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Contents

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

Biswajit Chanda*

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).

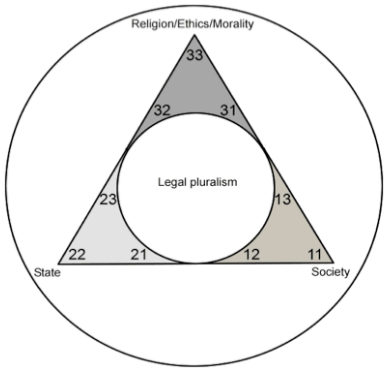
[137] Muslim Family Laws Ordinance, 1961 (Ordinance No. VIII of 1961).

[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.

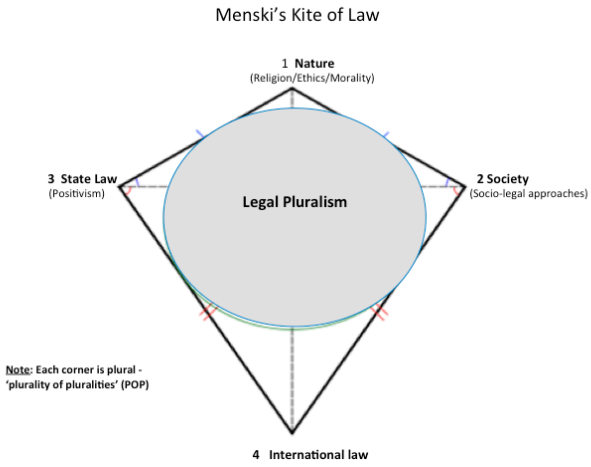
[142] ibid. For reviews on this model, see Maxwell O. Chibundu, Book Review on Werner Menski, Comparative Law in a Global Context: The Legal System of Asia and Africa, 2nd edn, CUP 2006 (2007) 17(8) Law and Politics Book Review 713-719; Jaakko Husa, 'Global Comparative Law: Right Cure for the Wrong Disease?'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

Elderly Persons' Right to Maintenance: A Critical Review of the Existing Legal Regime in Bangladesh and Exploring Potential Ideas from Successful Jurisdictions

Suprobhat Paul*

Abstract: Approximately 8.10% people of Bangladesh are the elderly citizens (over 60 years)[1] and most of them have no sufficient means to afford the basic necessities of life to survive. So, the maintenance of elderly people needs a serious attention both from social and legal perspective. To find legal solution for miserable life of elderly citizens of Bangladesh, this research examines the recent enactment for maintenance of aged parents in Bangladesh. It analyses Hindu and Muslim personal laws along with a comparison with maintenance laws of Singapore, China, and India. It reveals that our maintenance laws are weak in comparison with those of the above-mentioned jurisdictions. On the one hand, it is silent regarding the issues of childless parents and responsibility of the offsprings having no means to support their parents. On the other, it overemphasises the criminalisation of offsprings' failure to maintain their aged parents rather than ensuring proper financial support to the elderly. Therefore, it suggests that legislature should review or reconsider the Act. However, it should be mentioned that only legislative provisions are not enough for the betterment of elderly people, if our social values are not prevalent within the younger. So, the state should take responsibility on its own shoulder to ensure social security for elderly citizens.

Keywords: Ageing problem, elderly person, family law, right to maintenance, and social security.

1. Introduction

To Bangladesh the issue of demographic ageing is relatively new since its demographic transition started recently.[2] The quite impressive growth rate of the aged people[3] juxtaposed with the increasing lifespan of the population leads to a projection that the numbers of elderly people is certain to increase markedly with

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1 Aditya Gaur, 'Demographic Transition of Bangladesh' (2019) 8(12) International Journal of Science and Research 666, 669.

2 M Nazrul Islam and Dilip C Nath, 'A Future Journey to the Elderly Support in Bangladesh' [2012] Journal of Anthropology 1, 2.

3 Jakir Hossain and Saifur Rahman, 'Ageing in Bangladesh: Issues and Challenges' [2000] Centre for Policy Dialogue, Dialogue held at the Senate building of Rajshahi University on December 22, 1999.

time in Bangladesh.[4] Scholars opine that such growing numbers of the elderly people may set down several socio-legal concerns, i.e., their status in family, accommodation, food and other living arrangements, health support, social security and overall well-being of the elderly.[5] To mitigate all these concerns, the first and foremost issue is to ensure the financial support to the aged parents. Unfortunately, the society is witnessing a gradual decrease in this financial support to the elderly over time, and the problem has reached at an alarming situation.

In past, the society and legal system was so structured that the elderly had a great decision-making power in the family. A family was regarded as a unit in ancient Hindu legal system.[6] At the head of the family was the oldest male person, who had absolute authority over the family members and claimed absolute obedience from them.[7] In consequence, offsprings were bound to obey the elderly and to contribute and place their resources at the disposal of elders for prudent handling. Such status and roles of the elderly in the family continued as a social norm until the end of nineteenth century. During the last century this system slowly eroded, and the elderly evidenced abuse and neglect from their offsprings as a consequence. Though there are significant number of cases, where offsprings are unable to maintain their aged parents, the number of offsprings unwilling to maintain the aged are certainly not less than the number of indigent offsprings. As a result, most of the elderly, particularly widows, widowers, and the childless parents suffer from some basic human problems, such as, poverty, hunger, malnutrition, senile diseases, absence of proper medical care, exclusion, deprivation of accommodation, etc.

Available literatures in this field mainly tries to find out the causes responsible for discontinuity of long cultural and religious tradition of looking after the elderly,[8] which created a legitimate expectation that "families and

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[4] Samad Abedin, 'The Demographic Aspects of Ageing in South Asia with Special Reference to Bangladesh: Trends and Implications' (1995) Paper presented at the Conference of CMIG, Calcutta.

[5] Samad Abedin, 'Social and Health Status of the Aged in Bangladesh: Issues and Challenges' (1999) Paper presented at a conference arranged by Centre for Policy Dialogue in Rajshahi, 22 May 1999.

[6] VD Kulshreshtha, *Landmarks in Indian Legal and Constitutional History* (Revised by BM Gandhi, 7th edn, Eastern Book Company 1995) 2-3.

[7] ibid, 3.

[8] Samad Abedin, *The Elderly: Emarging Issuses* (Bangladesh Association of Gerontology 2005); Abedin (n 4 & 5); Islam and Nath (n 2); Hossain and Rahman (n 3); P. Chakrabarti, 'Perception of Old Age Problem in Rural Nadia' (1996) 3 The India Journal of Gerontology 1; Susan Erb, 'A Study of Older People's Livelihoods in Bangladesh' [2011] Help Age International <https://www.helpage.org/silo/files/a-study-of-older-peoples-livelihoods-in-bangladesh.pdf> accessed 06 January 2021; Md. Delower Hossain, 'The Law of Maintenance and its Implementation in Bangladesh: A Comparative Study' (2006) 1(7) Rajshahi University Law Journal 85.

communities will care for their own elderly members."[9] Poverty seems to be the single biggest factor that is weakening the traditional norm of caring old parents in the family.[10] Also, the gradual extinction of joint families is a good reason for deteriorating our old eulogistic traditions.[11] Since daughters are not expected to directly support their old parents, older parents generally live with their sons within the same house. Therefore, living arrangements of the elderly are co-residence with their earning son.[12] Though the moral duty of each and every child to maintain parents under divine law has been accepted worldwide, "the process of development tends to bring rapid changes in social behaviour and institutions, which might have adverse implications for the care and well-being of the elderly persons."[13] Because the protection of parents under divine laws is being violated with the gradual decline in this moral duty and the breaking-up of family bondage, statutory provisions addressing the needs and protection of aged parents are being introduced.

In this perspective, this paper deals with the right to maintenance and support of aged parents under existing statutory and personal laws in Bangladesh. It mainly concentrates on the lacuna of laws and nature of barriers to implement the rights of aged parents in Bangladesh. Also, it seeks to find out the loopholes of existing legal framework in order to realise how this deadlock situation can be removed to ensure maintenance and support for aged parents. To this end, the study undertakes a cross jurisdictional analysis examining the family laws of some selected Asian countries having specific laws on the maintenance and welfare of elderly persons.

2. Elderly people in Bangladesh

Those who are young today in course of time will surely be elderly. Everybody is to be elderly inevitably overcoming the restlessness of time of romanticism of youth one by one, i.e., in the assessment of time everybody is to reach a particular limit. However, there is no specific method to determine the actual number of the elderly people of Bangladesh as there is no particular age limit in respect of definition of old age. In Bangladesh, the elderly people can be defined in four ways. Firstly, the United Nations includes people aged sixty or more into

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[9] Islam and Nath (n 2) 2.

[10] Md. Ahsan Kabir, 'Rights and Care for Elderly People: Bangladesh Perspective' (2006) 1(6) Rajshahi University Law Journal 71, 84.

[11] ibid.

[12] AKM Shafiul Islam, *Social Aspects of Ageing in Bangladesh: A Case Study of Rajshahi City* (Rajshahi University Press 2001) 6.

[13] M Kabir, 'Demographic and Economic Consequences of Ageing in Bangladesh' (1999) Paper presented at a Dialogue held at the Senate building of Rajshahi University, 22 December 1999.

the elderly class in Asia and the Pacific region.[14] Secondly, the Bangladeshi government servants retire at 59 years[15] while, the judges of the Supreme Court and the teachers at the Universities retire at the age of 67 and 65 years respectively.[16] In measurement of upper limit of retirement age, people of 65 and more may be regarded as elderly. Thirdly, a government servant is to take preparation before retirement; that's why the persons yet to retire can be considered as elderly from the time of taking preparatory leave for the retirement. Lastly, the expected average span of life for the Bangladeshi is approximately 64 years. In this respect, the individuals reaching the age of 55 years may be called as elderly.[17] The statistics of various censuses indicate that the rate of increasing the elderly people is faster and more than that of total population. In 1951 the number of people of 55 years or above was 6.5% of the total population and in 1991, it increased to 7.2%. As per Bangladesh Demographics Profile 2013, the percentage of people over 55 years is 10.6% that amounts to 17 million approximately. Study reveals that "the numbers of elderly people will increase six-fold by mid-century, creating a large burden on the health system, especially for chronic illnesses."[18]

Old age, in fact, is a different social problem concerning development and value. In the cultural environment of Bangladesh, the old age case is a significant chapter. The elderly people of Bangladesh do face various types of problems. Among them, economic problem comes first for which they are to select begging for living. In addition, loneliness and deprivation of family and community make an elderly man's life intolerable. Besides, they have the problems of hygiene, treatment, housing, recreation, security etc. Of course, these problems vary according to socio-economic situation and regional position of the country. Usually, the disadvantaged elderly people face several problems.

One of the chief problems of the elderly people of Bangladesh is financial insolvency, for which they face acute problems at every step of their living. Among them, uncertainty of maintaining the daily living, scarcity of resource, lack of job opportunities and above all, gradual degradation of traditional social support system, etc. are principally responsible for their sufferings. For earning money, they are forced to engage themselves in such employments that are not suitable for their physical ability. Though they are not appropriate to their

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[14] Md. Nurul Islam, *Social Action, Social Reform and Social Legislation* (Tasmia Publications 2004) 82.

[15] Public Services Act 2018 (Act No. LVII of 2018) s 43. Under this section, the freedom fighters are entitled to serve the country one year more. Their retirement age is 60.

[16] Constitution of the People's Republic of Bangladesh 1972, art 96; Public University Teachers (Retirement) (Special Provision) Act 2012 (Act No. XXIX of 2012), s 3.

[17] Islam (n 14) 82.

[18] AKM Nurun Nabi, 'Population Challenges for Bangladesh' *The Daily Star* (July 2012) <https://archive.thedailystar.net/forum/2012/July/population.htm> accessed 6 February 2021.

physical state at all, for their living there is no other alternative open to them. At such old age, for earning money, they are forced to pull rickshaws and carts, break bricks, excavate earth and other hard labours. Those who are able to labour physically and take pride in living with the earning in such a way, take part in such professions or occupations. Otherwise, for living they are to depend on the mercy of others or select begging. Those who have no support from family or are unable to earn money for living, face extreme insecurity of money. In villages, the elderly people, particularly issueless widows face the worst economic wretchedness, because economic status in villages is comparatively lower than that in towns. Usually, it is noticeable that the elderly people themselves do not take preparation to cope with economic crisis at old age; they become destitute to cope with the daily necessity and do not get scope to think about their future.

In the final stages of old age, immeasurable condition of housing is more fatal. Inadequacy of proper housing facility is more heart-rending for the elderly people than their financial insufficiency. But in rural areas, housing problem is not so much serious matter. An old man can live with his offspring if s/he has no house. The elderly, who have no issue, can take shelter in their near relatives' house. Generally active old women afford their food and housing facility from any of their relatives and neighbour in exchange of their assistance in some domestic works of that family. But in case of an old man, getting such type of family support is harder than that of an old woman. Housing problem for urban aged people is more acute than the rural aged people. In urban society, getting such type of support from relatives is a rare scenario, if such relative is not very near one. Housing problem also exists for the elderly people having both family and property. In most cases, the offspring are not willing to give housing facility in their own house to their old parents. Rather they are more excited to take the possession of their parents' property. The descendants consider their parents burdensome. Even in some cases, it is seen that they have no definite living space in their own house. The old parents have to move from one child's house to another one, even in some not least, they are forced to take shelter to their sons-in-law.

With the gradual increase of age of the elderly, their immune system decreases day by day. As a result, they are attacked by different types of diseases. Some diseases are specially related with the old age people, such as eyesight, hearing power, memory power, digestive power, etc., decrease; blood pressure and cardiovascular diseases attack; and liver and kidneys become weak. That means the insight activity in all parts of their body becomes easily vulnerable. Besides, some mentionable problems are also seen, such as, sciatica, backbone pain, etc. There are some diseases like stroke, anaemia, asthma, paralysis, scurvy, malnutrition, pneumonia, leukaemia, schizophrenia, etc., which attack only the older people. For this reason, in proportion to their

increasing age, the necessity of proper treatment becomes urgent. In most cases, these problems attack the elderly for want of proper nutrition, unhealthy living condition, and unhygienic environment. So, the magnitude of diseases is more for these people. But the medical facilities are very limited for the old aged and the existing facilities are merely urban based, though they are not easily accessible for the disadvantaged section. As a result, the physical condition of the elderly who live in rural areas is more miserable. They have to die earlier and past their last stage of lives in illness condition.

In this transitional period, the main problem for the Bangladeshi elderly people is psychological one. One who is now old has shown their loyalty to the family and their previous generation. So, they can expect the similar loyalty and respect from their next generation. But they do not get so for the change of time and moral turpitude of the young generation. In their youth, they gave all their belongings to the family integration, and they did it in expectation of loyalty and respect from their descendants in their old age. But the practical phenomenon does not go to that way at all. All kinds of deprivation from society and community result in their mental problem. When the level of disappointment goes up to the highest position, some elderly chooses the way of suicide to get rid of all the problems, which is a very heart-rending graph.

Gradual deterioration of traditional values and customs are the main causes for creating many problems of the elderly people in domestic and social cases. The customs of joint family system, which have been working as a talisman for the elderly since the ancient time, are degrading at present because of the breaking-up of that system. The ever-increasing emergence of nuclear family system has great adverse impact on the safety of the elderly. In nuclear family system, the elderly persons are regarded as extra burden, even by their own family members. Besides, the separate living or staying in the abroad of their offspring always makes the lives of the elderly painful. In this circumstance, the social problem becomes more acute when it is accompanied by above mentioned ones.

3. Right to maintenance as social security of the elderly

Maintenance can be easily defined as a financial support given by one person to another person, who is dependent on the former on any reasonable ground. In general, "Maintenance signifies all those things, which are essential to the support of life,"[19] though in common parlance it is limited to food. It therefore comprehends food, cloths, lodging, toilet requisites, medical attention, and other

[19] DF Mulla, *Principles of Mahomedan Law* (Pak Publishers 1968) 338.

necessaries to life,[20] but not merely necessities of life.[21] Therefore, "maintenance must vary according to the position and status of a person."[22] Generally, persons of four categories are entitled to maintenance. Firstly, descendants include minor children, unmarried daughter, married daughter (if she is poor, but moral obligation) and adult son, if he is indigent. Secondly, ascendants include parents and grandparents. The others are collaterals and wife.

Focusing on the idea that the middle-aged group or working generation should repay the old for help they received as dependent children, Wynne defines social security and other arrangements for the support of the elderly as reciprocity system.[23] As Vladimir Rys observes, the terms "Social Security" mainly denotes:

> the securing of a financial support to take the place of earnings when they are interrupted by unemployment, sickness or accident, to provide for retirement through age, to provide against loss of support by the death of another person and to meet exceptional expenditures.[24]

Accordingly, Barua opined that:

> the concept of social security can be said to be inherent in the traditional joint family system which has been prevalent in our society since ages. With the growth of industrialisation in the wake of World War I, and under the impact of modern economic forces, the joint family system came to be gradually undermined. So, the modern concept of social security attracts attention of the state authorities.[25]

Therefore, modern concept of social security generally refers to social insurance, social assistance, family allowance and a variety of social services designated to reduce economic burdens of a family.[26] Historically people, however, look to their family members, even the religious groups as well, to meet their need for social security. So, the social security of a person can never be imagined without maintenance or financial support from the relatives. For this reason, maintenance or financial assistance should be provided for those, who, during their old age, are incapable of affording the basic needs (such as food, clothing, housing, medical facility, etc.) because of poverty, unemployment, sickness, or disability. To speak with due deliberation, the amount of maintenance should be enough to meet these needs, and therefore, subject to a comprehensive assessment of social

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[20] Faiz-Badruddin Tyabji, *A Handbook on Muhammadan Law* (All Pakistan Legal Decisions 1966) 100; Neil BE Baillie, *Digest of Moohummdan Law* (Premier Book House 1965) 441.

[21] *Aliyar v Pathu* [1988] 2 KER LT 446.

[22] *Kesarkoinverb v C.I.T* [1960] AIR (SC) 1343.

[23] Edward A Wynne, *Social Security: A Reciprocity System under Pressure* (Westview Press 1980) 12.

[24] Vladimir Rys, 'Comparative Studies of Social Security' (1966) 19(1) Bulletin of ISSA 7, 8.

[25] Nayan Barua, *Social Security and Labour Welfare in India* (Ashish Publishing House 1995) 11.

[26] Md. Ali Akbar, *Elements of Social Welfare (*College of Social Welfare and Research Centre 1965) 9.

and financial situation of the parties. At last, it can be concluded that the noble objective of social security to ensure standard lifestyle for a person is never possible but with private financial security or sufficient maintenance and support from the relatives.

4. Elderly persons' right to maintenance in Bangladesh

The exploitation and abuse of aged parents within the families and societies are very rampant. Examples of deprivation of aged parents from their wealth and property and their forced labour in their own house are not rare in our society. They are also deprived of due respect from their descendants, whom they made a huge contribution for in their period of ability. The state alone is not responsible party for such ignorance of the rights of aged parents. The family members, the society, and the victim aged parents themselves are responsible for this state of affairs. But Bangladesh did not have any special legislation for the aged parents before 2013 and the absence of such law was a good ground for the endless sufferings of aged parents. However, it should be admitted that our traditional religious laws were very much positive in this regard. But the lack of proper vigilance among the society members including the victims and the state mechanisms, especially the courts of law result in the non-enforcement of the aged parents' rights under the personal laws.

4.1. Right to maintenance under personal laws

The family related issues in Bangladesh are purely determined by the personal laws of the respective individuals. It is undeniable that maintenance is a matter of personal law. In every religion, this matter has been emphasised merely to ensure better lives for those who cannot support themselves. However, the paper concentrates on Hindu and Muslim laws regarding maintenance of aged parents, since most of the people in Bangladesh belong to two major religions, Santana and Islam. It is the limitation of the paper not to cover the Christian and Buddhist laws on this topic, though some populations of these religions also exist in Bangladesh.

4.1.1. Islamic jurisprudence and Muslim law on maintenance of aged parents

The holy Quran (17:23) has ordered the offsprings to be kind to their parents. Following the above verse, it has been accepted without any difference of opinion that it is incumbent upon a Muslim to maintain his parents and grandparents, if they are in necessitous circumstances.[27] The difference of religion creates no impediment for providing maintenance to parents. The Quran

[27] Muhammad Faiz-ud-din, *A Textbook on Islamic Law* (Shams Publications 2008) 150.

(31: 15) also commands, "make good behaviour with them (parents) in this world." The spirit of this verse is to provide maintenance to the parents even if they are infidels.

Regarding the obedience and maintenance to parents the Prophet Muhammad (peace be on Him) said, "Your father is your middle door. Now it is up to you to protect it or destroy it."[28] He also said, "the pleasure of Allah depends on the pleasure of your father and the displeasure of Allah depends on the displeasure of your father."[29] He further said "both your father and mother are either your paradise or hell."[30] The spirit of these *Hadiths* is that anybody can achieve paradise by providing maintenance and good treatment to his parents. If any Muslim, despite his ability to provide maintenance to his parents, neglects to do so, he then, of course, creates their displeasure, which will lead them to hell. It is, therefore, incumbent upon a son to maintain his parents whatever they are Muslims or not.

Parents have the next position in the right of maintenance after wife and minor children. The liability to provide maintenance to the parents solely rests on the offsprings and no one else shares with the offsprings the obligation of maintaining his parents.[31] However, there are disagreements among the eminent Muslim Jurists as to the extent of such right of parents and preference of mother to father. They have formulated some principles in this regard. Financially affluent sons and daughters are always bound to maintain their poor parents, whether they are Muslims or not and whether they are able to earn anything for themselves or not. And, the liability of all sons and daughters to provide maintenance to their parents is equal.[32] In contrast, when an offspring has both parents, but cannot afford maintenance to either of them, he should take them to live with him so that they may participate in what food he has for himself.

If an offspring is unable to maintain both of his parents, mother has the better right, that is, in this case, mother will be preferred over father.[33] Particularly, the right to maintenance of a poor mother cannot be qualified by financial hardness of the son. To simplify, a son, even being in a straitened circumstances himself, is bound to maintain his poor mother, though she may not be infirm.[34] Whereas, a poor son, is bound to provide maintenance to his father, only if the father is poor and earns nothing. On this issue, Baillie opined

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[28] ibid.
[29] ibid.
[30] ibid.
[31] Baillie (n 20) 465.
[32] BR Verma, *Mohammedan Law* (Delhi Law House 1978) 238.
[33] Baillie (n 20) 466.
[34] ibid.

that "if the son has wife and minor children, all that he can be compelled to do is to bring his father to live into his family, but he is not obliged to give separate maintenance."[35] In other words, the person of limited income can be compelled to maintain his father if he has any surplus. This difference of opinion raises a question whether a poor father, who is forced to do laborious works to earn and survive, is entitled to maintenance.

Under the *Shia* law, the rights of the two parents are equal. Also, the right of the parents and children are equal. Maintenance must in each case be divided equally. But the parents are preferred to grandparents.[36] Parents and offsprings are jointly liable for a person's maintenance. Thus, if a poor man has both father and a son who are not poor, the liability falls equally upon them.

Also, there are disagreements among different schools as to the extent of the liability of son and daughter to maintain the parents. Specifically, *Shaefi* law is undecided on the question whether the heirs are jointly liable for maintenance or only in proportion to their respective shares. In this perspective, Ameer Ali opines that "the liability should be in proportion to the shares of inheritance."[37] Another opinion is that if there is considerable difference in the means, maintenance is to be provided in proportion to the means. For example, in *Shia* law "the liability is apportioned according to the individual means of the persons who are bound to maintain."[38] However, the proposition that the duty to support should be equally incumbent upon son and daughter seems to be better.

Accordingly, grand-children are bound to maintain their grand-parents to the same extent to which the offsprings are bound to maintain the parents, provided that if a necessitous person has got both grand-parents and grand-children, who are not poor, they will be liable to provide maintenance in proportion of one-sixth and five-sixths.[39] But the grand-children of a person would not be liable to maintain if there is a husband, offsprings or parents, who would be under a duty to maintain, even though they may be entitled to inherit. Thus, if a man has a daughter or father and a grandson, the daughter or the father must maintain him. The grandson would not be bound to maintain him even though he is entitled to inherit. But where there are both grand-parents and grand-children, the liability would be of both proportionately to the extent of their shares in inheritance. Thus, if there is a grandfather and a grandson, they must provide maintenance in proportion of one-sixth and five-sixths.[40]

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[35] ibid.

[36] ibid, 102-104.

[37] Syed Ameer Ali, *Mahommedan Law* (Law Publishing House 1965) 431.

[38] Verma (n 32) 239.

[39] Baillie (n 20) 466.

[40] ibid, 468.

According to the *Shaefi* law, maintenance is due from all the descendants together, but they are not equal in all respects. The obligation is on the nearest. If there is equality in the degree of relationship, the obligation is on the persons who will be heirs.[41]

However, in Muslim law, the right to maintenance can be curtailed by gift since a Muslim can validly transfer his property in whole by way of gift, but that is not so in case of will. Yet, any amount payable as maintenance under the order of Arbitration Council or Family Court, if not paid in due time, will be recoverable as arrears of land revenue.[42]

4.1.2. Hindu philosophy and law on maintenance of aged parents

In *Monosonghita/Manusmriti,* also known as the Code of Monu (an important source of Hindu law) Monu has said "the support of the group of persons, who should be maintained, is the approved means of attaining heaven, but hell is the man's portion if they suffer."[43] Therefore a Hindu should carefully maintain that group of persons. Monu has further said "the aged parents, a virtuous wife and an infant child must be maintained even by doing a hundred of misdeeds."[44] So, a Hindu should maintain his/her parents with a view to gaining the spiritual benefits after death. The liability to maintain aged parents is imperative and independent of inherited assets.

