The Conceptual Framework of Legal Pluralism and Its Practical Application: Listening to the Voices of Different Types of Law in the Case of Legal Reform in Bangladesh

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Abstract: This paper briefly examines existing theoretical approaches to law in order to illustrate the inadequacy of a traditional positivist framework. It aims to explain relevant pluralist theories arguing the need for legal pluralism, since it seems to make sense for Bangladesh or South Asia too, to subscribe to the argument that state law is never alone in the wider socio-legal field.[1] Analyses of major legal theories and other associated issues provide a useful tool for better appreciation of subsequent analyses relating to the realisation of different sources of law in a particular society or community, and the apprehension of the position of existing reforms as well as the necessity and possibility of a further suitable reform policy for the Bangladeshi legal system. Thus, this paper argues that to effectively appreciate and tackle the legal system of a plural society like Bangladesh or any of the South Asian nations, the traditional positivist framework, based on Eurocentric monist legal methods, needs to be identified as insufficient and too state-centric. Instead, a more inherently plural, culture-specific and identity-conscious approach needs to be and is adopted, with due recognition given to all the elements of law or law-related entities, depending on which approach to legal pluralism theorising one wants to adopt.

Keywords: Bangladeshi legal culture, construction of identity through law-making, global legal realism, legal pluralism, legal positivism, legal theories, natural law, and socio-legal approaches.

1. Introduction

Based on an extensive literature review, this article argues that a Western-dominated positivistic approach of legal theorising has not been productive for understanding how effective legal reforms for an internally plural nation such as Bangladesh, particularly regarding the family laws or personal laws of different religious and indigenous communities, can be managed. A brief analysis of existing legal theories and of the emerging voices of legal pluralism offers a better and deeper understanding of this assertion. There has been hardly any discussion on methods of legal reforms in Bangladesh and the existing

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[1] Werner Menski, *Comparative Law in a Global Context: The Legal System of Asia and Africa* (2nd edn, CUP 2006).

discourses have been heavily politicised. Moreover, current domination of legal minds by the concepts of legal positivism methodically cuts out all other forms of law or normative orders, though they obviously remain enormously significant today and cannot just be put aside. This blatantly positivistic attitude has created a mental block in the case of personal law reforms in Bangladesh and it seems that the method to unblock this may be to consider the potential use of concepts of legal pluralism. This is also suggested because using the methodology of pluralism introduces stronger emphasis on the dynamic nature of law, rather than merely focusing on the law-making authority of parliament in accordance with colonially inspired principles of rule of law.[2]

This article also examines to what extent using legal transplants is an option for Bangladesh. The scholar who is most referred to for supporting legal transplants as a means to global unification pictured it mainly as an essentially 'unitary system'.[3] However, his scholarship may raise questions about the prospect and appropriateness of a unified system of law, as Watson himself admits that '[o]bviously a complete legal union is neither possible nor desirable'.[4] For Bangladesh, as well as in general terms, Hoque finds the idea of legal transplantation a 'notoriously misleading and multi-epistemic concept apart from being of imperialistic implications'.[5] This research finds the suggestion by Sack and Aleck 'to learn to live with the fact that "law" is like a multidimensional net'[6] very appropriate for Bangladesh. Thus, the idea and methodology of legal transplantation do not fit with the deeply plural legal system of Bangladesh and a culture-specific form of rule of law will need to be developed.

The paper therefore shows in the following sections that a pluralistic legal approach is required. Through this the interlinked relationship of state, society, ethics/morality/religion and international law, the four corners of Menski's kite or *ghuri* in Bangla,[7] can be perceived as an operational tool for useful legal reforms in Bangladesh. This article, based on theoretical methodology, thus briefly examines existing legal theories and their relevance to the Bangladeshi legal system to ground the argument that reforms of the personal laws, especially minority personal laws, are essential for national

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[2] Werner Menski, 'Bangladesh in 2015: Challenges of the *Iccher Ghuri* for Learning to Live Together' (2015) 1(1) University of Asia-Pacific Journal of Law and Politics 7.

[3] Alan Watson, *Legal Transplants: An Approach to Comparative Law* (First Published in 1974, 2nd edn, University of Georgia Press 1993) 101.

[4] ibid, 100.

[5] M. Ridwanul Hoque, 'Judicial Activism as a Golden Mean: A Critical Study of Evolving Activists Jurisprudence with Particular Reference to Bangladesh' (PhD Thesis, SOAS University of London 2007) 243.

[6] Peter Sack and Jonathan Aleck (eds), *Law and Anthropology* (Aldershot 1992) xxvi.

[7] Werner Menski, 'Flying Kites: Managing Family Laws and Gender Issues in Bangladesh' (2011) 2 Stamford Journal of Law 109; Werner Menski, 'Flying Kites in a Global Sky: New Models of Jurisprudence' (2011) 7(1) Socio-legal Review 1.

progress but require a level of plurality consciousness that goes beyond the narrow focus on either state law or just Islamic law concerns. Bangladesh is clearly an intensely plural legal environment in which a monist perspective of analysis will be insufficient to bring about meaningful and effective reforms.

Specifically, in the context of personal law reforms in South Asia, the existing Euro-centric positivist mind-set of law-related people and personnel in Bangladesh systematically undermines other forms of law,[8] such as socio-cultural and religious norms, local customs and traditions that people have followed for centuries. These other forms of law clearly retain immense importance still now in the different personal laws in South Asia and cannot be just overlooked. Traditional natural law concepts and socio-legal understandings of law were not simply eradicated when positivism started its luminary journey in the sub-continent during the colonial period.[9] Also, the relevance of international laws or norms in a particular legal system cannot certainly be ignored completely today, especially if these norms and laws conflict with the local socio-cultural and religious norms. However, imposition of international law norms by itself is clearly also not a magic remedy, as law everywhere remains a locally constructed and managed entity also in today's globalised world, manifesting as 'glocal law'.[10] There is, thus, a need to harmonise and manage competing expectations within the internally plural field of law, and this requires little discussion in the present day.[11]

2. The inadequacy of a traditional positivist framework

It is beyond the scope and aims of the present article to launch into a detailed discussion of all major legal theories.[12] However, a succinct analysis of existing

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[8] The term 'law-related people' may include lawmakers, legal academics, lawyers, judges, law enforcement agencies and associated personnel involved in maintaining law and order in a particular jurisdiction.

[9] Hoque (n 5).

[10] Werner Menski, 'Angrezi Shariat: Globalised Plural Arrangements by Migrants in Britain' (2008) 10 Law Vision 10; Menski (n 7 & 2).

[11] The literature on legal pluralism is by now huge. See Brian Z. Tamanaha, Caroline Sage, and Michael Woolcock, *Legal Pluralism and Development: Scholars and Practitioners in Dialogue* (CUP 2012).

