The Bangladeshi Legal System and Bangladeshi Conception of Law: Status of Legal Pluralism and the Issue of Legal Reform

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Abstract: This paper first focuses on the Bangladeshi legal system dividing the discussion chronologically into five historical periods, namely Hindu, Muslim, British, Pakistani and the post-liberation-Bangladesh period. It then examines the polarised trend or proliferation of Islamic extremism in the Bangladeshi legal system, which has had a direct impact on the debates on legal reform, particularly in the personal laws, in the country. An analysis of the post-2008 outlook also appears in this paper in order to examine, specifically through the 15th amendment of the Constitution, how far Bangladesh has been able to get back to its initial secular stand, which was apprehended by the original Constitution of 1972. This of course requires an examination of what is meant by 'secularism'. Within this particular context, a theoretical discussion of Bangladeshi legal pluralism through the reasoning of minority protection in a Muslim-dominated scenario is also developed in this paper. It also analyses the Bangladeshi legal education system to show how the traditional textbook-based legal education impacts on and generates a formal conception of law among Bangladeshi lawyers and judges, which is obviously different from the law in society or culture in Bangladesh.

Keywords: Bangladeshi conception of law, Bangladeshi legal system, legal education in Bangladesh, legal pluralism, legal reform, legal systems in the Indian subcontinent, and secularism.

1. Introduction

This paper examines the legal system of Bangladesh in order to have a detailed appreciation of the nature of the existing legal system and to develop a full perception of the kinds and nature of laws acceptable to its people. The paper relates the discussion very closely to the analyses of the existing legal theories. For Bangladesh, as we shall see in more detail below, as a Muslim-majority jurisdiction with a colonial common law heritage, there has been much evidence of plural – and thus competing – concepts of law and power. The analysis of the need for Bangladesh to develop a culture-sensitive legal framework for law reforms is central to the present academic exercise. It helps to appreciate, in turn, the relevance and practical application of existing legal theories to the legal

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system(s) of Bangladesh as well as of South Asia. The paper also analyses the failure of the existing legal education in appreciating the complex or hybrid nature of the legal system of Bangladesh.

The basic set up of the legal system of Bangladesh resembles most other South Asian legal systems with which it also shares a common history in many ways, particularly with India and Pakistan. The Bangladeshi legal system is a mixture of general law and religious and customary or culture-specific personal laws. General law includes the Constitution, criminal law, civil law, law of evidence and so forth, which is applicable to all citizens irrespective of their religious affiliation. However, the not entirely separate sphere of personal laws is deeply pertinent to the people of respective religious and indigenous communities. As there are many overlaps between religious and customary normative systems (corners 1 and 2 of Menski's kite respectively) with the general law (mostly located in corner 3 of the kite),[1] a scenario of conflicts and tensions is predictable and indeed underpins the entire discussion of family law reforms in Bangladesh. To some extent it has direct or indirect impact on general laws as well.

It is claimed that the Bangladeshi legal system is 'predominantly' common law based.[2] However, as Hoque rightly notes, 'an uncontested acceptance of this characterisation may bring home "genetic defects"[3] of the English common law'.[4] The present law represents a mixed system, the structure, legal principles and concepts of which are modelled on both Indo-Moghul and English law.[5] Hence it largely relies on the pre-British customary and religious/*shari'a* law and on Anglo-Indian laws,[6] which are partly indigenous and partly foreign. It is not only a matter of clash, thus, between 'received' Western law and 'indigenous' Hindu, Muslim, Buddhist and *Adivasi* or indigenous laws, but the picture is much more complex, as all systems of law also face tensions from within their own respective framework of reference. For those conflicts and tensions regarding Muslim law, Coulson remains a pioneering and very clear-cut contribution to knowledge, stressing the basic tensions in Muslim jurisprudence

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1 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.

2 Shah Alam, 'Bangladesh' in H. M. Kritzer, (ed), *Legal Systems of the World* (Volume I, Santa Barbara, ABL-CLIO 2002) 116.

3 Louis Henkin, 'A New Birth of Constitutionalism: Genetic Influences and Genetic Defects' (1993) 14 Cardozo Law Review 533.

4 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) 3-4.

5 Azizul Hoque, *The Legal System of Bangladesh (*BILIA 1980) 1.

6 Werner Menski and Tahmina Rahman,' Hindus and the Law in Bangladesh '(1988) 8(2) South Asia Research 111.

between divine laws and human law-making and interpretation.[7] On Hindu law and its internal tensions and conflicts, Menski is probably most pertinent to the present discussions,[8] though that book does not discuss Hindu law in Bangladesh in any depth. On the Buddhist, Adivasi/indigenous and Christian laws of Bangladesh, very little is known.[9]

A brief analysis of three major Western legal theoretical approaches and the pluralistic legal approach mainly through Menski's global legal realism or 'kite' model[10] and Chiba's identity postulate[11] has already facilitated and prepared an appreciation of the plural nature of the Bangladeshi legal system necessary for this article. This methodological approach, based on explicit recognition of the internal plurality and diversity of law, shows how different legal approaches have worked and continue to work together in the Bangladeshi legal system as a deeply plural legal system.

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[7] Noel J. Coulson, 'Islamic Law' in J.D.M. Derrett (ed), *An Introduction to Legal Systems* (Sweet & Maxwell 1968) 54.

[8] Werner Menski, *Hindu Law: Beyond Tradition and Modernity (*OUP 2003).

[9] For some information and basic insights on personal laws of the different indigenous communities, see Ganendu Bikash Chakma, Pratim Roy and Shailen Dey, *Chakma Byaktigata o Paribarik Ain [Chakma Personal and Family Law]* (Kopo Seba Sangha 2007); Ganendu Bikash Chakma, Pratim Roy and Shailen Dey, *Marma Byaktigata o Paribarik Ain [Marma Personal and Family Law]* (Kopo Seba Sangha 2007); Ganendu Bikash Chakma, Pratim Roy and Shailen Dey, *Tripura Byaktigata o Paribarik Ain [Tripura Personal and Family Law]* (Kopo Seba Sangha 2007); Ganendu Bikash Chakma, Pratim Roy and Shailen Dey, *Tonchongya Byaktigata o Paribarik Ain [Tonchongya Personal and Family Law]* (Kopo Seba Sangha 2007); Ganendu Bikash Chakma, Pratim Roy and Shailen Dey, *Mru Byaktigata o Paribarik Ain [Mru Personal and Family Law]* (Kopo Seba Sangha 2007); Ganendu Bikash Chakma, Pratim Roy and Shailen Dey, *Bawm Byaktigata o Paribarik Ain [Bawm Personal and Family Law]* (Kopo Seba Sangha 2007); Ganendu Bikash Chakma, Pratim Roy and Shailen Dey, *Khumi Byaktigata o Paribarik Ain [Khumi Personal and Family Law]* (Kopo Seba Sangha 2007); Ganendu Bikash Chakma, Pratim Roy and Shailen Dey, *Khyang Byaktigata o Paribarik Ain [Khyang Personal and Family Law]* (Kopo Seba Sangha 2007); Ganendu Bikash Chakma, Pratim Roy and Shailen Dey, *Chak Byaktigata o Paribarik Ain [Chak Personal and Family Law]* (Kopo Seba Sangha 2007); Ganendu Bikash Chakma, Pratim Roy and Shailen Dey, *Pankhua Byaktigata o Paribarik Ain [Pankhua Personal and Family Law]* (Kopo Seba Sangha 2007); Ganendu Bikash Chakma, Pratim Roy and Shailen Dey, *Lushai Byaktigata o Paribarik Ain [Lushai Personal and Family Law]* (Kopo Seba Sangha 2007); Stephen G. Gomes, *The Paharias: A Glimpse of Tribal Life in Northwestern Bangladesh* (Caritas - Bangladesh 1988). And, on Christian law, see Archana Parashar, 'Conflict of Laws – Hindu Law vs. Christian Law [*Pramila Khosla v. Rajnish Kumar Khosla*]' (1982) 2(4) Islamic & Comparative Law Quarterly 302; Archana Parashar, 'Do Changing Conceptions of Gender Justice Have a Place in Indian Women's Lives? A Study of Some Aspects of Christian Personal Laws' in Michael R. Anderson and Sumit Guha (eds), *Changing Concepts of Rights and Justice in South Asia* (OUP 2000); Faustina Pereira, *The Fractured Scales: The Search for a Uniform Personal Code* (Stree 2002); Faustina Pereira, *Civil Laws Governing Christians in Bangladesh: A Proposal for Reform* (South Asian Institute of Advanced Legal and Human Rights Studies 2011).

[10] Menski (n 1).

[11] Masaji Chiba, *Legal Pluralism: Towards a General Theory through Japanese Legal Culture* (Tokai University Press 1989).

