture because

[50] For example, in T D and Others v The Minister for Education, Ireland (2001) 4 IR 259, Keane CJ Referred to Gerard Hogan, "Unenumerated Personal Rights: Ryan's Case Re-evaluated" (1990-92) 25 Irish Jurist 95; Hardiman J referred to the writing of legal scholar Gerard Hogan published in The Irish Times, 14 July 2001, and Raoul Berger, Government by Judiciary (Harvard University Press 1977); Murphy J referred to Professor Gerard Quinn "Rethinking the Nature of Economic, Social and Cultural Rights in the Irish Legal Order" in Cathryn Costello (ed), "Fundamental Social Rights: Current European Legal Protection and the Challenge of EU Charter of Human Rights" (ICEL 2001).

academic writings of good quality generally provide all relevant information and references.[51]

One academic (AC06) has 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 from India 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:

> *Sensitisation takes place at two levels; one within own self (how sensitive you are) and secondly, sensitising 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)*

Lawyers Should Make a Good Case

Eight academics and six practitioners have stated that lawyers have the responsibility to make a good case before the court. One academic from India (AC03) has 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.

It is expected by one Bangladeshi academic (AC07) that environmental lawyers should understand in environmental cases that these are not only environmental issues but also social and economic issues.

Legal Scholarship for Judges

Five academics from India have stated that India has a number of environmental academics who are working and writing on environmental issues. Three academics from India have stated that there is also a steady stream of sociologists who also work on environment-related issues. All the five academics from India have stated that environmental academics' works to a great extent, have not been recognised by the courts. 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. Based on the Irish experience, this paper, therefore, argues that more initiatives should be taken by the law schools in India, Bangladesh to publish more on environmental issues and the practitioners should increasingly consult environmental legal scholarships.[52] However, the development of legal scholarship can serve various other purposes other than influencing judges, such as those might introduce new ideas, affect the development of the law and help to shift norms.[53] In this regard, one academic from India has suggested academics to work collaboratively. 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 academics and judges also.* *(AC01)*

[51] Vaughan Black and Nicholas Richter, "Did She Mention My Name?: Citation of Academic Authority by the Supreme Court of Canada, 1985-1990" (1993) 16(2) Dalhousie Law Journal 377.

[52] "Academic writing which is directed to judges, to the profession and on occasion to the public... [is] a valuable resource for judges...[which] confirms our shared concern with the correct and coherent development of the law" Susan Kiefel, "The Academy and the Courts: What Do They Mean to Each Other Today?" (2020) 44(1) Melbourne University Law Review 447.

[53] Diane P Wood, "Legal Scholarship for Judges" (2015) 124 The Yale Law Journal 2592.

Establishing Specialised Environmental Court or Tribunal

Referring to the success of the NGT[54] five academics and six practitioners have suggested establishing a stronger institution in the form of a specialised environmental tribunal. According to the interviewees, such a body can not only play a role in better protecting the environment but also can ensure better access to justice, public participation, stakeholder involvement, and expert consultation.

NGT benches are comprised of judicial members who are environmentally sensitive and expert members[55] and this particular feature has been praised by five academics from India as it can ensure better environmental decision-making. The expert members better understand the complex environmental issues and also have specialist knowledge on environmental matters which judges and lawyers lack.[56] Thus, a forum like this can increase the possibility of research sharing between the practitioners and the academics.

In addition to the interviewees from India, a total of eight participants (three academics and five practitioners) from Bangladesh and three 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.[57]

[54] 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. The NGT has been praised for its initiatives for ensuring access to justice, public participation, composition involving judicial and expert members, and the pragmatic problem-solving approach. Gitanjali Nain Gill, Environmental Justice in India: The National Green Tribunal (Routledge 2017).

[55] Section 4 of the National Green Tribunal Act 2010.

[56] Gill (n 54) 155.

[57] It is relevant to note here that among the selected jurisdictions, 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 specialised environmental court. George Pring and Catherine Pring, Environmental Courts & Tribunals: A Guide for Policy Makers (UN Environment Programme 2016) 1.

Conclusion

This research analysed qualitative data to see how academics and practitioners view the roles of the courts of the selected jurisdictions in environmental matters. The collected data shows that there are gaps between the academics and practitioners (especially judges) impacted by a colonial attitude by the South Asian judges. This paper argues and shows through data analysis that such gaps between the academics and practitioners have affected the development of environmental jurisprudence.

The collected and analysed data showed that the interviewees preferred a balanced and environmentally sensitive approach from the judiciary in environmental protection. It has been suggested by the interviewees 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. Based on the qualitative data this paper suggests that judges should adopt a proactive role contemplating a creative and socially relevant form of enlightened interpretation of law. Judges should also strike a balance between judicial adventurism 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. Better consultation of academic writings and with experts by judges and lawyers can improve judicial decision-making.

Based on the decolonisation trend followed by the Irish counterparts, it is argued that law schools in India and Bangladesh should take initiatives and academics should write more on environmental issues and on practice oriented matters directing judges. The importance of having collaboration among academics from the east and the west and between judges and between judges and academics is also recognised in this paper. It is expected that this research will prompt new research questions and inform existing descriptive and normative debates about the role of judges, lawyers, stakeholders, and academics in environmental protection.

LEAD Journal is a peer-reviewed journal which publishes - on lead-journal.org - articles, case notes and documents of interest to professionals, practitioners, researchers, students and policy-makers in the field of international and regional environmental law and domestic environmental laws of developing countries. It emphasises a comparative approach to the study of environmental law and is the only journal in the field to carry a North-South focus. It is unique in providing perspectives from both developed and developing countries. Bearing in mind the principles of "sustainable development", LEAD Journal also solicits writings which incorporate related concerns, such as human rights and trade, in the study of environmental management, thus adopting a contextual approach to the examination of environmental issues. LEAD Journal encourages scholarship which combine theoretical and practical approaches to the study of environmental law and practice.

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