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Contents

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

Biswajit Chanda*

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

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

1. Introduction

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

* The author is a Professor at the Department of Law and Land Administration, University of Rajshahi. Currently he is serving as a full-time Member of the University Grants Commission of Bangladesh. He can be reached at: bchandalaw@gmail.com.

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

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

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

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

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

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

4 M. Ridwanul Hoque, 'Judicial Activism as a Golden Mean: A Critical Study of Evolving Activists Jurisprudence with Particular Reference to Bangladesh' (PhD Thesis, SOAS University of London 2007) 3-4.

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

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

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

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

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

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

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

[10] Menski (n 1).

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

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

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

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

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

2. Development of the legal system of Bangladesh

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

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

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

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

2.1. The law in the Hindu period

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

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

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

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

[16] ibid.

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

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

[19] Chanda (n 12) chapter 4.

[20] Menski (n 8).

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

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

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

[22] ibid.

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

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

[25] ibid.

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

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

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

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

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

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

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

2.2. Legal system in the Muslim period

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

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

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

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

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

[38] Ahmad (n 36).

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

[40] Ahmad (n 36).

[41] Chanda (n 39) 307.

[42] Hoque (n 17).

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

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

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

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

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

[45] ibid.

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

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

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

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

[50] Burton (n 48).

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

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

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

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

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

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

[54] ibid.

[55] ibid.

[56] ibid.

[57] ibid, xxii.

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

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

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

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

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

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

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

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

[61] ibid.

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

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

[64] Mulla (n 53) xxiv.

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

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

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

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

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

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[65] ibid.

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

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

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

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

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

[71] Chanda (n 13) 257.

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

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

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

2.3. The law in the British period

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

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

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

[74] ibid.

[75] ibid.

[76] ibid, 279.

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

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

[79] Chanda (n 13) 257.

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

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

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

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

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

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

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

[84] Derrett (n 78) 11.

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

[86] Menski (n 23).

2.4. The Pakistani period

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

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

2.5. Bangladesh after 1971: socialist nature of the constitution

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

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

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

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

[90] ibid.

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

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

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

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

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

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

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

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

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

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

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

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

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[96] Menski (n 1).

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

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

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

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

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

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

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

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

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

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

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

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

[105] Jaising (n 43) 1.

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

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

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

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

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

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

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

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

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

[111] Menski (n 109).

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

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

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

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

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

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

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

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

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

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

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

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

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

[118] Chiba (n 46).

[119] Griffiths (n 117).

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

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

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

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

4. Bangladeshi legal pluralism

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

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

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

[123] Menski (n 109).

[124] Menski (n 23).

[125] Moore (n 34).

[126] Griffiths (n 117) 1.

[127] Jaising (n 43) 2.

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

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

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

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[128] Chiba (n 46).

[129] Menski (n 1).

[130] ibid.

[131] ibid.

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

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

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

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

5. Concluding remarks

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

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

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

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

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

[137] ibid.

[138] Menski (n 1).

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

Exploring the Impacts of Defining Rape as Non-consensual Sexual Intercourse: The Need to Redefine the Offence

Nasir Ahmad*

Abstract: This article explores the negative impacts of defining rape as non-consensual sexual intercourse as articulated in the relevant laws of Bangladesh. It demonstrates that such a definition of rape encounters a number of difficulties in proving the offence and becomes a stumbling block to ensure justice for the victims of rape in Bangladesh and prosecute the actual rapists. Hence, many victims of rape are deprived of justice and the offenders go unpunished. Moreover, the existing non-consensual definition of rape often persuades the trial courts to pay attention to the conduct and attitude of the victim rather than that of the perpetrators and allows the defence lawyer to raise question as to the character of the victims. In order to overcome the shortcomings of the present definition, this paper argues for redefining the offence of rape as a forced sexual intercourse to put the rapist on trial, not the victim.

Keywords: Conviction, impacts, non-consensual sexual intercourse, perpetrators, rape, and victims.

1. Introduction

The legal system of Bangladesh places great importance on justice. Indeed, it does not only seek to ensure redress for the victims but also emphasize more on ensuring justice for both the victims and the perpetrators of any crime. Therefore, the primary objective of each statutory law of the country is to secure justice for both parties. However, due to the shortcomings in the existing laws and practices,[1] it has become impossible to ensure justice for the parties in majority of the cases.[2]

* The author is an Assistant Professor at the Department of Law, Dhaka International University. He can be reached at:nasirdulaw@gmail.com.

[1] The researchers have demonstrated many shortcomings in the existing laws and practices in their papers. For example, Taslima Yasmin has found various gaps in the legal framework that addresses sexual violence. Taslima Yasmin, 'Sexual Violence in Bangladesh: Addressing Gaps in the Legal Framework' (2017) 28 Dhaka University Law Journal (The Dhaka University Studies Part-F) 105, 109-117. See also S. M. Atia Naznin and Tanjina Sharmin, Reasons for the Low Rate of Conviction in the VAW Cases and Inconsistencies in the Legislative Frameworks (The Research Report of the VAW Project, BRAC University, 2015) 43-71.