The liability of a Hindu to maintain others arises in some cases from the mere relationship between the parties, independently of the possession of the property; while in other cases, it depends altogether on the possession of the property. Thus, the liability of a Hindu to maintain the members of his family is of two kinds, i.e., personal liability and liability dependent on the possession of the property. Among these two forms of liability, to provide maintenance of the aged parents is a personal liability. In *Satyanarayanamurthy v Ram Subbamma* case[45] it was held that the liability to maintain one's parents is clear both from *shastric* law and the decided cases. The Madras High Court in *Subbarayana v Subbakka* case[46] confirmed that a Hindu is under a legal obligation to maintain his aged parents irrespective of that he has inherited any property from father or not.

However, Hindu law makes a clear distinction between a legal and a moral obligation of a person to provide maintenance for certain persons. Where

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41 Verma (n 32) 239.

42 Muslim Family Laws Ordinance 1961 (Ordinance No. VIII of 1961), s 3(3).

43 SK Routh, *Elements of Hindu Law* (Comilla Law Book House 2008) 231.

44 ibid.

45 [1964] AAP 105.

46 [1885] 8 Mad 236.

it is legal, it is necessarily enforceable against him. Where it is only moral, it cannot be enforced; rather it is a matter between him and his conscience.[47] Some persons can claim to be maintained on moral grounds, while others have a legal claim to be maintained. The legal obligation exists only in favour of a limited number of his relations, provided that certain conditions, of course, are fulfilled. In *Savitribai v Laximibai* case[48] it was held that the obligation to maintain these relations is personal in character and arises from the very existence of the relation between the parties. Yet, there is a disagreement as to the right to maintenance of stepmothers from stepchild. The Bombay High Court in *Bai Daya v Natha* case[49] held that a Hindu is under no personal obligation to maintain his stepmother. It is to be noted that the obligation to maintain the stepmother depends upon the condition that the son has inherited available assets from his father. But the Madras High Court in *Audemma v Varadareddi* case[50] held that a stepson, if he inherits his father's estate, he is legally bound to maintain her out of the estate, because his father was legally bound to maintain her as his wife.

Apart from the personal liability of a Hindu, Joint family property is liable for the maintenance of every member of the family. So far the family remains joint, the funds of the family are brought to the common chest and dealt with for the maintenance and support of the family according to its needs. The manager is bound to maintain the members of the family, that is, the coparceners and their descendants. So, if the aged parents and offsprings are members of a joint family governed by the *Mitakshara* law, the aged parents are entitled to maintenance out of the joint family property. Even on the death of aged father, aged widow mother cannot be deprived of the maintenance from joint family property, since under the Hindu Women's Right to Property Act 1937, a widow has in the joint family property the same right as her husband himself had.[51]

In Hindu law, the right to maintenance is a personal right. The right is so secured that it cannot be transferred nor can be attached.[52] Whereas, the arrears of maintenance may be so attached or transferred.[53] Unlike Muslim law, A Hindu cannot dispose of his entire property by gift or by will so as to defeat the right to maintenance, which a person is entitled to under Hindu law.[54] If he does so, the donee or devisee must hold the property subject to the right of maintenance and

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[47] SV Gupte, *Hindu Law in British India* (NM Tripathi Private Ltd. 1947) 1058.

[48] [1878] 2 Bom 573.

[49] [1885] 9 Bom 279.

[50] [1948] Mad 803.

[51] Hindu Women's Right to Property Act 1937 (Act No. XVIII of 1937) s 3. DF Mulla, *Principles of Hindu Law* (NM Tripathi Private Ltd. 1990) 279-372.

[52] *Narbadabai v Mahadeo* [1881] 5 Bom 99.

[53] *Jogendra v Fulkumari* [1900] 27 Cal 38.

[54] *Joytara v Ramhari* [1884] 10 Cal 638.

the right can be enforced against it.[55] The right to maintenance was at one time spoken of as a charge on estate but after the passing of Transfer of Property Act 1882, which has defined a charge that it is not so unless it is fixed and charged on a specific portion of the estate by contract or decree. In *Kuloda Prosad v Jogeshwar* case,[56] the court held that where the maintenance has been made a charge upon the property and the property is subsequently sold, the purchaser must hold it subject to charge. But debts contracted by a Hindu take precedence over the right to maintenance.[57]

However, no hard and fast rule can be laid down as to the amount to be awarded to a person entitled to maintenance. In determining such amount, the court may take into account various factors. So, every case must be determined based on its own facts. Hence, it shall be in the discretion of the court to determine what amount shall be awarded to the aged and infirm parents and in doing so, the court shall have due regard to the circumstances of the given case. The amount of maintenance to be awarded to the aged parents largely depends on gathering together of all the facts of the situation, the amount of free estate, and the conditions of life in addition to their necessities and rights. However, a reasonable view of circumstance, which may possibly change in the future, should be taken into consideration. So, due regard, of course, must be had to the scale and mode of living. In short, it is out of a great category of circumstances that a sufficient and reasonable induction is to be made by a court of law in arriving at a fixed sum. In determining the amount of maintenance, the court of law can take into consideration the factors, which were approved in various legal decisions. They are the means of the person, who is bound to maintain or the value of the estate which is liable;[58] the position and status of the person bound to maintain;[59] the wants and exigencies of a person in the position and rank of the life of the claimants, including not only the ordinary of living but also for religious and other duties of a Hindu;[60] the past mode of life, and conduct of the claimant;[61] the age, habits, wants, and class of life of the parties;[62] and the claims of other persons or other members of the family.[63] In *Devi Pershad v Gunwanti* case,[64] it was held that the extent of the property would be material in deciding whether the wants of the claimant could be provided for consistently with justice

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[55] *Becha v Mothina* [1901] 23 All 86.
[56] [1900] 27 Cal 194.
[57] *Adhiranee v Shona Malee* [1876] 1 Cal 365.
[58] *Tagore v Tagore* [1872] 9 Beng. LR 377.
[59] *Ekradeshwari v Homeshwar* [1929] 56 I.A. 182.
[60] *Rangubai v Subaji* [1912] 36 Bom 383.
[61] *Surampalli v Surampalli* [1908] 31 Mad 338.
[62] *Sobhanadramma v Narasimhaswami* [1934] 57 Mad 1003.
[63] Gupte (n 47) 1084.
[64] [1895] 22 Cal 410.

to other members. But the extent of the property is not a criterion of the sufficiency of the maintenance. So, the very amount should be a question of fact.

4.2. Statutory law on maintenance of parents

The religious laws are archaic in character, and therefore, their unwritten form adds with more problems. So, these laws need to be updated through codification, otherwise the end of justice cannot be reached. For that purpose, the House of Nation has enacted the Maintenance of Parents Act 2013 to implement the rights of the aged parents to get maintenance from their descendants. At the earlier stage, several enactments were made to ensure maintenance for both Hindu and Muslim women. Among them, the Hindu Married Women's Right to Separate Maintenance and Residence Act 1946 deals with the maintenance of Hindu women; and the Muslim Family Laws Ordinance 1961 and the Family Court Ordinance 1985 deal with the maintenance of Muslim women. But it is a matter of great regret that the law makers did not concentrate on the maintenance of parents until 2013.

The Maintenance of Parents Act 2013 has made provisions for maintenance of only natural parents excluding adoptive parents and stepparents. Now both son and daughter are equally bound to provide their parents with maintenance,[65] which includes food, cloths, medical care, housing facility, and giving company. If any parent has more than one child, the offsprings have to ensure their parents' maintenance by mutual discussion.[66] Even if any parent lives separately from their offsprings, then his/her every child has to regularly provide him/her with a reasonable amount of money from their daily or monthly or annual income.[67] The Act has also imposed on the offsprings the duty to maintain the paternal grandparents in the absence of their father. Similarly, they have to provide maintenance to the maternal grandparents in the absence of their mother.[68]

The offsprings must also ensure the living of their parents in a same place and they cannot force their parents to live separately as against their (aged parents) willingness. The aged parents cannot be compelled to live in old age homes as well.[69] Besides, the offsprings are legally bound to take care of health of

[65] Maintenance of Parents Act 2013 (Act No. XLIX of 2013), s 2(b).
[66] ibid, s 3(2).
[67] ibid, s 3(7).
[68] ibid, s 4.
[69] ibid, s 3(4).

their parents and to provide medical service if necessary.[70] In case of separate living of the parents, the offsprings must visit them regularly.[71]

A person responsible to maintain his/her parents, upon the proof of failure to perform the duties prescribed by the Act of 2013, will be liable to be fined up to one lac taka and in default of which punished with imprisonment, which may extend to three months.[72] If wife, husband or child of such person prevent him to do so, they will also be liable to be punished for the same offence.[73] The offence under this Act has been made cognizable, bailable, and compoundable in nature.[74] And this offence is within the jurisdiction of first class Judicial Magistrate.[75] However the court can refer the case to the chairman of Union Council or Mayor of the City Corporation or Pourashova, as the case may be for amicable settlement of the dispute.[76]

Before the enactment of the Maintenance of Parents Act 2013, the issue of maintenance was solely dealt with by the Family Courts established under the Family Court Ordinance 1985. But the Ordinance does not clarify whether the aged parents can file a suit for maintenance in the family courts on the one hand, and on the other, there was a confusion whether the Ordinance be applicable to only Muslims or others as well. However, the supreme court in its several decisions has made it clear now. The High Court Division in *Meher Negar v Mojibur Rahman* case[77] held that the provisions of this ordinance are applicable not only to the Muslim community but also to other communities constituting the populace of Bangladesh. In *Nirmal Kanti Das v Sreemati Biva Rani* case,[78] it was confirmed that a person professing any faith has got every right to bring suit for the purpose as contained in section 5 of the ordinance. Therefore, the ordinance has just provided the forum for the enforcement of some of the rights under various personal laws,[79] in which the poor parents may also file a suit for maintenance from their opulent offsprings.[80]

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[70] ibid, s 3(5).
[71] ibid, s 3(6).
[72] ibid, s 5(1).
[73] ibid, s 5(2).
[74] ibid, s 6.
[75] ibid, s 7.
[76] ibid, s 8.
[77] [1995] 47 DLR 18.
[78] [1995] 47 DLR 514.
[79] *Pochon Rissi Das v Khuku Rani Dasi* [1998] 50 DLR 47.
[80] *Jamila Khatun v Rustom Ali* [1996] 48 DLR 110.

5. Provision for maintenance and welfare of elderly persons in other jurisdictions

The topic of the elderly supports and maintenance was not an issue for discussion in most of the developing countries so long ago. Because a small proportion of population survived beyond middle age, those few were solidly entrenched into the family support system.[81] The changing age structure of population due to demographic ageing requires the change in legal systems as per the demands of old population of the countries. Consequently, various legal systems across the world have responded to the challenge of the time to a varying extent and at varying speed giving recognition of the right to maintenance of aged parents and imposing corresponding legal duty on the descendants.

At the first United Nations World Assembly on Ageing in 1982, some consideration was given to human rights issues.[82] However, no official United Nations document, except a Draft United Nations Declarations on the Rights of Older Persons, has ever identified and specified what rights the elderly have and why they are important. As per article 2 of the Draft, "states shall take effective measures to protect older persons from all forms of exploitation, abuse and marginalisation." The older persons have the right to adequate food, water, shelter, clothing, and health care. So, the states shall take measures to ensure the provision of an adequate income, family and community support, and opportunities for older persons to exercise financial independence and care for themselves in the same capacity as other adults.

Despite the existence of the Universal Declaration of Human Rights, older people are not recognised explicitly under the international human rights laws that legally oblige governments to realise the rights of all people. So, a UN Convention on the Rights of Older Persons is necessary to ensure that older persons realise their rights. In absence of a law universal in character, it is necessary to depend on the domestic laws of some countries for better analysis and understanding of the issue. That's why the paper draws a comparative analytical sketch of the extraordinary legal development regarding the elderly's right to maintenance at domestic level, focusing on Singapore, China, and India. The reasons behind the selection of these countries are availability of data essential for the research and their recent initiatives to enforce the right to maintenance of elderly persons through adopting new enactment. By critically evaluating the ongoing jurisprudential trend from a cross-country perspective,

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[81] Islam and Nath (n 2) 3.

[82] Robert N Butler, 'Declaration of the Rights of Older Persons' (2002) 42(2) The Gerontologist 152, 153.

the study unfolds the nature and extent of the right in these jurisdictions, which in turn may appreciate our laws (both personal and statutory).

5.1. Singapore

To ensure that the aged can in fact continue to rely upon the family and will not be abandoned by their offsprings, the Singapore Parliament passed the Maintenance of Parents Act 1995. Under the Act, an elderly person unable to maintain himself adequately, may apply to the Tribunal for an order that one or more of his offsprings pay him a monthly allowance or any other periodical payment or a lump sum for his maintenance.[83] A parent, whose total or expected income and other financial resources are inadequate to provide him/her with basic amenities and basic physical needs including (but not limited to) shelter, food, medical costs, and clothing, will be considered as unable one.[84] Though only the persons above 60 years of age have been considered as the elderly under this law,[85] a person below the specified age may get such maintenance if the Tribunal is satisfied that he is suffering from infirmity of mind or body which prevents him from maintaining or makes it difficult for him to maintain himself or that there is any other special reason.[86]

Where an applicant is unable to make an application for maintenance order (whether by reason of physical or mental infirmity or for any other reason), such application may be made on his behalf by any member of his family, any person in whose care he resides or any other person whom the applicant has authorised to make such application.[87] Even if that parent resides in care of an old-age home or an organisation, an approved person of that home or organisation may also apply to the Tribunal for a similar order for the purpose of defraying the costs and expenses of maintaining the parent.[88] Besides, the law has made provision for the appointment of adequate number of Commissioner, Deputy Commissioners, and Assistant Commissioners to make an application for maintenance on behalf of an applicant and represent such applicant in any proceedings or appeal.[89] Apart from the legal proceedings, the Commissioners also help parents to organise mediation sessions with their offsprings, to help them reach an agreement on the amount of maintenance or level of support to be given to parents, and to assist parents in exploring other non-legal options such as community resources.

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[83] Maintenance of Parent Act 1995, s 3(1).
[84] ibid, s 3(4).
[85] ibid.
[86] ibid, s 3(5).
[87] ibid, s 11.
[88] ibid, s 3(2).
[89] ibid, s 12(2).

The Act, in lieu of mentioning any specific amount of money to be prescribed in the maintenance order, has empowered the Tribunal to determine the amount of maintenance in the light of the circumstances of the given cases. Hence the Tribunal should make an objective assessment of the facts of a case before fixing the figure of money to be provided as maintenance to an applicant. To be specific, the Tribunal shall have regard to all the circumstances of the case (i.e., financial needs of the applicant taking into account reasonable expenses for housing and medical costs, earning capacity and other financial resources of the applicant and the respondent as well, any physical or mental disability of the applicant, expenses incurred by the respondent in supporting his spouse or children, and financial or other contributions and provisions made by the respondent for the maintenance of the applicant), but not limited to them.[90]

5.2. China

Amid the nation's rapid development, China's traditionally revered elderly, are now a forgotten section of population, and therefore, their stories of abandonment and mistreatment are not uncommon.[91] In response to that, the government of China enacted a law called Protection of the Rights and Interests of Elderly People Act 1996, having nine clauses that lay out the duties of children (both son and daughter) and their obligation to tend to the spiritual needs of the elderly. Along with the legal obligation to provide maintenance for the elderly, they are also bound to care for and look after them.[92] The elderly suffering from illnesses must be provided with medical expenses and nursing care by the supporters.[93] The spouses of the supporters are also under the obligation to provide for the elderly. Such obligations of the supporters have been made absolute irrespective of inheriting the property of the elderly. Even if the children give up their right of inheritance, they cannot refuse to perform their duties of providing maintenance for the elderly on that ground.[94] Neither sons nor daughters cannot seize the houses owned or rent by the elderly. Rather, they can be compelled to properly arrange for the housing of the elderly and refrained from compelling the latter to move to inferior houses.[95] Moreover, the supporters cannot ask the elderly to do any work beyond their ability. However, the sons and daughters may conclude an agreement between themselves on their duty to

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[90] ibid, s 5(2).

[91] Michelle Flor Cruz, 'China Enacts Law Requiring Adult Children to Visit Their Elderly Parents, But Can It Be Enforced?' *The International Business Times* (2 January 2013) <https://www.ibtimes.com/china-enacts-law-requiring-adult-children-visit-their-elderly-parents-can-it-be-1329639> accessed 6 February 2021.

[92] Protection of the Rights and Interests of Elderly People Act 1996, art 10.

[93] ibid, art 12.

[94] ibid, art 15.

[95] ibid, art 13.

provide maintenance for the elderly, subject to approval by the latter.[96] In that case, neighbourhood committees, villagers' committees or the organisations of the supporters, as the case may be, may supervise the fulfilment of the agreement. When the elderly has disputes with their family members over their support, or over housing or property, they may ask the organisations where their family members are employed, the neighbourhood committees or the villagers' committees to mediate.[97] They may also bring a civil lawsuit for maintenance and criminal case if any of his family members steal, defraud, seize, extort or deliberately damage the property of the elderly.[98]

Besides the legal obligation of the children, the State has established old-age insurance system to ensure pensions and other material benefits for the elderly.[99] The local governments are responsible for making the arrangements of financial relief, food, clothing, housing, medical care, and burial expenses for the elderly, who are unable to work and have no sources of income.[100] Different medical insurance systems have been established to provide the elderly with appropriate aid for medical expenses.[101] Besides, private medical institutions are encouraged to provide free treatment of elderly patients. Above all, to meet the needs of the elderly, service facilities and networks for the daily life, cultural and sports activities, nursing, and rehabilitation of the elderly are being gradually installed and established.

5.3. India

"There has been a steady rise in the population of older persons in India, because of an appreciable increase in the life expectancy."[102] But the increasing numbers of elders are not being maintained by their children, as was the normal and traditional social practice. Consequently, they are now exposed to emotional neglect, lack of physical and financial support, and social insecurity.[103] To force the children to maintain their parents so that this vulnerable section of society can get rid of old age sufferings, Indian Parliament passed an enactment for welfare of the Parents and Senior Citizens under the title of The Maintenance and Welfare of Parents and Senior Citizens Act 2007.

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[96] ibid, art 17.
[97] ibid, art 45.
[98] ibid.
[99] ibid, art 20.
[100] ibid, art 23.
[101] ibid, art 26.
[102] Runa Mehta Thakur, 'Philosophy of Maintenance and Welfare of Parents and Senior Citizens Act, 2007 in India: An Appraisal' (2012) 1(4) International Journal of Advancements in Research and Technology 1.
[103] ibid.

A senior citizen including parent, who is unable to maintain himself from his own earning or out of the property owned by him, is entitled to get maintenance from one or more of his children not being a minor. The Act has defined parent as "father or mother whether biological, adoptive or stepfather or stepmother, as the case may be, whether or not the father or the mother is a senior citizen."[104] So, it is clear to say that an adoptive parent can claim maintenance from his/her adopted child under the Act. Similarly, a stepfather or stepmother is entitled to get maintenance from his/her stepchild. Moreover, the definition of children 'including son, daughter, grandson and grand-daughter' has signified two phenomena.[105] Firstly, both son and daughter are equally responsible to provide their aged parents with proper maintenance. Secondly, grandparents can claim maintenance from their grandchildren under this Act. In case of a childless senior citizen, the application can be made against his/her relatives,[106] who is in possession of or would inherit his property after his death.[107] The obligation of the children or relative, as the case may be, to maintain a senior citizen extends to the needs of such citizen so that senior citizen may lead a normal life.

The unique character of this Act is borne by the provisions for application for maintenance. Under section 5 of the Act, an application for maintenance of an incapable parent or senior citizen can be made by any other person or organsation authorised by him. Moreover, the Tribunal may take cognizance *suo motu* as well. In case of neglect or refusal to maintain a parent or senior citizen by children or relatives the Tribunal may order the latter to make a monthly allowance for the maintenance of the former.[108] For every breach of the order, the amount due can be levied by a warrant of the court and in the manner provided for levying fines.[109]

Apart from this legislation, there are two separate enactments which deal with the maintenance of parents. They are the Code of Criminal Procedure (CrPC) 1973, and the Hindu Adoptions and Maintenance Act 1956. Under the CrPC, persons having sufficient means can be ordered by the court to make a monthly allowance for the maintenance of such father or mother, if the court is satisfied that he neglects or refuses to maintain his impoverished parents.[110] Giving a plain meaning to the provisions, the Bombay High Court held that:

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[104] Maintenance and Welfare of Parents and Senior Citizens Act 2007 (Act No. LVI of 2007), s 2(d).
[105] ibid, s 2(a).
[106] ibid, s 4.
[107] ibid, s 2(g).
[108] ibid, s 9(1).
[109] ibid, s 5(8).
[110] Code of Criminal Procedure 1973 (Act No. II of 1974), s 125.

> two circumstances which have to be gone into for the purpose of deciding a claim under the section 125 appear to be that the father and mother must be unable to maintain himself or herself and secondly, the person against whom an order is sought must have sufficient means to maintain the father and mother and yet neglects or refuse to maintain them.[111]

However, "the obligation to maintain an aged and infirm parent is not subject to the fulfilment of parents' obligation to maintain and bring up the children during the childhood of the children."[112] By several case laws, this provision has been so developed that it has a wider application now. The Supreme Court of India has made daughters and sons, married or unmarried, equally responsible to maintain their parents.[113] Besides, recognising the Hindu philosophy of adoption, courts permit adoptive parents to claim maintenance from their adopted child.[114] Similarly "a childless step-mother may claim maintenance from her step son provided she is widow or her husband, if living, is incapable of supporting and maintaining her."[115] The Karnataka High Court, in *Siddanna Kamballi and others v Gangabai* case, [116] reasoned that "to grant maintenance to such helpless stepmothers would be a motherly act and in consonance with the social object of providing maintenance to the destitute widow of the community."[117]

The Hindu Adoptions and Maintenance Act 1956 is applicable to the Hindu community only, whereas the previous laws are equally applicable to all, irrespective of their religious faith and religious persuasions. Under this Act, every Hindu son or daughter, during his or her lifetime, is under obligation to maintain his or her aged and infirm parent. This obligation extends in so far as the parent is unable to maintain himself or herself out of his or her own earnings.[118] But there is no absolute test for determining whether the parent is aged or infirm. It totally depends on the facts and circumstances of the case.

6. Legislative drawbacks in Bangladesh

The evaluation of the provisions regarding the maintenance of aged parents in Singapore, China, India, and Bangladesh in foregoing sections finds some considerable differences between the laws of Bangladesh and those of other countries. Such differences identify a few grey areas in the Maintenance of

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[111] *Pandurang Bhaurao Dabhade v Baburao Dabhade and others* [1980] 82 BomLR 116.

[112] ibid.

[113] *Mrs. Vijaya Manohar Arbat v Kashirao Rajaram and Another* [1987] AIR SC 1100; *Mst. Areefa Beevi v Dr. K. M. Sahib* [1983] CriLJ 412.

[114] *Madhav Dagadudange v ParvatibaiDagaduDange* [1978] CriLJ 1436.

[115] *Kirtikant D. Vadodaria v State of Gujarat and Another* [1996] 4 SC 479.

[116] [2003] CriLJ 2566.

[117] ibid.

[118] Hindu Adoptions and Maintenance Act 1956 (Act No. LXXVIII of 1956), s 20.

Parents Act 2013. The areas should be worked upon so that the Act can safeguard the rights of the elderly to the optimum level.

Firstly, the Act does not make it entirely clear about how the children unable to afford to pay for their parents will be dealt with. If the son is also poverty-stricken, how can he maintain his parents and grandparents? How would the Tribunal adjudicate such disputes? In this situation, the indigent son has no option than to go behind bars. Then, what benefit can such imprisonment of offsprings bring for the destitute parents. In contrast, the dependents on the accused offspring may also be deprived of the maintenance rights. Moreover, delay in the legal proceedings, since this matter will be dealt with by regular criminal courts, will frustrate the noble purpose of this Act.

Secondly, the Act has prescribed fine or imprisonment for the children upon the proof of failure to provide their parents with maintenance. Whereas the order for financial allowance, which could serve the interests of aged parents best, is totally ignored by the law makers. In Singapore, China, and India, the order for monthly allowance has been considered the first and foremost remedy as it can bring desired outcomes and satisfy the objective of law. Though India has also criminalised the failure to provide aged parents with proper financial support, but that remedy is resorted as secondary way to realise the primary relief.

Thirdly, no provision has been made in this Act for the maintenance of stepparents, though the step-children are bound to maintain them under the personal laws. Also, the Act does not address the needs of the childless and indigent aged parents. Notwithstanding the adoption is valid under the traditional Hindu law in Bangladesh, the Act did not include the adoptive parents in the definitions of 'Father' and 'Mother'.

Fourthly, the Act provides that the children have the obligation to provide their parents with a reasonable amount of money from their monthly or annual income. But the Act does neither indicate any standard to determine the reasonable amount of money nor prescribe the minimum amount of maintenance.

Lastly, the big issue is that parents often feel ashamed and become discouraged under various social pressures to take their children to the court for obtaining maintenance or allowance from them. Obviously, their sentiment to their children will prevent them to approach to the court. Moreover, the fear of sentencing their children in default will also weaken them emotionally to do so.

7. Options on the table for legislative reform

After considering whole practical situation and keeping in mind public and social concern for ensuring maintenance and social security of aged parents some

reforms should be made to existing laws. In this regard, Government should first make provisions for setting up supporting organisations, Counselling Centres etc., to serve the psychological and emotional needs of the elderly people, who often spend their twilight years lonely, in a state of negligence and deprivation.