[12] For comprehensive details on jurisprudence, see John Salmond, *Jurisprudence* (11th edn, Glanville Williams (ed), Sweet & Maxwell 1957); J.W. Harris, *Legal philosophies* (Butterworths 1980); R.W.M. Dias, *Jurisprudence* (Butterworths Law 1985); Masaji Chiba (ed), *Asian Indigenous Law in Interaction with Received Law* (KPI 1986); Masaji Chiba, *Legal Pluralism. Towards a General Theory through Japanese Legal Culture* (Tokai University Press 1989); Brian Bix, *Jurisprudence: Theory and Contex*t (First published in 1996, 3rd edn, Sweet & Maxwell 2006); Wayne Morrison, *Jurisprudence: From the Greeks to Post-modernism (*Cavendish 1997); William Twining, *Globalisation and Legal Theory* (Butterworths 2000); M.D.A. Freeman, *Lloyd's Introduction to Jurisprudence* (Sweet & Maxwell 2001); Brian Z. Tamanaha, *A General Jurisprudence of Law and Society* (OUP 2001); Roger Cotterrell, *The Politics of Jurisprudence: A Critical Introduction to Legal Philosophy* (LexisNexis 2003); Roger Cotterrell,

legal theories is indispensable, given that a critical appreciation of the plurality of legal theories and clear perceptions about law and its functions intensely impact on the methods and goals of reforms in every legal system today. The traditional schools of jurisprudence, mainly natural law, legal positivism and the socio-historical schools, when applied in isolation, intrinsically limit one's understanding to the perceived knowledge of Western legal systems. While these conceptualisations theorise law independently, and are all internally plural in their different orientations and combinations, it is obvious that exclusive reliance on any one of them provides too narrow a scope for the study of the Bangladeshi legal field or its internally complex entirety. For instance, the positivistic notion of Austin, a nineteenth century English lawyer and a foremost proponent of positivism arguing in essence that 'law is the command of the sovereign',[13] undoubtedly entails a denial of the legitimacy of many legal systems, including that of Bangladesh as well as of other South Asian States, which recognise the continued validity of religious and customary personal law systems. Bangladesh, like other legal cultures of the world, should by now have developed her own ways of 'law talk and talk about law',[14] which traditional Western positivistic legal theory has not been able to address in its entirety. Therefore, a critical reappraisal of old-established Western-dominated concepts and assumptions of legal theory in the sub-sections below would facilitate appreciation that one particular legal approach cannot totally exclude all the other types of legal theory.

The predominant positivist analysis, reflective of a Eurocentric modernist approach to the study of South Asian personal law systems, conceals from view a more complex plural legal reality. This reality shows that under the perceivably single unit of Bangladeshi law lies a complex and internally plural family of legal systems. To develop an effective appreciation of this assertion, as the research for this paper suggested, special emphasis needs to be given to Chiba's tripartite model of law,[15] especially Chiba's 'identity postulate', and the 'triangular' and more recent 'kite' model of Menski.[16] The research also found it significant to take proper account of the concept of 'law in culture/community'.[17]

'Law in Culture' (2004) 17(1) Ration Juris 1; Roger Cotterrell, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (Ashgate 2006); H. Patrick Glenn, *Legal Traditions of the World* (3rd edn, OUP 2007); Menski (n 1 & 7); and Paul Schiff. Berman, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders* (CUP 2012).

[13] John Austin, *The Province of Jurisprudence Determined* (First published in 1832, W. Rumble (ed), CUP 1995).

[14] Twining (n 11); William Twining, *Globalisation and Legal Theory* (Reprint, CUP 2006) 12.

[15] Chiba (n 12).

[16] Menski (n 1 & 7).

[17] Cotterrell (n 12).

The present discussion, based on fieldwork data of this author's PhD research,[18] shows that these models provide a realistic perception of law necessary for spearheading legal development in Bangladesh, since the narrow viewpoints of monist approaches restrict rather than facilitate the intellectual scope of the present analysis.

The analyses in this article present a realistic argument that not only state-centric Common Law and Civil Laws, but also Hindu Law, Muslim Law, indigenous laws and many other forms of law co-exist in this world.[19] Studying the intricate case of family law reform in Bangladesh and taking more explicit account of law's socio-cultural embeddedness and plurality-conscious analysis, this article also illustrates that it does not seem sensible to argue for one world legal system in a culturally plural world.[20]

2.1. Natural law: ethics, morality or religion matters

The origins of natural law theories arise from moral or religious sets of assumptions, having validity and authority independent of human enactment. This means they are at the same time 'religious' and secular. Cotterrell finds natural law 'as a "higher" or fundamental law against which the worth or authority of human law can be judged'.[21] Cotterrell further notes that contrary to legal positivism, natural law stands as a tradition of thought adopting a seemingly diametrically opposed position and that law cannot be properly understood except in moral terms, so that questions of law's nature and existence cannot be secluded from questions concerning its moral value.[22] Natural law theorists find an indispensable link between law and morality for both 'creation' and application 'of all laws'.[23] Friedmann sees this as 'a way of thinking about law that is not just rule-focused and does not ignore morality'.[24] Legal positivism, as represented by Austin (as indicated above), can almost be defined as the complete opposite in that it appears to insist on the rigid separation of law and morality.[25] Nonetheless, as Cotterrell notably indicates, 'legal positivism does not

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[18] Biswajit Chanda, 'Family Law Reform in Bangladesh: The Need for a Culture-Specific Legal System' (PhD Thesis, SOAS University of London 2017).

[19] For a tremendously rich source of information on legal histories and current legal developments, see Stanley N. Katz (ed), *The Oxford International Encyclopedia of Legal History* (Published in Six Volumes, OUP 2009). For highly analytical comparisons of different non-Western legal systems with Western legal theory, see Menski (n 1).

[20] Menski (n 1).

[21] Cotterrell (n 12) 115.

[22] ibid.

[23] Lon L. Fuller, 'Positivism and Fidelity to Law: A Reply to Professor Hart' (1958) 71 Harvard Law Review 630.

[24] W. Friedmann, *Legal Theory* (5th edn, Steven & Sons 1967) 61.

[25] Twining (n 12); Twining (n 14) 111. Earlier, also Cotterrell noted this. See Roger Cotterrell, *The Politics of Jurisprudence: A Critical Introduction to Legal Philosophy* (Butterworths 1989) 120.

deny that the substance of law can be subject to moral criticism',[26] while the key issue for natural law theories of any interpretation is 'not whether law can be morally evaluated but whether its essential character must be explained in moral terms'.[27] It appears that this is why many writers find that natural law ideas lack any convincing theoretical justification,[28] reflecting the strength of post-Enlightenment secular approaches in the conceptualisation of law. They are still too focused on insisting that only 'rational' positive law is really deserving of the label 'law'. However, in the 21st century, this approach is being challenged and we see significant modifications of legal consciousness.[29]

Freeman finds traces of natural law among almost all peoples,[30] but many legal theorists do not even recognise that non-European cultures may have something to say on natural law theories as well.[31] As we shall see, in Bangladeshi as well as South Asian legal discourses this restrictive approach is dominant too. Most natural law theorists have failed to contemplate that there may be different cultural forms of natural law.[32] The German jurist Stammler (1856-1938) was an exception, though. He developed a theory of 'natural law with a changing content', which embraces that 'while the ideal of justice is absolute, its application must vary with time, place and circumstance'.[33] Amongst these variations, according to Menski,[34] moral attitudes are imperative. Globally, Eurocentric natural law's shift from its church-centrism to secularism with all-encompassing emphasis on 'reason' supposedly reflects a universal element of modernism and modernisation. But secular values are still values, and thus fall under the ambit of natural law or, to use Chiba's terminology, constitute 'legal postulates'.[35]

Thinking about legal theories, the origins of law, its morality, and its potential for abuse has arisen everywhere in human societies, from earliest times and thus 'it is not the prerogative of the West'.[36] Glenn described the chthonic legal tradition as 'the oldest of traditions',[37] while Menski similarly finds that the first forms of natural law ubiquitously must be chthonic as well.[38] Since the

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[26] Cotterrell (n 12) 119.
[27] ibid.
[28] J. Habermas, *Theory and Practice* (J. Viertel (tr), Heinemann 1974) 113.
[29] Heather Walton, 'Ancient Practice, New Purpose' (2015) 39(7) Third Way 7.
[30] Freeman (n 12) 103.
[31] Werner Menski, *Comparative Law in a Global Context: The Legal System of Asia and Africa* (Platinium 2000) 80.
[32] Menski (n 1) 133.
[33] Freeman (n 12) 93.
[34] Menski (n 1) 133.
[35] Chiba (n 12).
[36] Menski (n 1) 131.
[37] Glenn (n 12) 60.
[38] Menski (n 1) 131.

origins of natural law that Asian or African, or Indian or Bangladeshi legal systems encompass are rooted in their own chthonic traditions and in their respective cultural contexts, Hindu law, Islamic law and other religious and indigenous laws found in Bangladesh today have their own culture-specific forms of natural law. This kind of finding clearly rejects the universality claims of Western natural law.