[2] It may be mentioned here that due to the gaps and shortcomings in the relevant laws and practices; the conviction rate in sexual violence cases is very low. A study demonstrates that out of the 22,073 rape cases disposed by the Nari-O-Shisu Nirjatan Daman (Women and Children Repression Prevention) Tribunals of Dhaka, Comilla and Pabna between 2009 and 2014, only 186 rape cases resulted in convictions, making the conviction rate as surprisingly low as 0.86%. S. M. Atia Naznin and Tanjina Sharmin (n 1) 42. However, a report published in the Daily Star on 30 March 2018 shows

Rape law is one of them, which covers some drawbacks generating a great impasse on achieving the expected objective and making it impossible to meet the goals of the relevant laws. Particularly, the relevant laws fail to provide an effective definition of rape that is very important to prove the case beyond reasonable doubt. The existing definition of rape, as provided in the Penal Code, 1860 and the Suppression of Oppression against Women and Children Act 2000[3] is old-fashioned and often alleged to be not well matched with the socio-legal milieu of the country. Therefore, the law academicians, legal researchers, lawyers and judges often raise a very significant question as to its appropriateness in the contemporary legal arena.[4]

Rape is traditionally understood as sexual intercourse committed by a man (the perpetrator) with a woman by force and against her will.[5] In Bangladesh, both the Code of 1860 and the Act of 2000 deal with the offence of rape, providing the definition of the offence and various degrees of punishments based on the

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that there is no conviction in 97 percent rape cases in Dhaka alone and most of the accused persons have been acquitted. See Bishakha Devnath, 'Many rapists escape thru' loopholes' The Daily Star (Dhaka, 30 March 2018) <https://www.thedailystar.net /frontpage/many-rapists-escape-thru-loopholes-1555585> accessed 21 February 2019. This situation of very low rate of conviction demonstrates the failure of the criminal justice system to ensure justice for most of the rape victims.

[3] The official version of the Act is in Bengali titled as the Nari O Shishu Nirjatan Daman Ain 2000 and the Suppression of Oppression against Women and Children Act is an unofficial translation of the Bengali title. This title has also been used for the purpose of this work. It is mentionable here that before enactment of the Act, there were two laws relating to protection of women and children against different heinous crimes including rape. The first one was titled as 'the Cruelty to Women (Deterrent Punishment) Ordinance, 1983'. Replacing the 1983 Ordinance, the second one was made in the form of (Prevention of Women and Children Repression (Special Provision) Act in 1995. Later, the government enacted the Suppression of Oppression against Women and Children Act 2000 repealing the Act of 1995. Taqbir Huda, 'The colonial legacy of rape laws' The Daily Star (Dhaka, 28 November 2019) <https://www.thedailystar.net/opinion/law/news/the-colonial-legacy-rape-laws1832800> accessed 23 March 2020.

[4] For example, in a conference on 'Rape Law Reform in Bangladesh', Justice A.F.M. Abdur Rahman, Former Justice, High Court Division, Supreme Court of Bangladesh, opined, "The definition of rape is yet to be updated, despite the enactment or amendment of special laws in 1995, 2000 and 2003". In addition, Dr. Shahnaz Huda, Professor, Dept. of Law, University of Dhaka, urged to update the definition of rape arguing, "The definition of rape needs to be updated since the Penal Code is now almost a 160-year-old law". See Taqbir Huda and Abdullah Anbar Titir, 'Rape Law Reform in Bangladesh' (Conference Report, Bangladesh Legal Aid and Services Trust (BLAST), Dhaka-1000, Bangladesh, April 2019) <https://www.blast.org.bd/content/publications...-RLR-ConferenceReport.pdf> accessed 23 March 2020.

[5] Victor Tadros, 'Rape without Consent' (2006) 26 (3) Oxford Journal of Legal Studies 515, 515, stating- "Traditionally, the law of rape prohibited penetration of the vagina of the complainant by the penis of the accused by force and against the will of the complainant". According to David Archard, rape may be defined as sex without the consent of its victim. David Archard, 'The Wrong of Rape' (2007) 57 (228) The Philosophical Quarterly 374, 374. However, some authors are in favour of a 'conjunctive definition' of rape describing it as sex that is non-consensual and forced. See J. McGregor, 'Why when she says no, she doesn't mean may be and doesn't mean yes: A critical reconstruction of consent, sex, and the law' (1996) 2(3), Legal Theory, 175.

gravity of the offence. Both these two laws have defined rape as sexual intercourse committed by a man with a woman against her will or without her consent. This definition of rape does not include both the requirements of non-consent and non-willingness of the victim concurrently. Accordingly, having sexual intercourse by a man with a woman without her consent is sufficient to be an offence of rape. Thus, rape may be defined as 'committing non-consensual sexual intercourse by a man with a woman'.