Secondly, Provisions should be made for financial security of childless people by taking measures like group insurance and old age pension at the early age. Or, government should set up sufficient number of old age homes. Otherwise, many of issueless parents will be forced either to beg or to die of starvation and uncared for.

Thirdly, the definitions of 'Father' and 'Mother' should be enlarged to include stepparents and adoptive parents so far as the respective personal laws recognise their rights. So, the definition of Parents may be substituted by the word 'Lawful Parents'.

Fourthly, Provisions should be made for recompensing the victim parents by creating charge on the estates of their respective children or from the money paid as fine by the respective convicted children. In that case the amount of fine needs to be practical so as to meet the needs of the parents. The provision for order of monthly allowance to indigent parents could be better alternative to sending the children into the jails. Whereas, the local government institutions should be activated to take responsibility of the elderly persons, whose children are also in need of money. The enhancement and transparency of social safety nets, i.e., old age allowance, widow allowance, etc., can work as well.

Fifthly, to ensure speedy trial, a separate and special tribunal compared to regular criminal courts should be given the jurisdiction to try the cases brought under this Act. In this regard, the Family Courts established under the Family Court Ordinance 1985 may be vested with this jurisdiction.

Finally, the Act needs more publicity to achieve its real purpose. People are to be sensitised about the agonies of the elderly citizens of our country. Specially, attempts should be made to sensitise the children to support and live with the elderly. Hence, including the ageing problem in the syllabus of school and college will be fruitful to encourage future generation to support their aged parents. Moreover, if public-private partnership is encouraged by engaging NGOs, community organisations, and corporate sectors for this program, it will become cost free and easier for the government to work on it.

8. Conclusion

In Bangladesh, innumerable aged parents are leading an inhuman life, even having one or more well-earned and well-off children. At the end of the day, when all efforts of parents get failed and they have to face a painful experience that their own children are abusing them, they actually do not have anything to

do other than accepting this harsh reality. When a stranger does anything wrong with an elderly person, they may easily accept it. But when their own children start doing injustice with them breaking the expectation of trust, love, and respect, they only remain silent and want to hide it. But this practice should be changed. When someone's moral values completely break down and cause injustice, they should be punished accordingly. No injustice should be allowed to be taken place at any cost, especially towards the elder people who have no one beside them to help. Since a parent can be compelled by law to maintain his/her children and a husband can be forced to support his wife, a child should also be compelled to maintain and support his/her parents.

No doubt, there is lack of adequate social security for the elderly people. Keeping in view the growing problems of the elders, the legislators should earnestly endeavour to come forth with effective reforms for better solution of the problem. Mere change in law is not enough to ensure welfare of the helpless aged people unless the Judiciary plays a pivotal role to put the paper rules into action. What is essential is that the judges also need to be sensitised to the growing menace of which the parents have become victims.

Jurisdictional and Procedural Dilemmas of the Family Courts in Bangladesh

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Abstract: The Family Courts Ordinance (FCO) 1985 was touted as a very significant development in the personal law enforcement regime. It sought to establish a civil court of exclusive jurisdiction to dispose of family suits. The court was supposed not to follow the rules of regular civil process codified in the Code of Civil Procedure (CPC) 1908. Instead, the Ordinance tried to provide a framework of rules that would avoid the protracted CPC process and ensure speedy disposal of the family suits. Additionally, a two-stage system of mediation was introduced in a hope that the avenues of alternative dispute resolution would help reducing case load of the courts and ease the sufferings of the litigants. The FCO also attempted to make the court's decree execution process less cumbersome and more litigant friendly. This paper suggests that the system has failed in almost every aspect of its so-called specialty - exclusivity of its jurisdiction, avoidance of the CPC, the two-stage mediation and efficient and the timely execution of decrees. After explaining how this is the case, the paper concludes with some recommendations touching upon key weaknesses of the system.

Keywords: family court, exclusive jurisdiction, civil procedure, pre-trail mediation, post-trail mediation, execution of decrees.

1. Introduction

The Family Courts Ordinance 1985 (hereinafter the FCO) established special civil courts in Bangladesh to deal with family matters. The family courts are vested with exclusive jurisdiction over five areas of family laws *e.g.*, dissolution of marriages, restitution of conjugal rights, dower, maintenance and guardianship and custody of children.[1] The FCO sought to streamline the procedural and institutional aspects of family laws. Procedure prescribed in the FCO is admittedly a short-circuited version of the regular civil court process found in the Code of Civil Procedure 1908 (hereinafter CPC).[2] The FCO thereby attempted a special arrangement for speedy and efficient remediation of grievances through an approach less formal than that

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[1] Family Courts Ordinance 1985 (FCO), s 5.

[2] Code of Civil Procedure 1908 (CPC).

of the CPC.[3] Prior to the establishment of family courts, these matters were dealt with by regular civil courts in Bangladesh. It was believed that specialization and institutionalization of family law enforcement system would help alleviate particularly the sufferings of poor women who are otherwise vulnerable to the scourges of theocratic, gender-biased, and clientelist attitude of the society.

After around 35 years of its introduction in 1985, this paper analyses the case laws from the Supreme Court of Bangladesh and also the relevant provisions of the FCO to assess whether the law has made to its original promises. It appears that the family court is facing deeply rooted problems in relation to many of its institutional and procedural aspects. Institutionally speaking, the FCO has conspicuously failed to materialize the so called 'special courts' with 'exclusive jurisdiction' in family matters. From a procedural consideration, a more-than-imagined intrusion of CPC into the courts' process has turned the so called 'summary procedure' into a misnomer. Uncharted avenues and insufficient tools to execute the courts' decrees have undermined the grievance remediation process badly. Another of the courts' widely boasted features - alternative dispute resolution – has been clogged with institutional conflicts, psychological inertia and capability deficits.

The paper is organized in six parts. Part 2 deals with the institutional problems of the court with its subject matter specialty and jurisdictional exclusivity. Parts 3-5 analyse the procedural stumbling blocks that prevent the family court from realizing its goal of speedy and summary administration of justice. Part 3 addresses the problematic application of the CPC in the family court process. It analyses the relevant case laws from the Supreme Court that arguably offer incoherent justifications for selective application of the CPC in family courts' process. Part 4 considers the complexities and conflicts within the family court sponsored mediation process. Part 5 the paper tries to identify loopholes of the decree execution process prescribed in the FCO. Each of the parts put forward some specific recommendations in relations to the problems identified. Part 6 concludes the paper.

2. The family courts' (non-) exclusive jurisdiction

Section 5 of the FCO vests in the family court, in plain terms, an '*exclusive jurisdiction'* to try suits relating to five specified family matters namely – restitution of conjugal rights, dissolution of marriages, dower, maintenance and guardianship. In addition, section 3 of the FCO contains a notwithstanding clause which guarantees that provisions of this law would apply despite anything

[3] Zahidul Islam, *Strengthening Family Court: An Analysis of the confusions and uncertainties thwarting the family courts in Bangladesh* (Bangladesh Legal Aid and Services Trust 2006) <https://www.blast.org.bd/content/publications/family_courts.pdf>accessed 22 July 2021.

contained in any other laws relating to civil and/or criminal suits. A study of the legal system of Bangladesh, however, suggests that there are at least four types of family matters in which the regular civil and/or criminal courts still retain jurisdictions. Those are discussed below.

2.1. Civil suits on issues 'relevant to or allied with' exclusive subject matters

There are matters incidentally or substantially related to any of the five principal heads of jurisdiction which are still amenable to other civil courts' jurisdiction. For example, issues like genuineness of a *kabinnama* and legitimacy/illegitimacy of a child are not covered in the FCO. These issues, if raised, would control the outcome of a restitution, maintenance, dower and/or custody suit lodged with family courts. In a series of cases, the High Court Division of the Supreme Court of Bangladesh (hereinafter the HCD) tried to offer a solution by holding that the family courts will have jurisdiction to dispose of all matters '*relevant to or allied with*' those mentioned in section 5, FCO. In crafting the solution, the HCD relied on justifications like 'common sense', 'interest of speedy remedy' or 'implied jurisdiction of the family court', etc.

In *Md Chand Miah v Rupnahar*[4], the defendant husband was facing a suit for conjugal rights. He denied the marriage itself and filed a separate declaration suit in another civil court.[5] The family court found that there was a marriage existing between the parties and accordingly decreed the suit in the wife's favour.[6] In the HCD, the moot question was whether the family court had jurisdiction to determine the existence of marriage. It was argued that since the matter of conjugal rights depended on the existence of marriage itself, the husband's suit in another civil court must be determined first.[7] The HCD held that the family court was competent to dispose of any matter 'relating to or arising out of' the matter before its hand. For the HCD, any view contrary to this would be 'preposterous'.[8]

A similar situation arose in *Shafiqul Huq v Mina Begum*.[9] There, pending the family suit, one of parties questioned the existence of marriage before another civil court. This time also, the question was whether a family suit should be put on hold until the other civil court decides the marriage question.[10] Like the *Chand Miah v Rupnahar* decision, the HCD purposively expanded the family court's jurisdiction over 'related matters.' This time, however, the HCD based its decision on the interest of offering speedy remedy rather than on the exclusivity of family

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4 *Md Chand Miah v* Rupnahar [1999] 51 DLR (HCD) 292.
5 ibid.
6 ibid [2].
7 ibid [5].
8 ibid [14].
9 *Shafiqul Huq v Mina Begum* [2002] 54 DLR (HCD) 481.
10 ibid [2], [6].

court jurisdiction. Since "nobody can surely say when such title suit [in the other civil court] would find the end of the tunnel", the HCD felt that keeping the wife's claim on hold for an indefinite time "would be [like] acting to frustrate the very purpose of the [Family Court] Ordinance".[11]

Next, the HCD applied an implied power argument in *Abul Hashem v Mahmuda Khatun*[12]. There the legitimacy of child, whose maintenance allowance was being claimed in family court, was questioned. Emdadul Hoque J. held:

> In my considered view, section 5 of the [Family Court] Ordinance *impliedly empowers* a family court to decide the issue of legitimacy of child if it arises as part of the decision on guardianship or maintenance.[13] [Emphasis supplied]

While the decisions of HCD in *Md Chand Miah, Shafiqul Huq* and *Abul Hashem* appear consistent, their solution to the problem of multiple and concurrent suits remained partial. None of the three decisions would effectively bar the statutory or common law jurisdictions of other civil courts. Statutory reform or express judicial nullification[14] of concurrent jurisdictions over these types of issues is important for a very important reason. Say for example, situations may arise where such incidental matters could be litigated before a family suit was lodged. Now, the question would be whether the subsequent family suit would put the already pending civil suit on hold or *vice versa*. As per the doctrine of *sub judice*, where there are two proceedings filed over the same cause of action, the later proceeding would remain on hold until disposal of the earlier one. This rule is defined in section 10 of the CPC and applicable to family court cases.[15] A combined reading of *Md Chand Miah, Shafiqul Huq,* and *Abul Hashem* seems to take an exception to this rule and prioritize the family courts' jurisdictional exclusivity. But this assumption is in clear conflict with another precedent of the HCD where the *sub judice* rule was declared binding upon family courts.

In *Abdur Rahman v Shahanara Begum*[16], Mrs Shahanara Begum lodged a petition with civil court seeking permission to sue as a pauper. This was lodged just two months before the enactment of FCO. If the petition was granted, she

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[11] ibid [7].

[12] *Abul Hashem v Mahmuda Khatun* [2012] 64 DLR (HCD) 494.

[13] ibid [41].

[14] To take an example, section 488 of the Code of Criminal Procedure (CrPC) 1898 has been a constant source of confusion in relation to maintenance claims. Section 488 conferred jurisdiction in regular criminal courts to entertain suits for maintenance. In light of section 5 of the FCO (exclusivity of jurisdiction), the Supreme Court of Bangladesh has declared the section 488 jurisdiction of judicial magistrates redundant (*Kawsar Chowdhury v Latifa Sultana* (2002) 54 DLR (HCD) 1755). Later in 2009, the parliament had to omit the section from CrPC.

[15] Section 20 of the Family Courts Ordinance runs as: "Save as otherwise expressly provided by or under this Ordinance, the provisions of the Evidence Act, 1872 (I of 1872), and of the Code except sections 10 and 11 shall not apply to proceedings before the Family Courts.

[16] *Abdur Rahman v Shahanara Begum* [1991] 43 DLR (HCD) 599.

would receive government funding for suing to recover her dower, maintenance etc.[17] After the establishment of family courts, Shahanara Begum filed her maintenance case there. Her lawyers advised her to absent from the hearing of her pauper petition and allow it to be dismissed accordingly. Unfortunately, the family court also dismissed her suit arguing that her case was pending in the civil court before the FCO was enacted. Section 27 of the newly enacted FCO expressly required any pre-FCO era case to continue in their original forum.[18] Her lawyers before the HCD tried to argue that section 27 could not foreclose her scope to choose after the family court's coming into existence.[19] The HCD accepted the argument and held that section 27 was a saving clause for proceedings pending in other courts. It would not prohibit the family court from entertaining a self-same claim in deserving cases. In such cases, the subsequent one of the two pending suits would remain on hold until disposal of the previous one.[20] So instead of dismissing Shahanara Begum's case straight, the family court should have waited to see the result of her pauper petition.

As indicated earlier, this holding of *Abdur Rahman* stands in conflict with *Md Chand Miah, Shafiqul Huq,* and *Abul Hashem* decisions which indicated that the family court would whisk away a regular civil suit on matters incidental or related to its exclusive jurisdiction. Either of these positions leads us to uncertainty and incongruity on the exclusivity of family courts' jurisdiction on the incidental or related matters.

2.2. Criminal suits on domestic violence and adultery charges

There are number of criminal statutes dealing with offenses of bigamy, polyandry, adultery and domestic violence. Those would raise causes of criminal action triable by general or specialized criminal courts under criminal statutes like the Penal Code 1860, the Prevention of Women & Children Repression Act 2000and the Domestic Violence (Prevention and Protection) Act 2010. All of these again are justiciable issues of concern in dissolution of marriage, conjugal rights, maintenance, and guardianship suits before the family courts.

Unlike the simultaneous civil suits on incidental or related issues, there are no judicial or statutory indications that such criminal cases will have to give way to the family suits. While both the suits may lawfully continue in both the forums, the freezing impact will most likely be on the family court proceedings.

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[17] ibid [9].

[18] Section 27 of the Family Courts Ordinance provided that all suits, appeal and other legal proceedings relating to, or arising out of any matter specified in section 5 pending in any Court immediately before the commencement of this Ordinance shall continue in the same Court and shall be heard and disposed of by that Court as if this Ordinance had not been made.

[19] *Abdur Rahman* (n 16).

[20] ibid [9].

This is because the litigants are more prone to vindication through criminal proceedings and likely to adopt every possible dilly-dallying technique to thwart the family court proceeding.[21] Such a scope of forum shopping also affects the alternative dispute resolution process in family courts. Female litigants, for example, are likely to file case under the Prevention of Women and Children Repression Act 2000 against their husband while they also lodge family court claims for realization of dower and maintenance or dissolution of marriage.[22] A husband already arrested and prosecuted under the excessively harsh law of 2000[23] would rarely agree to compromise during the family court's pre-trial and post-trial mediation stages, which are discussed at length below.

2.3. Claims under the Maintenance of Parents Act 2013

The beneficiaries of the family courts' maintenance jurisdiction are unspecified. It has been an established rule that a mother can claim children's maintenance on their behalf.[24] Cases of parents' maintenance, however, remains problematic as before. Before the passage of Maintenance of Parents Act 2013 (hereinafter MPA), *Jamila Khatun v Rostom Ali*[25] decision in the Appellate Division of the Supreme Court (hereinafter AD) allowed the parents to file maintenance suit in family courts. Similarly, poor and disabled relatives, even servants of a destitute woman, were held to be entitled to file a suit for maintenance in the family court. The MPA however has invited a criminal court to the scene. It imposes a legally enforceable burden upon the children to maintain their parents and grandparents upon penalty and punishment.[26] Under the law, parents will have to move to the criminal court of a First-Class Magistrate or Metropolitan Magistrate.[27] It has a notwithstanding clause which is silent on exclusivity rule of FCO section 5.It therefore remains uncertain whether the MPA has cut down the family court's exclusive jurisdiction over maintenance suits.

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[21] For example, in *Saleha Begum* v. *Dilruba Begum* [2001] 53 DLR (HCD) 346, Saleha Begum, the grandmother of a minor, filed application u/s 100 of the CrPC before the Court of Magistrate, obtained a search warrant and took the custody of Amena Akhter while the mother was pursuing her custodial case in the Family Court.

[22] Barrister Quazi Maruf, 'Preventing abuse of law', *The Daily Star, Law and Our Rights* (Dhaka, 23 March 2013) <https://www.thedailystar.net/news/preventing-abuse-of-law> accessed 22 July 2021.

[23] All the offences punishable under the Prevention of Women and Children Repression Act 2000 have been made cognizable, which means the police may arrest anyone almost immediately after the complaint is made (Section 19 of the Act). Though there is time limit to finish investigation, it may be extended by the Tribunal (section 18 of the Act) which means that the accused will have to undergo a prolonged imprisonment even before the investigation is over.

[24] *Bazlur Rahman Sikder v Tahera Begum Shamima* [1998] 18 BLD (HCD) 519.

[25] *Jamila Khatun v Rostom Ali* [1996] 48 DLR (AD) 110.

[26] Rafea Khatun, 'What Do Grown Children Owe Their Parents? A Moral Duty and Legal Responsibility in Bangladesh' (2018) 32 International Journal of Law, Policy and The Family 363.

[27] Maintenance of Parents Act 2013 (Bangla Version), s 7.

2.4. Simultaneous writs on family matters

Section 5 of the FCO does not bar the writ jurisdiction of the HCD on any of the five 'exclusive' family matters. Writ jurisdiction could be availed by any party if they can show that "there is no other equally efficacious remedy".[28] In certain circumstances, a father or mother claiming lawful custody of a child may think of a *writ of habeus corpus* instead of a guardianship suit in the family court. This possibility was materialised in *Farhana Azad v Samudra Ejazul Haque*[29] where a mother - contemplating an indefinite future of her family suit and also facing an immediate risk of her husband taking her minor children away from Bangladesh - moved the HCD with a writ of *habeus corpus* petition.[30] While allowing the writ petition, the HCD relied on *Abdul Jalil v Sharon Laily Begum*[31]. In an almost similar situation, the *Abdul Jalil* court held that a mother aggrieved by unilateral removal of the children from her custody would have the right to move the HCD for immediate custody of the children.[32] While the permissibility of constitutional writs in exceptional and extra-ordinary emergencies do not cast a serious repercussion on the family courts' jurisdiction, possibility of its abuse as a delaying tactic cannot be turned down. It may be argued that family courts could offer "efficacies remedies" through temporary and injunctive orders in such cases. As we turn to the next, this procedural device would appear very problematic.

2.5. Solving the puzzle of "exclusive jurisdiction"

It appears that bringing of a wide range of domestic issues within family court jurisdiction may contribute substantially in alleviating much of concern arising out of additional criminal proceedings between the same parties. Very often spouses involved in family disputes or otherwise commit excesses which constitute criminal offences under the Penal Code 1860, and accordingly, FIRs or complaints are lodged against each other. Sometimes such complaints are the result of ongoing litigation between parties. Such offences, usually or minor in nature including kidnapping, abduction of children from the custody of lawful custodian, illegal detention of wife, threats/criminal intimidation, assault, defamation, and minor bodily injuries, etc. These types of offences may constitute grounds for dissolution of marriage. To this end, the jurisdiction of the family courts could be extended to address disputes relating to inheritance, adoption, registration of

[28] Constitution of the Peoples Republic of Bangladesh 1972, art. 102.
[29] *Farhana Azad v Samudra Ejazul Haque* [2008] 60 DLR (HCD) 12.
[30] ibid [3].
[31] *Abdul Jalil v Sharon Laily Begum* [1998] 50 DLR (AD) 55.
[32] ibid [11].

birth, marriages and death, prevention of dowry and domestic violence to provide an efficacious forum for adjudication of family disputes.[33]

In Pakistan domestic violence became a subject for family courts when the Pakistan Family Court Act of 1964 (hereinafter PFCA) was amended in 2002.[34] Bangladesh has a separate Domestic Violence Act with a criminal approach to the problem. The Act has defined different types of crimes qualifying as 'domestic violence'. While transfer of the crimes of domestic violence to the family court would no doubt require a huge paradigm change in the administration of justice, it is not unusual in Bangladesh to assign the civil court officers in criminal courts. In jurisdictions like the United States, Canada and Australia, the object-oriented use of therapeutic justice in family violence matters has resulted in the establishment of a separate family law jurisprudence.[35] This would require training not only for judges, but also for other actors including the defense counsel, psychologists, police, investigation officers, etc. Training is an integral requirement of any sort of special court system that seeks to be successful.

3. Incoherent arguments for application of the CPC

FCO's summarized trial process aimed at facilitating dispute resolution within the shortest possible delay. Traditional civil court procedure outlined in the CPC being discredited for severely delayed administration of justice, the question for family court was whether it should apply CPC or not. Section 20(1) of the FCO answered it in the negative. It clearly provided that the provisions of CPC, except sections 10 and 11, would not apply in family court proceedings. Unfortunately, the FCO's attempt to replace the CPC regime was piecemeal and inadequate. Its half-hearted attempt to avoid the CPC and at the same time to cherry pick from it has resulted in some very confusing and contradictory decisions by the Supreme Court. Experiences show that the initial question as to "whether" CPC applies in family court later turned into one of "how much". Several factors contributed to this incremental change of paradigm.

First, the FCO's attempt to substitute the CPC was partial rather than full proof. It was silent on a wide range of procedural issues. For example, section 12 provides a simmering version of the CPC rules regarding record of evidence. The family court is given discretion to dispense personal appearance of parties and

[33] Bangladesh Legal Aid and Services Trust, *Report on Legislative Initiatives and Reforms in the Family Laws* (BLAST 2009) <https://www.blast.org.bd/content/publications/ Legislative_Inititiatives_ Family_Law.pdf> accessed 22 July 2021.

[34] The Pakistan Family Courts Act 1964, s 5(2); See also, Muhammad Amir Munir, 'Family Courts in Pakistan: In Search of 'Better Remedies' for Women and Children', (2006) LAWASIA Journal 191.

[35] J. Halley and K. Rittich, 'Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism' (2010) 58 The American Journal of Comparative Law 753.

allow witnesses through affidavit.[36] The court was also empowered not to summon witnesses unless required by the parties.[37] Absent the witnesses, section 12 remained silent on how a document could be proved or whether these could be shown as exhibit or not. This is an important question since a document which is not proved and shown as exhibit will not be accepted in evidence. Absent any clue, the family courts had to apply relevant provisions of the CPC. Secondly, some of the FCO provisions were total imitation of similar rules from the CPC. For example, sections 6 to 19 of the FCO detailing some stages of the court procedure were copied from similar rules of CPC. Also, the procedure of issuance and service of summons[38] was adopted from the CPC, which has long been identified as a major source of delay in civil proceedings.

While dealing with the inadequacy and in some cases the total absence, of alternatives in the FCO, the courts opted to apply CPC. In justifying those attempts, the Supreme Court had to apply many ambiguous concepts like 'ends of justice, 'lack of alternative' and 'inherent nature of a civil court', etc.

3.1. The 'ends/causes/requirements of justice' argument

Understandably, it is a matter of first principle that CPC would not apply in family cases unless it is expressly made applicable by the FCO. As Mohammad Hamidul Haque J. put it:

> The [Family] Court will always be guided by the concept that the FCO is a special law which aims at providing affordable remedies within the speediest possible time frame. Therefore, norms and practices of CPC will be used only when the requirement of justice calls for it.[39]

Over the years, Justice Haque's 'requirement of justice' criteria got supplemented by concepts like 'cause of justice', 'court's power to do complete justice', and 'justice of the case' etc. In *Md Maqbul Ahmed v Sufia Khatun*[40], a petitioner prayed for temporary injunction to restrain his wife from remarrying until disposal of his restitution of conjugal rights suit.[41] It was argued that purpose of the restitution suit would be frustrated, if temporary injunction was not granted and his wife married another person. Problem with this claim was clear. The FCO did not mention anything about temporary injunction. The family court was invited to apply section 141 of the CPC and grant the injunction.[42] Section 141 of CPC provides that the procedure provided in CPC shall be followed as far as applicable

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[36] FCO (n 1), s 12(6).

[37] ibid, s 12(2).

[38] ibid, s. 7(3).

[39] Justice Mohammad Hamidul Haque, *Trial Process: Civil and Criminal* (first published 2016, Universal Book House) 207.

[40] *Md Maqbul Ahmed v Sufia Khatun* [1998] 40 DLR 305.

[41] ibid [2].

[42] ibid [4],[8].

in all proceedings of a civil court. The HCD bench comprising Mahmudul Amin Chowdhury J. held that section 141 CPC could not be applied in family court proceedings.[43] While the court 'understood' the petitioner's agony and 'well-founded' cause of apprehension, it expressed its inability to apply the CPC by way of interpretation, especially when the law makers barred such application expressly.[44] Subsequently, the parliament would address the problem by amending FCO and allowing interim or interlocutory orders by the family courts.[45] Thereby the debate on permissibility of interim order was solved. However, the debates on the applicability of the CPC were not.