This paper, mainly on the basis of the analysis of secondary sources, shows how different periods contributed to and handled the plural nature of law by accommodating different corners of Menski's kite or the different elements of Chiba's tripartite model into its constantly developing legal system. The scrutiny of the legal systems of the Hindu, Muslim and British periods respectively illustrates the gradual development of the plurality of the legal system of British India and then explores how Pakistan (after 1947) and later new-born Bangladesh (from 1971) managed it. It will be a painful story, as everywhere the proclivity to rely on positivistic, state-centric structures and processes is at times completely overwhelming and suffocating. The examination of the post-1975 Islamisation process of the constitutional provisions in Bangladesh by autocratic military rulers illustrates also its direct impact on the process of legal reform particularly on the family law reform in the country.

Towards the end of this article, some analyses of the current outlook on the basis of the 15th amendment of the Constitution in 2011 would help appreciate specifically to examine how far Bangladesh has been able to get back to its initial secular stand of the original Constitution of 1972.

Then the Bangladeshi legal education system has been analysed to some extent to comprehend how this textbook-based positivistic approach of legal education impacts on the conception of law among Bangladeshi lawyers, judges and law-related people, which is clearly different from the law in society or culture in Bangladesh.

Based on the account of the analysis in Chapter 2 of Chanda,[12] the study of the Bangladeshi legal system in this paper facilitates a theoretical discussion of Bangladeshi legal pluralism. This is indispensable to appreciate the significance of a realistic plurality-conscious approach in order to respect the feelings of its peoples' culture and identity-consciousness through its laws and their projected or actual reforms.

2. Development of the legal system of Bangladesh

Eastern Bengal experienced the periods of Hindu, Buddhist, Muslim and British rule before becoming East Pakistan as a province of Pakistan on 14 August 1947. Subsequently Bangladesh declared its independence on 26 March 1971.[13] The roots of development of the formal legal system of Bangladesh thus go back to well before Indo-Moghul times. The following discussion depicts that each earlier period contributed to the current plurality of the legal system which

[12] Biswajit Chanda, 'Family Law Reform in Bangladesh: The Need for a Culture-Specific Legal System' (PhD Thesis, SOAS University of London 2017) chapter 2.

[13] Biswajit Chanda, 'Bangladesh' in Stanley N. Katz (ed), *The Oxford International Encyclopedia of Legal History* (Volume 1, OUP 2009) 257; Also, see Hoque (n 5) 1.

incorporates general laws as well as Hindu, Muslim, Buddhist, Christian and indigenous personal laws. This section focuses on the gradual development of this plural legal system under seven sub-sections, namely the law in the Hindu period, the legal system during the Muslim period, the British period and the Pakistani period. Finally, Bangladesh after 1971, the post-1975 polarised trend (or proliferation) of Islamic extremism and the situation after the 15th amendment of the Constitution are discussed.

2.1. The law in the Hindu period

In ancient Bengal, Hindu and Adivasi laws were the various legal orders in operation and we can assume that local Hindu rulers administered justice according to local customary laws.[14] Canon law was also recognised early on.[15] *Dicta* deriving from religion were then regarded as a major source of the knowledge of law.[16] This basically natural law system, known as Hindu law, remained functioning with some modifications until the advent of Islam in the Indian sub-continent.[17]

Mayne, in 1878, described that 'Hindu law has the oldest pedigree of any known system of jurisprudence, and even now it shows no signs of decrepitude'.[18] Portraying Hindu law in this manner stresses the role of written sources of law and seriously undervalues the customary normative orders that would prevail in lived reality. Independent India brought some drastic changes in its Hindu law during the 1950s, which are analysed in chapter 4 of Chanda.[19] However, the Indian state also has not been able to ignore the importance of religious or customary rites and rituals, rather it has accommodated them in its reformed laws where pertinent. Hence the value of 'religious' legal systems such as Hindu law should not be perceived as irrelevant in today's modernist society,[20] particularly when we are concerned about observing essential rites or rituals in marriage, or taking account of the importance of chthonic laws, customs or ethics.

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[14] For general reference on Hindu law, see Menski (n 8).

[15] Hoque (n 5) 2; Also, see A.B.M. Mafizul Islam Patwari, *Legal System of Bangladesh (*Humanist and Ethical Association of Bangladesh 2004) 10.

[16] ibid.

[17] Patwari (n 15) 9-10; Also, see Kazi Ebadul Hoque, 'Legal System', in Sirajul Islam (ed), *Banglapedia: National Encyclopedia of Bangladesh* (Asiatic Society of Bangladesh 2006) <http://www.banglapedia.org/httpdocs/HT/L_0089.HTM> accessed on 4 January 2015.

[18] See John D Mayne, *Mayne's Treatise on Hindu Law and Usage* (First published in 1878, Revised by Justice Alladi Kuppuswami, 14th edn, Bharat Law House 1998) preface, 11.

[19] Chanda (n 12) chapter 4.

[20] Menski (n 8).

In order to appreciate the plural nature of Hindu law it is essential to briefly analyse its sources. The sources are traced in *sruti* (what was heard),[21] *smriti* (remembered wisdom of ancestors and earlier teachers) in the form of the classical Hindu texts, then later their commentaries, and subsequently the digests and approved customs.[22] Traditional textual sources, collectively called *dharmaśāstras*, were mainly the depository of rules containing usage and the opinions of their erudite authors. *Dharma*, inefficiently and misleadingly translated simply as 'law', is in fact much more comprehensive, as it covers 'the all-encompassing duty to do the right thing at the right time, at any point of one's life'.[23] The commentaries and the later digests also illustrate that *smritis* were largely compilations of customs and usages.[24] Jurisprudentially, such texts were the sources of the knowledge of law, rather than the law itself.[25] The *dharmaśāstras* did not have the effect of unifying Hindus under one law as they were highly fragmented and also various local authorities had the ultimate say in their application.[26]

An important feature of the originality of Hindu law as a legal system is that its law does not derive from legislated written sources properly so-called and its development owes nothing either to positive law in the sense of a legislative act, or to judicial decisions.[27] The Hindu concept of law is, thus, different from the Austinian concept and cannot strictly be said to have been promulgated by any sovereign within the meaning of Austin's definition of law.[28] The most important characteristic of Hindu law is perhaps that '[it] has always been a people's law, not a body of rules made by powerful old men to be obeyed

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[21] Primarily the four *Vedas* — *Rigveda, Yajurveda, Sāmaveda* and *Atharvaveda* — are traditionally considered to be the repository of ancient wisdom. The Vedic texts contain hardly any evidence of law, in the sense of state law, although their statements of fact are infrequently referred to in the *smritis* and later commentaries as irrefutable evidence of legal usage. For details, see Virendra Kumar, 'Hindu Law: Overview' in N. Katz Stanley (ed), *The Oxford International Encyclopedia of Legal History* (Volume 3, OUP 2009) 147.

[22] ibid.

[23] Werner Menski, *Comparative Law in a Global Context: The Legal System of Asia and Africa* (2nd edn, CUP 2006) 198.

[24] Please see Kumar (n 21) 147. For example, *Medhātithi*, the most renowned commentator of *Manusmriti*, in his commentary *Manu Bhāshya* (I, I, 211-12), observed that the original text was actually a compilation of usages of virtuous men, put in the coat of a code. Also, *Mitakshara* (I, IV, 14), a major commentary on the *Yājñavalkyasmriti*, noted that mostly the *smritis* were records of well-known usages commonly accepted by the people. Whether such claims are maintainable is not a major issue for the present article, and this matter will remain contested.

[25] ibid.

[26] Jaynath K. Krishnan, 'India' in H.M. Kritzer (ed), *Legal Systems of the World (*Volume I, Santa Barbara, ABL-CLIO 2002) 693.

[27] Robert Lingat, *Les sources du droit dans le système traditionnel de l'Inde (The Classical Law of India)* (First Published in 1967 by Mouton & Co., J. Duncan M. Derrett (tr with additions), OUP 1998) x.