However, the existing definition of rape as non-consensual sexual intercourse gives rise to a number of problems in proving a rape-case beyond a reasonable doubt. This definition persuades the trial courts to focus problematically on the conduct and sexual history of the complainant rather than the conduct of the accused.[6] This definition may also open the door of confusion in determining whether sexual intercourse was rape and misguide the judges to not convicting many actual rapists. Relying on a mistaken understanding of consent, they may arrive at an unjust decision based on the wrongful belief that the complainant might have consented to sexual intercourse before committing it. Therefore, it is very difficult to prove the offence of rape resulting in non-conviction of many actual rapists. As a result, a culture of non-conviction in most of the rape cases has become a common scenario. Thus, this definition of rape brings a number of negative impacts causing injustice to the victims and their family members. Therefore, this situation usually gives rise to a question as to the appropriateness of the existing definition of rape based on non-consensual sex.

This article aims at revisiting the definition of rape as a non-consensual sexual intercourse by a man with a woman or girl as provided in the existing legal provisions. With this objective in mind, this paper first explains rape defined as non-consensual sexual intercourse along with the essential elements of the offence. Then it tries to clarify the concept of consensual sexual intercourse to understand the proper application of this definition. After that, it explains how the existing definition of rape may generate problems in the trial of rape cases and deprive the victims and their family-members of justice. Finally, the article substantiates that in order to overcome the drawbacks of the existing definition, it should be replaced by a definition based on forced sexual intercourse.

2. Defining rape as non-consensual sex

Simply rape may be defined as having sexual intercourse by a man with a woman or girl without her consent[7] or against her will[8]. According to section 2 (e) of the Suppression of Oppression against Women and Children Act 2000, 'rape' means,

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[6] Victor Tadros (n 5) 516.

[7] *Shibu Pada Acharjee v The State* (2003) 8 MLR (HC) 275.

[8] Penal Code 1860, s 375.

subject to section 9 of this Act, rape as defined in section 375 of the Penal Code 1860. Therefore, in order to comprehend the definition of rape, we need to read section 375 of the Penal Code along with section 9 of the Act of 2000. Thus, we find the basic definition in section 375 of the Code, which provides-

> A man is said to commit "rape" who except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the five following descriptions: -Firstly: Against her will; Secondly: Without her consent; Thirdly: With her consent, when her consent has been obtained by putting her in fear of death, or of hurt; Fourthly: With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married; Fifthly: With or without her consent, when she is under fourteen years of age.[9]

However, this definition is subject to section 9 of the Act of 2000, which provides-

> If any man, without lawful marriage, has sexual intercourse with a woman above sixteen years of age without her consent or with her consent obtained, by putting her in fear or by fraud, or commits sexual intercourse with a woman under sixteen years of age with or without her consent, he shall be deemed to have committed rape.[10]

Therefore, if we read both these two sections, it will be clear to us that a man will be guilty of rape, if he commits, without lawful marriage, sexual intercourse with a woman above sixteen years of age against her will or without her consent. Therefore, the basic definitional element of rape is non-consent or non – willingness of the victim to sex that renders sexual intercourse criminal; otherwise, it would not be rape. Thus, for sex to be rape, it must be committed against the will of the victim or without her consent to sexual intercourse or with consent not deemed in the eye of law as valid consent as prescribed in the above-mentioned provisions.[11] Accordingly, rape may be defined as 'committing non-consensual sexual intercourse by a man with a woman without lawful marriage'.

3. The legal requirements of rape defined as non-consensual sex

A criminal act or omission to be an offence must have certain essential requirements, which the prosecution is required to prove in order to hold the accused guilty of the offence and ensure his conviction. If we illustrate the definition of rape based on non-consensual sex, we will find the following

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[9] ibid.

[10] The Suppression of Oppression against Women and Children Act 2000, s 9 (Explanation).

[11] Consent to sex obtained by putting the victim in fear of death, or of hurt, or given by her under circumstances when she believes that the perpetrator is her lawful husband, but the perpetrator knows that he is not her husband, or given by a woman under sixteen years of age, is not consent. See Penal Code 1860, s 375 and Suppression of Oppression against Women and Children Act 2000, s 9 (Explanation).

essential requirements of rape, which the prosecution must prove beyond a reasonable doubt in a rape case-

3.1. Sexual intercourse by a man with a woman

In order to be an offence of rape, there must be sexual intercourse, without lawful marriage, by a man with a woman. Thus, the accomplishment of sexual instinct by a man with another man or by a woman with a woman or by a woman with a man is not rape according to the criminal law of Bangladesh; rather this type of sexual activity has been termed as 'unnatural offence'.[12] The term 'sexual intercourse' refers to the penetration of the sexual organ of the perpetrator (man) into that of the victim (woman). According to the Penal Code, 1860, penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.[13] Therefore, to constitute sexual intercourse in a rape case, there must have been an actual penetration of the virile member of the accused within the labia of the pudendum of the victim, no matter how little.[14]