In *Azad Alam v Jainab Khatun*[46] the Appellate Division of the Supreme Court refused to allow an amendment of pleadings under CPC rules in view of section 20 prohibition against the application of CPC. The courts had to rethink its position few months later. After the decision in *Azad Alam v Jainab Khatun*, a HCD bench in *Nazrul Islam Majumdar v Tahmina Akhtar*[47] expressed a completely opposite view. In that case, the wife divorced her husband after he initiated a family suit and wanted to bring the divorce to judicial notice of the court. Accordingly, an amendment of plaint was sought by the wife.[48] The HCD held that, omission of the FCO on amending pleadings could be filled up through rules borrowed from CPC - for 'the ends of justice' of course.[49]

3.2. The 'absence of alternative' argument

Occasionally, the Supreme Court resorted to 'absence of alternatives' argument to apply CPC in family court process. Again, case laws in this area suggest that the fill-in-gaps tactic was used in highly inconsistent ways.

In *Yunus Mia v Abida Sultana,*[50] a *pardanshin* Muslim lady, applied for examining herself on commission as per Order 26 of CPC. The other party claimed that there was no scope of issuing such commission under the FCO.[51] The family court issued the commission under CPC and the HCD upheld the decision on the ground that there was no provision in FCO in this regard.[52]

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[43] ibid [7].

[44] ibid [12].

[45] The newly added Section 16A reads as follows: "Where at any stage of a suit, the Family Court is satisfied by affidavit or otherwise, that immediate action should be taken for preventing any party from frustrating the purpose of the suit, it may make such interim orders as it thinks fit."

[46] *Azad Alam v Jainab Khatun* [1996] 1 BLC (AD) 24.

[47] *Nazrul Islam Majumdar v Tahmina Akhtar* [1995] 47 DLR (HCD) 235.

[48] ibid [4].

[49] ibid [8].

[50] *Yunus Mia v Abida Sultana* [1995] 47 DLR (HCD) 331.

[51] ibid [3].

[52] ibid [12].

Question of applying the CPC rules also arose in matters involving the powers of family appellate courts. As per section 17 of the FCO, appeal against the decisions of family courts would lie with the Court of District Judge or Additional District Judge –the designated family appellate courts. In *Hosne Ara Begum v Alhaj Md Rezaul Karim,*[53] a wife stranded in her father's house for a long time filed a suit for recovery of maintenance from her husband. The court partially decreed her case. The court of family appeal set aside the decree and remanded it back for retrial and fresh hearing.[54] Now the wife moved the HCD and sought a revision of the family appellate court's order. Question for the HCD was whether the family appellate court's decision of remanding the suit back to the trial court was lawful. It was held that the order of remand was illegal. Section 17 of the FCO did not expressly endorse such power in family appellate court.[55] This argument again is problematic because section 17 of the FCO is almost silent on the powers of family appellate court. Section 17 deals with time-limit for disposing an appeal, the form and documents to be submitted with the appeal bundle, and the way the trial court, i.e., the family court would comply the decision of family appellate court. Absent any guidelines on the way of dealing the appeal itself, the HCD's decision was confusing.

The problem resurfaced more acutely in *Saleha Begum v Dilruba Begum*.[56] The family appellate court's decision to take evidence by itself was questioned in this case.[57] The petitioner argued that there was no scope under the FCO, or even the CPC, to hold trial of a case or record full evidence of witnesses at the appellate stage.[58] The respondent however argued that evidence taken by the appellate court was necessary for the 'ends of justice'.[59] This time the HCD found itself in a trilemma. First, the bar on application of CPC suggested that the appellate court was not entitled to initiate a fresh and full-scale inquiry by using a CPC rule. Secondly, the *Hosne Ara Begum* decision would suggest that sending the case back or remanding it to the family court would be unacceptable. Thirdly, the family court in this case passed an order within 24 hours and after a single sitting with the parties involved. It was apparent that all the necessary evidence were not taken in the trial which might have resulted in failure of procedural justice.[60] Facing problem, the HCD held that instead of taking the evidence himself, the family appellate court should have sent the case back to the family court.[61] This, however, again is contrary to the *Hosne Ara Begum* decision of the same court. It sounds

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[53] *Hosne Ara Begum v Alhaj Md Rezaul Karim* [1991] 43 DLR (HCD) 543.
[54] ibid [4].
[55] ibid [11].
[56] *Saleha Begum v Dilruba Begum* [2001] 53 DLR (HCD) 346.
[57] ibid [6].
[58] ibid [7].
[59] ibid [8].
[60] ibid [11].
[61] ibid [15].

anomalous to note that an appellate court cannot remand a case back for fresh trial under the CPC, while it may send it back for taking of additional evidence following the same CPC.

3.3. The 'inherently civil court' argument

A third argument used by the HCD in these types of cases is 'Inherent powers of a Civil Court'. This argument confers in family courts the same inherent powers of ordinary civil courts mentioned in sections 141 and 151 of the CPC. Inherent powers would empower it to do things not otherwise regulated by the FCO for the purpose of doing justice among the parties. Though the HCD initially rejected the inherent power argument[62], it could not stop it.

In *Swapon Kumar Gain v Amita Golder*[63] the question was whether taking additional evidence by the appellate court would be permissible. Realizing the failure of the 'absence of alternative' argument noted earlier, the HCD sought to designate the family appellate court as 'an inherently civil court' which could take additional evidence when required.[64] This is a position clearly opposed to the HCD's position in *Hosne Ara Begum*, *Selina Begum*, and *Shafiqul Huq* cases discussed earlier. Given the context, it now appears that family appellate court can freely apply any provision of the CPC in disposing an appeal originating from the family court, while the family courts cannot do such in trying the original suit.

3.4. Clarifying the limits of applying the CPC

The Family Courts' entanglement with the application and non-application of the CPC appears a constant obstacle towards the speedy disposal of family disputes. To alleviate the concerns with unnecessary prolongation of family court process, there could be a bar to appeals against the interlocutory orders of the family courts by amending section 17(1) of the Ordinance. Instead of appeal against such interim orders, a provision for review by the family court itself may be made. Section 14(3) of the Pakistan Family Court Act accommodates such a rule aiming at speeding up the proceedings.

Order V, CPC as currently incorporated[65] need be amended suitably to incorporate modern and electronic service of notices alongside conventional modes of service like the process server of the court, registered acknowledgment due letter and courier services. The family courts currently serve summons either by registered post or by in person delivery by the *Nejarot* Department. In either case, the court waits for 30 days for the parties to appear before the court, which

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[62] *Shafiqul Huq v Mina Begum* [2002] 54 DLR (HCD) 481, [5].
[63] *Swapon Kumar Gain v Amita Golder* [2006] 58 DLR (HCD) 26.
[64] ibid [8].
[65] FCO (n 1), s 7(3).

is no doubt a huge delay in family disputes. As electronic mail (email) is becoming a fast and reliable mode of communication between individuals and businesses throughout the world, service of summons and notices using this medium should be allowed and should be incorporated into the FCO. E-mail service would be particularly important for cases where parties reside abroad.

4. Dilemmas and multifariousness of mediation

Family court's power to attempt pre-trial and post-trial mediation is touted as an important restorative justice feature. Section 10 of the FCO provides for pre-trial mediation once the pleadings are filed with the court. The court fixes a date, ordinarily within thirty days of submission of pleadings, for a pre-trial hearing. On the designated day, the court examines the plaint, written statement (if any) and summary of evidence filed and hears the parties. After ascertaining the issues in dispute, the judge attempts a compromise or reconciliation between the parties. If it fails to reach a compromise, the court proceeds to frame the issues of the suit and fix a date for recording evidence. However, at this stage, the door for mediation is not closed for good. Section 13 of the FCO provides another scope after closing of evidence and before pronouncement of judgment. At this stage, the court would again try to reach a compromise or reconciliation between the parties. If this is a success, a compromise decree will be passed keeping the trial and evidence apart.[66] If this second attempt fails, the court would move to pronounce its judgment and decree.

Though the introduction of this two-tier mediation process was a welcome invention, it revealed over time that there are at least three obstacles in the way of effective mediation. *First*, given the law's failure to make pre-trial mediation compulsory, judges find it unattractive and burdensome to venture the route. There is no recorded history of mediation attempt by family courts during the first one and a half decade of family courts. Mediation attempts started only in 2000 under a pilot project sponsored by the USAID and Bangladesh Legal Study Group.[67] *Secondly*, the Legal Aid Act 2000 as amended in 2013 has created a confusing scope of non-judicial mediation side by side with the family court's one. *Thirdly*, the divorce execution process prescribed in Muslim Family Laws Ordinance1961(hereinafter MFLO)[68] requires yet another post-judgment compulsory mediation.

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[66] The FCO (n 1), s 14.

[67] Zahidul Islam (n 3).

[68] The Muslim Family Laws Ordinance 1961<http://bdlaws.minlaw.gov.bd/act-305.html> accessed 18 July 2021.

4.1. Mediation as a discretionary course

Mediation is neither a compulsory route for the judges nor was a mandatory pre-action protocol for the parties. The FCO and rules made thereunder did not prescribe any procedure for the court to follow.[69] It is left open to the discretion of the judges. Judges working in the family courts are overburdened with other responsibilities in their regular civil matters. They usually find it difficult to spend a lot of their time and efforts in reaching a compromise through counselling, conversation and persuasion. To encourage the judges, a system of awarding professional credits for each successful and unsuccessful mediation attempt was introduced later. Credits so awarded however hardly match the rigor, efforts and time required for such mediation. The situation is worse for an Assistant Judge who is entrusted with the responsibilities of family court in addition to his/her traditional civil court jurisdictions.

4.2. Non-judicial mediation vis-a-vis court sponsored mediation

The Legal Aid Act 2000 (hereinafter LAA) was amended in 2013 to insert a new section 21A which empowers the Legal Aid Officer to mediate in cases whose litigants move to him for legal aid. As per the 2013 amendment to LAA, the district legal aid officer, whose primary responsibility is to decide whether to offer legal aid to the litigant or not, is now empowered to effect mediation in his office and pass an award on that basis. While this additional scope of mediation may help reduce the caseload of the family courts, there are problems not foreseen by the legislators. Consider the situation of a litigant who goes to the legal aid office for financial aid after instituting his/her case in the family court. Had there been any successful mediation at legal aid office, how would the family court react to the resultant award? How could the court enforce the award upon parties who might later change their mind? Neither the LAA nor the FCO is clear on the issue.

Facing the dilemma, one of the Legal Aid officers we talked to suggested that the FCO could be amended to transfer the tasks of section 10 pre-trial mediation to the Legal Aid office. Depending on the success or failure of mediation there, the family court will move with the rest of the trial process.[70] This proposal has both merits and demerits. A family court judge attempting and persuading the parties to mediate might be seen as biased by the party who is reluctant to go for a reconciliation. Legal aid officer on the other hand would be more suitably positioned to create peer pressure and make the parties come to a compromise. Also, when a family court attempts mediation and succeeds in it, it has to pass a compromise decree accordingly. The compromise decree so passed cannot order the parties to withdraw any other criminal or civil cases filed by them in relation

[69] Md. Majibar Rahman, *Muslim Family Laws in Bangladesh* (first published 1987, Aligarh Library) 84.

[70] Interview with Mr Sabbir Mahmud Chowdhury, Joint District Judge, The Judicial Service of Bangladesh and ex-District Legal Officer, Dhaka (date).

to this dispute. Family Court statutorily lacks the power to effect compromise on disputes that may be pending in some other forums. A Legal Aid Officer, on the other hand, is suitably placed to make the parties to come to agreement to withdraw all of the pending proceedings between the parties as part of a single compromise. The award so passed by the Legal Aid Office would help reduce the huge backlog of cases in the judiciary in general.

On the other hand, demerits of legal aid office mediation include, among others, confusions as to multiplicity of mediation, complexities with enforcement of awards passed by the legal aid officer and the problem of co-ordination between the family court and legal aid office. It might possibly further prolong the family dispute resolution process by inviting an extra-player to the field. Another problem with the approach is with the non-mandatory nature of mediation. While a Legal Aid officer may persuade the parties to come to agreement, they may subsequently change their mind and start the process a fresh.

4.3. Judicial mediation vis-a-vis local mediation

As per section 23(2) of the FCO, a decree of divorce between Muslim litigants must be sent by the family court to the Chairman of the Local Arbitration Council. Upon receipt of the decree, the Chairman would proceed as if it was an intimation of divorce by the parties themselves. As per sections 7 and 8 of the MFLO, such types of divorce could be effective only after the passage of 90 days after pronouncement of divorce and communication of notice to the other party. In the meantime, the Chairman of the Local Arbitration Council is obliged to attempt reconciliation between the divorcing parties. The divorce shall be effective only after the passage of 90 days or the failure of reconciliation whichever comes later. While the section 7 of the MFLO was confined to the divorces through extra-judicial act of the parties, it is difficult to understand why the FCO had to redirect some judicially enforced divorces to a local government body. Leaving the confirmation of a judicial decree in the hands of a non-judicial authority seems unusual.[71] Also, the rationale behind a third, or possibly fourth (in cases where the Legal Aid officer attempts one), attempt to reconcile between divorcing parties seems impractical and unnecessarily delaying the otherwise 'speedy' family court process.

4.4. Making the mediation work

As the discussion above shows, the force, effect and efficiency of the family court mediation are doubtful. Some of the problems are ingrained within the Ordinance whereas some others arise from the institutional structures of mediation. As the Ordinance provides no mode or procedure for effecting conciliation, it is left open

[71] Dr. Muhammad Ekramul Haque, *Muslim Family Law Sharia and Modern World* (first published in 2015, London College of Legal Studies South) 485-86.

to the discretion of the judge keeping in mind the peculiar circumstances of each case. The lacuna can be filled by effective training of family court judges in judicial academies where they can learn modern and result oriented ADR techniques. As regards the involvement of Legal Aid officers in the mediation process, some of the drawbacks discussed above might be mitigated by amending the FCO in a way that would transfer the tasks of section-10-pre-trial mediation to the Legal Aid office and also provide strict time-limit and guidelines to be followed in such cases.

To this effect it is vital that the FCO is amended to borrow or incorporate the process of sections 89A and 89B, CPC regarding the modes and modalities of out of the court settlement through alternative dispute settlement process. Section 89A of CPC details the process of appointing a mediator and related mediation process which if successful result in amiable settlement of cases. Section 89B on the other hand facilitates dispute settlement by arbitration under the process of the Arbitration Act 2001. It is also suggested that the requirement of a judicial decree of divorce to go through another round reconciliation attempt at the local level under the MFLO process is a redundancy and hence be scrapped.

5. Deficiency in the execution of decrees

In the FCO, a trial court is designated the executing court for any decree passed by it.[72] This unification of trial and executing court, which is not the case with CPC, has alleviated much of the difficulties associated with filing separate execution suit with a separate executing court. Additionally, had there been any decree for dissolution of marriage, the family court would automatically send a certified copy of the decree within seven days of passing such decree to the concerned Chairman of the Arbitration Council.[73] It means that the litigants are absolved from taking an extra-hassle of applying a fresh for execution of the decree of dissolution. Still the hassle with local reconciliation process remains for them.

On the flip side of the picture however a criticism that execution of monetary decrees in family suits is highly ineffective. Initially it was understood that any money decreed would be executed by the District Judge as a public demand, which has a very protracted process under Bangladesh's age-old Public Demands Recovery Act of 1913. This being proved ineffective, the legislature tried to change the way monetary decrees would be executed. Later in 1989, a substituted section 16(3) of the FCO provided the family court a two-way track to enforce its money decrees.Still, due to some inherent and apparent defects in section 16(3), the execution process remains in chaos and confusion. First, though the forum for trial and decree execution has been amalgamated, the process was not. Separation of the trial and execution process has been a major cause of diluted

[72] FCO (n 1), s 16(4).
[73] FCO (n 1), s 23(2).

efficacy of family court decrees. Secondly, the two-way track – civil and criminal routes - of execution prescribed by sections 16(3), (3A) and (3B) creates more problems than it solves. Thirdly, the imprisonment route of decree execution risks a total avoidance of paying the decretal money. Fourthly, the execution of non-money decrees is left completely in the hands of CPC, the very thing the FCO wants to avoid.

5.1. Problems of separate trial and execution process

In family suits, when it is decreed, the defendant-husband usually fails to pay the money voluntarily and make the petitioner wife, initiate a new execution proceeding. Section 16(3) requires the execution suit to be filed within one year after the expiry of the time frame set by the family court for voluntary payment of decretal money. While the welfare of minors, destitute wives and divorcees would require that the decree be executed at the end of a long drawn legal battle, section 16(3) drags the matter towards yet another round of protracted legal battle.

5.2. Problems of a two-track process

As per section 16(3), a decree may be executed in two ways, i.e., (a) *as a decree for money of a Civil Court* under the CPC, or (b) *as an order for payment of fine made by a Magistrate* under the CrPC. In the first method, the family court shall be considered a civil court and shall have powers of a civil court. In the second method, the family court shall be a criminal court and shall have all the powers of a criminal court. It is, however, unclear from section 16(3) as to who is to decide in which way the decree for money would be executed. Is it the executing court or is it the decree holder/judgments debtor? Which route, civil or criminal, should be prioritized by the executing court?

As per section 16(3A), if the parties and family court chose a civil mode of execution, provisions of Order XXVI, rules 30, 31, 37, 41-49 of the CPC will apply. Under this process, immovable property of the judgment-debtor may be attached and sold in realization of the decretal money. Instructions may be issued to the District Collector to realize the decretal amount by attachment and sale of movable and immovable property of the judgment debtor.

If the court prefers to act like a criminal court and go to imprison the judgment debtor, sections 386 and 387 of the CrPC should apply. There is, however, a problem with imprisonment approach. As per the proviso of section 386 CrPC, if someone undergoes imprisonment for failure to pay fine, new warrant of arrest will not be issued against him for realization of the fine a fresh. Section 16(3B) FCO, on the other hand, permits scope of successive imprisonments in default of every single instalment of payments.

Pitched against the dilemma, it may be argued that the choice of modes should be left with the parties. This, however, would not solve the problem fully. If the parties are to choose, they are highly likely look for imprisonment of the judgement-debtor rather than realization of their monetary entitlements.[74] This tendency, if encouraged, would risk changing the nature of family proceedings all together. As an essentially civil court under the FCO, realization of decretal money should be the priority for family courts and imprisonment should be the last resort.

5.3. Problems of execution through imprisonment

Maximum 3 months' imprisonment as prescribed in section 16(3B) is not favourable for realizing of the decretal money of dower and maintenance. If the amount is bigger, the defendants may choose to suffer three months' civil imprisonment instead of paying the decretal amount. The problem, however, does not end there. Section 16(5) of the FCO provides that the court may direct payment of money in instalments.[75] Considering the scope of imprisoning the judgement-debtor for the whole or any part of the decretal amount under section 16(3B), a defendant may suffer imprisonment for up to three months for failure to pay each and every instalment.[76]

In this regard, the HCD came out with a very strong opinion in *Md. Abdul Mannan Khan v Bangladesh*.[77] It was held in this case that an order of civil imprisonment is meant for a failure to comply with the court's order to pay, not for the failure to pay the decretal amount. The accused would not be allowed to exercise his option by undergoing imprisonment for default in payment of fine. The defaulter could be imprisoned as many times as may be required until his unpaid debt remains outstanding. It will be realized out of his estate in case he dies as a defaulter.[78] Now, it is not being clear as to how many terms a judgment debtor might be imprisoned, he would always carry the risk of consecutive imprisonments for every single instalment of the decretal amount. Thus, he might be imprisoned for an indefinite term until an instalment or the whole of the decretal amount is paid. Even this approach of continuous imprisonment fails to provide a guarantee that the decretal money will be paid to the wife or the children at the end.

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[74] Islam (n 3).

[75] *Md Alamgir v Habeba* Begum [2000] 52 DLR (HCD) 157.

[76] *Maksuda Akhter v Md Serajul Islam* [1999] 51 DLR (HCD) 554, 556-57; *Md Serajul Islam v Maksuda Akhter* [2000] 20 BLD (AD) 84, [4].

[77] *Md. Abdul Mannan Khan v Bangladesh* [2008] 28 BLD (HCD) 121.

[78] ibid [37].

5.4. Execution of non-money decree

The FCO, as it stands now, leaves the execution of non-money decrees in the hands of CPC regulated process. Marking a clear departure from the FCO's declared objective of avoiding CPC, section 16(3C) provides that if the decree is not a money decree (e.g., decree for restitution of conjugal rights, custody and guardianship, etc), such decrees will be executed in the same way as non-money decrees are executed by civil courts. The powers of civil courts in relation to execution of money and non-money decrees are explained in Rules 30-36 of Order XXI of the CPC, 1908.

If, for example, a decree is for a specific movable property, return of some furniture or marital gifts, the property may be seized, kept in attachment and ultimately sold in execution.[79] The problem, however, is that seizure, attachment, execution sale and realization of monetary amount fixed in lieu of the movable item, etc are extremely time consuming. Apart from a separate proceeding of attachment, it involves yet another proceeding for execution sale. Unless the decree holder initiates a fresh proceeding for execution sale, the judgment-debtor may release the attached property after three months of such attachment, without actually paying the money.[80]

5.5. Ways towards the efficient execution of decrees

Execution of decrees has been a major sign of weakness of the family court. Experience tells that when a suit is decreed, the defendant-husband tries to avoid the execution of the decree, which, by law, is required to be filed by the plaintiff/decree holder as an independent execution application. The welfare of minors and widows demands that a separate application for execution should not be required for maintenance decrees. Rather, when the decree is passed, it should automatically be converted into execution proceedings and there should be no break between the end of litigation and the start of execution proceedings, unless the parties have reached an agreement. Family courts should be bound to pass maintenance decrees with modes of execution stated in the final judgment and decree and imposing an obligation on the defendant or judgment debtor to start making payments according to the judgment and decree immediately. Of course, this order would be subject to any appeal. This would lessen the difficulties currently faced by mothers and children in enforcing maintenance decrees. It is suggested that these amendments be introduced together with a change in the language of the present law.

Next, the maximum 3 months' imprisonment as prescribed in section 16(3B) of the FCO is not significant and favorable for realizing of the decretal

[79] CPC (n 2), O. XXI, r. 31.
[80] CPC (n 2), O. XXI, r. 31(3).

money of dower and maintenance. If the amount to be paid sounds bigger, the defendants would rather choose to suffer the three months' civil imprisonment instead of paying the decretal amount. The length of imprisonment therefore should be increased on the basis of the amount of money of the decree.

Another option could be to take surety from the defendant when he first appears in a family suit, in terms of details of his personal movable and immovable property so that if he loses the suit, any decree may be satisfied from such properties. The family court may pass an interim order to preserve and protect any property in dispute in a suit and any other property of a party to the suit, the preservation of which is considered necessary for satisfaction of the decree, if and when passed. Such an order requiring securities would not be subject to appeal or revision.

Additionally, it is also worth consideration to empower the family courts to issue interim injunctions to check a well feared alienation of movable or immovable property by the defendant during pendency of the suit. This will help in ensuring the effective enforcement of maintenance decrees. As has been outlined earlier the HCD has confirmed the scope for family courts to grant interim order, if required by the justice of the case.

As an additional guarantee of successful execution, a separate procedure for direct auction-sale of the judgment debtor's property could be initiated instead of requiring a fresh application from the decree-holder.

The Law Commission of Bangladesh has suggested requiring an amendment in Section 17 of the FCO 1985 which would require submission of 50 per centum of the total decretal amount before any party lodge an appeal.[81] Considering the judgment debtors' unwillingness to cooperate the decree execution process, this suggestion appear worthy of serious consideration.

Decree of restitution of conjugal rights and guardianship and custody of children are distinctive than that of the decree of dower and maintenance. While the FCO mandates the Court to act like a Civil Court executing its non-money decree, separate and specific provisions regarding execution of the decree of restitution of conjugal rights and guardianship and custody of children should be inserted in the FCO.

6. Concluding remarks

As its fundamental lacunas transpire, the FCO has utterly failed to create a special court with any specialty of expertise, procedure and remediation. The family court

[81] Law Commission, *Proposed Bill for Amendment of the Family Courts Ordinance 1985* (Dhaka: Bangladesh Law Commission, 1999) <http://www.lawcommissionbangladesh.org/reports/26.pdf> accessed 22 July 2021.

has not been freed from the protracted stages of ordinary civil suits. The suit which starts with the presentation of a plaint before the Court of Assistant Judge having territorial jurisdiction upon the subject matter of the suit, does not always end with the judgment of the court. It might have to go through the four tiers of judiciary. The trial on appeal often continues indefinitely to the great disadvantage and hardships of the litigants, particularly the poor female litigants.[82] Thus, the final disposal of the suits takes years.

Additionally, the FCO's silence in many areas, insufficient alternatives to the CPC rules and the courts' occasional helplessness in acting like civil courts have adversely affected the family courts' original motivation. Although the FCO states that the provisions of the CPC except sections 10 and 11 shall not apply to proceedings before the family courts, the fact is that the provisions of Ordinance are almost same as they exist under CPC. Thus, the current system is unable to provide effective relief because of substantive and procedural defects surrounding it. Failure of the system not only increases the sufferings of the litigants but also affects the whole society. Had it been successful by this time, the family court could have opened a whole new branch of cross-religious family jurisprudence in Bangladeshi legal system. Reform of the existing family suit resolution system is therefore a pressing necessity. To this end, the court should be made accessible to the poor and illiterate litigants on the first place. Substantive and procedural matters discussed in this study if taken seriously could mark the beginning towards a meaningful reform of the system.

[82] Justice K. M. Hassan, 'A Report on Mediation in the Family Courts: Bangladesh Experience'(25th Anniversary Conference of the Family Courts of Australia, Sydney, Australia, 2001).