[28] Raj Kumari Agarwala, *Hindu law* (21st edn, Central Law Agency 2003) 4.

by all others'.[29] Ancient Sanskrit texts, such as *Manusmriti* and so forth, were and are still misleadingly (also in Bangladesh) shown and described as legal codes. But the socio-legal reality is that those were actually cultural documents, and it is a fact that 'holy men' like Manu have never been in a position to 'lay down the law' for all Hindus and they were not equivalents to Moses or Hazrat Mohammad (SM) in terms of their acceptance by the community as a whole.[30] Hence the idea of ancient law-making by sages or of the divine nature of Hindu law is fundamentally flawed. While there is some input from 'religion', this is only ever one of several sources. On the contrary, Hindu legal concepts firmly oppose the monotheistic revelation-based legal regulation or Austinian positivism, as shown in detail by Menski.[31] Such ongoing misconceptions about the process of law-making in Hindu law misrepresent the inherent dynamisms within and the flexible or plural nature of traditional Hindu law. Hence Hindu law has always been plurality-conscious and can be examined within the triangular model of global legal theory of Menski.[32] It is therefore also obvious that there is enormous scope for the piecemeal reform of Hindu law. That all legal reforms are piecemeal was established by Sally Falk Moore.[33] Moore developed the concept of the 'semi-autonomous social field'[34] and advised many decades ago that formal law-making is always a piecemeal form of legal intervention:

> The piecemeal quality of intentional legal intervention, whether legislative, executive or judicial, is due to its construction as a response to particular circumstances at particular moments. The accretion of many such responses over time makes for a composite, unplanned, total result. Even though, at various times and places, there have been attempts to codify everything once and for all, in the long term all legal 'systems' are built by accretion, not by total systematic planning.[35]

For the Bangladeshi legal debates on law reform, whether in relation to a uniform civil code or any other type of reform, the consequence appears to be that reforms are possible, but will never be complete and comprehensive, and also, any attempted abolition of Hindu law will pose theoretical as well as practical challenges that will need to be addressed.

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[29] Menski (n 23) 198.
[30] ibid, 198-199.
[31] ibid; Menski (n 8).
[32] ibid.
[33] Sally Falk Moore, *Social Facts and Fabrications: "Customary" Law on Kilimanjaro 1880-1980* (CUP 1986).
[34] Sally Falk Moore, *Law as Process: An Anthropological Approach* (Routledge & Kegan Paul 1978) 9.
[35] ibid.

2.2. Legal system in the Muslim period

Islam first reached India through trade across the Indian Ocean and Muslim traders initially introduced Muslim law under the umbrella of extraterritoriality. Later, starting with the invasion in 712 of Sindh by Mohammad Bin Qasim, Islam spread as a personal law of Muslim migrants and converts to northern parts of the subcontinent along land routes from Iran.[36] By 1192 centralised Muslim rule had been established in Delhi and the emerging Delhi Sultanate (1206-1526) developed a system of official law combining 'soft positivism' with local customary practices and adherence to principles of Islamic law.[37] The Sultans as head of state, legislator and chief judge ruled over Muslims and many more non-Muslims mainly through religious-cum-secular decrees (*farmans*).[38] Muslim personal law, specifically applied to Muslims, was limited to family law, apostasy and offences against God. Islamic laws related to torts, crime and nuisance were gradually applied to all subjects, but various local customary laws remained important in practice also among Muslims.[39]

Moghul Emperors ruled over most of the subcontinent from 1526 to 1858 and created gradually a more elaborate Islamic administration system based on Hanafi Sunni principles.[40] Focusing on effective methods to collect land revenue, Emperor Aurangzeb issued royal *farmans* (1665 and 1669) that regulated relationships between the state and landowners and land revenue collection. Thus, a hybrid legal system, tolerant of local diversity and greatly influenced by local practices, applied to Muslims and non-Muslims alike.[41]

Bengal was under Muslim rule from the beginning of the 13th century to the middle of the 18th century. The principles of Islamic law were applied in the administration of justice but Islamic law, significantly in light of the previous section, could not replace the Hindu law altogether – non-Muslims were guided by their personal law in matters between themselves.[42] Although most scholars continue to claim that the personal law system was the creation of the British

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[36] Muhammad Basheer Ahmad, *The Administration of Justice in Medieval India: A Study in Outline of the Judicial System under the Sultans and the Badshahs of Delhi Based Mainly upon Cases Decided by Medieval Courts In India between 1206-1750 A.D.* (The Aligarh Historical Research Institute for the Aligarh University 1941) 25.

[37] H.L.A. Hart, *The Concept of Law* (3rd edn, Clarendon 1994) 250; Patwari (n 15) 11; V.D. Kulshreshtha, *Landmarks in Indian Legal and Constitutional History* (Reprint of revised edition by B.M. Gandhi, Eastern Book Company 2006) 16.

[38] Ahmad (n 36).

[39] Biswajit Chanda, 'South Asian Law: Islamic Law' in Stanley N. Katz (ed), *The Oxford International Encyclopedia of Legal History* (Volume 5, OUP 2009) 307.

[40] Ahmad (n 36).

[41] Chanda (n 39) 307.

[42] Hoque (n 17).

colonial rulers,[43] in fact it started much earlier, and well before the Muslim period.

As Menski notes, Islam offered an authoritative message that subjected everything to a new ethical evaluation.[44] The Qur'an is acknowledged as a complete guidance for Muslim life, a code of ethics that covers everything. All major Muslim scholars accept that the Qur'an contains the essence of God's law, but at the same time it is not the law itself, rather a source of law. It does not answer all legal questions directly, but offers an overall guiding ethical framework.[45] In Chiba's terminology, this system is very strong on 'legal postulates'.[46] It proclaims higher divine authority as a religious guideline; however, human interpretation and application remained essential to establish it as a rule system in real life, which is now known as Islamic law. In other words, human effort was necessary to ascertain the meaning of Allah's message in the Qur'an in order to turn it into 'living law'. For its practical application, the Prophet and subsequently his companions and Muslim jurists, as human agents, needed to interpret this divine revelation to make it applicable to the day-to-day life of Muslims.[47]

In Islamic law, the *sunna*, communication of the Prophet's advice, is widely treated as the most reliable source after the Qur'an.[48] As the Prophet needed to balance situation-specific justice with allegiance to divinely revealed rules, the *sunna* unavoidably encompasses some human intermediation. The recollections of what the Prophet had said or done on particular occasions were unsystematically compiled mainly by his companions, and these subsequently became subject to standardisation and selection.[49] The compendia of these sayings were later called *hadith*, comprising the records of the Prophet's *sunna*.[50] The activities of their formal collation and editing took around two hundred years. Coulson suggested that the genuine core of the Prophet's sayings gradually 'became overlaid by a mass of fictitious material'.[51] *Sunna* or *hadith* is regarded as the second authoritative source of Islamic law.[52] According to Mulla,

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[43] Archana Parashar, *Women and Family Law Reform in India: Uniform Civil Code and Gender Equality* (Sage Publications 1992) 46; Indira Jaising, 'Gender Justice: A Constitutional Perspective', in Indira Jaising (ed), *Men's Laws Women's Lives: A Constitutional Perspective on Religion, Common Law and Culture in South Asia* (Women Unlimited 2005).

[44] Menski (n 23) 283-287.

[45] ibid.

[46] Masaji Chiba (ed), *Asian Indigenous Law in Interaction with Received Law* (KPI 1986); Chiba (n 11).

[47] Menski (n 23) 284-287.

[48] John Burton, *An Introduction to the Hadith* (Edinburgh University Press 1994) ix.

[49] Abdur Rahman I. Doi, *Shari'ah: The Islamic law* (Ta-Ha Publishers 1984) 48.

[50] Burton (n 48).

[51] Noel J. Coulson, *A History of Islamic Law* (Edinburgh University Press 1964) 43.

[52] Menski (n 23) 319-324.

Qur'an and *sunna* are immutable and 'may thus be said to form the fundamental roots of Islamic law'.[53]

The third source, *ijma*, a term that has many meanings and implies a human method as well as a source, had basically been established by consensus among highly qualified legal scholars of any generation on a principle that it would not be contrary to the Qur'an and *sunna,* but 'exigency of time and public interest were also borne in mind', and this is equally binding upon Muslims.[54] The various schools of Islamic law agreed that no disagreement can be allowed where there is valid consensus, but rules deduced on the basis of *ijma* have varying degrees of sanctity in the different schools: the Hanafis treat *ijma* as a fundamental source but the Shafi'is regard it as of less importance, whereas Malikis place *ijma* of scholars of Medina above others and generally follow the Medinese thought.[55] *Ijma* is thus a rather plural concept and the assumed consensus is made by a group of men, often just scholars, but sometimes more widely drawn, and *ijma* does not get the same importance from all schools of Islamic law. The Hanafi school supports it because they believe that 'the provisions of law must change with the changing times' and Maliki doctrine in this respect is that 'new facts require new decisions'.[56] So human intervention, the importance of situation-specificity and overall the necessity of legal reforms were recognised by the different schools of Islam. For discussions in Bangladesh today this will mean, importantly, that any outright rejection of legal reform on the basis of 'religious' grounds does not appear to be a correct approach.