3.2. Non-consensual sexual intercourse

Sexual intercourse by a man with a woman will turn into rape if it has been committed without her consent. In contrast, having sexual intercourse with the consent of a woman, who is not less than sixteen years of age, is not rape and as such, no person will be guilty of rape for sex with consent. Therefore, in order to hold an accused person guilty of rape, the prosecution must prove that the accused had sexual intercourse without the consent of the complainant. Consent in rape cases covers states of mind ranging widely from an actual desire to reluctant acquiesce.[15] The complete willingness of the woman (complainant) is not necessary to constitute consent to sex. If a woman consciously permits sexual intercourse, there is consent to sex, though it may be hesitant, reluctant, or grudging.[16]

3.3. Resistance by the victim

Although the statutory provision does not explicitly require physical resistance by the victim, it nevertheless remains an unacknowledged practice of the courts to require the prosecution to prove this element in order to determine whether the

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[12] Penal Code 1860, s 377. In addition, Section 10 of the Suppression of Oppression against Women and Children Act 2000 has criminalized the accomplishment of sexual desire by touching the sexual organ or any other organ of a woman or of a child by any of organ of a perpetrator or by any other objects and defined this offence as sexual oppression.

[13] Penal Code 1860, s 375 (explanation)

[14] *R. v Joseph Lines* (1844) 1 C&K 393 cited in Muhammad Mahbubur Rahman, Nari –O- Shishu Nirjatan Daman Ain 2000 (1st edition, New Warsi Book Corporation, 2005) 68.

[15] *R. v Olugboja* (1981) 3 W.L.R. 585. cited in Muhammad Mahbubur Rahman, (n 14) 76.

[16] Holman vs. The Queen, 1970, W.A.R. 2. cited in Muhammad Mahbubur Rahman (n 14) 76.

complainant consented to sex.[17] Therefore, a victim's lack of resistance is often considered a crucial factor in a rape case where the accused raises "the defense of reasonable belief of consent"[18]. Consequently, physical resistance by the victim of rape is considered an essential element required to be proved to convict an accused of rape.[19] The proof of vigorous resistance of the victim indicates the absence of consent to sex and requires the use of force by the accused to overcome her resistance. On the other hand, submission or lack of resistance indicates that the complainant consented to sex, and not using force by the accused denotes the absence of his criminal intent to rape.[20] Hence, if there is no evidence of struggle between the perpetrator and the complainant or no mark of injury is found on the body of any of them, rape will not be proved, even though the defense party raises no defense of consent by the complainant.[21] Demonstrating this traditional attitude, the High Court Division of the Supreme Court of Bangladesh held in a rape case:

> Absence of marks of violence on the body of the victim itself proves that the prosecution case is false. In case of rape, it is the duty of the prosecution to produce wearing apparels of the victim to show marks of stain in order to establish claim of rape. If the statement of victim does not tally with the sketch-map, it creates doubt about the place of occurrence.[22]

In contrast to the argument that absence of struggle between the perpetrator and the complainant or mark of injury on the body of any of them implies consent to intercourse on the part of the complainant, it may be rightly asserted that 'failure to resist' or 'absence of mark of violence' is not necessarily equivalent to consent. Naima Huq has strongly argued that though consent implies submission, mere act of submission does not mean that the complainant has consented to intercourse, as surrender of body does not amount to her desire or will to intercourse. The court

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[17] However, some researchers are against the application of physical resistance requirement arguing that it places "stringent demands" on the victim. Matthew R. Lyon, 'No Means No: Withdrawal of Consent during Intercourse and the Continuing Evolution of the Definition of Rape', (2004-2005) 95 (1) Journal of Criminal Law & Criminology 277, 286. In contrast to this argument, some writers support to apply this requirement arguing that exclusion of the physical resistance requirement may cause conviction of an innocent accused solely because of a woman's subjective feelings of violation, even when her behavior amounts to consent to sex. Moreover, physical resistance requirement may solve another problem arising from dichotomous subjective understanding of sexual encounters between female and male. Thus, this requirement can serve as an objective measure to determine whether a rape took place. See Dana Berliner, 'Rethinking the Reasonable Belief Defense to Rape' (1991) 100 (8) Yale Law Journal 2687, 2692-2696.

[18] The defense of "reasonable belief of consent" refers to the defense raised by an accused in a rape case claiming that he truly and reasonably believed that the victim consented to sexual activity. See Dana Berliner (n 17) 2688.

[19] ibid, 2691-2692.

[20] ibid, 2692.

[21] 1985 P. Cr. L. J. 2396 Cited in Muhammad Mahbubur Rahman (n 14) 77.