Consensual Minimalism: Rape Laws and Rape Law Reform Movements of Bangladesh in Context

Tamanna Aziz Tuli*

Abstract: The zeal of the reformers sometimes causes them to have a misplaced faith in the ability of law to change long embedded cultural norms and the behaviour that manifests those norms.[1] We all are well aware of the loss of rape cases in Bangladesh that starts from the part of the law enforcing agencies to consider the first report and finally ends at the judiciary's failure to convict. Many of us, if not all, are used to evaluating this awful state of rape laws in our country from two aspects. Firstly, the most contested issues in rape cases are procedural law rather than substantive[2] what is popularly said is that it is not the fault of the law rather its poor implementation. Secondly, the extension of the amount of punishment, specifically the death penalty, for the rapist would serve to reduce the number of rape crimes committed. Still, some people believe otherwise and suggest that the definition of rape paves the way to deny justice to victims of sexual offences.[3] The recent movements in Bangladesh to reform the rape laws are more about giving an inclusive definition of rape, mainly focusing on extending the scope of rape law to be accessible to all rape victims. With due respect to all involved in or anyhow connected with the ongoing fight to reform the existing rape laws in Bangladesh, this paper argues that the current consent-based reform movement is conceptually flawed and normatively misguided; therefore, they shall head us nowhere. This paper explores the dynamics of existing rape laws and rape law reform movements to reform these laws in Bangladesh.

Keywords: Active resistance, consent, consensual-minimalism, rape, rape laws reform, sexual intercourse.

1. Introduction

Rape, as defined under the penal laws of Bangladesh, as intercourse that happened by the use of force or against a woman's will, is a notion of common law legislative scheme. Surprisingly, despite several reforms for decades, the rape laws of Bangladesh still worship this traditional common law understanding. The recent rape law reform movements attract considerable interest for this paper because of its promising commitment to move our criminal

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1 George C. Thomas III, 'Realism About Rape Law: A Comment on 'Redefining Rape' [2000] Buffalo Criminal Law Review, 527, 534, 537.

2 Stephen J. Schulhofer, *Unwanted Sex: The Culture of Intimidation and The Failure of Law* (Harvard University Press, 1998).

3 David P. Bryden, 'Redefining Rape' (2000) 3 Buffalo Criminal Law Review 317, 319, 324.

justice system forward in a progressive direction that was unwarranted in the earlier reforms. However, optimism about the recent reforms campaigns declines in a blink of an eye if we look at the basic construction of the reforms that they demand. Despite incorporating some of the praiseworthy initiates, the ongoing reforms are silent about the structural loopholes of the existing laws that typically criminalize only physically violent sexual intercourse and neglect an array of other prevalent forms of sexual violence. This paper argues that the consent-based framework as followed in defining rape under the statutes of Bangladesh are inept at identifying the harm and wrongdoing of sexual abuses that many victims still experienced; therefore, the contemporary rape law reform movement fails to effect any instrumental change in the existing rape laws.

In this article, two distinct tasks are undertaken to be taken care of. First, this article outlines what progress we've made in case of rape laws and what issues are left behind that we still need to address. Secondly, I want to explore the doubt that the ongoing rape law reforms movement represents a well-intentioned intervention as they follow a conceptually flawed structure. To explore these issues within the confines of this article, I shall discuss them in several parts. After this introduction in part I, part II articulates an overview of the major laws related to rape in Bangladesh. Part III portrays a picture of past and present movements to reform rape laws in Bangladesh. Part IV critically appraises the rape laws and the movements to reform those laws as already discussed under part II and part III of this paper and identifies that the statutory laws, interpretation of these laws, and the movement all three are recurring consensual minimalism. Part V discusses marital rape as an example to reveal the conceptual and empirical flaws of uncritical consent-based rape law. Part VI is the conclusion.

2. Overview of the laws related to rape in Bangladesh

In our country, particular provisions of two significant legislation, namely the Penal Code, 1860 and the Women and Children Repression Prevention Act, 2000, deal with the definition and punishment of rape. Section 375 of the Penal Code, 1860 has identified several circumstances under which 'sexual intercourse'[4] shall be criminalized as rape. As per this section, a man shall be punished for committing rape who is involved in sexual intercourse with a woman in any of the following circumstances- (i) against the will of that woman; (ii) without the consent of that woman; (iii) with consent of that woman but when she is compelled to consent because of fear; (iv) with consent of that woman when the consent is obtained by the man fraudulently impersonating him as her lawful husband; (v) if the woman is under fourteen years of age.[5] Whereas, it has been

[4] Under section 375 of the Penal Code, 1860 penetration is enough to constitute sexual intercourse.

[5] Penal Code 1860, s 375.

saved in this section that intercourse between a husband and a wife is not rape even though that intercourse has happened in any of the forbidden circumstances mentioned thereby.[6] In other words, all wives of thirteen years or more are barred by law to bring an action of rape against their husband under the Penal Code.

As outlined in section 357 of the Penal Code, the definition has been carried on without or with some textual modifications in all the penal laws enacted after this Code in Bangladesh. For example, even though the Women and Children Repression Prevention Act is a special law relating to offences against children and women, it does not define rape separate from the Penal Code. Under Section 2, the definition that has been given under the Penal Code has been accepted without any modification.[7] Section 375 of the Penal Code, 1860 contains one exception, one explanation, and five descriptions, where five circumstances of committing rape have been mentioned. Under the exception clause to section 375 and the explanation clause to section 9(1) of the Women and Children Repression Prevention Act, 2000 a shameful exemption has been provided to a married man who had intercourse with his wife against her will or without having consent.

We can identify two critical points from the exception clause of Section 375 of the Penal Code, 1860, and the Explanation clause of Section 9(1) of the Women and Children Repression Prevention Act, 2000. Firstly, the age line under which wives of thirteen or more are presumed not to be harmed from non-consensual or unwilling sex, whatever they endure, rationalizes a condition of sexual coercion. This age line implicates that one day a wife can claim legal remedies against her husband, whereas the next day, she becomes unentitled to bring any legal allegation against her husband. Secondly, in general, rape laws in Bangladesh divide women into spheres of consent according to the nature of the relationship to men. Whether a woman is entitled to claim, far from getting a remedy, depends upon whom she is relative to that accused man, not what has happened to her. This categorization provides a list to men who are open season to them and fated to be abused legally by him.

3. Outlines of the initiatives (past and ongoing) to reform rape laws in Bangladesh

In Bangladesh, there has been an almost continuous process of legislative tinkering to combat existing problems. Since her independence in 1971, Bangladesh has enacted, repealed, and re-enacted several laws against rape as part of its generous efforts to check on, if prevention is impossible, violence

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[6] ibid.

[7] Section 2(e) 'Rape' means rape as defined under section 375 of the Penal Code 1860.

against women.[8] For the first time, a reform was made in 1983 in the name of the Cruelty to Women (Deterrent Punishment) Ordinance, 1983. The Ordinance retained the definition of rape intact in the Penal Code, whereas increased the punishment of rape that might extend to the death penalty.[9] A decade later, another change was initiated by an Act, namely the Repression Against Women and Children (Special Provision) Act, 1995, which replaces the 1983 Ordinance. Like its predecessor, this Act also primarily concentrates on increasing the amount of punishment already has. The Act provides for the death penalty if anyone causes death to any child or woman while committing rape under Section 6.[10] The most significant change came in 2000 by the Women and Children Repression Prevention Act, which repealed and replaced the 1995 Act. Without changes to the definitional level, this Act affirms and continues the definition given under the Penal Code. However, unlike earlier reforms, the Act introduced some measures to provide minimum protection to rape victims. Some measures are like the prohibition on disclosing a rape victim's identity,[11] initiating a camera trial of rape cases if required, and providing an immediate medical examination of rape victims.[12] Nonetheless, this reform's focus was mainly on procedural safeguards and protections, with the substantive issues remaining the same.

The rape law reforms movement has taken a new turn recently. A nationwide rape law reform movement has been going on since 2018 by the name Rape Law Reform Law Campaign. As part of this Campaign, a Rape Law Reform Coalition (RLRC) forum was formed in 2019, comprising the seventeen major Bangladesh organizations.[13] RLRC demands the reforms of existing rape law, identifying the gaps in both the legal and institutional framework that causes the failure of justice to the victims, and issued a 10-points demand[14] formulating reform proposals.[15] The first demand is to reform the rape laws in conformity with the rights both under the constitution of Bangladesh and International Laws to ensure access to justice to all the rape victims without any

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[8] Taqbir Huda, 'The colonial legacy of rape laws' *The Daily Star* (Thu Nov 28, 2019).

[9] ibid.

[10] Whoever rapes any child or woman shall be punished with death or lifelong imprisonment and whoever causes the death of any child or woman in or after committing rape shall be punishable with death.

[11] Women and Children Repression Prevention Act, s 14.

[12] ibid, s 32.

[13] Acid Survivors Foundation, Action Aid, ASK, BMP, BLAST, BNWLA, Bondhu Social Welfare Society, BRAC, Care Bangladesh, JANO, ICDDRB, MJF, Naripokkho, WDDF, We Can, Women for Women, Young Women's Christian Association.

[14] For detail you may have a look at Taqbir Huda, 'Ten reforms we need to end impunity for rape' *The Daily Star* (Tue Mar 9, 2021) https://www.thedailystar.net/opinion/news/ten-reforms-we-need-end-impunity-rape-2057173 accessed 25 July 2021.

[15] 'Rape Law Reform Now Campaign' (Sat Dec 8, 2018) <https://www.blast.org.bd/rapelawreform> accessed 25 July 2021.

discrimination. The second and third demands are related to redefining rape under Section 375 of the Penal Code to cover all forms of non-consensual intercourse that happened with someone regardless of gender, age, and marital status. It has also been demanded that a definition of penetration beyond its conventional gender-binarism should be provided.[16] The fourth demand is about the principle of proportionality, which suggests that criminals should be punished according to its magnitude. Number Fifth and sixth are about the reformation and modernization of the Evidence Act, 1872, abolishing the relevancy of character evidence of the victim. The Seventh and eighth are related to the witness and victims' protection, safeguard, and compensation. Demands number nine and ten are concerned about the institutional reformation necessary to ensure justice.[17] According to Ain-o-Salish Kendra, a pioneer Bangladeshi human rights organization found that between January and September 2020, at least 975 rape cases were reported in Bangladesh leaving behind many cases unreported.[18] A nationwide street demonstration happened for the reformation of the existing rape laws incorporating the death penalty as the highest punishment and ensuring a speedy trial for the ends of justice to the rape victims. On October 12, the cabinet approved the Women and Children Repression Prevention (Amendment) Bill, 2020 introducing capital punishment as the highest punishment for rape convicts instead of life imprisonment. Since the parliament was not in session at that time on the following day, a Bill was promulgated through an ordinance by the president named as the Women and Children Repression Prevention (Amendment) Bill, 2020. The parliament passed the bill on November 17, 2020, coming into force with immediate effect.

Besides activism, even a court-room initiative has been initiated by four renowned members of RLRC[19] against the exception clause of Section 375 of the penal Code, 1860 and Section 9(1) of the Women and Children Repression Prevention Act, 2000 where a man has been exempted from legal culpability despite having non-consensual sexual intercourse with his wife obviously with a definite age line.[20] The writ petition was filed under Article 102 of the Constitution of the People's Republic of Bangladesh has challenged the legality of these two provisions for not complying with its constitutional promises to protect the rights to life, personal liberty, equality, and non-discrimination of all people within its jurisdiction irrespective of sex, gender or status.[21] On 3 November 2020, a Division Bench of the High Court Division called upon the Government to show cause as to why the laws that

[16] ibid.
[17] ibid.
[18] 'Countries with the highest rape incidents' *The Business Standard* (13 October, 2020).
[19] BLAST, Brac, Naripokkho, and Manusher Jonno.
[20] HCD 3 November, 2020 WP 7758.
[21] ibid.

allow for rape of married women aged above thirteen should not be declared to be void and why the respondents should not be directed to take necessary action to repeal these general provisions.[22]

4. A critical appraisal of prevailing rape laws and rape law reform movements: identifies consensual-minimalism

From the criminal law literature of Bangladesh, as discussed above, it is identified that consent, with all its limitations, is understood as a deontic transformer[23] that means consent can make any sexual intercourse permissible that would otherwise be culpable. Thus, sexual intercourse is forbidden because it has been performed without the required consent is not culpable if it is performed with consent. Alan Wertheimer suggests that consent without removing the actual harm that happened to the consent giver negates her right to complain about the harm.[24] Hurd, therefore, has labeled consent as 'moral magic' considering how consent performs a normative power over another person's limits of liberty and duty towards others. [25]

Anyone might get very much ambitious from the overuse of the term consent; nonetheless, till now, it is one of the most contested legal concepts. From random use of the concept of consent in the legal periphery, we get the suggestion that consent is the perimeter of delimiting rape from other permissible sexual intercourses. However, this suggestion gets complex in the absence of any legal definition of consent. To take care of this statutory void, the judiciary stepped in as it was expected and required. Unfortunately, its jurisdiction to interpret has created more problems pushing the idea to conceptually flawed navigation. Dissection of the two major sections from the Penal Code, 1860 and the Women and Children Repression Prevention Act, 2000 reveal that 'against her will' and 'without her consent' are two determining parameters to distinguish rape from other lawful sexual activities. From the material analysis of these sections, it is observed that 'against her will' and 'without her consent' are not conjunctive requirements for an offense of rape to commit; rather, the statutes have used them disjunctively, leaving the scope of discretion for a judge to decide a case without applying force standard or requiring resistance always.[26] Every act done against the will of a person is done without his consent, but an act done without a person's consent is not necessarily

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[22] Naimul Karim, 'Bangladesh's High Court questions ban on marital rape prosecutions' *Reuters* (3 November, 2020) <https://www.reuters.com/article/us-bangladesh-rape-lawmaking-trfn-idUSKBN27J1WZ> accessed 27 July 2020.

[23] Alan Wertheimer, *Consent to Sexual Relations* (Cambridge University Press, 2003) 120.

[24] ibid.

[25] Heidi M. Hurd, 'The Moral Magic of Consent' (1996) 2 Legal Theory 121, 141.

[26] Ragib Mahtab and PsymheWadud, 'An Outline of 'Consent' in Rape Jurisprudence: From General to the Specifics in Bangladesh' (2020) XIX JATI 227.

against the will of the person. The expression an act is done 'against her will' imports that the act is done despite the person's opposition.[27] The idea 'against her will' equates with the demonstration of active physical resistance. Anatomical analysis of section 375 does not direct that resistance requirement is a must to prove rape. However, it is identified that there has been a judicial inclination to interpret these sections in a way that results in a typical minimalist baseline of consent. The judiciary showed their conviction towards the force standard, completely ignoring the passive standard. In several cases, the judiciary has observed that upon being raped, vital parts of the body[28] of the victim 'should have' marks of violence.[29] In one instance, when the victim claimed that she offered resistance to the alleged accused, injuries were searched for because 'before the victim could be subdued and completely overpowered by the aggressor, the struggle should inevitably have left marks on ... her body.'[30] The judiciary took a similar stance was taken in several other cases.[31] In addition to scratches and bruises, in one case, signs that the victim would be likely to experience difficulty in walking and pain in micturition,'[32] with extraordinary marks of violence were sought,[33] when the victim claimed to have been raped by a 'macho hero of youthful exuberance. This is how the judiciary has narrowed the idea of consent to the demonstration of active resistance. Despite having no positive obligation to seek physical force under the law, the court has interpreted force interchangeably with consent. So how can we expect that this narrowest interpretation will successfully be championed against rape within a marital framework?

The courtroom culture plays a contributory role in causing the failure of justice to the rape victims equalizing the absence of active resistance with consent. Therefore, this minimalist interpretation results in an oversimplification that all sexual intercourse is consensual in some reasonably straightforward sense, like if active physical resistance from the end of the woman is absent there. Any circumstances of absence of force, coercion will be sufficient in itself to grant any sexual contact consensual.[34] Constructing consent in this manner protects the man from any subsequent culpability of rape by precluding the woman from bringing any claim against him.[35] It does not detail how individuals experience intersectional discrimination to their ethnicity, caste, disability, location, or

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[27] *Khalilur Rahman v Emperor* (1933) 34 CrLJ 696.
[28] *Akhter Hossain and others v State* (1999) 4 BLC 236.
[29] *Masud Mia v State* (2004) 56 DLR 352.
[30] ibid.
[31] *Abdul Aziz v State* (1997) 2 BLC 630.
[32] *Saleh Muhammad v the State* (1996) 18 DLR 67.
[33] *Mansur Ali v State* (2000) 5 BLC 374.
[34] Alan Wertheimer, *Consent to Sexual Relations* (Cambridge University Press, 2003) 130.
[35] Heidi M Hurd, 'The moral magic of consent' (1996) 2 Legal Theory 121, 133.

status, including statelessness in securing justice for rape.[36] Our judiciary has followed the narrowest interpretation of consensual minimalism in rape cases.

Now we shall explore to what extend reform movements are conceptually different from the general understanding of rape by the judiciary and what substantial changes might happen if those movements succeed. The rape laws of Bangladesh had gone through several reforms in the past, and some major reform movements are ongoing; still, there is a substantive amount of dissatisfaction with these laws. The major reforms related to rape laws in Bangladesh can be stratified into three different waves.[37] Whereas the first two waves are primarily associated with extending the punishment threshold for the rapist and providing minimum protection measures to the victim, it at least introduced minimum victim protection measures, such as discussed under part III. The meager practical effect of this wave is their minor positive impact on victim reporting, charging practices, and conviction rates. However, the focus primarily rests on increasing the threshold of imprisonment, with the substance of the rape offense being left unchanged.

Third-wave initiates to fill up the lacunae at the definitional level. In this wave, states follow different approaches to change the definition of rape to make it more up-to-date. At this level, reformation aimed at becoming more acceptive, being non-discriminatory, clearing marital exemption, withdrawing gender and age barriers, and so on. But the basic framework of the law of rape has remained substantively the same as they demand nothing against the conceptual defaults of existing laws. All reform movements of Bangladesh stop at this point.

Therefore, apparently, Bangladesh's most promising movement will fail to bring any qualitative change if we cannot deal with dilemmas of consensual frameworks. Let's contemplate a hypothetical scenario where the Judiciary of Bangladesh has interpreted consent liberally as most moderate feminists seek by extending the scope of non-consent. They suggest including situations that fall short of actual violence, hoping to eradicate the gender gap. However, Schulhofer argues that expanding the force definition is neither practically workable nor politically realistic, and thus it is bound to fail.[38] This liberal approach is misdirected to be identified as too radical and too conservative at the same time. [39] They are identified as too radical since there is no stopping line. On the contrary, they are too conservative because of their compliance to nothing but the notion of force, which our judiciary interprets in the narrowest terms

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[36] Special Rapporteur on Violence against Women, Its Causes and Consequences <https://www.ohchr.org/en/issues/women/srwomen/pages/srwomenindex.aspx> accessed 29 September 2021.

[37] Stephen J. Schulhofer, 'Reforming the Law of Rape' (2017) 35 Minnesota Journal of Law and Inequality 333.

[38] Stephen J. Schulhofer 'Taking Sexual Autonomy Seriously' [1992] Springer 63, 79.

[39] Schulhofer (n 37) 335-343.

leaving women unprotected against other types of exploitation like socio-legal, cultural, or religious.

5. Marital rape in Bangladesh: a possible worst example of consensual-minimalism

Consent, as understood traditionally, disregards the affiliation its interplay with culture, religion, existing relational dynamics, and the prevalent economic inequality, therefore, overlooks the surrender of a Muslim wife's sexual autonomy to meet a prescriptive standard of piety where a wife is made to believe that to that's the way of being certified as a good Muslim woman.[40] Women, therefore, agree to those sexual intercourses they don't initiate, want or desire, but still voluntarily agree to.[41] Being voluntary, these are legitimate sexual intercourses. How does consensual minimalism accommodate a situation within its legal periphery when a woman believes it is her obligation, being influenced by religion, culture, or social stereotypes, to satisfy the husband physically? To what extent consensual minimalism might be accessible for these women? This part of the paper examines the theoretical limitations of the expression consent itself with the help of some real life cases.

'Sex is a husband's right and co-operative towards my husband's need is one of my religious duties as has been mentioned in Qur'an- Hadith. I even feel guilty about not being a good wife if unable to fulfill my religious duty.[42] This case refers to sexual intercourse that is not desired but driven by a religious imperative and cultural ethics that requires participation in sexual activities as a condition to be included in a high-status group 'good wives.'[43] Therefore, how consensual minimalism encounters these religious beliefs that result in a woman routinely submitting to have sex with her husband without desiring it? [44]

'It happened enormous times with me when despite my un-wanting, I had to intimate with my husband because I know if I would disagree next morning, he would send me away to my father's home or have to spend my whole life having Satin. The practical consequence of divorce takes precedence to any sexual violence that happened to me.'[45] Many women accept un-pleasurable sex for maintaining a relationship she has an emotional attachment with.[46] It is relevant to mention that Shaiah Law allows a male to marry four wives at a

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[40] Zohreh Ghorashi, Mohammad Najafi & Effat Merghati Khoei, Religious teachings and sexuality of women living in Rafsanjan: A qualitative inquiry (2017) 15 IJRM 771, 780, 788.

[41] ibid.

[42] Interview with Shafia khatun, domestic worker (Arunapalli, Savar, 4 May 2021).

[43] Robin West, 'Sex, Law and Consent' in Franklin G. Miller and Alan Wertheimer (eds), The ethics of consent (OUP 2010).

[44] ibid.

[45] Interview with Razia Begum, baby sitter (Arunapalli, Savar, 4 May 2021).

[46] ibid.

time.[47] It is needless to say that the Muslim Family Laws Ordinance (MFLO), 1961[48] has permitted polygamy only with some limitations like a prior permission from the Arbitration Council[49] is required if a man desires to remarry in the existence of a marriage. In such a circumstance, his husband's threat of a second marriage can easily manipulate an unwilling wife to consent. Nonetheless, this compulsion would successfully constitute this intercourse as consensual within the existing legal framework of Bangladesh.

'He is the breadwinner of the family. So, what else can I do to please him sexually even if I am not wanting? So, it's been my fate that he will come to bed at night and I've to have sex with him. If I even dare to deny him, he will divorce me without having a second thought. Neither I do anything, nor will my brother or anyone from my father's home bear my expenses. I would have died from hunger.'[50] Again, divorce law in Bangladesh allows the husband to orally divorce his wife without showing any just cause giving her maintenance of three months of obligatory iddat and having no equally affordable, if not a better alternative, toleration of abuse becomes the only option. The existing legal framework equated her tolerance with consent and exempted the husband from criminality. Robin west has referred to this 'commodified sex' as unwanted, un-pleasurable sex that is not coerced but is a part of a trade for money or in-kind necessities.[51] Some people argue that this sexual intercourse in consideration of social and economic security is reciprocal, and virtually all consensual sex is reciprocal since each party consents because they expect to be better off by their standards and values.[52] On an unsophisticated understanding of the reciprocity model, their claim might seem right so. A sophisticated sense of reciprocity does not expect the parties are benefited in terms of their prima facie values and preferences, but also that those values and preferences have themselves been subjected to a process of personal critical reflection.[53] Thus, the fact that a woman tolerates her husband and has intercourse in consideration of maintenance fails to render intercourse permissible unless she has 'endorsed' these preferences and

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[47] Sura An-Nisa "If you fear that, you will not deal fairly with orphan girls you may marry whichever another woman seems good to you, two, three or four. If you fear that you cannot be equitable to them, then marry only one."

[48] Under section 6(1) of the MFLO, No man, during the subsistence of an existing marriage, shall, except with the previous permission in writing of the Arbitration Council, contract another marriage.

[49] An Arbitration Council is a body that is constituted with the local chairman and the representatives nominated by previous wife.

[50] Interview with Rina Begum, housewife (Tarabari, Tangail, 16 July 2021).

[51] Robin West, 'Sex, Law and Consent' in Franklin G. Miller and Alan Wertheimer (eds), *The ethics of consent* (OUP 2010).

[52] Vanessa E. Munro, 'Concerning Consent: Standards of Permissibility in Sexual Relations' (2005) 25 Oxford Journal of Legal Studies 335, 342.

[53] West (n 51).

values.[54] Alternatively, unless she has hitherto reconciled her providing sexual services in exchange for maintenance as a coherent aspect of her self-identity and life-plan.[55] Therefore, variation Standards of permissibility in the sexual relations approach would render the intercourse that occurs impermissible if a woman's experience of self-alienation reflects an absence of welcomeness and critical reconciliation between her immediate choices and a more profound sense of personal values. [56]

'What shall people say if I disclose that my husband forces me to get intimate with him every night, and will it increase the honor of my family? Not really. It's not that we can do anything with our family's honor once we are married to some other guy.'[57] Even the notion of shame of the individual's family and community impacts how the consent is given. Besides self-interest, there are often other interests such as those of the individual's family, and the community at stake also plays a vital role for some women. A sensitive understanding of the impact of culture might reveal it that notion of self-interest acts for someone who has a conviction towards community.[58]

None of the above instances would be recognized as rape under the present law of Bangladesh since they don't fall under any of the circumstances mentioned under the Penal Code. Here for some women, sex is about the husband's pleasure; few internalizes sex as an obligation to be upgraded as a socially or culturally nominated class 'good wives' some women tolerate sexual abuses as considering maintenance, necessities, better lifestyle. Women's narratives revealed not any single rather multi-dimensional aspects of sexual behaviors and in profoundly messy contexts, within which gender power dynamics, socio-economic stratifications, inter-personal relations, and contradictory impulses of desire often coalesce.[59] This construct constrains both our substantive decisions and our perception of the options available to us to choose from. Only the most abstract and detached understanding of sexual autonomy can ignore this reality, and yet, once this fact is acknowledged, the standards against which voluntariness and harm are to be evaluated become both complex and contested.[60] What is crucial here is that law could not

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[54] Ronald Dworkin, 'Foundations of liberal equality' in G. Peterson (ed), *The Tanner Lectures on Human Values* (University of Utah press 1990).