Where the Qur'an and the hadith did not provide any precise direction to cover an individual case an independent effort, called *ijtihad*, had to be made by *mujtahids*, who were presumed to have a complete knowledge of Arabic, of the Qur'an, the *sunna* and *hadith*, *amal* (practice) of the companions of the Prophet and all existing legal knowledge.[57] This notion of *ijtihad* is not a source of Islamic law, but a method by which the will of Allah is discovered.[58] However, the effect in practice of this basic method of *ijtihad* was to create an extremely diverse normative framework, in which the basic principle of *ikhtilaf* (tolerated diversity of opinion, as no one human could ever fully understand God's intentions) led to increasing confusion and thus growing legal insecurity and, as Menski would probably call it, intensive messiness. Hence there were early calls for uniformisation and a process of going back to the roots of the system, rather than everyone exercising individual discretion.

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[53] D.F. Mulla, *Principles of Mahomedan Law* (19th edn, M. Hidayatullah and Arshad Hidayatullah (eds), N.M. Tripathi Pvt Ltd. 1990) xxi.

[54] ibid.

[55] ibid.

[56] ibid.

[57] ibid, xxii.

[58] David Pearl and Werner Menski, *Muslim Family Law* (Sweet & Maxwell 1998) 14.

This process, known as 'closing the gate of *ijtihad*' (in Arabic: *'insidid bab al-ijtihad'*), was described by Schacht as follows:

> By the beginning of the fourth century of the hijra (about A.D. 900), however, the point had been reached when the scholars of all schools felt that all essential questions had been thoroughly discussed and finally settled, and a consensus gradually established itself to the effect that from that time onwards no one might be deemed to have the necessary qualifications for independent reasoning in law, and that all future activity would have to be confined to the explanation, application, and at the most, interpretation of the doctrine as it had been laid down once and for all. This 'closing of the door of *ijtihad*', as it was called, amounted to the demand for *taklid*, a term which had originally denoted the kind of reference to Companions of the Prophet that had been customary in the ancient schools of law, and which now came to mean the unquestioning acceptance of the doctrines of established schools and authorities.[59]

However, Hallaq shows that 'the gate of *ijtihad* was not closed in theory nor in practice'[60] and he makes it clear that

> (1) jurists who were capable of *ijtihad* existed at nearly all times; (2) *ijtihad* was used in developing positive law after the formation of the schools; (3) up to ca. 500 A.H. there was no mention whatsoever of the phrase *'insidad bab al-ijtihad*' or of any expression that may have alluded to the notion of the closure; (4) the controversy about the closure of the gate and the extinction of *mujtahids* prevented jurists from reaching a consensus to that effect.[61]

The fourth and last traditional source of Islamic law is *qiyas*, generally translatable as 'analogy', which is again a method of human interpretation rather than a God-given or divinely inspired source. The 'points of law and fact that were not covered by the sources were to be the object of reasoning through what is known as *qiyas'*.[62] This is independent reasoning in the form of analogical deduction.[63] *Qiyas* does — in theory — not involve the laying down of new principles but is a kind of admissible interpretation upon some text.[64] The Prophet fully approved *qiyas* and through a sort of compromise and tolerance Shafi'i and Malik approved it as a source, and Imam Abu Hanifa placed it above *khabar-al-wahid* (*hadith* based on single testimony); however, the followers of Ahmad ibn Hanbal did not approve *qiyas* and *Shi'as* also did not accept it as they believe that when law needs to be expanded, it must be by the imam and nobody

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[59] Joseph Schacht, *An Introduction to Islamic Law* (Reprint, OUP 1964) 70-71.

[60] Wael B. Hallaq,'Was the Gate of Ijtihad Closed?' (1984) 16(1) International Journal of Middle Eastern Studies 3, 4.

[61] ibid.

[62] Wael B. Hallaq, 'Non-Analogical Arguments in Sunni Juridical Qiyās '(1989) 36(3) Arabica 286, 287.

[63] Pearl and Menski (n 58) 12.

[64] Mulla (n 53) xxiv.

else.[65] The Supreme Court of Pakistan in *Mst. Khurshid Bibi v Baboo Muhammad Amin* described the sources of Islamic law in the following manner:

> [T]he fundamental laws of Islam are contained in the Qur'an and this, by common consent, is the primary source of law for Muslims. Hanafi Muslim jurisprudence also recognizes *hadith, ijtihad and ijma* as the three other secondary sources of law. The last two really fall under a single category of subsidiary reasoning, *ijtihad* being by individual scholars and *ijma* being the consensus of scholars who have resorted to *ijtihad* in any one age.[66]

It is not the aim of this paper to enter into a detailed analysis of all spheres of the sources of Islamic law.[67] From the discussion above, however, it is quite clear that all the elements of Islamic law are not purely religious and that there is human intervention at virtually every level. Consequently, there is scope for the reform of this law, too, but no possibility of simply legislating it away, again because of the strong connection to legal postulates.

In the Indian sub-continent, hence in Bengal as well, Moghul rulers administered civil and criminal justice by applying Islamic law, but existing personal law system, local legal arrangements and customs remained basically and largely unaffected.[68] After Hanafi Sunni Islam became officially dominant in South Asia, Sunni Hanafi jurists produced a medieval subcontinental literature of authoritative responses called *fatwas*. Collected under Moghul rule, two officially acknowledged authoritative medieval juristic texts, the *Hedaya*[69] and *Fatawa-i-Alamgiri* commissioned by the Moghul Emperor Aurangzeb as a digest of fatwas mainly on Hanafi law, turned out to be local written sources.[70] Besides such written guidance, Muslim judges drew on secular elements and ordinances (*qanuns*) of various emperors. Moghul civil and criminal laws based on Muslim laws operated as a general territorial law, supplemented by a plethora of personal laws and local customs.[71]

However, seemingly the rules of the official legal system were not well known. Banerjee pointed out that '[i]n practice, what was the exact law on a particular crime or what was the punishment for it, would never be known before the pronouncement of sentence by the Quadi or Magistrate'.[72] Most Muslim rulers focused on restructuring local tax laws and criminal laws, but left most legal administration to local agents and to local people, mainly Hindus,

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[65] ibid.

[66] [1967] PLD (SC) 97.

[67] For a detailed analysis, see Menski (n 23) chapter 5; Pearl and Menski (n 58), Hallaq (n 60 & 62), and Mulla (n 53).

[68] Pearl and Menski (n 58) 30-31.

[69] Charles Hamilton, *The Hedaya or Guide: A Commentary on the Mussulman Laws (*T. Bensley 1891).

[70] A. C. Banerjee, *English Law in India* (Abhinav 1984) 55.

[71] Chanda (n 13) 257.

[72] Tapas Kumar Banerjee, *History of Indian Criminal Law* (Riddhi 1962) 62.

whose rulers had been often in power under Muslim supremacy. Islamic law thus became even more of a personal law of Muslims and was also concerned mostly with some aspects of public law rather than complete regulation by *shari'a*.[73]

This section has shown that the legal system during this period was also plural. Islamic law, too, in general as well as in the Indian sub-continent, encompasses all three corners of Menski's triangle.[74] It is crafted on a conception of plurality-consciousness and can also be examined within Menski's triangular model of global legal theory because the ethics of Chiba's postulates in corner 3 of Menski's triangle of law include Islam's visions of international law as well.[75] Although Islamic law is a religion-based legal system, it manages to reunite the doctrinal supremacy of religious belief with its inherent plurality of socio-cultural manifestations.[76] In Islamic law, natural law and socio-legal approaches are interrelated and while the role of state positivism is also obviously present, it is not the only law, and not even the main source of the law.

2.3. The law in the British period

After the British came to the sub-continent at the beginning of the 17th century, in the form of the East India Company rather than a full-fledged colonial government, they managed to establish their political sovereignty over Bengal and ultimately almost over the whole of the Indian sub-continent by the middle of the 18th century.[77] Early British administrators slowly developed the foundations of a secular Anglo-Indian law, together with Anglo-Muhammadan and Anglo-Hindu laws.

The British slowly reduced the application of Islamic law in civil and criminal justice and then after 1858 produced a range of secular Anglo-Indian laws through codification.[78] The colonial rulers replaced many aspects of general law by a blend of common law and civil law with indigenous Indian elements. This territorial secular law was adjusted to local conditions and applied to all citizens irrespective of their religion. It is thus erroneous to claim, as some scholars still do, that the emerging Anglo-Indian legal systems were based only on English common law.[79] Earlier, British administrators had decided to leave the family/personal laws of the natives undisturbed, generally in line with Moghul

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[73] Menski (n 23) 365-366.

[74] ibid.

[75] ibid.

[76] ibid, 279.

[77] H.K. Saharay, *Legal and Constitutional History of India: A Legal Study of Constitutional Development of India* (2nd edn, Kamal Law House 1997) 2-16.