In opposition to European claims of such universality, conflicting universalising claims of Islam were also becoming increasingly known even by the time of St. Thomas Aquinas (1226-74), known as a key figure in the development of a universal divine law.[39] Aquinas' contention that the Christian God's law is always superior to that of man competes with the Islamic thought that Allah's law is supreme.[40] It is evident that this notion still plays an important role in law making processes and discourses in Bangladesh, especially for family law. However, like Western natural law, Islamic law is also not independent of culture-specific parameters. Nor are the other personal laws in application in Bangladesh purely a matter of religious doctrine and authority. These aspects of law are interlinked and connected.

The article takes account of this notion of internal plurality of authorities whilst discussing the Bangladeshi legal system, in which Muslim law, as the personal law of the majority, has a prominent position and dominates the family law of Muslims, in most cases, with the express recognition of official law.[41] Simultaneously, family laws of the minority communities in Bangladesh are governed by their respective culture-specific 'religious' personal laws and/or indigenous personal laws. Natural laws are thus a powerful ancient and internally plural concept, retaining current relevance all over the world and thus also in Bangladesh. It is not that the age of positivism led to the disappearance of natural law concepts.

2.2. Legal positivism: state law is not all-powerful

Presently, the dominant legal theory popularised by Eurocentric universalistic rhetoric continues to be the approach of legal positivism, which was strengthened in the subcontinent by colonial intervention. Legal positivism prefers law *as it is,* rather than *as it ought to be*. Hence Friedmann depicts the separation of law and morality, i.e. of 'is' and 'ought', as the most fundamental philosophical postulation of legal positivism.[42] Natural law's long-standing

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[39] ibid, 146.

[40] ibid, 142.

[41] For a comprehensive discussion on 'official law' as opposed to other forms of law, see Chiba (n 12) and Menski (31 & 1).

[42] Friedmann (n 24) 257.

engagement in discovering the principles of just law,[43] with eventual lack of studying law as practically applied, led to a significant shift of focus from natural law to legal positivism towards the end of the 19th century.[44] However, much earlier, Aquinas, who is seen by Menski as an unacknowledged early legal pluralist,[45] assigned a rightfully emerging place to positivism. Menski observes that 'his theories are based on the understanding that different types of law co-exist and interact with each other harmoniously and conflictingly'.[46] Among his four types of law two categories, namely 'divine law' as revealed in scripture, and 'human law' as articulated by human authorities, can be marked as 'positive law'.[47]

Today, '*positive* law, in the sense of the law of the state, is something ascertainable and valid without regard to subjective considerations'.[48] Olivecrona is critical about the use of the term 'positive' as he finds that

> [n]o rules of law at all are the expression of the will of an authority existing prior to the law itself. What we have before us is a body of rules that has been slowly changing and growing during the centuries. It would be no use to call this body of rules positive law.[49]

He therefore considers that '[t]he adjective "positive" is entirely superfluous; it might be misleading', because it gives a wrong impression that 'the law is "posited" in the sense of being an expression of the will of a lawgiver'. Hence, he suggests that it is sensible to call it 'the law' without the adjective 'positive'. When we look at Menski's article on Bangladesh, the observation that the most recent constitutional reforms in Bangladesh presumed law to be a higher entity than any law made by Parliament may strike us.[50] While most lawyers may not like Olivecrona's view, the term 'official law' as used by Chiba[51] is a more suitable alternative to the term 'positive law'. Chiba appreciably identifies that 'official law' actually consists of two types, directly posited law and pre-existing forms of law accepted by the state,[52] which is what Olivecrona also indicated.[53]

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[43] For many previous centuries, positive law was neglected in the universities. There the main study was the search for just rules that would be applicable in all countries. Surprisingly, this study, which was to unearth the 'true science of law', was not conducted in the study of the various national or local laws but only in Roman and Canon law, the laws common to the Christian world. See René David and John E. C. Brierley, *Major Legal Systems in the World Today: An Introduction to the Comparative Study of Law* (Free Press 1978) 2.

[44] ibid.

[45] Menski (n 1) 142.

[46] ibid.

[47] ibid, 151.

[48] Freeman (n 12) 200.

[49] Karl Olivecrona, *Law as Fact* (2nd edn, Stevens & Co. 1971) 77-78.

[50] Menski (n 2).

[51] Chiba (n 12).

[52] ibid.

The new secular positivist approach did not pay much attention to natural law, particularly in the West, which sought to divide 'law' and 'religion'. However, Asian laws still take cautious account of the latter and remain aware of the invisible links.[54] Besides suggesting the implausibility that a law could absolutely abolish a religion, the modernist positivist approach also fails to appreciate the more hidden dynamics of social contexts.[55] Thus a purely positivist methodology would hide from view the moral and customary importance of family laws of different religious and indigenous communities, also in Bangladesh. Austinian positivism not only methodically disregards and seeks to curtail the influence of different religious and indigenous expressions of natural law in Bangladesh, but also refutes any claim to the customary and socio-legal identity of an individual community.[56] Thus the fundamental problem with legal positivism is that it attempts and claims to be able to analyse law outside of, or separate from, its social contexts or settings and tries to divide it from ethics. Since in socio-legal reality this is never fully possible, the present article needs to build into its analytical framework that there are always considerable limits to the authority of state law and that, rather than ruling, state law should learn to listen to the voices of other types of law.

2.3. Socio-historical or socio-legal approaches: law as a social phenomenon

It appears that more legal scholars realise this now and argue today that legal theory should not overlook the respective law-making roles of communities.[57] In addition to legal positivism or natural law, the socio-legal approaches, which concentrate on the analysis of law as a social phenomenon, are in essence 'a method of studying law in its specific socio-cultural, political and economic context'.[58] Thus, instead of providing a rather myopic monist perspective, this plurality-conscious approach, more than many others, emphasises the importance of interdisciplinarity in the study of law. It looks particularly towards people and social groups as law making entities rather than just the state or particular religious or value systems. Cotterrell points out that law and social theory are not like oil and water, 'as modes of analysis they have some important characteristics in common'.[59] Cotterrell notes:

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[53] Olivecrona (n 49).

[54] Menski (n 1) 6.

[55] Tamanaha (n 12); Sally Falk Moore, *Law as Process: An Anthropological Approach* (Routledge & Kegan Paul 1978) 214-256.

[56] However, as a Benthamite reformer, Austin was certainly not unaware of the need to relate law to the needs of society. Freeman and Morrison also suggest that Austin was actually acutely conscious of what we now call legal pluralism. See Freeman (n 12) 220 and Morrison (n 12) 6.

[57] Moore (n 55); Cotterrell (n 12).

[58] Menski (n 31) 105-106.

[59] Cotterrell (n 12) 1.

