@ Dhaka University Law Journal, 2023, 34 (2), 115-131
DOI: https://doi.org/10.3329/dulj.v34i2.72328

Collaborative Constitutionalism and Courts as Partners in the Joint Enterprise of Governing

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Abstract: *Although the doctrine of separation of powers has significantly influenced the development of constitutional doctrine in many countries, an acknowledgment of the myriad limitations of the theory allows reevaluating the traditional approach to view institutional governance. This article explores collaborative constitutionalism which sees the state organs not as solitary entities confined to one single function rather as constituent parts of a joint enterprise where each of the organs has its own role to play and they work together. Based on judicial decisions by the courts of Bangladesh, India, and Ireland, three forms of collaboration have been identified where the courts have acted as partners in the joint enterprise of governing with other organs. It has been demonstrated that adopting a collaborative approach allows the courts to perform a proactive and meaningful supervisory role vis-à-vis the other organs of the state to ensure the rule of law.*

Keywords: Collaboration, Courts, Rule of Law, Public Participation, Separation of Powers.

1. Introduction

In the contemporary world, one of the major challenges faced by the countries is the lack of adequate legislation coupled with executive inertia in implementing the laws and policies. In some countries, the judiciaries have stepped in and tried to fill in the gaps in the legislation or adopted policies and created methods and institutions for the implementation of its decisions. Although these have earned the courts plaudits such as 'savior,[1] there are references to its role as a 'usurper'. The over-enthusiastic role by the courts has not only contributed to a polity that is becoming consistently reliant on the judiciary for remedying all kinds of problems but has also severely dented the institutional balance.[2] The much-hyped benefits of

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1 V. Krishna Murthy, 'Environment, Growth and Public Interest Litigation' (1987) 14 IBR 260.

2 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.

judicial involvement are also far from real because of the inability of the courts to involve and engage public officials in reform activities directed by the court; lack of political willingness; and resorting to the armory of contempt jurisprudence by the courts in order to ensure executive compliance. The challenges can be encountered if an atmosphere can be generated that strengthens decisional legitimacy. The courts can ensure compliance of decisions by the executive and by soliciting 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. [3] This article argues that all the suggested means can be attained by adopting a collaborative approach resulting in effective engagement by the relevant stakeholders (i.e. government departments, experts, related bodies and persons) and participated by all three organs of the state. Collaboration, if is well designed and can be appropriately applied, has the potential to create opportunities for ensuring stakeholder engagement in decision-making in a meaningful way.[4]

Recognizing that collaboration, though important, is a relatively new idea in constitutional jurisprudence,[5] 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. With this aim, the discussion of the collaborative method in this article broadly based on the works of Eoin Carolan,[6] Aileen Kavanagh,[7] and Christopher Ansell[8] also explore judicial decisions where the courts of Bangladesh, India, and Ireland (the selected jurisdictions) [9] have adopted a collaborative approach.

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[3] Ridwanul Hoque, 'Taking Justice Seriously: Judicial Public Interest and Constitutional Activism in Bangladesh' (2006) 15(4) Contemporary South Asia 399.

[4] 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.

[5] Eoin Carolan, *The New Separation of Powers: A Theory of the Modern State* (Oxford University Press 2009) 18.

[6] Eoin Carolan, 'Dialogue Isn't Working: The Case for Collaboration as a Model of Legislative–Judicial Relations' (2016) 36 Legal Studies 209.

[7] Aileen Kavanagh, *Constitutional Review under the Human Rights Act* (Cambridge University Press 2009).

[8] Christopher Ansell, *Pragmatist Democracy: Evolutionary Learning as Public Philosophy* (Oxford University Press 2011).

[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; Haque, M. E., 'In Search of Origin of Recognition of Economic and Social Rights as Constitutional Principles: From Ireland to Bangladesh' (2012) 23(2) Dhaka University Law Journal 79.

The discussion in this article 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 in.[10] *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) of India.[11] *Third*, the courts can adopt the remedy of suspended declaration of invalidity to achieve a just solution through a constructive engagement between different organs of the state.[12]

Discussion in this article is divided into three parts. The *first part* is an exploration of collaborative constitutionalism as an alternative conception of constitutional government because it has the potential to eschew the exaggerated images of institutional conflict that the language of judicial or parliamentary supremacy tends to evoke.

In the *second part* 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 the rule of law.

Part three discusses the three forms of collaborative constitutionalism based on precedents 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. 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.