[78] J. Duncan M. Derrett, 'The Administration of Hindu Law by the British '(1961) 4(1) Comparative Studies in Society and History 10.

[79] Chanda (n 13) 257.

legal policy, apparently because they were known as religion-based laws. Following the 1772 judicial plan of Warren Hastings[80] concerning the division of general and personal laws, Hindu law was placed on an equal footing with Islamic personal law. According to a formal declaration of 1772, in all suits relating to inheritance, marriage, caste and other religious usages and institutions, the laws of the Qur'an with regard to Muslims and those of *Shaster* regarding the Hindus had to be applied.[81]

Hindu law became a gradually more important topic under British rule (1858-1947) in India, maybe because the majority of Indians were Hindus. But British efforts through learning Sanskrit to turn the textual sources of Hindu law into an operative legal system were soon abandoned.[82] In British India, Hindu law developed gradually under the tutelage of Common Law and Equity, modified occasionally by statutes, known since 1920 as "Anglo-Hindu law".[83] Hence, it is often argued that British methods hampered the natural growth of the indigenous systems in India.[84] Several laws were enacted for Christians as well. Further discussion on all these issues is avoided here as this topic is examined copiously in chapter 4 of Chanda in relation to the development of family laws during the colonial government.[85]

The picture painted above so far shows that the law of the region we are concerned with in the British period was deeply plural and represented all three corners of Menski's triangle.[86] The British period after 1858 is marked as the golden period for legal positivism, which is a reference to the massive codifications of Anglo-Indian law during this period. In relation to the personal law system, a deeper analysis shows that the colonial rulers and the people themselves did not discard local customary or religious norms or laws. Although they brought many more aspects of law under the umbrella of state-driven codification, the colonial rulers as a tiny ruling elite did not dare to ignore the different socio-religious and cultural elements of law that existed in India.

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[80] Warren Hastings was the first Governor General of British India.

[81] Parashar (n 43) 46; Michael R. Anderson, 'Islamic Law and the Colonial Encounter in British India', in David Arnold and Peter Rob (eds), *Institutions and Ideologies: A SOAS South Asia Reader* (Curzon Press Ltd. 1993) (Reproduced by Women Living Under Muslim Law (WLUML) as WLUML Occasional Paper No. 7, June 1996); J. Nair, *Women and Law in Colonial India: A Social History* (Kali for Women 1996); Flavia Agnes, *Law and Gender Inequality: The Politics of Women's Rights in India* (OUP 1999).

[82] For details, see Menski (n 8) chapter 5.

[83] J. Duncan M. Derrett (tr), *The Classical Law of India* (OUP 1998) v.

[84] Derrett (n 78) 11.

[85] See Chanda (n 12) chapter 4.

[86] Menski (n 23).

2.4. The Pakistani period

On 14/15th August 1947, British India was divided into two independent states, Pakistan and India, on the basis of concentration of Muslim population. In Bengal, those areas with a Muslim majority formed the eastern wing of Pakistan – since 1971, Bangladesh – whereas mostly those parts of the province with a Muslim minority became the state of West Bengal and remained with the Republic of India.[87] On independence, Pakistan upheld the policy of British rulers but following an early short-lived commitment to Indian-style secularism, started the process of Islamisation. Subsequent Islamisation in Pakistan has demanded public and also more explicitly private commitment to Islam, first ideologically and politically reinforced when the Objectives Resolution of 1949 provided that all Muslims 'shall be enabled to order their lives in the individual and collective spheres in accordance with the teachings and requirements of Islam as set out in the Holy Quran and Sunnah'.[88] This Declaration subsequently became the Preamble to the Pakistani Constitutions in 1956, 1962 and 1973 and then subsequently, in 1985, this was made a substantive provision of the Constitution of Pakistan.[89]

Apart from Islamisation through such constitutional changes, Pakistan had brought about some earlier important reforms in Muslim family law through the *Muslim Family Laws Ordinance,* 1961. No changes were made in Hindu or other family laws and they remained as separate personal laws. Although Islamic law was dominant in Pakistan and the *Qur'an* and *sunna* had been the basis of the legal system, other types of law or all three corners of Menski's triangle were clearly present in the legal system of Pakistan during this period.[90]

2.5. Bangladesh after 1971: socialist nature of the constitution

Upon the proclamation of its independence on 26 March 1971 and through a historic struggle for national liberation, Bangladesh emerged as an independent,

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[87] Richard M. Eaton, *The Rise of Islam and the Bengal Frontier, 1204-1760* (University of California Press 1993); James J. Novak, *Bangladesh: Reflections on the Water* (First published in 1993, University Press Limited 2008); Partha S. Ghosh, 'The Other Side of Partition: Resonances on Cultural Expression ' (2015) 35(1) South Asia Research 42.

[88] 'The Objectives Resolution of 1949' <http://www.loonwatch.com/wp-content/uploads/2010/05/The-Objectives-Resolution-of-1949-LoonWatch.pdf> accessed 15 June 2021.

[89] Menski (n 23) 371; Martin Lau, 'Islam and Constitutional Development in Pakistan' in Ian Edge (ed), *Comparative Law in a Global Perspective* (Transnational Publishers 2000); Martin Lau, 'Article 2a, the Objectives Resolution and the Islamisation of Pakistani Laws', in H.G. Ebert and T. Hanstein (eds), *Beitraege zum Islamischen Recht III* (Peter Lang 2003); Martin Lau, *The Role of Islam in the Legal System of Pakistan* (Martinus Nijhoff 2006).

[90] ibid.

sovereign People's Republic on 16 December 1971, a painful process that ended with the surrender of the occupying Pakistani forces.[91]

Bangladesh's liberation and emergence as a separate nation state was partly a necessity since Pakistan was more than 1,000 miles away from Bangladesh, was characterised by huge linguistic and cultural differences, and it was being treated like a colony and deliberately denied proportionate participation in governance.[92] The liberation also connotes remarkable condemnation by its people of the communal and colonial attitudes of West-Pakistani rulers towards Bengalis and religious minorities, the denial of human rights and dignity, and the social injustice and economic deprivation imposed on them by the West Pakistani rulers.

The newborn Bangladesh rejected the Islamic Constitution of Pakistan and the Islamic nature of the state and started its journey with an unambiguous secular and socialist Constitution on 16 December 1972.[93] Part III of the Constitution guaranteed most of the civil and political rights as fundamental rights,[94] while Part II incorporated most of the economic, social and cultural rights as 'fundamental principles of state policy'.[95] Otherwise, Bangladesh adopted the entire legal system of the Pakistani period, including all the existing laws of the Indo-Moghul period, the British-era legislation and post-1947 Pakistani law as they existed on 26th March 1971, through the Bangladesh (Adaptation of Existing Bangladesh Laws) Order of 1972.

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[91] Constitution of the People's Republic of Bangladesh, Preamble.

[92] International Commission of Jurists, *The Events in East Pakistan, 1971: A Legal Study by the Secretariat of the International Commission of Jurists* (International Commission of Jurists 1972) 9-12.

[93] Secular but South Asian in spirit. Article 12 of the Constitution of the People's Republic of Bangladesh clarifies the term 'secularism and freedom of religion' as:
The principle of secularism shall be realised by the elimination of
(a) communalism in all its forms;
(b) the granting by the State of political status in favour of any religion;
(c) the abuse of religion for political purposes;
(d) any discrimination against, or persecution of, persons practising a particular religion.
Hence, in Bangladesh, secularism is neither synonymous to atheism nor it forbids anything which is religious. The state is committed to provide security and protection to the people and institutions of all religions. This is not a US-style policy of non-attachment, but a basic guarantee of fair and equal treatment of all religions.

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

[95] Of the International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR). According to Article 8(2) of the Constitution of the People's Republic of Bangladesh, 1972, 'The principles set out in this Part shall be fundamental to the governance of Bangladesh, shall be applied by the State in the making of laws, shall be a guide to the interpretation of the Constitution and of the other laws of Bangladesh, and shall form the basis of the work of the State and of its citizens, but shall not be judicially enforceable.' However, these are not fundamental rights.

Bangladesh thus continued to entertain the division of general law and personal laws and endorsed customary laws and norms of different religious and indigenous peoples as well. An important development was that this new country, through its secularism policy, in a typically South Asian approach, constitutionally guaranteed equal respect to and treatment of all religions. In addition, the new Constitution also guaranteed fundamental rights. Thus right after her birth, by recognising now all four corners of Menski's kite, Bangladesh became committed to fly her *iccher ghuri* (wish kite) in such a way that legal development would ideally be designed to bring about harmony in society, which was clearly a plural society in every respect.[96] This article refrains here from going into details of the socialist rhetoric of the Bangladeshi Constitution, which was initially perceived to be a left-leaning, pro-Soviet approach, but is today much more focused on sustained government efforts to ensure that the people of Bangladesh have the possibility to experience economic growth and better and more equitable distribution of economic resources. This aspect of the vision of Bangladesh is not directly relevant to a deeper examination of the re-construction and reform of the country's legal system.