[22] *Abdul (Md) Hakim v The State* BCR 2004 HCD 98.

ought to consider certain factors associated with the circumstances to ascertain the reason behind the failure of the victim to resist. She may fail to show her vigorous resistance due to her extreme youth, threat of use of force by the perpetrator to overpower her resistance, want of strength or attack by number of men indicating uselessness of resistance, unconsciousness or deep sleep. Therefore, 'failure to resist' or 'the absence of marks of violence' on part of the victim should not be treated as necessary ingredients of the crime.[23]

4. Conceptualizing 'consensual sexual intercourse'

The concept 'consensual sexual intercourse' is combined of two terms, consensual and sexual intercourse. The word 'consensual' is derived from 'consent' that refers to anything or any act 'done with the agreement of all the people or groups involved'.[24] Consent implies "the exercise of a free and untrammeled right to forbid or withhold what is being consented to".[25] It may consist of facts about a person's mental state or expressive conduct.[26] On the other hand, the term 'sexual intercourse' indicates the penetration of the sexual organ of a man into that of a woman in order to satisfy sexual desire. Therefore, the concept 'consensual sexual intercourse' denotes committing sexual intercourse by a man with a woman with her consent. Its synonymous term is 'consent to sex' which means expressing actual words or showing conduct indicating freely given agreement to have sexual intercourse or sexual contact just before or at the time of sexual intercourse.[27] Thus, consensual sex implies sexual intercourse in which the parties to intercourse have indicated consent based on the complete understanding of the circumstances and their interests or desires, and none of them is unduly constrained by extraneous factors. It requires that the parties must know that what they are doing is sexual

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[23] Dr. Naima Huq, 'Reflections on the Perception of 'Consent' in Rape Cases' (2005) XVI (2) Dhaka University Law Journal (The Dhaka University Studies, Part-F) 71, 74. The High Court Division of the Supreme Court also supports this view in the case of Abdus Sobhan Biswas v State. The court prudently takes the testimony of the victim into consideration when she does not resist the alleged intercourse or does not scream and shout in fear of the accused while being raped behind locked door of a residential hotel on the night of the occurrence. See Abdus Sobhan Biswas v State 54 DLR (2002) 556, 560.

[24] See Cambridge Dictionary, <https://dictionary.cambridge.org/dictionary/english/consensual> accessed 01 February 2020

[25] *Rao Harnarain Singh v State*, AIR 1958 Punj 123; 1958 CrLJ 563 Cited in Muhammad Mahbubur Rahman, (n 14) 75.

[26] Peter Westen, 'Some Common Confusions About Consent in Rape Cases' (2004) 2 Ohio State Journal of Criminal Law 333, 333.

[27] Almost similar definition of consent is found in Section 9A.44.010(7) of Wash. Rev. Code § 9A.44.010, which provides-"Consent" means that at the time of the act of sexual intercourse or sexual contact there are actual words or conduct indicating freely given agreement to have sexual intercourse or sexual contact. See D. N. Husak and G. C. Thomas, 'Date Rape, Social Convention, and Reasonable Mistakes' (1992) 11(1-2) Law and Philosophy 95, 110. According to Peter Westen, "consent" to sexual intercourse in law is to acquiesce to it in one or more ways. Peter Westen, (n 26) 333, 335.

and they must desire to commit it with the knowledge of the risks associated with the conduct they engage in.[28]

This consent to sexual intercourse involving permission or authorization to engage in sexual acts, either by the complainant's express words or by her behavior, is very important in the existing law of rape because it transforms sexual intercourse from being one of the most heinous crimes into sex that is not so blameworthy. However, the issue of consent is to be judged on careful consideration and scrutiny of the relevant evidence, and the attendant circumstances preceding, accompanying, or following the acts of sexual intercourse.[29]

Consent may be either attitudinal or per-formative.[30] From an attitudinal point of view, consent is considered as a mental state of affirmation or willingness to do or to abstain from doing something, while per-formative accounts regard it as a certain kind of action or utterance (for instance, saying "yes" or nodding). However, the feminists favour the per-formative accounts rejecting the attitudinal consent. Their view is in contrast to the traditional patriarchal view, which holds that unless a woman physically resists a man's attempt to have sexual intercourse; she will be presumed to have consented to such intercourse.[31] However, a purely performative account of consent is not free from limitation. It is not always admissible, as it does not take into consideration the circumstances surrounding the relevant behavior or utterance. For example, if a woman says "yes" or even feigns sexual enthusiasm to save her from hurting or killing by a knife-wielding attacker, interpreting her behavior or utterance as meaningful consent will be unreasonable and ridiculous.[32] Since none of these two types of consent is free from criticism, the judges should decide whether consent existed considering the circumstances and facts of the cases as well as both these two types of consent.

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[28] J.H. Bogart, 'Reconsidering Rape: Rethinking the Conceptual Foundations of Rape Law' (1995) 8(1) The Canadian Journal of Law and Jurisprudence 159, 163-164.

[29] 1986 Mad LW (Cri) 129 cited in Muhammad Mahbubur Rahman (n 14) 75-76.

[30] P. Kazan, 'Sexual Assault and the Problem of Consent' in S. French, W. Teays and L. Purdy (eds.), Violence Against Women: Philosophical Perspectives (Cornell University Press 1998) 27–42. In order to distinguish rape from sex, Peter Westen, however, puts emphasis on different types of consents, which are factual consent, legal consent, attitudinal consent, expressive consent, actual consent and imputed consent. See Peter Westen (n 26) 333-337. According to Robin West, there may be three types of consents i.e. fictional consent, acquiescent consent and erotic consent. Robin West, 'A Comment on Consent, Sex, and Rape' (1996) 2 (03) Legal Theory 233, 237-238.