2. Defining Collaboration

Collaboration allows each organ to engage with the others 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

[10] Ioanna Tourkochoriti, 'What is the Best Way to Realize Rights?' (2019) 39(1) Oxford Journal of Legal Studies 209.

[11] 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.

[12] 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.

competencies.[13] According to Eoin Carolan, 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.[14] According to Christopher Ansell, collaboration signifies the potential for fruitful conflict resolution between different organs and tends to facilitate and develops knowledge, understanding, and capacity of the organs that has opposing perspectives and also divergent interests. 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.[15] Aileen Kavanagh termed the coordinated institutional effort between the branches of government in the service of good government as 'joint enterprise of governing' and argues for a reconstructed view of separation of powers which sees the state organs not as solitary entities confined to one single function rather as constituent parts of a joint enterprise where each of the organs has their own role to play while working together. In collaborative constitutionalism, the organs will be independent but will remain interdependent in various ways.[16]

The collaborative constitutionalism process is well explained by Eoin Carolan by using the example of the adoption of the remedy of suspended declaration of invalidity by the courts. When the court adopts the remedy of suspended declaration of invalidity and determines that a certain measure or law or policy is in contravention of the constitution of any particular country that does not close off all policy debate on that subject. Rather, the remedy acknowledges that the concerned institution will respond to the decision of the court by adopting a new measure that might pursue the same objective taking into account the reasoning forwarded by the court. It is then due upon the court to understand that the response is not a challenge to the authority of the court rather is an attempt to better accord with the decision of the court. The whole process has been described as collaborative constitutionalism which enhances the interaction between the organs and increases the mutual respect and interdependence between the state organs.[17] However, a cautionary statement has been made by J O' Flynn not to give the label of collaboration to every conduct involving more than one organ or

[13] Carolan, *The New Separation of Powers* (n 5).

[14] Carolan, 'Dialogue Isn't Working' (n 6) 209.

[15] Christopher Ansell, *Pragmatist Democracy: Evolutionary Learning as Public Philosophy* (Oxford University Press 2011) 168.

[16] Aileen Kavanagh, 'The Constitutional Separation of Powers' in David Dyzenhaus and Malcolm Thorburn (eds), *Philosophical Foundation of Constitutional Law* (Oxford Scholarship Online 2016) 221.

[17] 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 180

even any form of working together by all the organs.[18] His voice has been echoed by Carolan who mentioned that collaboration is not a label for any conduct which involves more than one party.[19]

This article argues to adopt a collaborative approach because collaboration has the capacity to provide a more descriptively and normatively appropriate account of constitutional power relations. Collaboration can also 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 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.[20]

a. Features of Collaboration

Conscious of the definitional dilemmas with collaboration which poses the challenge of over-identifying and over-selling the idea,[21] this article proposes and develops collaboration as a method that can help the courts to overcome a majority of the challenges faced in uplifting the rule of law because of the following features of the method:

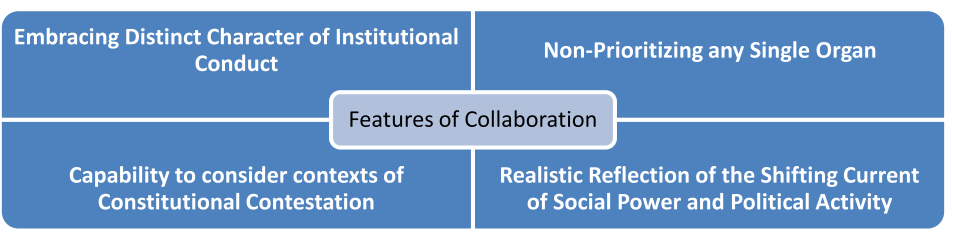

Figure 1.1: Features of Collaboration

i. 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 in various types of processes and diverse knowledge bases. Diversity is one of the critical factors for fashioning collaboration. The driving force behind

[18] Janine O'Flynn, 'The Cult of Collaboration in Public Policy' (2009) 68 Australian Journal of Public Administration 112.

[19] Carolan, 'Dialogue Isn't Working' (n 6) 209.

[20] 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.

[21] Carolan, 'Dialogue Isn't Working' (n 6) 209.