2.6. The post-1975 polarised trend (or proliferation) of Islamic extremism

On becoming a sovereign independent nation by seceding from Pakistan in 1971, Bangladesh started its journey with a fresh secular Constitution,[97] but after the assassination of its founding father, Bangabandhu Sheikh Mujibur Rahman, on 15 August 1975, by the way a notably strategic date as the day of independence of India, the military rulers performed a massive surgery on its secular Constitution to establish Islam as the state religion and thus started the journey of Islamisation. This remained a bone of contention until the 15th amendment of the Constitution following a landmark decision of the Supreme Court of Bangladesh, which will be discussed further below and even further most recent developments in Bangladeshi law at the time of writing concern this particular issue.

After the assassination of Sheikh Mujib, Major General Ziaur Rahman took the first step of Islamisation through the Proclamations Order No. I of 1977: (a) 'Secularism', one of four fundamental principles of state policy, in Article 8(1) of the Constitution, was replaced by 'absolute trust and faith in Almighty Allah'; (b) a new provision 'Absolute trust and faith in the Almighty Allah shall be the basis of all actions' was inserted as Article 8(1A).[98] Article 12 of the original Constitution, which contained references to 'secularism and freedom of religion',

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[96] Menski (n 1).

[97] Constitution of the People's Republic of Bangladesh 1972, Preamble, arts 8 & 12.

[98] Ministry of Law, Justice and Parliamentary Affairs of Bangladesh (MLJPA), *Constitution of the People's Republic of Bangladesh* (MLJPA 2008) 4.

was omitted altogether. It is clear that this was a significant shift towards strong commitment to Islamic legal postulates and an implied rejection of secular legal approaches, whether one takes them as anti-religious or reflective of the principle of the state's equidistance to all religions. However, quite what is meant by 'secular' in Bangladeshi political and legal debates has remained heavily contested and obfuscated by extreme positions, even today, which claim, for example, that secularism is anti-religious, and thus an automatic threat to an Islamic legal order.[99] What such politicised arguments regularly overlook is that even so-called secular legal systems are not denying a role for religion and the place of religions in relation to people's lives. Rather, the argument appears to be over relative power and authority. From that perspective, the Islamisation proponents claim that God's law remains supreme, or should be re-instated as supreme, thus in effect instituting a kind of theocracy, conveniently forgetting that the interpretation of what God's will is has remained one of the major bones of contention among Muslims. An alleged theocracy is therefore still based on human acts of interpretation as the discussion in earlier sections of this paper, considering the sources of Islamic law, already indicated. Lip service to Islamisation is thus a political strategy of those who wish to cement their rule and power by claiming some kind of divine authority for their human activities. It is a strategic device that obviously operates in opposition to any form of plural arrangement and is thus, unsurprisingly, often connected to military rule and long periods of dictatorship.

In Bangladesh, to secure more support of religious Muslims and the oil-rich Middle East, like Ziaur Rahman earlier, another military ruler and by then president Lt. General Ershad, made Islam the state religion by the eighth amendment of the Constitution in 1988. This created an impression that Bangladesh had become an Islamic state.[100] Since then Bangladesh was slowly moving from the post-liberation ideology of secularism toward more emphasis on Islamisation. This Islamisation of the Constitution and specifically the amended Articles 8 (1) and 8 (1A) created a barrier for any major initiative to reform the Muslim personal law,[101] which is allegedly under constant challenge by 'secularisation'.

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[99] Kunwar Khuldune Shahid, 'Separating State and Islam'. *The Nation* (10 March 2016) <http://nation.com.pk/columns/10-Mar-2016/separating-state-and-islam> accessed 15 March 2016.

[100] Deniz Kandiyoti, 'Women and Islam: What are the Missing Terms?' Women Living under Muslim Laws (WLUML) (ed), *WLUML Dossier 5-6* (WLUML 1988-1989) 8 <https://essaydocs.org/dossier-5-6-december-1988--may-1989-women-and-islam-what-are-t.html> accessed 15 March 2021. Article 2A ('The state religion of the Republic is Islam, but other religions may be practiced in peace and harmony in the Republic.') was inserted by section 2 of the Constitution (Eighth Amendment) Act, 1988 (Act No. XXX of 1988). See MLJPA (n 98) 2.

[101] The Law Commission of Bangladesh, *Report on a Reference by the Government towards the Possibility of Framing Out of a Uniform Family Code for All Communities of Bangladesh Relating to Marriage, Divorce, Guardianship, Inheritance etc* (The Law Commission of Bangladesh 2005).

Bangladesh, quite unlike Pakistan, has not Islamised its criminal law, however. The main demand of the Islamic fundamentalists, a small but vocal minority, remains the implementation of *sharia*, the Islamic way of life according to the Qur'an and the *sunna* as applied by the Islamic legal scholars in the first and second centuries of the *Hijri* (Islamic calendar), as the sole legal and administrative system of the country. It is a call for return to a presumed 'Golden Age',[102] thereby also a refusal to tackle and address the challenges of the present and to take account of the plural local scenario. On the other hand, modernists have been arguing for a secular legal system, including the application of a uniform civil or family code.[103] In 2005, however, the Law Commission of Bangladesh rejected the idea of a uniform family code for all religions on the basis of Articles 8(1) and 8(1A), thereby refusing legitimation to secularisation.[104] Unsurprisingly, the country is thus still torn between widespread commitment to Islamisation and to Islamic basic values, and the continuing realisation that practice-focused reforms have to tackle the needs of the clearly very diverse traditions, laws and expectations of the people of Bangladesh.

Since Bangladesh stepped back from its original policy of secularism and started the process of Islamisation like Pakistan, especially by changing the secular structure of the state through the 5th and 8th amendments, Jaising quite rightly claimed that the Bangladeshi state, like Pakistan, is constitutionally mandated to interpret laws in the light of Islam.[105] This was so because Article 8 sub-article 1A of the Bangladeshi Constitution articulates, 'Absolute trust and faith in the Almighty Allah shall be the basis of all actions'. However, as we shall instantly see below, there is room for interpretation of what this phrase actually means and how one is to institutionalise an Islamic form of governance that remains conscious of religious, cultural and legal diversities among a huge population of around 167 million.[106] However, this scenario has recently been changed, as shown in the following section.

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[102] The Change Institute for the European Commission, *Studies into Violent Radicalisation; Lot 2 The Beliefs Ideologies and Narratives* (The Change Institute for the European Commission (Directorate General Justice, Freedom and Security) 2008) 37.

[103] Bangladesh Mahila Parishad, *Uniform Family Code* (First Published in 1993, Bangladesh Mahila Parishad 2006); Pereira (n 9); Shahnaz Huda, 'Personal Laws in Bangladesh: The Need for Substantive Reforms' (2004) 15(1) The Dhaka University Studies 103, 126.

[104] Law Commission (n 101). It is believed that behind such a recommendation against the UCC/UFC there were personal reasons too because of the views and input of the then conservative Chairman of the Law Commission, Justice Mustafa Kamal.

[105] Jaising (n 43) 1.

[106] World Population review <https://worldpopulationreview.com/countries/bangladesh-population> accessed 31 November 2021.

2.7. Fifteenth amendment of the constitution: back to secularism?

The Constitution of Bangladesh has undergone seventeen amendments so far. Following the judgment of the Supreme Court in *Bangladesh Italian Marble Works Ltd. v Govt. of Bangladesh and Others*,[107] the fifteenth amendment of the Constitution brought the provisions relating to 'secularism' back into Article 8(1).[108] The fifteenth amendment also put Article 12 of the original Constitution back into place, and it provides a definition of what 'secularism' means or includes in the Bangladeshi context. The fifteenth amendment also reinstates some other important provisions of the original (1972) Constitution, which were previously changed by General Zia by the Proclamations Order I of 1977 and then through the 5th amendment. However, significantly, the fifteenth amendment did not go as far as removing the heavily contested Article 2A, which made Islam the state religion. One could see this as a manifestation of emerging or growing legal realism. Clearly, Islam is the majority religion in Bangladesh.[109] The key issue would be not only to what extent privileging Islam disadvantages members of the other religions, but how the majoritarian position of Islamic values, which was deliberately retained, would impact on governance. In more clear-cut text, the key question becomes to what extent state powers would still be allowed to reform Islamic law provisions and to operationalise a whole legal system in which not only Sunni Muslims of the Hanafi school exist, but also other Muslim groupings (e.g., Shias and the Ahmadis), as well as non-Muslim minorities. Anyway, the removal of clauses (1) and (1A) of Article 8 of the 5th amendment by the revival of clause (1) of Article 8 of the original Constitution has cleared the constitutional barrier for reforming Islamic laws in Bangladesh. However, this does not automatically give free license to change Islamic law altogether without considering other relevant factors. As indicated, this is first of all a power-play over the position of Islamic law in the country as a whole. The current government has made it quite clear through the 15th amendment that Bangladesh is a Muslim majority nation with substantial Muslim and non-Muslim minorities, and thus a plural legal space, in which future reforms may now be anticipated.