> Law as institutionalized doctrine can be found outside the 'official' legal system of the state. Law, in some sense, may flourish in social sites and settings where lawyers or police never venture. Equally, it could be a mistake – looking at matters sociologically – to think that the state legal system is necessarily a unified entity.[60]

Historically, as Chiba notes, two French thinkers, Jean Bodin and Montesquieu (1689-1755), both particularly interested in the influences of natural or religious features of geographical regions upon the legal system, respectively in 1579 and in 1748, directed attention to the cultural aspects of law.[61] Chiba suggests that the French thinker Jean Bodin was an early pioneer; he directed specific attention to the cultural aspects of law in 1576.[62] Later Montesquieu, in his famous works *Lettres Persanes* (1721) and *De L'espirit des Lois* (1748), again drew attention to 'the varying customs of different nations (while giving the usual perfunctory salute … to the supremacy of the law of nature) and suggesting that their variety was explained by the variety in their surrounding conditions'.[63] He developed this, as Menski observes, by constructing the well-known principle that laws made by the state should be adapted to suit the actual condition of the people concerned.[64] This does not deny the state's rule-making authority, but places a heavy burden and responsibility on those who rule, and thus in general on 'the state', to acknowledge law's social embeddedness, which is what Santos calls 'interlegality'.[65] Bangladesh, hiding behind positivist axioms, has systematically failed to take full account of such interconnectivities.

In Germany, a little later than in France, Johann Gottfried von Herder (1744-1803), German critic, theologian and philosopher, an innovator in the philosophy of history and culture, had rejected the universalising philosophical tendencies of natural law but was also very doubtful about the state. In his vast work *Ideenzur Philosophie der Geschichte der Menschheit* (1784-91; tr. *Outlines of a Philosophy of the History of Man*, 1800), Herder developed a major evolutionary approach to history in which he propounded the uniqueness of every historical age,[66] arguing that every historical period, civilisation and nation had its unique character and therefore 'different cultures and societies developed their own culture specific values'.[67] As a consequence, 'the quality of human life and its

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[60] ibid.

[61] Chiba (n 12) 30.

[62] ibid.

[63] J.M. Kelly, *A Short History of Western Legal Theory* (Clarendon Press 1992) 273.

[64] Menski (n 1) 86.

[65] Boaventura de. Santos, *Toward a New Common Sense: Law, Science, Politics in the Paradigmatic Transition* (Routledge 1995).

[66] 'Johann Gottfried von Herder (1744-1803)', *The Columbia Encyclopedia* (6th edn, 2008) <http://www.encyclopedia.com/doc/1E1-Herder-J.html> accessed 13 September 2013.

[67] Menski (n 1) 90.

scope for self-expression resided precisely in this plurality of values'.[68] It is evident that Chiba picks up such ideas when he emphasises that official laws and unofficial laws are always linked to specific 'legal postulates' that change over time and space.[69]

The German jurist, legal historian and one of the founders of the historical school of jurisprudence, Friedrich Karl von Savigny (1779-1861), like Montesquieu, also opposed the classical religio-centric natural law approach when he found law an unavoidable part of the culture of a people.[70] Savigny developed the view that the legal institutions of a people are, like their art or music, an indigenous expression of their culture, and cannot be externally imposed.[71] They are, as Glenn called it much later, 'chthonic'.[72] Savigny's thoughts emphasised the *Volksgeist* (spirit of the people), folk culture, and national history. Hence, he opposed the movement for legal codification, but did not oppose legislation altogether.[73] His stand was that no official law should be enacted which would defy local customary norms and the value systems of the subjects of the law. In Glenn's terminology, this forced law-related people to take account of chthonic laws.[74] However, Savigny has been criticised for overstating his historical approach and of treating it as universal. Further he has been criticised by Freeman, perhaps unfairly, for underestimating the significance of legislation in modern society and for his failure to appreciate that law may mould customs, rather than just invalidating them.[75] Indeed, in current discussions about the concept of 'living customary laws', which have developed out of Southern African developments,[76] we find explicit recognition that 'custom' is not just something 'traditional' and 'static'.

These criticisms connote that social dimensions of law on their own are also not enough as a foundation of legal theory. A dynamic legal analysis needs to take all types of impact into consideration. Hence, later theorists like the eminent Austrian jurist Eugen Ehrlich (1862-1922) started to develop a more

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[68] Freeman (n 12) 905.

[69] Chiba (n 12).

[70] Menski (n 1) 90.

[71] In 1814, Savigny wrote *The Vocation of Our Time for Legislation and Jurisprudence* (tr. 1831), which developed this view. See 'Friedrich Karl von Savigny', *The Columbia Encyclopedia* (6th edn, 2008) <http://www.encyclopedia.com/doc/1E1-Savigny.html> accessed 10 September 2013.

[72] H. Patrick Glenn, *Legal Traditions of the World. Sustainable Diversity in Law* (OUP 2000).

[73] Menski (n 1) 91; Menski rightly comments that 'Savigny merely warned that careless or rushed legislation would lead to negative consequences, … [it] reflects what Montesquieu had said earlier'.

[74] Glenn (n 72 & 12).

[75] Freeman (n 12) 908.

[76] Manfred O. Hinz, *Without Chiefs There Would Be Bo Game: Customary Law and Nature Conservation* (Out of Africa Publishers 2003).

plurality-conscious sociologically oriented legal approach, discussed in the following section.

This socio-legal approach provides a seemingly important methodology when analysing the role of society or custom within the Bangladeshi legal system. Essentially it appears, as a result, that different communities in Bangladesh have a legitimate claim to their own customs, affecting the operation of official law. However, since neither the discussion on personal laws as identity markers nor a plurality-conscious legal education system has been developed in Bangladesh, such debates have so far not taken place, adding to the significant mental blockages when it comes to reform of minority personal laws in this important South Asian jurisdiction.

2.4. International law as an unsuitable remedy for improving local laws

There is no doubt that international law and human rights are very important elements of law. Professor Mizanur Rahman, the then Chairman of the National Human Rights Commission, Bangladesh rightly stated that '[i]t is not without reason that the understanding of human rights has become a critical component of modern legal systems'.[77] In today's world, it may not be wise to keep international law out of the scene, because it may be wrong to think that international law is not plurality-conscious at all and it takes the customary laws or culture of a people away or it argues for absolute equality only. Although the ultimate goal of this law is to ensure equal rights to all, especially to both sexes (or, in more modern language, to all genders), it also protects the customs and customary laws of Adivasi/indigenous peoples as far as they are not contrary to provisions relating to women's equal rights. For example, article 8(1) of the Indigenous and Tribal Peoples Convention, 1989 reads as follows: 'In applying national laws and regulations to the peoples concerned, due regard shall be had to their customs or customary laws'.[78] Broadly speaking, this concerns the right to culture, which has been debated in much depth in South African laws recently, but not so far in Bangladesh. The International Covenant on Civil and Political Rights (ICCPR) 1966 gives minorities the right to enjoy their own culture, to profess and practise their own religion and to use their language.[79] The Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities gives minorities the right of survival, the

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[77] S.M. Zakir Hossain, *The International Covenant on Economic, Social and Cultural Rights: A Study on Bangladesh Compliance* (National Human Rights Commission, Bangladesh 2012) forward.

[78] International Labour Organization (ILO), Indigenous and Tribal Peoples Convention (entered into force 5 September 1991), art 8(1).