[31] Rebecca Whisnant, "Feminist Perspectives on Rape", *The Stanford Encyclopedia of Philosophy* (Fall 2021 Edition), Edward N. Zalta (ed.) <https://plato.stanford.edu/archives/fall2021/entries/feminism-rape/> accessed 25 January 2022.

[32] ibid.

However, it is worth mentionable here that neither the Code of 1860 nor the Act of 2000 defines consent to sex or consensual sexual intercourse,[33] though the Penal Code provides a negative definition of the term 'consent' by listing certain circumstances under which giving consent cannot be taken as signifying consent.[34] However, this definition of consent is inconsistent with the definition of rape as provided in section 9 of the Act of 2000 and section 375 of the Code of 1860 in respect of age when consent is immaterial.[35]

Consent to sexual intercourse given by the complainant (victim) of rape (rape) is a good defence to a charge of rape unless she is unable to consent because of extreme youth, unconsciousness, idiocy, or imbecility.[36] Since non-consent to sexual intercourse is an element of the offence of rape and giving consent to sex converts an offence of rape to non-offensive sexual conduct, consent to sexual intercourse must be treated as a defense in rape cases.[37] However, in order to use it as a defense in a rape case, the accused must prove that the complainant gave consent to sex with her free choice. Supporting this requirement, some commentators argue that the seriousness and overwhelming consequences of rape justify requiring the accused to ensure consent.[38]

The consent defense is similar to, and sometimes indistinguishable from, the reasonable belief of consent defense, which asserts that the victim's behavior would have looked like consent to a reasonable man.[39] To establish the reasonable

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[33] "Taslima Yasmin rightly viewed "The colonial definition of rape in the Penal Code, does not define penetration, fails to elaborate the meaning of consent, or how consent can be proved. See Taqbir Huda and Abdullah Anbar Titir (n 4).

[34] See, Penal Code 1860 s 90, which provides – "A consent is not such a consent as is intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception; or If the consent is given by a person who, from unsoundness of mind, or intoxication, is unable to understand the nature and consequence of that to which he gives his consent; or unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age."

[35] This inconsistency will be clear if we read section 9 of the Suppression of Oppression against Women and Children Act 2000 and sections 90 and 375 of the Penal Code 1860. According to 90 of the Penal Code, consent given by a person who is under twelve years of age is not consent. Again, as per section 375 of the Code, consent to sexual intercourse given by a woman who is under fourteen years of age is immaterial. On the other hand, under section 9 of the Act of 2000, consent to sexual intercourse given by a woman who is under sixteen years of age will not be treated as such consent. However, this inconsistency may be removed by holding the sixteen years as the minimum age of giving consent to sex according to section 9 of the Act, as it is the latest relevant law.

[36] ILR (1952) 2 Raj 817 cited in Muhammad Mahbubur Rahman (n 14) 77

[37] Markus Dirk Dubber, 'Toward a Constitutional Law of Crime and Punishment, (2004) 55 (3) Hastings Law Journal 509, 569 (arguing –"Consent is a defense if non-consent is an element of the offense charged, or if it "precludes the infliction of the harm or evil sought to be prevented by the law defining the offense).

[38] Dana Berliner (n 17) 2695-2696.

[39] ibid, 2693.

belief defense, the accused must claim and prove that he did not have the requisite *mens rea* for the crime of rape because he honestly believed that the victim was consenting and he merely intended to have consensual sexual intercourse and had no criminal intent to have sex with her without her consent.[40]

5. Impacts of defining rape as non-consensual sexual intercourse

The criminal law of any country is expected to define any offence in a clear and intelligible way making it very easy for the prosecution to prove the offence against the accused so that no actual offender can escape punishment due to any shortcoming in the definition of the offence. In contrast, if the law defines any offence in a way that is very difficult to be proved, many actual offenders may be acquitted and thus may go unpunished due to failure of the prosecution to prove the offence. In Bangladesh, both the Code of 1860 and the Act of 2000 have defined rape as sexual intercourse committed by a man with a woman without her consent bringing the following negative impacts:

5.1. Difficulty to prove lack of consent beyond reasonable doubt

Since neither the Penal Code 1860 nor the Suppression of Oppression against Women and Children Act 2000 has defined consent to sexual intercourse, it is very difficult for the prosecution to prove lack of consent demonstrated by the complainant and accordingly, to prove the offence of rape beyond a reasonable doubt. As it is not clear what consent to sex is, it is also unclear what will constitute substantial evidence of it. This situation makes it very difficult for the trial court to decide what kind of evidence will be relevant in determining whether the complainant consented to sex[41] and often convinces it to believe that the complainant may have consented to sex.[42] Furthermore, the defence lawyer usually tries to create doubt into the minds of the judges about lack of consent by claiming that the complainant had consented to sex and subsequently she repudiated her previous position. Particularly, it is very easy for him to create doubt if there is any previous relationship between the complainant and the perpetrator. Therefore, it is more difficult for the prosecution to prove a lack of consent to sexual intercourse in the case of such a relationship.[43] Consequently, the court does not frequently hold the accused guilty of rape believing that the complainant consented to sexual intercourse and convict him. Hence, difficulty to

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[40] *People v Mayberry*, 15 Cal. 3d 143, 155,542 P.2d 1337, 1345, 125 Cal. Rptr. 745,753 (1975). Cited in Dana Berliner (n 17) 2693.