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[107] In Writ Petition No. 6016 of 2000, the High Court Division declared the Proclamations (Amendment) Order, 1977 (Proclamations Order No. I of 1977) illegal and without lawful authority, and this has been approved by the Appellate Division of the Supreme Court in the Civil Petition for Leave to Appeal Nos. 1044/09 and 1045/09.

[108] The original clause (1) of Article 8 has been revived, replacing the clauses (1) and (1A) of Article 8, by *the Constitution (Fifteenth Amendment) Act*, 2011 (Act XIV of 2011), s 8. The new clause (original clause of Constitution of 1972) is as follows:

[(1) The principles of nationalism, socialism, democracy and secularism, together with the principles derived from those as set out in this Part, shall constitute the fundamental principles of state policy.]

[109] 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.

The current position appears to be that after the fifteenth amendment, nobody will be able to show the Constitution as a barrier to the reform of Islamic law, like the Law Commission did in 2005 under the leadership of its then Chairman, Justice Mustafa Kamal. Although the provision of Islam as state religion still appears in the Constitution,[110] the fifteenth amendment has been able to restore a secular atmosphere to some extent where the commitment of flying a plurality-conscious *iccher ghuri* (wish kite) has been reaffirmed.[111] At first, Bangabandhu Sheikh Mujibur Rahman, educated at Kolkata (then Calcutta) in West Bengal, desired to fly such a kite by presenting a secular Constitution in 1972, and now his daughter, the sitting Prime Minister Sheikh Hasina has reestablished it to let the *Sonar Bangla* (Golden Bangla) fly her golden kites of development, where four fundamental principles of state policy, namely secularism, socialism, democracy and nationalism,[112] are treated in an article by Menski as the four corners of the wish kite, respectively corners 1, 2, 3 and 4.[113]

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[110] On 28 March 2016, the High Court Division of the Supreme Court of Bangladesh rejected a writ petition for removing the provision regarding 'Islam as the state religion'. According to AFP, 'a special bench of three judges threw out the petition within moments of opening the case and without allowing any testimony'. see AFP, 'Bangladesh Court Rejects Petition to Scrap Islam as State Religion' *The Express Tribune* (28 March 2016) <http://tribune.com.pk/story/1074252/bangladesh-court-rejects-petition-to-scrap-islam-as-state-religion> accessed 15 April 2016. The Court mentioned that the petitioners did not have any right or jurisdiction to make this petition, and thus did not allow the petitioners' lawyer to make arguments on the jurisdiction of his clients. The case was apparently treated as lacking *bona fides*. The provision of state religion, Article 2A, was inserted by an army-autocrat General Ershad in 1988, as mentioned above, through the 8th amendment of the Constitution by his rubber-stamp parliament to secure the support of religious Muslims of Bangladesh and of the oil rich Arab countries. Through this action of the court, now Islam will remain as the state religion in the Constitution and at the same time 'secularism' will continue as one of the four fundamental principles of state policy. The Court took such a stance perhaps to avoid chaos and maintain peace in the country, as Islamist political organisations such as *Jama'at-i-Islami*, *Hefazat-e-Islam* (protectors of Islam) and such other organisations protested against the demand (writ) and called for a movement if the petition is granted, i.e., if Islam's status as the state religion is removed from the Constitution. However, minorities certainly do not like the present position and feel like second-class citizens. The 1988 petition was made by 15 high profile distinguished citizens, ten of whom died a long time ago, including the first famous female poet of Bangladesh Begum Sufia Kamal, a very reputed former Chief Justice Kemal Uddin Hossain, two more renowned former judges of the Supreme Court – Justice KM Sobhan and Justice Devesh Chandra Bhattacharya. For further details, see 'HC Rejects Writ over Islam as State Religion' *The Daily Star* (29 March 2016) <http://www.thedailystar.net/frontpage/writ-challenging-islam-state-religion-rejected-1201132> accessed 3 June 2021; 'Bangladesh Rejects Petition to Remove Islam as State Religion' *The Independent (UK)* (28 March 2016) <http://www.independent.co.uk/news/world/asia/bangladesh-rejects-petition-to-remove-islam-as-state-religion-a6956216.html> accessed 3 June 2021; 'Bangladesh High Court Rejects Petition Challenging Islam as State Religion' *The Times of India* (28 March 2016) <http://timesofindia.indiatimes.com/world/south-asia/Bangladesh-high-court-rejects-petition-challenging-Islam-as-state-religion/articleshow/51583515.cms> accessed 3 June 2021.

[111] Menski (n 109).

[112] Constitution of the People's Republic of Bangladesh 1972, art 8(1).

[113] For a deeper explanation, see Menski (n 109).

The challenge, this means to say, lies in balancing the competing expectations of the various corners, rather than to dictate that one particular corner should rule the others to the exclusion of one or more. As we shall see, such highly significant legal developments also tell us about a growing sophistication in Bangladeshi official understandings of the internally plural concept of 'law' itself. That this growing realisation of the practical importance of legal pluralism upsets Political Islamists is completely unsurprising and explains why very recent legal action is now being undertaken to challenge the 15th amendment through the courts.

3. Bangladeshi legal education and 'textbook knowledge': implication in the Bangladeshi legal system

So far, though, the leading law schools in Bangladesh overlook the growing gap between 'law as taught in those law schools' and 'Bangladeshi law on the ground'. The learning and teaching of 'law' in Bangladesh remains mostly text-book based. Students are hardly taught how to see an issue from different perspectives and there is a lack of analytical study. Law students read or their teachers make them read the various sections or articles of the different Acts or ordinances on a particular issue and they then try to memorise them. They learn the straight-forward application of those sections or articles or regulations directly in a case. The positivism-centred colonial mind-set about law and legal education still plays a dominating role in Bangladeshi legal education. A Bangladesh Law Commission report on the state of legal education in Bangladesh observes:

> [T]he present state of legal education in Bangladesh does not sufficiently respond to the needs of modern society and economy, its reforms have become a national need. Our law curriculum, teaching methodology and institutions that provide legal education have generally remained where they were decades ago, incapable of producing law graduates that our nation needs to cope with its enormous problems.[114]

The author, as a university law teacher in Bangladesh, observes that the students are taught that law is law when the state recognises it as law in a written form, a typical circular definition. Some law teachers, who pursued their Doctoral and Post-Doctoral research at some western universities, have been deeply indoctrinated by state-centric methodology and perceptions and have not been able to appreciate the necessity of locally centred legal pluralism. Thus they, too, have not been able to change the situation of Bangladeshi legal education. Law students, teachers, lawyers and judges learn to define law as 'the command of the

[114] Bangladesh Law Commission, *Review of Legal Education in Bangladesh: Final Report – Executive Summary & Recommendations* (Bangladesh Law Commission 2006) i <http://www.lc.gov.bd/report 84.htm> accessed 20 March 2015.

sovereign.'[115] If they provide an accommodative definition at all, then they quote it from the Constitution, which is '"law" means any Act, ordinance, order, rule, regulation, bye law, notification or other legal instrument, and any custom or usage, having the force of law in Bangladesh.'[116] Although this definition incorporates various elements, this is not an absolutely pluralistic definition, as it may not recognise many social, cultural and religious elements of law as law. It is only what Griffiths would call 'weak legal pluralism', identifying the diversity within state law.[117] When they are asked to elaborate on this definition, students keep repeating that law is something which the state or a statutory authority formally or officially declares or accepts as law, which means the state has to officially accept it as law in a form of either Act, Ordinance, legal rule, or regulation and so on. In Chiba's terminology, we are thus only talking about 'official law' and the intricate interaction with what Chiba called 'unofficial law' and 'legal postulates' is not factored into the picture.[118] There is no real awareness of the practical importance of what Griffiths called 'strong legal pluralism'.[119]

The mind-sets of most of the judges and of law-related people are the same. 'Situation specificity 'is largely absent in their mind; they learn from their respective law schools and their senior colleagues that 'everybody is equal in the eye of law',[120] but they forget that this basic principle has to be read with other relevant provisions which may ultimately help them ensure plurality conscious and situation-specific remedies or justice and equity in a particular case or situation. The same interpretation may not be able to provide justice to and in all situations. Often the law-related people are not able to seek help from the Constitution itself or from other laws (both civil and criminal or other sources), which give judges or decision makers the scope to exercise discretion in many cases, if needed. Otherwise there is a huge scope of interpreting a particular law or legal issue in different ways to provide a situation-specific remedy or justice. The Constitution itself appreciates that 'equality' is not always 'equal'. Hence – as everywhere in law – there are exceptions in this supreme law of the state, which talks about 'positive discrimination 'or about 'making special provision in favour of women or children or for the advancement of any backward section of

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[115] The author, as a former Member of Bangladesh Judicial Service Commission, when used to sit in the national selection board for recruiting judicial officers, namely Assistant Judges and Judicial Magistrates, experienced that hundreds of candidates, who have very good LLB and LLM degrees from the different law schools in Bangladesh, define law in such a positivistic approach and that is what they learn from their law schools.