[55] ibid.

[56] Vanessa E. Munro, Concerning Consent: Standards of Permissibility in Sexual Relations (2005) 25 Oxford Journal of Legal Studies 335, 337.

[57] Interview with Akifa Zahid, student (Tangail, 28 July 2021).

[58] Aisha Gill, 'Violence against women in South Asian communities: a culture of silence' in Clare McGlynn and Venessa E. Munro (eds), *Rethinking Rape Law* (Routlage 2010) 309.

[59] Vanessa E Munro, 'An Unholy Trinity? Non-Consent, Coercion and Exploitation in Contemporary Legal Responses to Sexual Violence in England and Wales' (2010) 63 Current Legal problems PL 45, 49.

[60] Gill (n 58) 314-319.

understand her silence that was influenced by a myriad of cultural forces that undermined her interest. Her cultural background mandated that she preserve the family 'honor' at all costs, even though this prejudiced her defense. The law does not appear to fully appreciate the circumstances that labeled her, in legal eyes, a consenter and whatever happened between her and her husband as consensual.

6. Conclusion

Consensual minimalism can rarely identify the complex ways in which deep-rooted socio-sexual norms act to constrain not only a women's ability to say no to male sexual demand but also even more problematically to say yes in an unchecked manner.[61] In a context where these social and legal landscape dynamics are prevalent, uncritical faith in the ideal of consent initiates nothing more than a desire to escape from reality.[62] While searching for what accounts for the failure of the rape law reform movements in Bangladesh, this article identifies that all the previous and even the ongoing reform movements have been entrusted to the unsophisticated consent-based framework so far. Consent-based sexual laws have been showing their inadequacy to accommodate the complex interplay of social and psychological elements of consent in rape.[63] Criminal law, in general, presumes that one will not give away that which is his to a thief, whereas in rape cases, it makes a reversed presumption. Thus, proving that a woman did not expressly consent does not raise a presumption of non-consent but consent. Only through the demonstration of overt action or active resistance can the prosecution meet its burden of proving non-consent. Interpreted in this way, a woman's right to control sexual access to her body is not absolute but conditional on her affirmative assertion to deny the access in any circumstance.[64] On the other hand, a man wishing to participate in sexual intercourse with a woman may presume consent from that woman since the rape laws do impose upon her has no obligation to affirmative indications of her willingness to engage in such activity. If the woman does not resist actively, he may presume that the woman is ready to have sex with him.

There is an alternative suggestion from the liberal theorists that extending the boundaries of the principal tool of understanding consent, e.g., voluntariness, dominance, and force, can sort out the problem carried by the traditional consensual framework. While on the contrary, this paper suggests it is

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[61] Vanessa E. Munro, Constructing Consent: Legislating Freedom and Legitimating Constraint in the Expression of Sexual Autonomy (2008) 41 Akron Law Review 923.

[62] ibid.

[63] Michal Buchhandler-Raphael, 'The Failure of Consent: Re-Conceptualizing Rape as Sexual Abuse of Power' (2011) 18 Michigan Journal of Gender & Law 147.

[64] Lani Anne Remick, 'read her lips: an argument for a verbal consent standard in rape' (1993) 141 University of Pennsylvania Law Review 1103.

high time to rethink an alternative conceptual understanding of rape shifting away from the consent model, where the accused would be required to show why it was a fair transaction between the parties. An important implication of the alternative approach advocates reform towards a reasonableness standard that focuses on the defendant's perspective.[65] The focus of the reasonableness inquiry is to be based on all the circumstances, and the sexually interested party is permitted to proceed if he has treated the other party fairly and responds in a reasonable manner considering the circumstances of both of them.[66] And an act is permitted means no more than that the reasons against performing it are insufficient to determine that it ought not to be done. In this sense, a person is permitted to act if and only if it is not the case that he ought, all things considered, to refrain from it.[67] Nothing can ameliorate the current condition of rape laws so long we grapple with constraints of consensual minimalism.

[65] Vanessa E. Munro, 'constructing consent: legislating freedom and legitimating constraint in the expression of sexual autonomy' (2008) 41 Akron Law Review PL 923.

[66] Alan Wertheimer, 'What Is Consent? And Is It Important?' (2000) 3 Buffalo Criminal Law Review 557.

[67] Joseph Raz, 'Permissions and Supererogation' (1973) 12 American Philosophical Quarterly 161.

Legal Aid as a Means to Combat Poverty in Bangladesh: An Appraisal

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Abstract: The article examines whether or not the government operated legal aid system of Bangladesh is effective in combating poverty and thus, enhances meaningful justice for the poor of the country. Poverty is multidimensional and is not limited to economic considerations only. The ineffective functioning of the Bangladeshi legal aid system does not further the collective interests and needs of the poor. This also fails to bring social reforms by changing the status of the poor; it rather maintains inequality and justice gap in the society. As a result, the poverty cycle continues and the poor cannot come out ahead in establishing their rights and challenging oppressions. The article suggests that the government should take into account the collective interests and needs of the poor and, accordingly develop the legal aid system of the country.

Keywords: Access to justice, equality, legal aid, lawyers, and poverty.

1. Introduction

The poor face the violation of human rights in many cases, but in few instances are able to enforce their rights.[1] The enjoyment of human rights works on paper for them despite the recognition of such rights both in constitutions of countries and in international covenants, and even if judicial mechanisms are put in place for the enforcement of those rights at the national level.[2] Therefore, poverty in economic capacity and poverty as regards the realisation of human rights are closely linked to each other.[3] Legal aid is crucial in promoting access to justice for the poor since it guarantees equality before the law, the right to have lawyer's assistance and the right to a fair trial.[4] It functions by eradicating the impediments that limit the poor's ability to obtain justice by offering lawyers' assistance and access to the formal courts of the state.[5]

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1 Eva Brems and Charles Olufemi Adekoya, 'Human Rights Enforcement by People Living in Poverty: Access to Justice in Nigeria' (2010) 54(2) Journal of African Law 258-9.

2 ibid.

3 ibid.

4 Bernard Hubeau and Ashley Terlouw, 'Legal Aid and Access to Justice: How to Look at and Evaluate Legal Aid Systems?' in Bernard Hubeau and Ashley Terlouw (eds) *Legal Aid in the Low Countries* (Intersentia 2014) 5.

5 Gabriela Knaul, 'Report of the Special Rapporteur on the Independence of Judges and Lawyers' (A/HRC/23/43, 15 March 2013) para. 27 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G13/119/35/PDF/G1311935.pdf?OpenElement> accessed 27 October 2020.

In Bangladesh, various constitutional provisions incorporate the right of equality before the law and the right to a fair trial for all citizens of the country.[6] However, the poor are not able to approach and utilise the legal system when they consider it necessary.[7] This results in the denial of justice and demonstrates the ineffectiveness of legal institutions and processes. The government promulgated the Legal Aid Services Act[8] in 2000 in order to provide legal aid service across the country in a coordinated manner. In this context, the present article investigates whether or not the government run legal aid system of Bangladesh is effective in combating poverty and thus, enhances meaningful justice for the poor of the country. In doing so, the article first draws a link between the alleviation of poverty and a functional legal aid system. It then investigates how the Bangladeshi legal aid system is functioning towards the goal of promoting access to justice by reducing poverty of the beneficiaries.

2. Correlation between poverty and legal aid

The traditional definition of poverty is premised on economic considerations, because economic hardship or low income is considered a dominant factor in most definitions of the term.[9] However, the views towards poverty have undergone substantial changes in recent years. Poverty is now regarded not merely as an economic concern; it is rather a multidimensional concept that incorporates both financial considerations and the basic capabilities to lead a dignified life.[10] Amartya Sen has linked poverty to a wider concept of human development because he considers that poverty is not limited to income only; it embodies the refusal of capabilities and freedoms that disallows individuals to achieve what they are able to.[11] Sen's capability approach, thus, focuses on people as the central feature of development agenda and considers them as both "the means and ends of development."[12] Development occurs by expanding the scope of choices and capabilities of individuals with a view to achieving the lives they value. Capabilities refer to the choices and opportunities within the reach of

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6 Articles 27 and 33 contain such provisions in clear terms.

7 Sumaiya Khair, *Legal Empowerment for the Poor and the Disadvantaged: Strategies Achievements and Challenges. Experiences from Bangladesh* (Dhaka, Department of Justice Canada's CIDA Legal Reform Project in Bangladesh 2008) 41-52.

8 Act No. VI of 2000.

9 OHCHR, 'Guiding Principles on Extreme Poverty and Human Rights' (2012) 2 <https://www.ohchr.org/Documents...R_ExtremePovertyandHumanRights_EN.pdf> accessed 30 December 2020.

10 WHO, 'Human Rights, Health and Poverty Reduction Strategies' (2005) 5 Health and Human Rights Publications Series, 10 <https://www.who.i...ws/HRHPRS.pdf> accessed 30 December 2020.

11 Center for Economic and Social Rights, 'Human Rights and Poverty: Is poverty a violation of human rights?' (2009) 1 Human Rights Insights 2 <https://www.cesr.org/sites/default/files/CESR_Brie...Human_Rights_and_Poverty_-_Draft_December_2009.pdf> accessed 30 December 2020.

12 Solava Ibrahim, 'Introduction: The Capability Approach: From Theory to Practice — Rationale, Review and Reflections' in Solava Ibrahim and Meera Tiwari (eds), *The Capability Approach* (Palgrave Macmillan 2014) 2 <https://doi.org/10.1057/978113700143> accessed 30 December 2020.

individuals in order to attain lives they consider worthy of.[13] This approach has been accepted by the UNDP in its Human Development Reports. The Human Development Report 2000 suggests that poverty is an infringement of freedom, and the elimination of poverty should be considered as a basic a human right and not a mere act of charity.[14]

The human rights community takes into account the issues associated with 'poverty' in several ways despite the absence of specific definition of the term in the international human rights instruments. The Universal Declaration of Human Rights[15] and the International Covenant on Economic, Social and Cultural Rights[16] mention about the right of every individual to have a recognized standard of living that involves various factors, such as, satisfactory food, clothing, accommodation, medical facility and other essential social services.[17] The Committee on Economic, Social and Cultural Rights provided the definition of poverty in 2001. It considers the term as "a human condition characterized by the sustained or chronic deprivation of the resources, capabilities, choices, security and power necessary for the enjoyment of an adequate standard of living and other civil, cultural, economic, political and social rights."[18] Therefore, poverty involves the deficiency of tangible amenities and benefits, such as "employment, ownership of productive assets and savings" on the one hand, and the deficiency of personal and social services, for instance, "health, physical integrity, freedom from fear and violence, social belonging, cultural identity, organizational capacity, and the ability to live a life with respect and dignity" on the other.[19] Poverty, in this way, creates 'disempowerment' and 'exclusion' in the society, [20] and can be said to be both a reason and effect of the infringement of human rights.[21] It further generates an enabling situation that triggers the violation of other human rights.[22]

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[13] ibid.

[14] UNDP, 'Human Development Report' (2000) 2 <http://www.hdr.undp.org/sites/default/files/reports/261/hdr_2000_en.pdf> accessed 30 December 2020.

[15] The United Nations General Assembly promulgated the Declaration on 10 December 1948 (UNGA resolution 217A) "as a common standard of achievements for all peoples and all nations" <https://www.un.org/en/universal-declaration-human-rights/> accessed 30 December 2020.

[16] It was adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 and became effective on 3 January 1976, in accordance with article 27 <https://www.ohchr.org/en/professi...ages/cescr.aspx> accessed 30 December 2020.

[17] WHO (n 10).

[18] Economic and Social Council, 'Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural rights: Poverty and the International Covenant on Economic, Social and Cultural rights' (E/C.12/2001/10) para. 8 <https://undocs.org/en/E/C.12/2001/10> accessed 30 December 2020.

[19] OHCHR, Frequently Asked Questions on a Human Rights-Based Approach to Development Cooperation' (2006) 10 <https://www.ohchr.org/docu...ons/faqen.pdf> accessed 30 December 2020.

[20] ibid.

[21] OHCHR (n 9).

[22] ibid.

In order to achieve substantial progress in reducing poverty, the poor need access to the justice system to claim their rights, challenge inequality and oppression or hold the perpetrators accountable for the violations of their rights.[23] Therefore, access to justice services is critical in ensuring citizens' welfare, inclusive growth and healthy public administration.[24] However, the poor lack the ability to approach the formal justice system due to excessive cost, delay, ignorance and other cultural and procedural barriers. This resulting justice gap impairs equality in society and causes adverse consequences in different aspects of life including income loss, family disputes and various employment issues.[25] The poor's incapability to deal with legal problems further reduces economic and inclusive growth, and eventually prolongs the poverty cycle.[26]

According to Francioni, legal aid is crucial to enhance access to justice because it makes judicial remedies available to those who do not have economic resources to satisfy the fees of lawyers and other ancillary costs of the justice system.[27] The United Nations Special Rapporteur on the Independence of Judges and Lawyers considers legal aid as a basic component of 'a fair and efficient justice system' established on the 'rule of law'.[28] It functions by defeating the barriers to access to justice that limit the capacity of those living in poverty to afford legal representation and receive a fair outcome from the court processes.[29] The Declaration of the High-level Meeting of the 67th session of the General Assembly on the Rule of Law reaffirmed the commitment of Member States to take requisite actions to render "fair, transparent, effective, non-discriminatory and accountable services" that ensure "access to justice for all, including legal aid".[30] In 2012, the General Assembly consensually endorsed the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems[31] to set up basic standards for ensuring the right to legal aid in criminal matters and also to provide realistic and functional models with regard to the effective implementation of the legal aid programme. The UN Principles and Guidelines is the pioneer international instrument that solely covers on the right to legal aid. It considers legal aid as "an essential element of a fair, humane and efficient criminal justice system that is based on the rule of law. Legal aid acts as the basis

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[23] Open Society Justice Initiative, Delivering Justice through the UN's 2030 Development Agenda (2015) <https://www.justiceinitiative.org/publications/delivering-justice-through-the-uns-2030-development-agenda> accessed 30 December 2020.

[24] OCDE, Access to Justice <https://www.oecd.org/...ss-to-justice.htm> accessed 30 December 2020.

[25] ibid.

[26] ibid.

[27] Francesco Francioni, 'The Development of Access to Justice in Customary Law' in Francesco Francioni (ed), *Access to Justice as a Human right* (Oxford University Press 2007) 1.

[28] Knaul (n 5) para. 20.

[29] ibid, para. 27.

[30] ibid, para. 12 and 14 <https://www.un.org/ruleoflaw/...-RES-67-1.pdf> accessed 30 December 2020.

[31] (67/187) <https://www.ohchr.org/documents/publications/faqen.pdf > accessed 30 December 2020.

for the enjoyment of other rights including the right to a fair trial."[32] The International Covenant on Civil and Political Rights (ICCPR)[33] also contains definite provisions concerning the right to legal assistance. Article 14 states that the State Party of the Convention undertakes the duty to safeguard the right to legal assistance in criminal cases without payment where the person lacks requisite ability to offer the payment for it or where the 'interests of justice' require so.[34] Thus, legal aid enables those without adequate financial resources to receive legal assistance to exercise their rights and to defend themselves before the courts of law. In addition, legal aid advances Goal 16 of the United Nations Sustainable Goals by "promoting peaceful and inclusive societies for sustainable development" and, by rendering "access to justice for all". It further seeks to establish "effective, accountable and inclusive institutions" at respective levels in a country.

3. Legal aid system in Bangladesh and its effectiveness in combating poverty

As Muralidhar says, the Bangladeshi government took the first formal initiative to establish a legal aid system across the country in 1994 and introduced a fund towards this end.[35] The Ministry of Law, Justice and Parliamentary Affairs adopted a resolution that culminated in the establishment of a National Legal Aid Committee in 1997.[36] The Resolution further established committees at the

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[32] Annex, Introduction, para 1.

[33] The ICCPR was adopted by the General Assembly resolution 2200A (XXI) of 16 December 1966 and entered into force on 23 March 1976. <https://www.ohchr.org/Documents/Professional Interest/ccpr.pdf> accessed 6 December 2020.

[34] Article 14(3) says, "In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
(c) To be tried without undue delay;
(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
(g) Not to be compelled to testify against himself or to confess guilt. The person is also entitled to choose the lawyer under this provision."

[35] S. Muralidhar, *Law, Poverty and Legal Aid: Access to Criminal Justice* (LexisNexis/Butterworth 2004) 357.

[36] S.R.O. No. 74-Law/1997.

district levels. The District and Sessions Judges chaired these committees. But due to the absence of official records of the services of this system, it is not possible to evaluate the activities of this mechanism[37]. However, Chowdhury and Malik state that the legal aid system was substantially ineffective and the allocated fund was accordingly not utilized to achieve the goal.[38] The number of legal aid cases amounted to only 70 within two years after the programme had started operating all over Bangladesh. It is reported that seven district committees endured special arrangements with a view to delivering the service.[39] Thus, the 1997 Resolution was not able to establish a service oriented legal aid system. In the following years, the government undertook various activities to endorse a specific law on legal aid.[40] In 2000, the government finally promulgated the Legal Aid Services Act[41] (hereinafter LASA) that establishes a nationwide legal aid system in the country. The Legal Aid Services Policies were adopted next year that determined the criteria for eligible legal aid recipients.[42] However, the government amended the Policies in 2014.[43] Besides the Policies, the Legal Aid Services Regulation 2001 was also adopted that covers various issues involving procedure for legal aid applications, selection of legal aid lawyers, lawyers' fees and other related matters. The Regulation underwent amendments in 2015.[44] The LASA provides for the establishment of a central organization called the National Legal Aid Services Organization for implementing the objectives of the Act.[45] It has also established legal aid committees at the district, upazilla (sub-district) and union (lowest administrative unit) levels. In 2016, provisions were made to form committees in the Supreme Court, Labour Courts and Chouki Courts.[46]

The LASA has defined the term legal aid by saying that it is a kind of assistance that incorporates provisions for legal advice, fees of lawyers, litigation expenses, and other related costs provided to financially restrained groups and to those who for different socio-economic reasons do not have the capacity to

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[37] Nazmul Ahsan Chowdhury and Shadeen Malik, 'Awareness on Rights and Legal Aid Facilities: The First Step to Ensuring Human Security', in A.T.R. Rahman and D. Solongo (eds), *Human Securityin Bangladesh: In Search of Justice and Dignity* (United Nations Development Programme 2002) 43–4.

[38] ibid.

[39] ibid.

[40] Nusrat Ameen, 'The Legal Aid Act, 2000: Implementation of Government Legal Aid versus NGO Legal Aid', (2004) 15 The Dhaka University Studies Part F 63.

[41] Act No. VI of 2000.

[42] S.R.O. No. 130-Law/2001.

[43] The Legal Aid Services Policies, 2014, S.R.O. No. 194-Law/2014.

[44] The Legal Aid Services Regulation 2015, S.R.O. No.166-Law/2015.

[45] LASA, Sec 3.

[46] S.R.O. No.33-Law/2016. Chouki Courts are established in far-off areas that have long distance from headquarters of districts with a view to promoting access to justice for the people of such areas.

access justice.[47] As per the Legal Aid Services Policies, 2014 read with Section 7(a) of the Act, legal aid is available to persons who are not able to approach the formal justice system because of economic hardship, destitution, helplessness and for various socio-economic considerations. In particular, those who are financially weak can apply for legal aid under the Bangladeshi system and their eligibility is assessed based on their yearly average income ceiling that equals to less than 1000,000 taka.[48] Therefore, the Legal Aid Services Policies prescribe that people who lack the ability to claim their right or to defend themselves before the courts due to financial hardship, those who are detained without trial and are unable to defend themselves because of financial calamity, persons regarded by the court as poor or helpless and those referred to by the jail authority as economically feeble are eligible to seek legal aid in Bangladesh. The LASA further allows some defined groups of persons the right to legal aid without specifying any financial eligibility criteria for them. These groups include women and children who become victims of human trafficking; those who are allocated land or housing in an 'ideal/model' village[49]; women and children suffering from acid-attacks; poor widows, and physically or mentally handicapped persons lacking ability of earning and thus enjoying no means of subsistence. This indicates that some specific categories of persons enjoy an unequivocal right to legal aid under the provisions of the LASA and the Legal Aid Services Policies.

According to the statistics of the NLASO, the number of legal aid beneficiaries follows an increasing trend over the years. During the financial year 2018-19, the number of beneficiaries amounts to 100,806 which is clearly higher than previous years; for instance, the number of beneficiaries was approximately less than 50, 000 in the financial year of 2015-16.[50] Therefore, it can be said that the need for legal aid is substantial and such demand for the service is rising in years. It should be noted that a comprehensive and effective legal aid system enables the poor to claim legal services for the purpose of resolving their matters and achieving a fair outcome. This protects their freedom and choices and eventually combats poverty by upholding the spirit of social justice.[51] In this context, it is essential to analyse whether or not the Bangladeshi legal aid system

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[47] Sec. 2(a).

[48] However, the financial eligibility threshold requires being less than 150,000 taka for matters filed before the Supreme Court. In addition, freedom fighters whose annual income limit does not exceed 150,000 taka are allowed to apply for legal aid as per the provisions of the Legal Services Policies 2014.

[49] The model village approach aims to enhance the livelihoods of the poor by establishing one community as a role model for adjoining villages. It focuses on specific issues like health and hygiene, access to water, agriculture and others.

[50] National Legal Aid Services Organisation <http://www.nlaso.gov.bd/sites/default/files/files/nlaso.portal.gov.bd/annual_reports/...fcc 9_487c_906a_1b440b231d.pdf> accessed 30 December 2020.

[51] Farzana Akter 'Legal Aid for Ensuring Access to Justice in Bangladesh: A Paradox?' (2017) 4 Asian Journal of Law and Society 272-3.

functions adequately to repel poverty and its multidimensional aspects by meeting the needs of the beneficiaries.

Legal aid programme is operated to safeguard the rights and interests of its beneficiaries.[52] However, as Abel says, such scheme reflects the struggle between the rich and poor and is designed to legitimize the benefits enjoyed by the affluent of the society.[53] It is due to the fact that legal services maintain a market oriented procedure and a portion of such services is granted to the poor as a part of the legal aid programme. The government decides to provide the service to the target groups as one of its political decisions.[54] The prevailing criteria for determining the eligibility of the legal aid beneficiaries in a given country is a vital factor in evaluating the government's position or intention in establishing the mechanism.[55] In Bangladesh, as noted earlier, a financial eligibility test applies to legal aid seekers and they must pass it to receive the service. According to Akter, this standard is based exclusively on the income of the service seekers; it does not consider other issues that are crucial in determining the condition of the applicants. These issues include the rate of inflation, costs of living and related financial liabilities of the applications.[56] A study of 2017 (the study was based on both empirical data and literature review) shows that the living cost follows an upward spiral in Bangladesh and the difference between the annual income and the living expenses is meager.[57] As a result, the eligibility test of legal aid applicants (less than 100,000 taka in a year and more than 8,000 taka monthly) is not proportionate with the social and economic conditions of the state; rather it is excessively low and unrealistic. It prohibits many people who might approach the court in case they find it necessary.[58] This restricted eligibility criteria functions to continue the justice gap between the wealthy and deprived sections of the society.[59] It further frustrates the aim of the legal aid scheme as it expels many of those who might be willing to approach the system to claim their rights and benefits.[60] In addition, it contradicts the principle of equality before the law for every citizens of the country by granting the service to a limited number of people. Also, the impractical eligibility test maintains the market- oriented attitude of the legal

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[52] Farzana Akter, 'Examining the Scope of Legal Aid Clients: Bangladesh Perspective' (2019) 30 Dhaka University Law Journal 77.

[53] Richard L. Abel, 'The Paradoxes of Legal Aid,' in Jeremy Cooper and Rajeev Dhaveen (eds), *Public Interest Law* (Basil Blackwell 1986) 383, 388.

[54] ibid, 386.

[55] Clifford M. Greene, David R. Keyser and John A. Nadas, 'Depoliticizing Legal Aid: A Constitutional Analysis of the Legal Services Corporation Act,' (1976) 61 Cornell L. Review 775–6.

[56] Akter (n 51) 257, 261.

[57] ibid, 262-3.

[58] ibid.

[59] ibid.

[60] ibid.

systemin the sense that legal services are available only to those who have the ability to compensate the price of lawyers and various related expenses of the court proceedings.[61]

An adequate publicity about the nature, types and extent of service is essential to inform the potential beneficiaries so that they become able to make decisions whether or not to approach the authority and apply for the service. According to Moran, 97% of respondents in the study are ignorant of the Bangladeshi government sponsored legal aid programme and those who are somehow aware of the scheme are not clear about the nature and the quality of the service.[62] It has been even said that the legal aid system has not been widely publicised among the common populace of the country; and even if it is done in some cases, such publicity lacks coordination among the authorities.[63] Akter has identified another reason for the lack of publicity of the legal aid programme in Bangladesh. The government has prescribed a limit of expenses that should be utilised for making the programme well publicised. In pursuance of the Legal Aid Services Regulation 2015, District Legal Aid Committees enjoy the right to spend 10% of the amount allocated to them for the purpose of conducting activities relating to publicity and other issues.[64] However, this amount is not reasonable with the purpose of arranging prescribed programmes and developments.[65] As a result, inadequate publicity prevents potential beneficiaries from accessing the service to claim or enforce their rights through the courts of law.[66] It also demonstrates the lack of willingness on the government's part to establish a functional system that is able to change the attitude of those who might ask for the service in times of their need.