[79] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), art 27.

right to promote their identity[80] and also the right to enjoy their own culture, religion and language.[81]

Modern Constitutions have incorporated human rights recognising it as one of its important components. Many countries, including some South Asian countries, too, have recognised many provisions of human rights as fundamental rights which have been guaranteed by the Constitution. Many of them, which have monetary involvement and financial and economic implications, serve as fundamental principles of state policy, which may not be constitutionally guaranteed, but are nevertheless important and fundamental in the governance of the respective country.[82] In Bangladesh, most of the rights enshrined in the ICCPR have been incorporated in the Constitution as fundamental rights and most of the rights from the International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966[83] have taken a place in the Constitution as fundamental principles of state policy.[84] But considering its economy and resources, Bangladesh has not been able to guarantee economic, social and cultural rights. However, Bangladesh is trying to realise some of these right within its 'maximum available resources' as has been expected by the ICESCR. For example, Bangladesh has made primary education free and compulsory for all and it now provides free books to all primary students. The Human Development Index shows that Bangladesh is in a better position than some of its neighbouring countries today, and public health and sanitation in this country is much better than in the neighbouring countries.[85] As for child and maternal health and nutrition, the following observation by Indian scholars shows how well Bangladesh is doing in these sectors and thus has been trying to cope with ESC rights:

> [C]ompared to other countries in South Asia such as Sri Lanka, Bangladesh and Nepal, India's progress towards the achievement of its Millennium Development Goals (1, 4 and 5 specifically) is quite concerning. Despite having their own "local" problems, Bangladesh and Nepal have achieved or nearly achieved many of their MDG targets of optimal maternal and child health and

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[80] UNGA Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (adopted 18 December 1992) UN Doc A/RES/47/135, art 1.

[81] ibid, art 2.

[82] See Constitution of the People's Republic of Bangladesh 1972; Constitution of India 1950.

[83] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).

[84] Hossain (n 77).

[85] See United Nations Development Programme, 'Human Development Report 2015: Work for Human Development, Briefing Note for Countries on the 2015 Human Development Report on Bangladesh' (2015) <http://hdr.undp.org/sites/all/themes/hdr_theme/country-notes/BGD.pdf> accessed 12 March 2016. Also, see Anonymous, 'Bangladesh Static in Human Development Index' *The Daily Star* (20 December 2015) <http://www.thedailystar.net/country/bangladesh-static-human-development-index-190033> accessed 12 March 2016.

> nutrition and Sri Lanka is already in its post-MDG phase. However, as far as India is concerned, the achievement of MDGs seems way off target.[86]

Hossain observes that:

> [t]he Government of Bangladesh has taken various measures in realising the ESC rights in line with its human rights obligations. However, it is still clear that more could be done within available resources to improve the situation of the ESC rights within the country.[87]

The above examples may have nothing to do with family law reform, but may be able to show that Bangladesh does care for international law and human rights as long as they do not go against this nation's socio-cultural or religious norms. For instance, this Muslim-dominated state would certainly not be able to legalise LGBT rights or same-sex marriages.[88] Further, although Bangladesh had ratified the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) 1979,[89] it had to set reservations in a couple of articles giving importance to *shari'a*.[90] Islam rightly notes that:

> [r]eservations and declarations are reflective of state practice and provide evidence of a state's response to norms espoused subservient to the overriding supremacy of constitutional, religious and cultural norms.[91]

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[86] Pavithra Rajan, Jonathan Gangbar, and K Gayathri, *Child and Maternal Health and Nutrition in South Asia: Lessons for India* (The Institute for Social and Economic Change 2014) 1.

[87] Hossain (n 77) 68.

[88] According to section 377 of the Penal Code 1860, a British-Indian colonial law as in application in Bangladesh, homosexuality is an unnatural offence and a punishable criminal offence. Also, Bangladesh voted against the resolution submitted by South Africa requesting a study on discrimination and sexual orientation (A/HRC/17/L.9/Rev.1) passed in the UNHRC on 17th June 2011.

[89] Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW).

[90] Mahmuda Islam, 'CEDAW and Bangladesh: A Study to Explore the Possibilities of Full Implementation of CEDAW in Bangladesh' in Shaheen Sardar Ali (ed), *Conceptualising Islamic Law, CEDAW, and Women's Human Rights in Plural Legal Settings: A Comparative Analysis of Application of CEDAW in Bangladesh, India, and Pakistan* (UNIFEM-South Asia Regional Office 2006) 79. Not only Bangladesh ratified CEDAW five years before India's ratification but also eight years before the accession by Pakistan. India and Pakistan also kept reservations as Islam notes:
'Bangladesh initially entered reservations on Articles 2, 13(a) and 16.1(c) and (f) on the basis that it conflicts with *Sharia* law based on the *Sunna* and the Holy *Quran*. Pakistan entered a general declaration that the provisions of the convention are subject to the Constitution of the Islamic Republic of Pakistan; it also has a specific reservation on Art 29(1) (on the arbitration of disputes).'
India has entered several reservations to the convention. It has declared that it cannot comply with Art 5(a) (on sex role stereotyping and prejudice based on cultural, social customary practices) and Art 16(1) (on marriage and family relations) because of its policy of non-interference in the personal laws of different religious communities in India. It has further declared that it cannot comply with Art 16(2) (registration of marriages) because of the impracticality of the application of the article in a vast country such as India. India also has a reservation on Art 29(1) (arbitration of disputes).

[91] ibid, 78-80.

This also shows that the massive countries of South Asia face specific practical implementation issues, which the smaller nations of the world can more easily manage and control.

When we talk about legal reform, we need to consider the issue of sustainability. Most scholars will agree that the circumstances might be problematic surrounding the implementation of human rights, especially in non-Western countries, allegedly because of basic lack of respect for the essential value of human rights among so-called under-developed peoples, otherwise in contrast, the real cause in their traditional cultures.[92] Examining this problem in a global theoretical perspective, everyone needs to be conscious that good theory must relate to sustainable practice and should avoid accepting the 'intolerable'.[93] Hence, the context of globalisation has brought a shift of emphasis towards international law and human rights concerns, but this has also not replaced the other types of law.[94] Although international law and human rights have become important elements of law, a legal system like Bangladesh needs to take all the other elements of law into account while it tries to bring about reforms, especially in personal/family laws.

3. Relevant pluralist theories: the need for legal pluralism

The key argument in the present section is that pluralist legal theories can help to unblock closed minds and can assist in deliberations about reforms to the personal law system in Bangladesh without fundamentally challenging (as many Muslim observers have claimed with reference to the perceived threat of 'secularism') the religious linkages of the various types of law. John Griffiths offers an elaborate pluralist theoretical analysis,[95] when relying on Moore,[96] he defines legal pluralism as 'the presence in a social field of more than one legal order'.[97] Practically, legal pluralism is certainly not a recent approach and is found particularly among people 'who live ecological lives by being chthonic'.[98] As indicated in sub-section 2.1 above, chthonic legal traditions are the oldest forms of legal tradition in the world as 'all people of the earth are descended from people who were chthonic' and 'its chain of tradition is as long as the

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[92] Masaji Chiba, 'Seeking for Intermediate Variable of Human Rights' (2000) 16(1) The International Journal of Humanities and Peace 94.

[93] William Twining (ed), *Human Rights, Southern Voices* (CUP 2009).

[94] Manfred O. Hinz, 'Jurisprudence and Anthropology' (2003) 26(3–4) Anthropology Southern Africa 114.

[95] John Griffiths, 'What is Legal Pluralism?' (1986) 24 Journal of Legal Pluralism and Unofficial Law 1.

[96] Moore (n 55).

[97] Griffiths (n 95).

[98] Glenn (n 12) 59-60; Glenn duly acknowledges that the description of chthonic people was used in such a lucid way by Edward Goldsmith. See Edward Goldsmith, *The Way: An Ecological World View* (Rider 1992).

history of humanity'.[99] While John Gilissen's *Le Pluralisme Juridique*[100] was the first pioneering study on legal pluralism,[101] Barry Hooker's book on legal pluralism,[102] though remaining rather state-centric, first introduced the term 'legal pluralism' into Anglophone scholarship.[103] Thus, also theoretically, plurality consciousness is not really a new approach. However, it is possible to see with the benefit of hindsight that there were different stages in the development and elaboration of legal pluralist thought. Hooker,[104] for example, has been criticised by several later writers during the 1980s, particularly Chiba,[105] as merely illustrating 'weak' legal pluralism, basically highlighting the internal diversity and plurality of state law.