[116] Article 152(1) of *the Constitution of the People's Republic of Bangladesh*.

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

[118] Chiba (n 46).

[119] Griffiths (n 117).

[120] Constitution of the People's Republic of Bangladesh 1972, art 27. It says, "All citizens are equal before law and are entitled to equal protection of law."

citizens.'[121] The law students and law-related people of Bangladesh should learn more about how to apply such differentiating provisions in practice or in a particular situation to ensure justice. Professor Mizanur Rahman, a prominent law teacher and former Chairman of the National Human Rights Commission in Bangladesh, appreciates the necessity of improving the legal education in Bangladesh:

> [L]egal education must be brought out of the four walls; it has to be made practical and be brought to the problems of the people and society. ... In the present system, law courses are being taught without their practical aspects. ... It's like one is learning how to swim without getting into water. Therefore, in practice one found him- or herself unable to swim in the huge ocean of practical lives and legal complexities.[122]

That the legal education system needs a thorough revision is beyond question, but this is not the main focus of the present article. Law students also need to learn about the application of law in real life. Most researchers in these law schools, however, simply suggest enacting tougher laws, but they do not try to realise why hundreds of existing laws do not work properly. Their suggestions do not work because they are not the reflection of the societal needs and demands, or are just copies of the laws of other countries or of international laws without taking the culture or legal postulates of Bangladesh into account. The law schools thus need to reconsider their education system. Instead of producing only monist positivist lawyers, judges or law-related people, the law teachers in Bangladesh need to create 'highly skillful legal kite flyers … [who may] allow the *iccher ghuri* of Bangladesh to fly safely'.[123] The law teachers in Bangladesh therefore need to learn/appreciate and teach how the different corners of the 'wish kite' interact in a society[124] like Bangladesh and may produce an effective legal system if they are nourished in an appropriate manner.

4. Bangladeshi legal pluralism

By 'legal pluralism 'Griffiths means, following Moore,[125] the presence of more than one legal order in a social field.[126] A plural legal system thus indicates a political formation where more than one system of laws applies.[127] In that case, like all other South Asian countries, the Bangladeshi legal system is also plural as

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[121] Clause (4) of Article 28 of the Constitution.

[122] Mizanur Rahman, 'Law Interview: Legal Education Must be Brought Out of the Four Walls' *The Daily Star* (16 October 2009) Law and Our Rights (190) <http://archive.thedailystar.net/law/2010/10/03/interview.htm> accessed 30 June 2021.

[123] Menski (n 109).

[124] Menski (n 23).

[125] Moore (n 34).

[126] Griffiths (n 117) 1.

[127] Jaising (n 43) 2.

different types of laws such as general law, personal laws, indigenous laws and so forth are in active operation in Bangladesh as official law, unofficial law and legal postulates.[128] The discussion in the sections above has already confirmed that the present legal system of Bangladesh represents all four corners of Menski's kite model.[129]

However, the current domination of legal minds by legal positivism systematically cuts out other forms of law, though they clearly retain immense importance today and cannot be cast aside.[130] There will be little disagreement about this in Muslim-dominated Bangladesh in terms of religion, and thus the influence of natural laws, as is reflected in the muddled debates about the extent of 'secularisation' and its perceived dangers. But what about socio-cultural norms as law, local customs and traditions that people follow and that may be more in line with local *dharma* or *shari'a* than state law?[131] Traditional natural law concepts and socio-legal understandings of law were not simply eradicated when positivism made its star appearance in colonial Bengal centuries ago. On the other hand, Bangladesh has incorporated most human rights principles in her Constitution and ratified many documents of international law.[132] While this is evidence of globalisation also in the field of law, corresponding evidence of globalisation occurs and is also manifest and reinforced when all new laws are now made in the national language, Bangla, rather than English. It remains to be examined to what extent, in the process of translation of various concepts, other changes are being incorporated. Since there is no global agreement on the concept of 'law 'itself, as noted, to expect uniform understandings and operation of numerous key aspects of the legal system is not just myopic, and thus partially blind, but it creates adversarial power struggles rather than to work constructively towards agreed compromises.

Nowadays, all legal systems, whether religious or state-centric, have come under global pressure to secularise or internationalise following a new central moral authority in the form of international laws, globalising human rights discourses, and the like.[133] Bangladesh is not outside of this grip, but as indicated there is also pressure from Islamists, very small in number but strong,

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[128] Chiba (n 46).

[129] Menski (n 1).

[130] ibid.

[131] ibid.

[132] Dinah Shelton, *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (OUP 2011) 102-103; Mohammad Shahabuddin, 'Human Rights and the Law 'in Ali Riaz and Mohammad Sajjadur Rahman (eds), *Routledge Handbook of Contemporary Bangladesh* (Routledge 2016).

[133] Werner Menski, 'The Uniform Civil Code Debate in Indian law: New Developments and Changing Agenda '(2008) 9(3) German Law Journal 211, 226 <http://www.germanlawjournal.com/submissions.php> accessed 23 February 2016.

to implement *sharia*-based legal and administrative system. Bangladesh is trying to tackle all these contesting demands and has certainly retained the pluralistic nature of its legal system as a result. While on the surface, this could be taken to include the endorsement of legal plurality by the Law Commission in 2005 when it refused to recommend a Uniform Civil Code, a different interpretation is possible. The then Chairman, after all, as a former Chief Justice of the country with a track record of Islam-centric decisions was first and foremost concerned to protect Islamic law from state intervention in the shape of modernising reforms.[134]

If we look beyond Bangladesh, we see a rich debate on legal pluralism which is not really taken notice of in Bangladesh itself. Melissaris argues, for example, that law is ubiquitous, it is everywhere.[135] Menski thinks that Melissaris does not make it clear enough that 'law is also manifesting itself as belief or religion, as various forms of natural law, and as normative orders and social norms and customs that a plurality-conscious government cannot ignore.'[136] Law is not only ubiquitous, it contains many roots of conflict at different levels because it is always its own 'other'.[137] One requires much pluralist sensitivity to understand such basic truths, even if the acceptance of pluralism seems just like a ground rule of common sense.

5. Concluding remarks

Due to the positivistic nature of the legal education system and its colonial heritage, Bangladesh is so deeply infected by positivist legal thinking that one does not see or readily acknowledges the relevance and importance of other sources of law. However, in reality Bangladesh has a deeply plural legal system where, as shown above, all four corners of the kite are present.[138] The question then becomes how effectively the stakeholders handle these competing elements to get the best butter out of milk, to use a Bangla image which is typically agricultural. Due to adversarial politics, so much is certain, Bangladesh needs to be more careful and circumspect in managing its legal system.

The above discussion on the existing plurality of legal systems and the resulting problematic issues demonstrates the deeply complex interactions of socio-cultural forces that shape the legal regime and the extent to which, while new forces bring their own influences to bear, the past also continues to exert

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[134] See *Md. Hefzur Rahman* v. *Shamsun Nahar Begum and another* (1999) 47 DLR (AD) 172.

[135] Emmanuel Melissaris, *Ubiquitous Law* (Ashgate 2009).

[136] Werner Menski, 'Identity of a Nation: The Predicaments of Starting on a Wrong Foot' (2009) Lecture at the Seminar on *Let Justice Prevail: Law and War Crimes in Bangladesh* on 19 June 2009 at the House of Lords in London 3.

[137] ibid.

[138] Menski (n 1).

significant influences on the current legal order. Although positivism plays a dominating role, religion/ethics/morality and society are also important elements of the Bangladeshi legal system. International law and human rights have played and still are playing an unavoidable role to design/redesign the country's Constitution and other laws. With so many claimants for a voice at the table of legal management, the key task for the country in terms of operationalising the constitutional guarantees to basic rights for all, while retaining a structure of personal law systems, is clearly a major challenge for the whole nation.