The meaningful service delivery in the legal aid system of Bangladesh is also interrupted by the allocation of inadequate financial, human and logistical resources.[67] The budget allocation is not commensurate with the increasing trend of the recipients and the economic standards of the country.[68] Moreover, the system suffers from inadequate infrastructural and logistical supports that impede the effective functioning of the scheme.[69] This eventually fails to provide service that would enable the poor to capably assert their rights on a par with the affluent in the society.

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[61] ibid.

[62] Greg Moran, 'Access to Justice in Bangladesh: Situation Analysis' (Summary Report, Justice Sector Facility Project, 2015) 25 <http://www.bd.undp.org/content/bangladesh/en/home/library/democratic_governance/access-to-justice-in-bangladesh-situation-analysis.html> accessed 9 August 2019.

[63] Akter (n 51) 264.

[64] The Legal Aid Services Regulation 2015, s. 11.

[65] Akter (n 52) 89.

[66] ibid, 89.

[67] Akter (n 51) 265-7.

[68] ibid.

[69] ibid.

The service delivery by legal aid lawyers is another crucial factor in evaluating the effectiveness of the system. As Akter states, the selection process of lawyers is not able to nominate capable and efficient lawyers as it exclusively depends on the lawyers' years of experience.[70] Moreover, lawyers are not committed and put emphasis on their personal interests rather than protecting the interests of clients.[71] Senior and well known lawyers show reluctance towards the legal aid service of Bangladesh and therefore, the service is provided by less experienced lawyers.[72] Also, legal aid lawyers do not function effectively by following the recognised professional norms and ethics. Legal aid clients are not represented appropriately and the assistance does not satisfy their need.[73] The insincerity and reluctance of lawyers towards the legal aid service is related to the poor payment offered to them.[74][75] In addition, the government does not have a vigorous and efficacious monitoring system to assess and supervise the activities of lawyers.[76] All these result into ineffective service delivery by legal aid lawyers that fails to satisfy clients' requirement and exigency. It further dissuades potential service seekers to apply for the service assuming that they would receive perfunctory service.[77]

4. Conclusion

The article has shown that poverty is multidimensional and is not limited to economic considerations only. It also involves the violation of freedom, choices and capabilities that degrades the quality of human life. In addition, poverty restricts people's opportunities and choices to lead a life they have reason to value. Given that poverty comprises of various aspects, the poor are the deprived sections of the community and are not able to establish their rights through the formal courts of law. This is because they lack resources to hire lawyers and manage other incidental expenses of legal proceedings. The role of the legal aid system in a country is considerable in enhancing access to justice. However, the above discussions indicate that the government sponsored Bangladeshi legal aid system does not run effectively due to various factors and, thus, is not able to satisfy the needs of the poor to promote their access to justice.[78] It is undeniable that ineffective service is as good as no service. The ineffective functioning of the

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[70] ibid, 269. Lawyers who have five years of experience are eligible to be selected as panel lawyers as per section 15 of the LASA.

[71] ibid, 269-71.

[72] ibid.

[73] ibid.

[74] Jamila Ahmed Chowdhury, 'Legal Aid and Women's Access to Justice in Bangladesh: A Drizzling in the Desert' (2012) 1 International Research Journal of Social Sciences 8, 11.

[75] Akter (n 51) 269-70.

[76] ibid, 271-2.

[77] Khair (n 7) 235.

[78] Akter (n 51) 272-3.

Bangladeshi legal aid system does not further the collective interests, urgencies and needs of the poor. This also fails to bring social reforms by changing the status of the poor; it rather maintains inequality and justice gap in the society. As a result, the poverty cycle continues and the poor cannot come out ahead in establishing their rights and challenging oppressions. The article suggests that the government should take into account the collective interests and needs of the poor and, accordingly develop the legal aid system of the country. The forceful commitment, durable strategy and sincerity of the government are essential to improve the system. The provisions of the LASA should also reflect the needs and interests of the poor. The legal aid lawyers should be motivated and compensated in a way so they deliver the service to best protect the interests of the beneficiaries. In short, the substantial service of legal aid system would improve the quality of life of the poor. Further, it would enable them to contribute to social development by the alleviation of poverty.

The Doctrine of Public Trust: Its Judicial Invocation in Bangladesh and the Future Potentials

Azhar U. Bhuiyan*

Abstract: The Doctrine of Public Trust (DPT), despite its south Asian root and constitutional base, was introduced late into the constitutional law of Bangladesh. In 2010, the Supreme Court of Bangladesh felt it was time for them to adopt DPT, and thus without offering any methodological justification as to how they are bringing a US doctrine in our constitutional jurisprudence, the Court applied the DPT in a matter involving protection of a natural resource-gas. However, while the DPT could play its role in the protection of public properties in Bangladesh in only a limited number of cases, that too after 2010, it does have the potential to play bigger role in Bangladesh given its growth in other parts of the world. This article traces the development of this doctrine in Bangladesh and its application. At the same time, it responds to the existing critiques of the DPT that are raised against its judicial invocation in the west from the perspective of Bangladesh. Lastly, this article will project the future path of the DPT in Bangladesh. This article adds significantly to the existing body of legal literature by theorising a test with the existing judicial developments of the doctrine in Bangladesh.

Keywords: Constitution of Bangladesh, doctrine of public trust, and public property.

1. Introduction

Despite being an evolving issue, the Doctrine of Public Trust (DPT) has not received any scholarly attention in Bangladesh. Even, the Supreme Court of Bangladesh (SCB) has raised this concern in one of its recent observations.[1]

The Doctrine of Public Trust (DPT) has prominently developed as an enforceable legal doctrine in the 20th century United States (US) with the seminal article authored by Professor Joseph Sax.[2] Sax grounded the basis of the doctrine in ancient Roman law and common law. In the south Asian subcontinent, the Indian Judiciary was the first to incorporate the entire domain of US development of the DPT through *MC Mehta v Kamal Nath*.[3] All these developments based on the ancient Roman concept of *res communis* has been questionable by US academics on the ground that Roman Law did not have any

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1 *Human Rights & Peace for Bangladesh v Bangladesh* (2019) WP No 13989/2016 at 257.

2 See for details, Joseph L. Sax, 'The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention' (1970) 68 Michigan Law Review 471.

3 *M C Mehta v Kamal Nath &Ors* (1997) 1 SCC 388.

concept of preserving public trust properties and Magna Carta had nothing to do with the community rights of the citizens.[4] While relying much on the western notion of the DPT, the south Asian courts have ignored, what the International Court of Justice did not, the south Asian autochthonous origin of the doctrine. This article attempts to point out the south Asian autochthonous origin of the doctrine and traces its historical trajectory in Bangladesh.

At first this paper investigates the historical evolution of the DPT as it was developed. It starts by focusing on the widely accepted belief that the DPT has its origin in ancient Roman law and later on was borrowed by the English Common Law through the incorporation of the doctrine in the Magna Carta. The paper addresses the concerns raised by Professor Huffman and shows that even if his claim is true, the DPT has its autochthonous south Asian root. Therefore, the shaky history in the west cannot overrule the development of the DPT in this part of the world. In the next part, the paper analyses the current status of the DPT in Bangladesh in view of all four cases - *Shah Abdul Hannan*,[5] *Faridul Alam*,[6] *HRPB (2010)*,[7] *HRPB (2019)*,[8] decided by the SCB. It also discusses the role of the legislature apart from the court in fulfilling the obligation stemming from the DPT as incorporated in the Constitution of Bangladesh. It analyses the fiduciary duties of the trustees of the public trust properties in light of the latest judicial development in Bangladesh.

Later, this paper points out the criticism of the DPT in the context of Bangladesh and addresses such criticisms. It points out three popularly raised criticisms: shaky legal background, apparent inconsistency with the concept of rule of law and finally the issue of separation of powers. In the next part, this paper emphasises on the role of the legal community in not creating any bar in the development of the DPT. This paper asserts that the DPT is an important legal fiction acknowledged and utilized by the SCB. At the same time, it theorizes a cost-benefit analysis test taking into consideration the overall development of the doctrine in Bangladesh. This paper ends by projecting the future use of the DPT in Bangladesh.

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4 See for details, James L Huffman, 'Speaking Inconvenient Truths: A History of Public Trust Doctrine' (2007) 18 Duke Environmental Law and Policy Forum 1 (argues that the origin of DPT is not based on true facts to the extent of preserving public rights).

5 *Shah Abdul Hannan v Bangladesh* (2011) 16 BLC 386.

6 *Faridul Alam v Bangladesh* (2010) 18 BLT 323.

7 *Human Rights & Peace for Bangladesh v Bangladesh* (2010) 22 BLC 48.

8 *Human Rights & Peace for Bangladesh v Bangladesh* (2019) WP No 13989/2016.

2. The historical trajectory of the public trust doctrine

2.1. A transplantation from ancient roman law or one of south Asian autochthonous origin?

A big majority of the legal scholars from the west trace the origin of the DPT in the concept of 'common properties' (*res communis*)[9] as found in the ancient Justinian Code of 530 A.D where it was stated: "by the law of nature, these things are common to mankind – the air, running water, the sea, and consequently the shores of the sea…".[10] On the contrary, it has been argued that relying on this provision of Justinian Code to locate the origin of 'public trust' was a 'creative judicial misunderstanding' of the Roman Law.[11] The reason behind such an argument is the qualifiers after the above quotation from Justinian Code, "whilst he abstains from damaging farms, monuments, edifices, etc. which are not in common as the sea is", have been always ignored except the minority opinion in the *Glass v Goeckel*.[12] Moreover, in the Roman Empire, sea shores or submerged lands were often privately owned and were free to be taken.[13]Therefore, it seems that there is a debate as to the origin of the DPT in Roman law. The High Court Division (HCD) of the SCB has also endorsed the trend in the U.S. academia and maintained that the current conception on the 'environment' bears a close resemblance to the roman origin of DPT.[14]While adopting such a position, this south Asian court seems to ignore the South Asian origin of the doctrine in Sri Lanka.

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[9] See for details, Joseph L. Sax, 'Liberating the Public Trust Doctrine from its Historical Shackles' (1980) 14(2) University of California Davis Law Review 185.

[10] See for example, Robert Haskell Abrams, 'Governmental Expansion of Recreational Water Use Opportunities' (1980) 59(2&3) Oregon Law Review 159, 162; Seldon, 'Wherever the Water Flows: Lyon Applies the Public Trust to Non-Tidal Water' (1983) 11 Ecology Law Quarterly 21, 26. However, there is an interesting argument on the origin of the doctrine in Sri Lanka. See for details, Rajitha Perera, 'The Public Trust Doctrine' (2016) 4 Judicial Service Association of Sri Lanka Law Journal <https://www.academia.edu/37942953/The_Public_Trust_Doctrine> accessed 16 April 2020. On the other hand, tracing the origin of the public trust doctrine has been considered as another 'creative judicial misunderstanding' of the Roman Law. See for details, Carl Shadi Paganelli, 'Creative Judicial Misunderstanding: Misapplication of the Public Trust Doctrine in Michigan' (2007) 58 Hastings Law Journal 1095, 1096.

[11] See for details, Carl Shadi Paganelli, 'Creative Judicial Misunderstanding: Misapplication of the Public Trust Doctrine in Michigan' (2007) 58 Hastings Law Journal 1095, 1096; also see James L. Huffman, 'Protecting the Great Lakes: The Allure and Limitations of the Public Trust Doctrine' (2016) 93 University of Detroit Mercy Law Review 239.

[12] *Glass v Goeckel* (2005) 703 N.W.2d 58.

[13] See for details, Patrick Deveney, 'Title, Jus Publicum, and the Public Trust: An Historical Analysis' (1976) 1 Sea Grant Law Journal 13, 30.

[14] See for details, *Faridul Alam v Bangladesh* (2010) 30 BLD 500; *Human Rights & Peace for Bangladesh v Bangladesh* (2019) Writ Petition No 13989/2016 <http://www.supremecourt.gov.bd/resources/documents/1048627_W.P.13989of2016.pdf> accessed 17 April 2020.

The concept of guardianship over public properties in south Asia, specifically in Sri Lanka dates back to the third century BC.[15] According to the historical accounts[16], in 223 BC, the King of this region Devanampiya Tissa went for an animal hunting. Emperor Asoka's[17] son Arahat Mahinda preached to him the following sermon:

> O great King, the birds of the air and the beasts have as equal a right to live and move about in any part of the land as thou. The land belongs to the people and all living beings; thou art only the guardian of it…[18]

Although the Justinian Code and the Mahāvaṃsa[19] (the Great Chronicle of Ceylon) conceptually overlaps in providing protection to the elements of environment, public property, a critical look into these two sources shows that the latter imports deeper and advanced version of environmental philosophy. Justinian recognized the air, running water, the sea, and consequently the shores of the sea, as 'common property' or in other words property enjoyable by all. On the contrary, the Mahāvaṃsa's thoughts go deep down to the preservation of such elements of nature and the role of the king (or ruler, i.e. government) as the guardian of such public properties. The most significant part of the Sri Lankan origin is that the king or the ruler was placed in the position of guardian which we can directly relate to the modern concept of 'public trust'.[20]Therefore, there remains no doubt as to the south Asian origin of the doctrine.

2.2. European civil and common law antecedents

Although there is debate as to the origin of the doctrine in Rome or in South Asia, there is no question on the fact that it is the English Law that finally gave legal shape to the DPT to restrict the proprietary control of the King over certain natural resources. The pedigree of the doctrine can be found in Chapters 16[21] and 23[22] of the Magna Carta although it is correct to say that these chapters have a very thin link to the modern understanding of the doctrine. At the same time, it

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15 *Hungary v Slovakia* (Gabčikovo-Nagymaros Project) [1997] ICJ Rep 7.

16 Such an account has been cited even in the judgment of the International Court of Justice in the Gabcikovo-Nagymaros Project Case.

17 Ashok, also known as Ashoka the Great, was an Indian emperor of the Maurya Dynasty, who ruled almost all of the Indian subcontinent from c. 268 to 232 BC.

18 See for details, Walpola Rāhula, *History of Buddhism in Ceylon: the Anuradhapura period, 3d century BC-10th century AC.* (M.D. Gunasena, 1956) 217-221.

19 See generally, Wilhelm Geiger and Mabel Haynes Bode, *The Mahāvaṃsa, Or, The Great Chronicle of Ceylon by Mahanama* (Asian Educational Services, 1993).

20 See for details, Rajitha Perera (n 10) 1-4.

21 Chapter 16 of Magna Carta states: "No riverbanks shall be placed in defense from henceforth except such as were so placed in the time of King Henry, our grandfather, by the same places and the same bounds as they were to be in his time."

22 Chapter 23 of Magna Carta provides that: "All weirs for the future shall be utterly put down on the Thames and Medway and throughout all England, except on the seashore."

must be admitted that the concept of public trust doctrine was finally given a legal shape by the European civil and common law antecedents. Spain recognized a public right to navigable waterways in the thirteenth century.[23] The French Civil Code maintained that navigable rivers and streams, beaches, ports and harbors shall be treated as common property.[24] Incorporation of this doctrine into the legal texts to impose obligation on the government or the ruler to protect the properties, however, was oblivious to grant public rights that could be legally enforceable against a recalcitrant government for a long time.[25]

2.3. Trajectory of DPT in Bangladesh through India: inspiration from the United States

For a long time, almost the entire sub-continent was ruled by the British colonizers. Inspirations from Magna Carta and other common law precepts, however, did not reach the subcontinent. Understandably, the intention of the colonizers was to exploit the resources of the sub-continent to enrich themselves.[26] There was no intention in the British colonizers to preserve and protect any resources of the sub-continent. That is perhaps the most plausible reason why the countries in south Asian sub-continent had to wait till 1997 to recognize the 'DPT' formally within their laws of the lands.[27]

In the south Asian sub-continent, India is the first country to recognize DPT as a law of the land. In *M C Mehta v Kamal Nath*[28], the petitioner built a motel at the delta of a river while it changed the course of the river. The Ministry of Environment was responsible for overlooking such activities. Notably, the DPT did not specifically exist in the constitutional law of India then. The change of course of the river caused flooding in the nearby villages. To adjudicate the case, the Indian Supreme Court relied on the reasoning offered by the celebrated work of the U.S. Academic Joseph Sax[29] where he argued that the public must have an enforceable right against the government to protect the natural resources of the country from commercial exploitation. The Court located the origin of the DPT in the common law and ended up adopting the entirety of the American version

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23 See for details, Samuel Parsons Scott (ed) Robert I. Burns, *Las Siete partidas, Vol IV (in English Family, Commerce, and the Sea: The Worlds of Women and Merchants)* (Philadelphia: University of Pennsylvania Press, 2001) ("Rivers, harbors, and public highways belong to all persons in common . . . .").

24 French Civil Code, Article 538.

25 *M C Mehta v Kamal Nath & Ors* (1997) 1 SCC 388.

26 For an account of the approach of the British colonizers in ruling the Indian sub-continent, see Shoshi Tharoor, *An Era of Darkness: The British Empire in India* (Aleph Book Company 2011).

27 *M C Mehta* (n 25).

28 ibid.

29 See for details, Joseph L. Sax, 'The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention' (1970) 68 Michigan Law Review 471.

DPT in a wholesale basis.[30] Within the next three years, the Supreme Court of India could find the constitutional abode of the DPT in Article 21 by widening the ambit of the right to life.[31] However, till date there exists no legislation in India to regulate the scope of the DPT.

The journey of DPT in Bangladesh started from the very beginning of its independence. Two reasons can be attributed behind this. Firstly, Bangladesh has also been a part of the British colony and the legal system is deeply influenced by the common law traditions. Secondly, it has been often argued by the historians that one environmental disaster prior to 1971 made the destined break-up of Pakistan speedy.[32] Therefore, the political leadership of independent Bangladesh was really aware of the environmental needs of the country and thus incorporated the DPT in Article 21 of the Constitution. However, SCB took long time to flesh out the DPT as such from the language of Article 21. As a result, there has been only 4 cases so far where the SCB utilized the concept of DPT. As summarised in the following table, they also seem to have followed the Indian line of reasoning:

Name of the Case	Judge	Reasoning	Relied on	Subject matter
Shah Abdul Hannan v Bangladesh[33] (2010)	A.H.M. Shamsuddin Choudhury	a) DPT is part of English Common Law b) Time has come to adopt the theory Indian judiciary adopted	MC Mehta v Kamal Nath[34]	Natural Resources: Gas
FaridulAlam v Bangladesh[35] (2010)	Md. Mamtaz Uddin Ahmed	DPT is part of English Common Law	a) MC Mehta v Kamal Nath[36] b) Joseph Sax's Article	Lease for hotel/motel in the Coxs' Bazar Sea beach area
Human Rights & Peace for Bangladesh v Bangladesh[37](2010)	Md. Rezaul Hasan	The Indian adoption of DPT is of great persuasive value.	M C Mehta v Kamal Nath[38]	Preservation and protection of 'Karnaphuli' river

30 *M C Mehta* (n 25) para 269, 270.

31 *M.I. Builders Private Ltd. v Radhey Shyam Sahu* (1999) 6 SCC 464, 466.

32 See for details, Naomi Hossain, 'The 1970 Bhola cyclone, nationalist politics, and the subsistence crisis contract in Bangladesh' (2018) 42(1) Disasters 187-203.

33 *Shah Abdul Hannan v Bangladesh* (2011) 16 BLC 386.

34 *M C Mehta* (n 25).

35 *Faridul Alam v Bangladesh* (2010) 18 BLT 323.

36 *M C Mehta* (n 25).

37 *Human Rights & Peace for Bangladesh v Bangladesh* (2010) 22 BLC 48.

38 *M C Mehta* (n 25).

Name of the Case	Judge	Reasoning	Relied on	Subject matter
Human Rights & Peace for Bangladesh v Bangladesh[39] (2019)	Md. Ashraful Kamal	a) Article 21 (duties of citizens and of public servants) b) Article 18A (protection and improvement of environment and biodiversity) c) Article 31 (right to protection of law) and 32 (protection of right to life and personal liberty)	a) MC Mehta v Kamal Nath b) Joseph Sax's Article	Preservation and protection of 'Turag' river

Figure 1: *Cases involving DPT in Bangladesh*

If we critically delve into the root of the DPT in Bangladesh, it is evident that the judiciary was, at first, not certain about the constitutional position of the doctrine in Bangladesh. Rather the judiciary kept taking a functionalist approach to the doctrine relying on the English Common Law precepts and persuasive authority of the Indian cases. In the first two cases, the judges as well as the lawyers, refrained from referring to any constitutional provision in Bangladesh. This raises an important question as to the methodology of transplantation of constitutional doctrines. However, in the third case, the Judiciary could reach a more transparent position. In this case, the Court was of the view that although Article 18A was later entrenched into the constitution through an amendment after 39 years of its establishment and the right to life was yet show its elasticity, the constituent assembly led by father of the nation Bangabandhu Sheikh Mujibur Rahman incorporated the concept of public trust in the Part II (Fundamental Principles of State Policy (FPSP)) of the 1972 Constitution making the it the first constitution ever to recognize DPT. Article 21(1) of the Bangladesh Constitution states that:

> It is the duty of every citizen to observe the Constitution and the laws to maintain discipline, to perform public duties and *to protect public property*. (emphasis on the italic portion)

Although following the classical position of the FPSPs, it can be argued that provisions of the part II are not judicially enforceable, it is submitted that considering the modern developments in several case laws[40] and academic commentaries[41], the Part II provision of the Constitution is definitely negatively

[39] *Human Rights & Peace for Bangladesh v Bangladesh* (2019) WP No 13989/2016.

[40] See for details, *Chairman, National Board of Revenue v Advocate Julhas Uddin* (2010) 15 MLR (AD) 457; *Major General K M Shafiullah v Bangladesh* (2009) Writ Petition no. 4313/2009.

[41] See for details, Muhammad Ekramul Haque, 'Legal and Constitutional Status of the Fundamental Principles of State Policy as Embodied in the Constitution of Bangladesh' (2005) 16(1) Journal of the Faculty of Law 45-81; Muhammad Ekramul Haque, 'The Bangladesh Constitutional Framework and Human Rights' (2011) 22 (1) Dhaka University Law Journal 55-79; Muhammad

enforceable if not positively. On the other hand, even before these judicial pronouncements and academic commentaries, there was no doubt as to the constitutional obligation on the state to consider the provisions of Part II in the governance of Bangladesh, to apply them while making laws, to use them as a guide to interpretation of the constitution and of other laws, to use them as the basis of the work of the state and of its citizens.[42] Therefore, a close reading of these case law, academic commentaries and the clear constitutional provision in Article 8(2) read with Article 21(1) provides that there is at least a negative obligation on the state to protect public property. The concept of DPT develops on the concept of public property.[43] In addition after the entrenchment of the Article 18A in the Bangladesh Constitution, and expansion of the meaning of right to life under Article 32 of the Constitution, there remains no doubt as to the constitutional abode of the DPT in Bangladesh. This is how so far the DPT has developed in Bangladesh.

3. The public trust doctrine in Bangladesh: analyzing the present

3.1. Meaning and scope

Constitutional Law jurist in Bangladesh Mahmudul Islam relied on the definition of the Black's Law Dictionary to define the DPT. It defines as follows:

> The doctrine provides that submerged and submersible lands are preserved for public use in navigation, fishing and recreation and State as a trustee for the people, bears the responsibility of preserving and protecting the right of the public to the use of the waters for those purposes.[44]

The opinion of Mahmudul Islam in the context on 2020 seems a bit backdated because around the globe DPT has evolved beyond the traditional concept of navigation, fishing and recreation rights. However, Mahmudul Islam actively referred to the approach of the Indian Supreme Court in the *MC Mehta v Kamal Nath* on which the SCB relied on in the *Faridul Alam*. Bangladeshi courts as well the jurists are highly persuaded by the *MC Mehta* dictum where the court "quashed a lease of forest land by the side of a river for interfering with natural flow of the river and ordered the lessee to pay compensation by way of restitution of the environment and ecology."[45] Bangladesh court, however, expanded the meaning and scope of the doctrine in three subsequent cases.

Ekramul Haque, 'Does Part II of the Constitution of Bangladesh contain only economic and social rights?' (2012) 23(1) Dhaka University Law Journal 45-51.

42 Constitution of Bangladesh, art 8(2).

43 *Human Rights & Peace for Bangladesh* (n 39) 157.

44 Henry Campbell Black, *Black's Law Dictionary* (6th edn, West Publishing Company 1996) cited in Mahmudul Islam, *Constitutional Law of Bangladesh* (3rd edn, Mullick Brothers Ltd 2012) 258.

45 See for details, Mahmudul Islam (n 44) 258.

In *Shah Abdul Hannan*, the petitioners sued "with honest and sincere desire"[46] to protect natural resources, e.g., gas and coal. Though the case was finally disposed of on a different issue, it was all agreed by both the parties and Shamsuddin Chowdhury J. that DPT is part of English common law and thus it is part of the law of the land. Accordingly, the 'natural and mineral resources' like natural gas is entitled to the protection of public trust. The Court transplanted the Indian doctrine of public trust and said that the state's duty is essentially akin to that of a Trustee of a Public trust, a fiduciary duty to act as protectors. By doing so, the Court expanded the scope of the DPT giving protection of public trust to the natural resources. In the second one, *Faridul Alam*, the court did not need to go beyond the traditional meaning of the DPT. Here the DPT was used to direct the government to take steps to protect the ecologically critical area of Cox's Bazar sea beach. In the third one, *Turag River*, the court utilized the DPT to declare the encroachment of the occupier unlawful and unconstitutional. In this judgment, Ashraful Kamal J. declared all the rivers in Bangladesh a legal person relying on the DPT. Thus, so far, the scope of DPT in Bangladesh has extended to natural resources like gas and coal, sea beach, and rivers. However, the HCD of the SCB has expressly said that new elements shall be added in future in the scope of the DPT.[47] Therefore, at the moment, it is not possible to provide a conclusive definition or comprehensive scope of the DPT in Bangladesh. Whatever, the definition will turn out to be in future, according to the DPT, the Constitution did not grant the state ownership of forest, wild animals, sea, sea-beach, rivers, and canals. Rather the state is merely in the position of a trustee whose obligation is to protect and develop the public trust properties.