[41] Victor Tadros (n 5) 530.

[42] ibid, 531, arguing… "as it is unclear what consent is, it is also unclear what will constitute substantial evidence of it. So, there may be cases where the jury would have been inclined to decide that the complainant may have been consenting…"

[43] David P. Bryden and Sonja Lengnick, 'Rape in the Criminal Justice System' (1997) 87(4) Journal of Criminal Law and Criminology 1194, 1216.

prove lack of consent has become one of the substantial reasons behind the non-conviction of many actual rapists resulting in a very low rate of conviction in rape cases.[44]

5.2. Diverting the attention of the courts

Since the definition of rape based on non-consensual sex requires the trial court to determine whether the victim (the complainant) gave consent to sex, that may be implied from the victim's behaviour[45] and her other actions[46], this definition diverts the attention of the Court from the conduct and behaviour of the accused to that of the victim.[47] Thus, the definition persuades the courts to emphasize the behaviour and attitudes of the rape-victims as if they were worthy to be blamed because of being victims of this heinous crime. Though the courts, in deciding the cases other than rape, focus almost on the conducts and mental conditions of the accused and the circumstances of the case, the courts, in rape cases, focus mainly on the conduct and attitude of the victims to determine the existence of consent to sex.[48] Therefore, this non-consensual sex-based definition of rape opens the door of stigmatizing the non-offensive behavior and attitudes of the victims and makes the nature of the offence different from that of other offences.

5.3. Converting the offence of rape into non-punishable sex

There is a common presumption that one has no access to, and cannot use, another's body, property, personal information, or other elements of his or her personal domain except the other consents to such access or use. "Consent thus alters the structure of rights and obligations between two or more parties."[49] In the same way, by consenting to have sex with a man, a woman temporarily waives her right to physical inviolability. She relieves the man of his obligation not to cross the boundaries of her sexual autonomy, and in most instances, simultaneously relieves the state of its obligation to protect her from his boundary-crossing conduct. Moreover, by consenting to have sex with him, she not only relieves the state of its obligation to protect her but also demands that the state not intervene in this consensual transaction because such intervention would violate their sexual

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[44] However, there are many other reasons for low rate of conviction in rape cases, which include technicalities of the relevant legislations relating to the offence of rape, filing of false cases, insufficient police investigation, lack of proper and adequate evidence, settlement of disputes out of court, weak presentation of case by the prosecution, harshness of punishment and case backlog. S.M. Atia Naznin and Tanjina Sharmin (n 1) 43-71.

[45] Rachael Burgin and Asher Flynn, 'Women's behavior as implied consent: Male "reasonableness" in Australian rape law' (2021) 21(3) Criminology & Criminal Justice 334, 338.

[46] Rachael Burgin, 'Persistent Narratives of Force and Resistance: Affirmative Consent as Law Reform' (2019) 59(2) The British Journal of Criminology 296, 302.

[47] Victor Tadros (n 5) 516.

[48] Susan Estrich, 'Rape' (1986) 95 (6) Yale Law Journal 1087, 1094.

[49] Rebecca Whisnant (n 31).

autonomy.[50] Heidi Hurd, therefore, commented, "Consent turns a rape into lovemaking."[51] Thus, giving consent to sex by a woman converts the offence of rape into non-punishable sex.

5.4. Ignoring criminal intent as a necessary element of crime

The traditional way of defining a crime is to describe the prohibited act (*actus reus*) committed by the accused and the prohibited mental state (*mens rea*) with which he commits the said prohibited act. It is a general principle of criminal law that an act or omission to be a crime must be committed with the criminal intent of the perpetrator. Hence, an accused of an offence cannot be held guilty, unless he commits it with requisite criminal intent[52] or *mens rea*. However, due to the definition of rape based on non-consensual sex, the courts mainly focus on the conduct of the victims to determine whether the complainant consented to sex rather than the criminal intent or *mens rea* of the accused. Therefore, the *mens rea* doctrine bears very little theoretical importance in rape cases.[53] Thus, this definition ignores criminal intent as an essential requirement of the offence.

5.5. Complexity in existence of relationship between the victim and the perpetrator

The relationship between the perpetrator and victim of rape makes proof of the offence more complex, because in case of such relationship, the victim usually does not cooperate with the prosecution once ill feelings have gone out.[54] If the victim and the accused know each other and there exists any previous relationship between them, the prosecutors are less likely to prosecute and the judges are less likely to convict the accused. Therefore, when the relationship between the accused and the victim becomes closer, there is a greater tendency of the Courts to

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[50] Vera Bergelson, 'The Meaning of Consent' (2014) 12, Ohio State Journal of Criminal Law 171, 172. See also Markus Dirk Dubber (n 37) 509, 569.