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 to offer a framework for handling constitutional contestation integrating diversified societal interests.[22] Collaboration would allow the legislature to decline to enact legislation following unpopular and controversial judicial pronouncements. Support of this contestation can be found in the American examples where the legislature consciously declined to enact legislation in response to the Supreme Court's decision in *Miranda v Arizona*,[23] although the legislature enacted law aiming to pursue the same policy objective articulated in the judgment.[24]

ii. 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.[25]

iii. 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.[26]

iv. 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 institution and to test ideas and views. Collaboration provides the facility of acknowledging diverse institutional positions as they are the creation of dynamic social and political processes which remain prone to modifications in those dynamics.[27]

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[22] Ibid.

[23] [1966] 384 US 436.

[24] 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.

[25] Carolan, 'Dialogue Isn't Working' (n 6) 209.

[26] Ibid.

[27] Ibid.

3. 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 said rules. Although the courts in common law systems have the power to make rules and develop doctrines, this is quite limited in comparison to the law-making power of the legislature. Generally, 'judicial law-making is piecemeal, incremental and interstitial.'[28] 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 disputes.[29] 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.[30]

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.[31] In a democratic state, independence of the judiciary is a *sine qua non* for maintaining rule of law.[32] 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/their acts. The legislature has the capacity to hold the government accountable for any matter whereas the court can hold the government accountable for

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[28] 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.

[29] Lord Devlin, 'Judges and Lawmakers' (1976) 39 Modern Law Review 1.

[30] John Gardner, 'Legal Positivism: 5 ½ Myths' (2001) 47 American Journal of Jurisprudence 199.

[31] 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.

[32] 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.

violations of law.[33] The judiciary has the jurisdiction to bring back the parliament and the executive from constitutional derailment and give necessary direction to follow the constitutional course.[34] However, the Supreme Court of India in *Ugar Sugar Works Ltd. v Delhi Administration & Ors*,[35] 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.[36] An active interpretative role is sometimes assumed by the courts when they adopt legislative measures to deal with changing social needs and by that way, courts give effect to legislation in new circumstances. By doing this, the courts help the legislature to implement the law over time.[37] It is the parliament that enacts the laws, but it is for the courts to tell the nation what those laws in fact mean.[38] 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.[39] 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.[40]

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

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[33] Kavanagh, 'The Role of Courts in the Joint Enterprise of Governing' (n 28) 121.

[34] *Shah Abdul Hannan v Bangladesh* [2011] 16 BLC 386.

[35] [2001] 3 SCC 635.

[36] Lord Reid, 'The Judge as Lawmaker' (1997) 63 Arbitration 180.

[37] Dimitrios Kyritsis, 'Constitutional Review in Representative Democracy' (2012) 22 Oxford Journal of Legal Studies 297.

[38] *BLAST v Bangladesh* [2007] 15 BLT 156.

[39] P.N. Bhagwati, 'The Role of the Judiciary in the Democratic Process: Balancing Activism and Judicial Restraint' (1992) 18 Commonwealth Law Bulletin 1262.

[40] Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Clarendon Press 1995) 376.

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 upheld.[41] The courts being designed to ensure stability, certainty, and coherence in the law can make another significant contribution to the collaborative enterprise by integrating ongoing legislation into the stable framework of fundamental legal doctrine.[42]

Judges, in adopting a pro-active role have to show respect to the constitutional power of the legislature by applying the laws enacted by the legislature following the legislative intent. In addition to that, judges 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 to 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 garnering popular support for the proposed amendment.[43]

4. Courts as Partners in Collaboration

Aileen Kavanagh 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 overall contribution of the other institutions. However, Kavanagh reiterated that neither enacting legislation nor initiating large-scale policy changes are the jobs of the judges.[44] Ioanna views the Courts as a contributor in improving the decision making of elected representatives without necessarily substituting their own decisions and supports the view of Durkheim[45] who holds

[41] Kavanagh, 'The Role of Courts in the Joint Enterprise of Governing' (n 28) 121.

[42] Raz (n 40) 54.

[43] Kavanagh, 'The Role of Courts in the Joint Enterprise of Governing' (n 28) 121.