We have seen in the above section that many early thinkers, jurists and anthropologists made significant contributions to this gradually emerging field. Jean Bodin's concentration on the cultural aspects of law was a way forward to legal pluralism.[106] Montesquieu, in his recognition for the variability of law, is perhaps the first legal anthropologist of the modern period.[107] Various branches of legal scholarship recognise him as a central character of the legal pluralist approach,[108] because he rejected a fixed attitude towards law and considered law as a changeable entity that varies according to society, time and place and pioneered a so-called holistic perspective which also spurned the evolutionary model[109] and resurfaces in Stammler's concept of 'the right law', discussed above.

The foremost English jurist, Jeremy Bentham, was influenced by Montesquieu's work while formulating his renowned concept of utilitarianism.[110] Bentham was not a pure positivist, however. Twining notes that through considering the influence of time and place upon legislation, he also was in favour of giving some weight to local customs and circumstances.[111] He was thus more sensitive compared to most of his successors to the limitation of 'black box' theories.[112] Menski considers Bentham's intellectual contribution still relevant

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[99] ibid, 60.

[100] John Gilissen (ed), *Le Pluralisme Juridiqu* (Editions de l' Université de Bruxelles 1971).

[101] Anne Griffiths, 'Legal Pluralism' in Reza Banakar and Max Travers (eds), *An Introduction to Law and Social Theory* (Hart Publishing 2002) 290.

[102] M. Barry Hooker, *Legal Pluralism. An Introduction to Colonial and Neo-colonial Laws* (Clarendon 1975).

[103] Menski (n 1) 86.

[104] Hooker (n 102).

[105] Chiba (n 12).

[106] ibid, 30.

[107] Norbert Rouland, *Legal Anthropology* (Athlone Press 1994) 20.

[108] Tamanaha (n 12) 27.

[109] Rouland (n 107) 20.

[110] Menski (n 1) 87; Utilitarianism is the principle of the greatest happiness for the largest number. On Bentham, see Twining (n 12); Twining (n 14) 15-20; Freeman (n 12) 200-207.

[111] Twining (n 14) 20.

[112] ibid, 250.

today[113] and it seems that Bentham's acknowledgment of local customs and circumstances will always be relevant for every legal system, including that of Bangladesh. A critical question to ask then would be, rather, why state-centric positivism came to ignore such plurality-conscious visions and became so dominant in the age of modernity.

Ehrlich discussed legal pluralism comprehensively, though he did not use the term explicitly. He is discussed by Freeman under sociological jurisprudence,[114] while Menski notes that Ehrlich developed a socio-legal approach similar to legal pluralism by minimising the differences between law and other norms of social control, and situating the state and its attempts at legal regulation on a clearly lower footing than positivists.[115] He did not completely isolate and separate the elements of social customs and posited law but focused on how posited law's function is affected in practice by societal norms. Ehrlich introduced the concept of 'living law' as law 'which is not fixed in legal statements and yet dominates life'.[116] According to Menski, what Ehrlich denoted by this is that all law as 'living law' is a complex combination of rules laid down as official law and social and other norms that affect their operation.[117] Hence it 'is never just "custom" or the law as officially laid down by the state but the law as lived and applied by people in different life situations as an amalgam'.[118] If what people do in such life situations is officially recognised as 'law', then it becomes Chiba's 'official law',[119] but, as Menski also observes, much of Ehrlich's living law appears to remain under the ambit of Chiba's 'unofficial law'.[120] Chiba and others confirm for the late twentieth century that Ehrlich's approach has not lost any of its relevance.[121] The notion of 'living law' is strongly present in Chiba's model of legal pluralism, arguing that, in social reality, official law cannot deny the existence of unofficial law and legal postulates. Living law is thus fundamental to a globally focused legal analysis and is therefore also vital

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[113] Menski (n 1) 87.

[114] Freeman (n 12) 670.

[115] Menski (n 1) 96.

[116] Eugen Ehrlich, *Grundlegung der Soziologie des Rechts* (Duncker & Humblot 1913); Eugen Ehrlich, *Fundamental Principles of the Sociology of Law* (Harvard University Press 1936) (as cited in Menski (n 1) 95). For a detailed discussion of Ehrlich, see also Menski (n 1) 92-98.

[117] Menski (n 1) 96.

[118] ibid; The emergence of Muslim law in Britain as *angrezi sharia* or in the United States as *amrikanshari'a* applies and proves Ehrlich's theory of 'living law'. A more live 'living law' is actively in operation in the legal system of Bangladesh. For details, see David Pearl and Werner Menski, *Muslim Family Law* (Sweet & Maxwell 1998); Saminaz Zaman, 'Amrikan Shari'a: The Reconstruction of Islamic Family Law in the United States' (2008) 28(2) South Asia Research 185.

[119] Chiba (n 12).

[120] Menski (n 1) 96.

[121] Chiba (n 12).

for any efforts of understanding law and legal reforms in Bangladesh.[122] Legal pluralists believe that the plural nature of law itself is a fact.[123]

This is an evident reality for the Bangladeshi and South Asian legal systems as well since the main three institutions, precisely society, religion and state, play significant roles in the legal system of Bangladesh moreover, increasing pressure from international law is now also a matter of fact. Hence, this article argues that for a fruitful reform of the Bangladeshi legal system, a pluralistic approach is necessary that takes account of all these elements of law. Menski through his triangular model of law[124] and more recently through the 'kite' model,[125] which explicitly incorporates international law and human rights norms, shows how different elements of law can and do interact and become important parts of a plural legal system.

Faced with such intrinsic pluralities, theoretical analyses of law, over many centuries, have not been able to bring a global consensus on the fundamental definition of 'law'. Hence, there is simply no globally agreed definition of 'law'.[126] Hart's (1907-92) model of the interaction of primary and secondary rules in reality is clearly a failed model of universal application, since his theory could not incorporate the conceptually challenging legal realities of laws in Asia and Africa.[127] Hooker's differentiation of 'weak' and 'strong' legal pluralism[128] was later correctly criticised as an insufficient effort, since both types of law remain dependent on state sanction and are simply different types of statist official law.[129] Griffiths notes that Hooker's concept of legal pluralism was not moving away far enough from legal centralist ideology.[130] Hooker remained shackled by positivist concepts of law, whereas early postmodern pluralist scholars such as Moore,[131] Allott,[132] Griffiths,[133] and Chiba[134] offer more precise

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[122] Roger Cotterrell, 'Seeking Similarity, Appreciating Difference: Comparative Law Communities', in Andrew Harding and Esin Orucu (eds), *Comparative Law in the 21st Century* (Kluwer 2002) 35. Cotterrell finds it essential to develop appropriate interdisciplinary legal approaches akin to those of Ehrlich.

[123] Griffiths (n 95); Gordon R. Woodman, 'Ideological Combat and Social Observation: Recent Debate about Legal Pluralism' (1998) 42 Journal of Legal Pluralism and Unofficial Law 21.

[124] Menski (n 1).

[125] Menski (n 7).

[126] Menski (n 1) 32.

[127] H.L.A. Hart, *The Concept of Law* (Clarendon Press 1961). For a detailed discussion on Hart, see Menski (n 1) 98-103.

[128] Hooker (n 102).

[129] Chiba (n 12); Griffiths (n 95); Griffiths (n 101).

[130] Griffiths (n 95) 9.

[131] Moore (n 55).

[132] Antony N. Allott, *The Limits of Law* (Butterworths 1980).

[133] Griffiths (n 95).