The leading authority on the DPT, Professor Sax found three types of restriction on the authority of the government in dealing with public trust property.[48] Firstly, the public trust property must be held accessible for use by the general public. Second, the public trust property is invaluable, i.e. the government cannot transfer the property for any amount of compensation. Thirdly, the governmental conduct for relocating the public trust property or subjecting it to uses for the interest of the private persons shall be sceptically looked into by the Judiciary. As the study of cases above shows, the Judiciary of Bangladesh has typically maintained a similar position on the DPT with regard to the restrictions on the governmental authority.

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46 Hannan (n 33) para 4.

47 *Human Rights & Peace for Bangladesh* (n 39) 81.

48 See for details, Joseph L. Sax, 'The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention' (1970) 68 (3) Michigan Law Review 471.

3.2. Application of the doctrine

While the Bangladesh Supreme Court's recognition, reasoning and expansion of the DPT is a welcome development, in general there remains critical questions to be answered in relation to its application in Bangladesh. In the following the role of the courts and the legislature with regard to the DPT shall be discussed with particular focus on the substantive elements of the doctrine.

3.2.1. Role of the courts

Judicial Review of the Administration of the Trust: The HCD of the SCB is constitutionally empowered with the authority of judicial review and thus it can inquire into and provide remedy by "directing a person performing any functions in connection with the affairs of the Republic or of a local authority, to refrain from doing that which he is not permitted by law to do or to do that which he is required by law to do".[49] From the above discussions, the obligation upon the state towards public trust property is clear. In this circumstance, the courts can make sure that the public trust property is not being used for any purpose other than public's benefit under the constitutional authority of the court. The court can also adjudicate the issue: whether the state has fulfilled its obligation to maintain the public trust. Moreover, the court is the final authority to decide if any particular legislation has questionable content in itself which can be deemed unconstitutional because of being contrary to the DPT.

In all four cases involving DPT in Bangladesh, the suit was filed by public spirited individuals or organizations and the courts readily granted them locus standi.[50] When a Public Interest Litigation is filed on issues relating to the affairs of the public trust property, the court is obliged to grant locus standi and 'strictly scrutinize'[51] the legality of the affairs of the trust property. Thus, if any legislative action or executive action is contrary to the preservation of public trust property, the courts must step in by inquiring if there is any compelling government interest and if there is no other alternative to do that. However,

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[49] Constitution of Bangladesh, Article 102(2) (a).

[50] Over the past two decades, the concept of locus standi has been liberalized to a wide extent only to face the abuse of the liberal interpretation and thereafter the courts had to narrow down the scope of the widened locus standi. With the judgment on *NBR v Abu Sayeed* (2013) 18 BLC (AD) 116, the position of the law came to a settled position. See for details, Md Rizwanul Islam and Md Tayeb-Ul-Islam Showrov, 'Sifting through the Maze of 'Person Aggrieved' in Constitutional Public Interest Litigation: Has Abu Saeed Case Ushered a New Dawn?' (2017) 28 Dhaka University Law Journal (Dhaka University Studies Part-F) 155-168.

[51] Although there is no study on the implication of 'doctrine of strict scrutiny' in Bangladesh, the equality clauses of the Constitution of India and Bangladesh are similar. Moreover, the Bangladeshi courts routinely rely on the Indian constitutional jurisprudence unless the constitutional texts are different. For implications of the doctrine of strict scrutiny in India, see Moiz Tundawala, 'Invocation of strict scrutiny in India: Why the Opposition?' (2010) 3 NUJS Law Review 465.

while doing so it is important for the judges to be cautious if they are transgressing the limits of the Constitution itself.

Role of the Legislature: Under the DPT, it is the 'state' that is in charge of the public trust property. It purports to mean that all three branches of the state shall play its expected role to preserve and protect the properties. As the law-making branch of the state, the legislature or the Parliament of Bangladesh has to play its role by enacting laws respecting public trust property. The legislature is the principal trustee of the public trust properties. The Constitutional basis of the DPT is an indication that if any legislative action fails to meet the fiduciary standard of care for the trustees, such actions and standards can be strike down. Moreover, it is also the obligation of the legislature to promote the DPT by enacting legislation for different sectors. Fortunately, the Parliament of Bangladesh has tried to incorporate the concept of DPT into different legislation from the very beginning. Justice Ashraful Kamal in the *Turag river*[52] has identified all the legislation that incorporated the concept of DPT, enacted so far:

a) 'The Bangladesh Wild Life (Preservation) Order, 1973
b) The Bangladesh Petroleum Act, 1974
c) The Environment Conservation Act, 1995
d) The Environment Conservation Rules, 1997
e) The Environment Court Act, 2000
f) The Play-ground, Open space, Park and Natural Wetland Conservation Act, 2000
g) The Climate Change Trust Act, 2010
h) The Wildlife (Preservation and Security) Act, 2012
i) The National River Protection Commission Act, 2013
j) The Bangladesh Water Act, 2013
k) The Bangladesh Bio-diversity Act, 2017

3.2.2. Fiduciary duties of the trustees

3.2.2.1. Substantive duties

The duty of the public servant: Since the public servants are appointed by the people of this country with the support of the Government, the government officials are legally obliged to maintain the public trust properties.[53] If there is any inconsistency in fulfilling the obligation, they are accountable to the people. The people can ensure such accountability through the Government or the Judiciary.

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[52] *Human Rights & Peace for Bangladesh* (n 39).
[53] ibid, 260.

The duty of the National River Protection Commission: The National River Protection Commission has been declared as the legal guardian (person in loco parentis) of all the rivers of Bangladesh.[54]The Court also imposed obligation on them to protect and develop the rivers and recover those which were encroached unlawfully. Moreover, the organizations of the Government are also made responsible to assist the National River Protection Commission fulfil their responsibilities.[55]

The duty of Bangladesh Bank: The Court imposed an obligation on the central bank of Bangladesh, Bangladesh Bank, to direct all the banks of Bangladesh by a circular to take necessary measures so that no amount of loan is granted against any individual or company who is alleged to be an encroacher of public trust property.[56] However, mere allegation cannot be considered as a conclusive proof of an offence. Thus, the Banks may be instructed to postpone the entire process of granting loan when the decision makers of the Bank have knowledge about the illegal encroachment of the loan applicant. If after the due process, the loan applicant is acquitted of the charges, the Bank can definitely resume the loan application.

The duty of the National Election Commission: The Court has directed the National Election Commission to include the unlawful encroachment and destroyer of public trust property in the list of conditions for ineligibility in elections in all levels including union, sub-district, district and Parliament.[57]

The duty of protection: The duty of protection to the public trust properties requires an active role on the part of the state. Therefore, the state, i.e. the executive Government and the legislature must take an active role or affirmative actions to preserve and protect the public trust properties. If any backsliding in their role is noticed, the beneficiaries of the public trust properties can sue the state in the court of law for proper remedies. Thus, if any permit of any developmental project involving the public trust property is granted, as the trustee, the state must take an active interest over the project, continue supervision over such project and put an end to such project when it becomes harmful for public interest.

The duty against waste: The Constitution of Bangladesh provides protection for environment not only for the present generation but also for the future generation, thereby including inter-generational equity principle in itself.[58]Indian Supreme Court is of the view that the DPT looks beyond the need of the present

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54 ibid, 278.
55 ibid.
56 ibid, 281.
57 ibid.
58 Constitution of Bangladesh, Article 18A.

generation and also suggests that certain resources are invested with a special nature.[59] Thus the trustees shall have a duty to make sure that the public trust properties are not being wasted.

3.2.2.2. Procedural duties

The duty of precaution: It is required of the state to take pre-cautionary measure to protect public trust property in all the development related functions. The Court in the Turag river has clarified that it is a legal obligation on the part of the state to abide by the obligations it took upon itself from Rio Declaration.[60] Principle 15 of the Declaration incorporates the duty of the state to take precautionary measures.

The duty to enforce polluter pays principle: In the Turag river, the court adopted the polluter pays principle in Bangladesh. The court made it clear that the hard-earned income of the people and their tax money cannot be used for restoring the Turag River back to its original form due to the encroachment and pollution of the river. While doing so, the Court relied on the authority of Principle 16 of the Rio Declaration which states that: "the polluter should in principle bear the cost of pollution with due regard to the public interest".[61] The court read Article 21 of the Constitution with Principle 16 of the Rio Declaration to observe that it is the obligation of the citizens to protect, preserve and not to cause destruction of the public trust property. Thus Ashraful Kamal J. declared that the court shall be the resort of the citizens if anyone destroys the public trust properties under its writ jurisdiction under Article 102(1) of the Constitution. It might be a moot question if actions in the writ jurisdiction can be brought against private persons. Following the Dataphin test[62] from the UK jurisdiction, the SCB has also adopted similar test utilizing the leeway in Article 102(1) of the Constitution. Since maintenance of the public trust property inevitably falls within the 'affairs of the Republic', suit can be brought against 'any person'.[63] Thus if any person aggrieved brings a suit in the writ jurisdiction against any person who was caused injury to the public trust property, the Court shall be obliged to grant an order directing the polluter to pay such amount of damages as may be necessary to restore the public trust property.

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59 *T.N. Godavarman Thirumulpad v Union of India* AIR 2005 (SC) 4258.

60 *Human Rights & Peace for Bangladesh* (n 39) 268.

61 ibid, 269.

62 *R (Datafin plc) v Panel on Take-overs and Mergers* (1987) 1 All ER 564.

63 Such an approach was taken in *Moulana Md. Abdul Hakim v Bangladesh* (2014) 34 BLD 129. However, the development of this concept is yet in its early stage and there has no decision on this issue by the Appellate Division of the Supreme Court. But see Ridwanul Haque, 'The "Datafin" Turn in Bangladesh: Opening Up Judicial Review of Private Bodies' (*Adminlawblog*, 25 October 2017) <https://adminlawblog.org/2017/10/25/ridwanul-hoque-the-datafin-turn-in-bangladesh-opening-up-judicial-review-of-private-bodies/> accessed 21 April 2020.

The duty towards sustainable development: The needs of the future generation cannot be overlooked in the name of fulfilling the needs of the present generation. The Constitution of Bangladesh recognises the obligation of the state in ensuring the protection and improvement of the environment for the future generation.[64] Moreover, the Stockholm Declaration[65] and the Rio Declaration on Environment and Development[66] is also reflective of principle of striking a balance between environment and development. Thus, the environment, natural resources and bio-diversity cannot be destroyed for economic development of the country. The state must make a balance between the need for economic development and environmental pollution.[67] Such an approach is reflective of the sustainable development policy of the state.

The duty of furnishing information to beneficiaries (duty of accounting): Under the Private Trust Law, a trustee is bound to maintain clear and accurate accounts of the trust property.[68] However such an obligation upon the trustee is inherent in the trust law. In Bangladesh, there is no legislation to regulate the public trusts in general although there are laws to regulate the religious and charitable trusts.[69] Even in the absence of any specific law, the trustee of the public trust properties shall be responsible to make all the information about the accounts of the public trust property available in the online platform and update them regular in the online and offline site.

4. Critiques and responses to the critiques of public trust doctrine in Bangladesh

The legal literature in Bangladesh on the issue is seriously under-developed. The fact that there has been no literature on the critique of the DPT in Bangladesh is just one case-study of it. However, taking into consideration the U.S. academic scholarships, quite a few criticisms have been identified. In the following these identified criticisms shall be addressed in the context of Bangladesh.

4.1. Shaky origin

There has been huge criticism against the roman and common law roots of the DPT in the US legal academia. This criticism stems from Huffman's account that the Roman law and common law had nothing resembling to the concept of

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64 Constitution of Bangladesh, Article 18A.

65 Stockholm Declaration on Human Environment 1972 U.N. Doc. A/CONF.48/4 at 2-65, Principles 1 and 2.

66 Rio Declaration on Environment and Development 1992 UN Doc. A/CONF.151/26 (vol. I), 31 ILM 874 (1992), Principles 1, 4, 15, 16.

67 *Human Rights & Peace for Bangladesh* (n 39) 260.

68 Trust Act 1882, s 19.

69 Charitable and Religious Trust Act 1920.

public trust and that Magna Carta had nothing to do with public rights.[70] In Bangladesh, the SCB have adopted the Saxion version of DPT by relying on the principle enunciated in *MC Mehta*.[71] In doing so, the SCB has ignored a south-Asian root of the concept which has been even acknowledged in an International Court of Justice Decision.[72] Therefore, even if one day the court decides to overturn its reliance of Saxion version of history, the Bangladeshi courts can still rely on the South Asian narrative of the development of the doctrine. Moreover, in Bangladesh the DPT has been developed as a constitutionally entrenched doctrine.[73] Ashraful Kamal J. observed that the DPT was incorporated into the original constitution of Bangladesh in Article 21 of the Constitution.[74] Later on, with the entrenchment of Article 18A and expansion of the meaning of Article 32 has only given it a solid grounding. Therefore, such a critique of shady historical background cannot stand in Bangladesh.

4.2. Inconsistent with rule of law

The DPT has also been alleged to be inconsistent with the concept of rule. The reason behind such an allegation is the contention that DPT allows the courts to "modify or abandon established common law principles in the name of present day notions of the public interest and public rights".[75] Even if such an account is correct in those jurisdictions where DPT has developed as a common law based concept, such a contention does not hold true in Bangladesh because DPT has been a constitutionally entrenched provision since the its inception.

4.3. Judiciary led governance

The most prominent criticism against the DPT is that it has given too much power to the courts by incorporating a judiciary-based model of governance for the public trust properties.[76] Such a criticism stems from the traditional concept of separation of powers with the belief that only the legislature and executive possess the competency to deal with complex problems of environmental

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[70] See for details, James L Huffman, 'Speaking Inconvenient Truths: A History of Public Trust Doctrine' (2007) 18 Duke Environmental Law and Policy Forum 1 (argues that the origin of DPT is not based on true facts to the extent of preserving public rights).

[71] In all four cases involving DPT in Bangladesh, the Court has actively relied on the principle of *M C Mehta* (n 25).

[72] See for details, *Hungary v Slovakia* (n 15).

[73] See for details, *Human Rights & Peace for Bangladesh v Bangladesh* (n 39).

[74] Ibid.

[75] See for details, James L Huffman, 'Background Principles and the Rule of Law: Fifteen years after Lucas' (2008) 35 Ecology Law Quarterly 1, 27.

[76] James L. Huffman, 'Why Liberating the Public Trust Doctrine is bad for the Public' (2015) 45(2) Environmental Law 337-377 (identified issues involving separation of powers, rule of law and due process).

concern.[77] However, it has to be kept in mind that the nature and environment has significantly deteriorated over the years although there has been consistent efforts of the legislature and executive government. This has happened due to the lobbying efforts of the big industries and the vulnerability of the government to such lobbying efforts. However, in Bangladesh the question about supremacy of any particular branch of the government does not arise because it is the Constitution that is supreme.[78] Therefore, all the branches of the government shall function according to the Constitution of Bangladesh. Moreover, since complete separation of powers is not feasible and non-existent even in the United States, following the global practice, Bangladesh has also adopted the doctrine of check and balance.[79] The doctrine of check and balance requires the judiciary to oversee the legality of the actions of legislature and the executive. In the name of water-tight compartmentalization, the judges cannot bypass their constitutional obligation towards public trust properties when there has been a manifest violation of citizen's right to enjoy public property. In this situation it is imperative that the members of the public are given the opportunity and legal standing to oversee the management of the public trust properties.

5. Future of public trust doctrine in Bangladesh

5.1. Importance of allowing the DPT to develop

The future of DPT in Bangladesh is really bright. It requires further academic discussion as to how the doctrine will gradually evolve and what areas it will touch. At the same time, it is important for us to let DPT develop itself. The reason is very obvious. The DPT is causing no harm to the rule of law, preservation of public trust properties although the potential development of the DPT can fill up the vacuum in the legislative framework which is very essential for the protection of various resources. Moreover, DPT plays at least two major roles in protecting the public properties. First, in the absence of any legislation, the DPT fills up the regulatory gap. Second, not only DPT fills up the legislative vacuum, it also sets the normative standard for the legislature in providing protection to the public trust property.

The prime reason why DPT should be let develop is that it fills the vacuum in the legal framework to give protection to the natural resources and ensures permanent sovereignty over natural resources. The multi-national corporations are constantly trying to siege the communal value of the natural

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[77] Richard J. Lazarus, 'Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine' (1986) 71 Iowa Law Review 631, 633; Barton H Thompson Jr, 'Judicial Takings' (1990) 76 Virginia Law Review 1449.

[78] Constitution of Bangladesh, Article 7.

[79] *Bangladesh v Aftab Uddin* (2010) 30 BLD (AD) 1.

resources[80] and public properties. This is the same reason there is lack of positive law addressing the concerns of natural resources.[81] At the same time there are other areas beyond natural resources where the judiciary needs tool to protect the public properties which shall be discussed in the following. Moreover, the DPT gives a normative standard and other tool to enact legislation on the area that are not being regulated by the positive law. Therefore, it is wise for the environment sensitive people to advocate for allowing the DPT to develop to address the unnoticed public properties.

5.2. Ways DPT can develop

5.2.1. Transformation of DPT into a cost-benefit analysis

Incorporation of Article 18A in the Constitution of Bangladesh makes a bold statement about the state's emphasis on the environmental protection and preservation. However, since it is assumable that the environmental consciousness will regularly be in violent clash with our developmental goal, the state shall move towards a balance of both interest transforming the entire DPT into a cost-benefit analysis. It requires to be mentioned that over the last century, the United States has also transformed into such a paradigm.[82] In the sub-continent, the Indian Judiciary has engaged in, respecting separation of power theory, cost-benefit analysis between environmental concern and fundamental rights of the citizens.[83] Even in Bangladesh, the beginning of the journey to a cost-benefit analysis test can be noted. In *Human Rights and Peace for Bangladesh v Bangladesh*[84] ('*Thermal Power Plant*', hereinafter), the Court had to make a somewhat cost-benefit analysis between the need of the energy supply and preservation of marine life. The court finally directed the government to look for sites that will cause lesser or minimal harm. In *Advocate Asaduzzaman Siddiqui and others v Bangladesh*[85], the court acknowledged that since no nation can deny economic development and economic development itself is an antithesis of natural balance, all the developed nations are found to strike balance between economic development and its cost upon environment. Keeping the damage at the minimal Level has always been the policy everywhere. Thus, in future the

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80 See for details, Hope M Babcock, 'The Public Trust Doctrine: What a Tall Tale they Tell' (2009) 61 South Carolina Law Review 393.

81 Mary Christina Wood, 'Advancing the Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations (Part II): Instilling a Fiduciary Obligation in Governance' (2009) 39 Environmental Law 91, 103.

82 For details on the US approach to the situation see, Matthew Thor Kirsch, 'Upholding the Public Trust in State Constitutions' (1997) 46 Duke Law Journal 1169.

83 *Narmada Bachao Andolan v Union of India* (2000) 10 SCC 664; *Rural Litigation and Entitlement Kendra, Dehradun and Others v State of U.P. and Others* AIR 1985 SC 652; *Karnataka Industrial Areas Development Board v Sri C. Kenchappa and Others* AIR 2006 SC 2038.

84 *Human Rights and Peace for Bangladesh v Bangladesh* (2012) Writ Petition No. 8282/2010.

85 *Advocate Asaduzzaman Siddiqui and others v Bangladesh* (2013) WP No.10937/2013, para 5.

DPT will impose ban on state actions unless that passes the cost-benefit test. However, taking into consideration the current developments so far, the following threefold test can be theorized:

1. Has the government taken necessary measures to minimize the negative impact on the public trust property to the maximum level?
2. Is there any other alternative place where the project can be shifted for better preservation of the public trust property?
3. Whether the socio-economic impact of the project would supersede the negative impacts on the public trust property?

5.2.2. Expansion of the public trust to new resources

The Constitution of Bangladesh in its Part II embodies the Fundamental Principles of State Principles. The constitutional status of this part of the constitution is as follows:

> 8(2). 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.

Unlike the Indian Constitution[86], the Bangladesh Constitution does make it imperative for the judiciary to use part II provisions as a "guide to interpretation of the Constitution". The academic commentators are also of the same view that using the leeway in "guide to interpretation", the courts can at least develop contents in enforcing a constitutional obligation on the part of the state.[87] With time the courts will try to widen the ambit of the DPT in Bangladesh. Thus it will try to incorporate the contents from the explicit environmental protection article

[86] Similar provision of the Indian Constitution can be found in Article 37 where it states: "The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws." While interpreting the Bangladesh Constitution, I argue that looking at the relevant provision through the lens of Comparative Constitutional Law of India is important since the Constituent Assembly of Bangladesh explicitly debated on the model of Indian Constitution.

[87] See for details, M Waheduzzaman, 'Judicial Enforcement of Socio-Economic Rights in Bangladesh: Theoretical aspects from comparative perspective' in Mizanur Rahman (ed), *Human Rights and Environment* (Dhaka: ELCOP, 2011) 57-80; M Waheduzzaman, 'Economic, Social and Cultural Rights under the Constitution: Critical Evaluation of Judicial Jurisprudence in Bangladesh' (2014) 14(1 & 2) Bangladesh Journal of Law; M Waheduzzaman, 'Inclusion and Enforcement of ESC Rights under State Constitutions: An Appraisal' (2015) 3 Jahangirnagar University Journal of Law; M Jashim Ali Chowdhury, 'Does inconsistency with Fundamental Principles of State Policy invalidate a Law?' (2009) 5 BRAC University Journal 71-75; Md. Reajul Hasan Shohag and ABM Asrafuzzaman, 'Enforcing Socio-Economic Rights Judicially: Experiments in Bangladesh, India and South Africa' (2012) 3 Northern Uni. Journal of Law 87.

of the Bangladesh Constitution and extend the protection to "bio-diversity, wetlands, forests and wild life for the present and future citizens".[88] Moreover, the DPT can also expand its purview to provide protection to national cultural traditions, heritage of people of Bangladesh, local culture and tradition of tribes, minor races, ethnic sects and communities.[89] If we look into the whole discussion from a bird's eye view, it is clear that the DPT can turn to be epitome of negative enforcement of entire part II of the constitution. That means if the state actions are manifestly contrary to the objectives of the Part II provisions of the Constitution, the Court shall impose ban on those state actions.

5.2.3. Developing privacy regulation

The Constitution of Bangladesh guarantees to right to privacy of the correspondence and other means of communication of the citizens.[90] However, such a constitutional provision is inadequate to give protection to the citizens from data leakage out of big data industries. Back in 2016, when the Government of Bangladesh initiated a mandatory biometric sim registration, questions were raised as to the legality of the system since it places tremendous trust on the Telecommunication corporations. Thus when a writ petition was filed, the court issued a rule as to the legality of the biometric registration.[91] The government took the position that the mobile phone operators were merely cross checking the finger prints with the database of the National ID card.[92] After a hearing on the rule, the Court legalised the biometric sim registration. However, such a legalisation brings into forefront the issue of government responsibility in protecting the most delicate data of the individuals of the country. The legal regime is totally silent in placing obligation on the part of the government. This loophole creates a possibility that such a vacuum shall be addressed by judicial innovation, i.e. considering the national database a public trust property. The government shall be under the obligation to take all sorts of measure to protect the database.

6. Conclusion

Although the DPT has been a part of Bangladeshi law since the beginning of the constitutional framework of Bangladesh, it took time for the judiciary to acknowledge it and use it as a tool to provide protection to the public properties.

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88 Constitution of Bangladesh, Article 18A.

89 ibid, Article 23.

90 ibid, Article 43.

91 Ashutosh Sarkar and Muhammad Zahidul Islam, 'HC questions legality: Issues rule on authorities amid public fear of misuse of their personal data' *The Daily Star* (Dhaka, 15 March 2016) <https://www.thedailystar.net/frontpage/hc...legality-791446> accessed 26 April 2020.

92 UNB, 'No fingerprint stored during SIM re-registration: Tarana' *The Independent* (Dhaka, 12 June 2016) <http://www.theindependentbd.com/post/47244> accessed 27 April 2020.

Unlike many jurisdictions, the DPT has a constitutional root in Bangladesh and has an autochthonous South Asian origin. Therefore, the popular criticisms against the doctrine does not hold value at all. Moreover, in this article, the proper meaning of the DPT and the scope of such doctrine has been elaborated taking into consideration all the judicial decision by the SCB so far. It shows that the DPT can be utilized in areas far beyond its current usage for protecting natural resources and environmental elements.

This article theorized a threefold test for the judiciary to use it as a tool to adjudicate matters related to natural resources or public properties at large. It is expected that the judiciary will take the threefold test in judicial approval of projects involving harm to the public trust properties. The government also needs to run the threefold test before initiating any project involving public trust properties. The legislature should consider the test to ensure none of their Acts are violative of the constitutional mandate to protect public trust properties. This Article also predicts that the judiciary shall extend the ambit of the DPT in Bangladesh in view of the Part II provisions of the Constitution and in developing protection for privacy issues in the absence of any legislative framework. With concerted efforts from all three branches of the state machinery, the public trust properties can be properly protected and preserved.