[44] Ibid

[45] E´mile Durkheim, *The Division of Labor in Society* (first published 1893, WD Halls tr, The Free Press 1997).

that courts and legislatures express and influence the collective consciousness.[46]

Three forms of collaboration where the courts have acted as a partner in the joint enterprise of government have been identified from an examination of the judicial pronouncements by the courts of the selected jurisdictions: *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. The following discussion includes case studies where 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.

a. Courts Acting as a Facilitator in Collaboration

One of the most recent and significant examples of judicial pro-activism in adopting the collaborative approach is the *Saif Kamal's Case*.[47] A writ petition was filed seeking to ensure emergency medical service to the victims of accidents by hospitals and clinics. Upon submission of the application under Article 102 of the Constitution of Bangladesh,[48] against Respondent No. 1 Secretary, Ministry of Health and Family Welfare (MoH&FW), Respondent No. 2 Secretary Ministry of Road Transport and Bridges (MRTB), Respondent No. 3 the Director-General of the Directorate General of Health Services (DGHS), and Respondent No. 4 the Bangladesh Medical and Dental Council (BMDC), the High Court Division (HCD) of the Supreme Court (SC) of Bangladesh issued a *Rule Nisi*[49] on 10.02.2016. Along with the *Rule Nisi* the HCD also handed down a set of directions that have formed the basis of successive orders leading to the formulation of a guideline for ensuring emergency medical services to persons injured in accident and security of the Good Samaritan, 2018.

An examination of the impugned judgment shows that the adoption of the guideline has been possible and reflected a concerted effort of the parties and the Court. However, the Court had to issue extensive directions and thereby 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.

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[46] Tourkochoriti (n 10) 209.

[47] *Syed Saifuddin Kamal v Bangladesh, represented by the Secretary, Ministry of Health, Bangladesh, Dhaka and others* [2018] 70 DLR 833.

[48] Article 102 of the Constitution of Bangladesh authorizes the High Court Division of the Supreme Court 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.

[49] A rule Nisi is one kind of show cause notice allowing the other side an opportunity to reply or state her case before anything is decided regarding or against her.

Respondent No. 1 MoH&FW formed a four-member Special Committee and a Core Committee to formulate the guidelines and subsequently 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 that took 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 the Petitioners. 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.[50]

Pursuant to the Court's Order, two consultation sessions were organized by Respondent No. 1 to review the recommendations of the Petitioners. In the consultation meetings representatives from MoH&FW, Attorney General's Office, Doctors, Lawyers' representing the Petitioners were present. After adopting the input and considerations of various stakeholders the finalized text was submitted before the Court. The reflection of the collaborative approach in the impugned case and in the adoption of the guideline is evidenced when the Court after reviewing the guideline states that the guideline is 'an outcome of strident, bold and trail-blazing efforts of all stakeholders concerned and chiefly the two Petitioners and Respondent No. 1, Ministry of Health.' The Court after noting the concerted effort of all concerned approved and sanctioned the official publication of the guideline by mentioning that:

> This Court, hereby, further directs, and as per the prayer of all parties concerned agreed on the same, 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.[51]

The initiatives taken by the court, in this case, is significant from the perspective of institutional governance because the Court did not make any law or travelled into the domain of the legislature. In addition, the Court left the discretion to issue directions for implementation of the guidelines to the Government and the guidelines will remain enforceable as binding by judicial sanction and approval pending appropriate legislative enactments that would incorporate entrenched standards, objectives, rights, and duties. The Court also directed wide dissemination of the guidelines by gazette publication and through publication in electronic and print media so that it can secure the objective of social mobilization of view and perception of the necessity of such guidelines. The Court assigned the responsibility of such dissemination to Respondent No. 1.

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[50] *Syed Saifuddin Kamal v Bangladesh, represented by the Secretary, Ministry of Health, Bangladesh, Dhaka and others* [2018] 70 DLR 833.

[51] Ibid.

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 relevant 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.

The judgment in *Saif Kamal's Case*[52] is a good improvement compared to the Indian Supreme Court's decision in *Vishaka v State of Rajasthan*.[53] 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.[54] Several years after that, the Indian Parliament enacted the Protection of Women from Domestic Violence Act 2005.[55]

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*.[56] 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.[57]

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

[52] Ibid.

[53] [1997] 6 SCC 241.

[54] 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.

[55] Act No. 43 of 2005

[56] [2019] 13 SCC 715.

[57] Ibid, Order dated 10 August 2018.

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.[58]

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.[59]

b. Collaboration in the Form of Suspended Declaration of Invalidity

Collaborative constitutionalism can also take the form of a suspended declaration of invalidity[60] and can be helpful in developing effective instruments of institutional governance which would eventually improve the separation of power system.

The *Kinsella Case*[61] 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.'

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58 Ibid.