[134] Chiba (n 12).

accounts of the polycentric nature of law, which is explicitly debated in such terms by Petersen and Zahle.[135]

Chiba's basic but actually quite sophisticated three-level structure of law[136] distinguished 'official law', 'unofficial law' and 'legal postulates'. He unambiguously observed that official law did not have to be made by the state, but was often recognised by a particular state from among pre-existing traditions or cultural norms. Thus there can be different types of 'official law': much of 'customary law' and 'religious law' could in fact be official law, as we clearly find also in Bangladesh, for example in the provisions of the Muslim Family Laws Ordinance (MFLO) 1961,[137] which was inherited from Pakistan. Unofficial law for Chiba is the legal system and its components not officially authorised by any legitimate authority, but applied in practice by the general consensus of a certain circle of people, whether within or beyond the bounds of a country.[138] It appears that many local forms of law-related, informal activities in countries such as Bangladesh are falling within this 'unofficial' sphere, and are then sometimes seen to challenge the official law. An example would be the informal methods of dispute settlement that fall under the broad label of *shalish*.[139] The third element in Chiba's model,[140] legal postulates, is the particular values or ideas specifically connected with a particular legal system, which acts to found, justify and guide as well as criticise and revise individual legal rules in the system.

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[135] Hanne Petersen and Henrik Zahle (eds), *Legal Polycentricity: Consequences of Pluralism in Law* (Dartmouth/Ashgate 1995).

[136] Chiba (n 12).

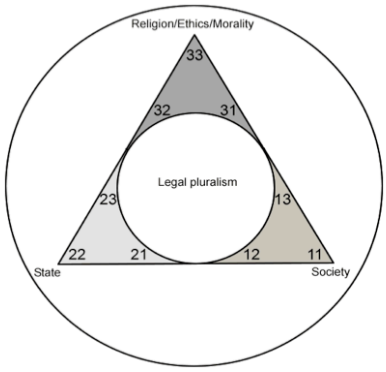
[137] Muslim Family Laws Ordinance, 1961 (Ordinance No. VIII of 1961).

[138] Chiba 1986 (n 12) 6; Chiba 1989 (n 12) 150.

[139] *Shalish* is in fact of two types: (i) officially recognised or formal and (ii) unofficial/informal and thus not officially recognised by the state. Official *shalish* is conducted by the local government representatives and legally it is called Village Court (Gram Adalat). The aggrieved party can file an appeal against the 'decree' or 'order' of the Village Court before the Court of Assistant Judge or the Court of Judicial Magistrate, depending on the civil or criminal nature of the case. Sections 6, 7 and 9 of the MFLO, 1961 also provide provisions relating to 'Arbitration Council'. The decision of this council is also formal and under sections 6 and 9 of this Ordinance, any party may prefer an application for revision to the Assistant Judge concerned and his decision shall be final and shall not be called in question again in any Court. However, the decision of unofficial or informal *shalish* is not legally binding upon the parties, however, as admitted by a report of a reputed NGO BRAC, in practice it plays an important role in societal level. Anyway, no appeal/revision application can be filed/preferred against the decision of any local unofficial/informal *shalish*. Even any party may decline to take part in such an unofficial/informal *shalish*. But they may become bound if the *shalish* takes place under the leadership of locally and politically influential persons (*ibid*). In addition to these, where applicable, if both parties enter into any formal and mutual legally valid agreement/contract that might fall under the Contract Act, 1872. See Village Courts Act, 2006 (Act No. XIX of 2006); MFLO (n 137); Abdul Md Alim and Tariq Omar Ali, *NGO-shalish and Justice-seeking Behaviour in Rural Bangladesh* (Research and Evaluation Division, BRAC Centre 2007); Contract Act, 1872 (Act No. IX of 1872).

[140] Chiba 1986 (n 12) 6; Chiba 1989 (n 12) 150.

In his concluding analysis of major theoretical schools of jurisprudence, Menski finds that 'positivist analysis has been criticised for being too narrowly focused on rules, natural law theories are viewed with suspicion for ending up as "religious positivism", and socio-legal approaches face fears about fuzziness'.[141] Hence Menski introduces a methodology which not only efficiently applies Chiba's tripartite model of law, but also presents a new 'triangular model of legal pluralism and interlegality',[142] in which the interlinking legal forces of state, society and religion are clearly represented. This model incorporates the dynamic negotiations of all three major traditional schools of jurisprudence to comprise a more sophisticated appreciation of law and its interactions under the postmodern heading of 'global legal realism'.[143]



Global legal realism: The triangle[144]

Menski's triangular model proposes a plurality-focused model of understanding of law that, rather than focusing on only one theory, takes account of all three major elements of law, their intrinsically plural nature, and their constant dynamic interaction. Menski's basic volatile structure of a triangle matches the three major theories of law commonly studied by lawyers: the three angles are, to reiterate, firstly those of the socio-legal approaches which takes account of law in society or community that creates its own norms, secondly the state and positivism, and thirdly natural law, in the form of concepts of religion, ethics,

[141] Menski (n 1) 173.

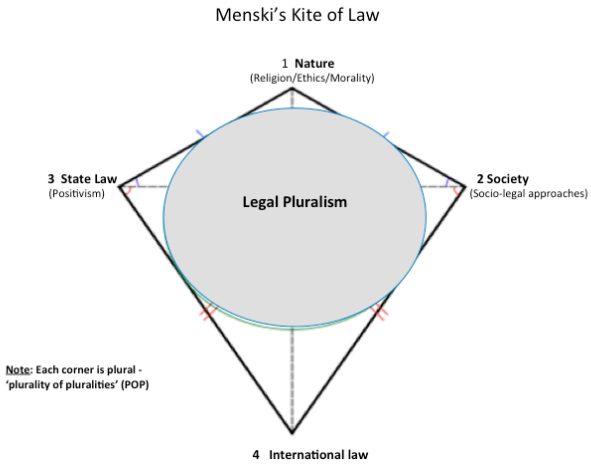
[142] ibid. For reviews on this model, see Maxwell O. Chibundu, Book Review on Werner Menski, Comparative Law in a Global Context: The Legal System of Asia and Africa, 2nd edn, CUP 2006 (2007) 17(8) Law and Politics Book Review 713-719; Jaakko Husa, 'Global Comparative Law: Right Cure for the Wrong Disease?' (2006-2007) 13 Tilburg Foreign Law Review 393); and R. Gordon Woodman, 'Book Review on Werner Menski, Comparative Law in a Global Context: The Legal System of Asia and Africa, 2nd edn, CUP 2006' (2006) 52 Journal of Legal Pluralism and Unofficial Law 207.

[143] ibid, 173-90, 594-613.

[144] ibid, 612.

morality and values.[145] Legal pluralism is located in the vast central space of the triangle, within a more spacious and dynamic circle, since it denotes all those scenarios and conflict situations in which neither of the three major law making elements rules the roost completely, implying potential situation-specific justice as the outcome of a naturally unstable equilibrium between the different competing forces, with a continuous need for renegotiation of this central ideal.[146] Without explicit reference to Derrida,[147] this takes account of the assumption that 'justice' is never finally arriving and 'law' is never a static entity.

Although culture is not visible in his triangular model, Menski confirms that he finds 'culture' in every corner, within the triangles of religion/ethics/morality as well as society, and to some extent even within the triangle of the state.[148]



Menski subsequently turned his 'triangle' into a 'kite' model to show 'international law and human rights' as a separate corner and thus explicitly recognised the importance of international law and human rights as a new form of natural law in the fourth corner of the kite image.[149] In traditional legal systems, international law or human rights claims and the global dimensions were included in the natural law/values corner (corner 3 of Menski's triangle),[150] and even Chiba and his 'postulates' included international law and human rights

[145] ibid, 187-88, 611-13; Menski (n 7); Menski explains the particular sequence of numbering, based on the understanding that all law is located in society, but has revised this model more recently to favour a more historical approach without falling into the trap of evolutionist positioning that sees one element replaced by the next.

[146] ibid, 186-187.

[147] Jacques Derrida, 'Force of Law: "The Mystical Foundation of Authority"', in Drucilla Cornell and Michael Rosenfeld (eds), *Deconstruction and the Possibility of Justice* (Routledge 1992).

[148] Menski (n 1) 189.

[149] Menski (n 7).

[150] Menski (n 1).

in that as modern natural law.[151] The real progress comes by separating corner 3 of Menski' triangle[152] into corners 1 and 4 (which were still conflated by Chiba's theorising) in the new kite model, showing the huge potential conflict between these two kinds of law in countries such as Bangladesh, but really everywhere.[153]

The basic principle of the key to understanding global legal pluralism is, then, that all voices of law in the semi-autonomous social or legal field should be heard and recorded in some form, and that no one type of legal theory can totally exclude all the other types of legal theory. This realisation helped Menski to add the fourth corner to his structure of the original triangle.[154] As discussed in sub-section 2.4 above, international law is clearly a form of law that needs to be built into this pluralistic model as an important element and cannot be left outside it. It also appears as a recognition of the claims of the human rights specialists to honour international norms in various aspects of domestic law, perhaps without harming the culture and identity of a people.

The argument for reforms in Bangladeshi family laws is to the effect that the state needs to act, as the existing laws are out of date and discriminatory. The transition from Chiba[155] to Menski[156] and then Menski's traiangle and kite represent a testing of different models and options. Menski's kite was chosen and data are collected by Chanda[157] to give this theoretical foundation a practical focus. The paper takes Chiba's model[158] as a basis, with the co-existence of official law, unofficial law and legal postulates, and uses Menski's kite[159] as a vision for the nation, but questions whether the people of Bangladesh actually want comprehensive legal reforms or not.

The present article thus applies this kite model to the Bangladeshi legal system, because through an open-minded analysis of this kind, one will easily feel the presence of all these corners of the kite in the Bangladeshi legal system. Hence when one talks about reforms of Bangladeshi laws, one has to take all these elements of law into account to offer an effective and acceptable method of reform, especially for family laws.

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[151] Chiba (n 12).
[152] Menski (n 1).
[153] Menski (n 7).
[154] ibid.
[155] Chiba (n 12).
[156] Menski (n 31, 1, & 7).
[157] Chanda (n 18).
[158] Chiba (n 12).
[159] Menski (n 7).

4. Implementation: the construction of identity through law-making

Chiba observed that it is the task of every nation to construct an identity postulate for itself that matches its specific cultural, religious and other value-related characteristics.[160] The identity postulate[161] of Bangladeshi legal culture is an important factor for our present analysis, since it is presumed that it can provide the socio-legal entity of Bangladeshi legal culture, like any other legal culture, with the criteria which both promote and limit the entity's choice as to how and to what extent the existing legal system, socio-legal order and legal culture should be modified, replaced or preserved; and particularly as to how and to what extent the legal system should adopt or reject indigenous and foreign factors.[162]

British legal influence in terms of substance and/or legal education, unchecked reception of international law or human rights laws, or too aggressive Islamising trends, *inter alia*, may create a cultural crisis for the Bangladeshi people because of the possibility that their cultural identity may be disturbed or even obliterated. Thus the choice as to whether international human rights laws, or some of its features, are to be adopted, with or without reformulation, has to be made in such a way which allows the continuation of cultural identity in law.[163] From the experience of the Japanese legal modernisation process, Chiba finds that cultural identity can be maintained by accommodating certain aspects of foreign law or integrating international law and indigenous law, and it then potentially provides a new or modified legal postulate which enables 'people to behave flexibly so as to adapt themselves to changing circumstances insofar as it is possible to maintain their individuality/identity.'[164] Or, in other words, it can constitute the new legal postulate, which allows people to 'maintain their cultural identity in law by making a choice between foreign law and indigenous law, and by reformulating both forms of laws insofar as they were adopted'.[165] It is a quality that is indispensable to every system of law which wants to remain – and it is argued here needs to remain – culturally connected and thus to some extent dependent on such non-legal entities.

As for Bangladesh, the role of identity postulates may be performed by *shariah* in Islamic law, *dharma* in Hindu law and distinctive concepts of law or, more precisely, the respective customary laws and concepts of different indigenous communities in Bangladesh, particularly those which they still follow for their family/personal law related matters.

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[160] Chiba 1986 (n 12).
[161] ibid.
[162] Chiba 1989 (n 12) 166-167.
[163] ibid, 155-156.
[164] ibid, 156.
[165] ibid.

The legal culture of a socio-legal entity maintains its identity in a plural legal structure. Chiba calls a legal postulate the *'identity postulate of a legal culture'*,[166] which works to maintain the identity of a legal culture as well as to facilitate change of its constituent variables to allow room to changing circumstances.

Menski suggests that it would be a big mistake in constructing an appropriate national identity if naked positivism is taken as the ground rule of legal reform.[167] A properly conceived rule of law model or strategy needs the input of different perspectives and greater respect for plurality and diversity.

5. Concluding remarks

Finally, it seems evident that relying on any one of the three or now four major global legal theoretical approaches to law provides too narrow a scope for the study of the Bangladeshi legal field. In the simplest case, the Eurocentric positivistic notion of law quite clearly implies a repudiation of the legitimacy of many legal systems, including that of Bangladesh, which for its different family laws has quite clearly expressed that religious and/or indigenous personal laws have to be the basis, although timely reform is a necessity. As law operates within a pluralistic matrix in all societies, particularly in non-Western ones, the role of law-related personnel and the state should be seen in the context of a culture-specific, identity-conscious and plurality-conscious approach. Even in pluralist legal systems like those of South Asia, realising the spirit of sensible legal pluralism is, however, a challenging task for the law-related actors and state agencies. Their particular challenge is to act as an essential equaliser to ensure that the rights of those marginalised on the basis of ethnicity, gender, religion, culture and language are well protected. Ensuring respect to the culture and identity of all and not merely of the dominating group or a fortunate few is a special responsibility of the state and its public law with its legislative and law-enforcement agencies. This requires socially and culturally sensitive agencies adequately informed of the imperatives of legal pluralism. In attaining plurifocal legal reform, the doctrine of legal pluralism, thus, may lend its instrumentality by informing law-related personnel and the general public of the usefulness of resorting to interdisciplinarity and of accommodating national specificities as suggested in Menski, particularly in the 'kite' model.[168]

This paper also, besides considering Chiba's 'identity postulate',[169] analyses the academic discourse about the relationship of 'law' and 'society', finding much relevance in Cotterrell's understanding of 'society' and

[166] ibid, 166.
[167] Menski (n 7).
[168] Menski (n 1 & 7).
[169] Chiba (n 12).

'community'[170] and endorses the significance he places on the need for legal theory to now take account of the notion of 'culture'.[171] But focusing only on 'law and culture' still risks avoiding talk about 'religion' and 'values', and in countries and jurisdictions such as Bangladesh, as shown in Chanda,[172] this is clearly not possible. Whether we portray the resulting plural image explicitly as 'legal pluralism' or choose some other form of words, the fact that 'law' as a global phenomenon manifests itself in so many different forms and also has multiple limits[173] can never be left aside in the case of legal reform, especially reforms in personal or family laws in Bangladesh as well as in any South Asian State.

[170] Cotterrell (n 122).
[171] Cotterrell (n 12) 1.
[172] Chanda (n 18).
[173] Allot (n 132).