59 Tourkochoriti (n 10).

60 Carolan, *The New Separation of Powers* (n 5); 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.

61 *Kinsella v Governor of Mount Joy Prison* [2011] IEHC 235.

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.[62] In the language of Hogan J:

> 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.[63]

Another example of the similar approach adopted by the Irish judiciary can be seen in *Blake v Attorney General*.[64] 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.[65] 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.[66]

The recent decision of the Supreme Court of Ireland in *NHV v Ministry for Justice & Equity*[67] where the Court decided to defer a prospective declaration of invalidity is also an example of suspended declaration of invalidity.[68]

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[62] Carolan, 'The Relationship between Judicial Remedies and the Separation of Powers' (n 17) 180.

[63] *Kinsella v Governor of Mount Joy Prison* [2011] IEHC 235.

[64] [1982] IR 117 (SC).

[65] Carolan, 'The Relationship between Judicial Remedies and the Separation of Powers' (n 17) 180.

[66] *A v Governor of Arbour Hill* [2006] 4 IR 88 (SC).

[67] [2017] IESC 35.

[68] Carolan, 'A Dialogue-Oriented Departure in Constitutional Remedies' (n 60) 191.

c. Collaboration in the Form of Participatory Decision-Making

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)*.[69] 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*[70] 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 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.[71]

The National Green Tribunal (NGT) of India has demonstrated the exercise of participatory decision-making in environmental matters. The NGT has adopted a collaborative approach in several cases[72] by applying stakeholder consultative adjudicatory process and establishing monitoring committees.

The stakeholder consultative procedure is an innovative problem-solving 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.[73]

The perception of the judges in the NGT is that issues having wider ramifications and public impact can be better handled and resolved when

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[69] [1996] Bangladesh Supreme Court Report 27.

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

[71] Imtiaz Ahmed Sajal, 'Strengthening the National River Conservation Commission of Bangladesh' *The Daily Star* (Dhaka, 15 October 2019).

[72] *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).

[73] Gitanjali Nain Gill, 'The National Green Tribunal: Evolving Adjudicatory Dimensions' (2019) 49 (2-3) Environmental Policy and Law 153.

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.[74] 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.[75] 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.[76]

In *Indian Council for Enviro-Legal Action v National Ganga River Basin Authority*,[77] the NGT observed:

> ... 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.[78]

This NGT pronouncement shows that by engaging all the necessary stakeholders the NGT has ensured both access to environmental information and participatory decision-making. In *Paryawaran Sanrakshan Sangarsh Samiti Lippa v Union of India*,[79] the rights of the villagers to be consulted regarding the construction of the Kashang Integrated Hydroelectric Project was recognized by

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[74] *Manoj Misra v Union of India* (Judgment 13 January 2015).

[75] Gill, 'Mapping the Power Struggles of the National Green Tribunal of India' (n 11) 85.

[76] Gitanjali Nain Gill, *Environmental Justice in India: The National Green Tribunal* (Routledge 2017) 167, 168.

[77] Judgment 10 December 2015.

[78] Ibid, 3.

[79] Judgment 4 May 2016.

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).

The above-discussed forms of collaboration are helpful for judges because these will help them to uphold the constitution and the rule of law and at the same time allow them to overcome the challenges they face in bridging the gaps between law and society.[80] 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.[81]

5. Conclusion

The adoption of collaborative constitutionalism may bring substantial benefit as different forms of collaboration would allow the courts to move beyond the traditional remedies and develop a more carefully calibrated response. The above discussion arguably establishes that collaborative constitutionalism is consistent with the nature of contemporary government, checks, and balances and can increase mutual respect between and among different organs. Collaboration has the capacity to respond to debates about institutional supremacy in advancing a solution acknowledging the interdependent way of working of the institutions of modern states and to apply that insight to appropriate cases. Collaboration among the organs of the state reduces competitions between the powers, and ensures participatory decision making. However, there are limitations to the concept and 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 others.[82] This can be rationalized by mentioning that the diversified institutional inputs put forward by different institutions can bring valid alternative perspectives to shared problems and unlike the dialogue model, it is not required under collaborative constitutionalism to get engaged with alternative perspectives. 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 article 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.

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[80] Aharon Barak, *The Judge in Democracy* (Princeton University Press 2006).

[81] Tourkochoriti (n 10).

[82] Eoin Carolan, 'Leaving Behind the Commonwealth Model of Rights Review' (n 60).