[51] Heidi M. Hurd, 'Blaming the Victim: A Response to the Proposal That Criminal Law Recognize a General Defense of Contributory Responsibility' (2005) 8(2) Buffalo Criminal Law Review 503, 504.

[52] Criminal intent may be one of four levels of mental culpability: intention, knowledge, recklessness, or negligence.' See Dana Berliner (n 17) 2691.

[53] Dana Berliner (n 17) 2691. However, there are two views which claim that non-consensual sex based definition of rape does not deny the *mens rea* requirement. According to the most conservative point of view, a man is deemed to have *mens rea* while committing rape only if he believes that the victim has not consented to sexual intercourse. According to this view, a man who sincerely believes that the woman has consented is not guilty of rape, no matter how unreasonable his belief may be under the circumstances. A more moderate view is that a man has *mens rea* if he believes while committing intercourse that the woman has not consented or unreasonably believes that she has consented. Rebecca Whisnant (n 31).

[54] However, in case of rape by stranger, there is less uncertainty in proving the case. The victims are more likely to cooperate with the prosecution. C. A. Albonetti, 'Prosecutorial Discretion: The Effects of Uncertainty' (1987) 21(2) Law & Society Review 291, 301

presume that the complainant consented to sex.[55] The accused can argue that he was in such an ongoing sexual relationship of mutual trust with the complainant that sexual intercourse in such circumstances was not blameworthy as an offence of rape.[56] Consequently, the court does not convict the perpetrators in cases of such relationship. Robin West rightly commented that:

> the closer the relationship between the victim and her assailant to the traditional one of man and wife, the less likely a rape conviction, or prosecution, will be forthcoming. The more a "girlfriend" resembles a "wife," the more likely her "consent" to sex with her boyfriend will prevent her from successfully charging him with rape.[57]

5.6. Complication in determining the reasonableness of belief about consent to sex

In most countries, the rape law permits the accused of rape to raise defence asserting that he believed that the concerned victim had consented to sexual intercourse. The issue of whether such belief is reasonable or unreasonable is to be decided by the trial courts. However, a relevant question arises how the court will determine the reasonableness of such belief. There is no undisputed method of ascertaining the issue. According to Husak and Thomas, social conventions[58] are important factor in distinguishing between reasonable and unreasonable belief about consent to sex and the law should not determine the criteria of reasonableness about such a belief.[59] They argue that there are social and behavioral conventions by which women manifest their willingness to have sex and that where a woman has engaged in such conventions, it is reasonable for a man to believe that she is consenting. They have also emphasized understanding the social conventions for making any judgment about the reasonableness of a mistake about consent by arguing, "Until we more fully understand the social

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[55] Dana Berliner (n 17) 2687. Catharine MacKinnon also argues that the relationship of the complainant with the accused and presumption of consent are inversely related. Thus, there is often a presumption of non-consent in stranger rapes, but in marital rapes, the courts, in most of the cases, hold that there exists an irrefutable presumption of consent. Catharine A. MacKinnon, 'Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence' (1983) 8 (4) Signs: Journal of Women in Culture and Society 635, 648-649.

[56] Victor Tadros (n 5), 541-542.

[57] Robin West (n 30) 237. Dana Berliner also views almost in the same words stating, "Empirical studies indicate that when the victim and defendant are not strangers, prosecutors are less likely to prosecute and juries less likely to convict than in stranger rapes. As the relationship between defendant and victim becomes closer, there is a greater tendency to presume consent". Dana Berliner (n 17) 2687.

[58] A social convention is a societal norm to which a person, as a member of society, ought to conform. See David Lewis, Convention (Cambridge: Harvard University Press 1969) 99 cited in D. N. Husak and G. C. Thomas, (n 27) 103. Conventions are comprised of facts which can help to establish the reasonableness of a belief seems plausible. They are always changing and are used to help establish that a belief is reasonable in a wide range of controversial legal disputes. D. N. Husak and G. C. Thomas (n 27)103-104.

[59] D. N. Husak and G. C. Thomas (n 27) 95.

convention about consent to having sex, any judgment about the reasonableness of a mistake about consent is fragile."[60] Archard, however, is against this view pointing out that any such conventions may be ambiguous and not understood to all, because many men usually interpret women's behavior in more sexual terms than women mean or intend, and someone may have sexual intercourse causing serious harm relying on his beliefs about such conventions.[61] Therefore, it is very difficult to ascertain whether the accused had reasonable belief that the complainant consented to sex, as there is no unanimous standard for determining the reasonableness of such belief.

5.7. Possibility of making the powerless women subject to sexual exploitation

Many women may give consent to sex due to economic, psychological, and social hierarchical threats shown by the perpetrators and sexual intercourse with such consent is not rape within the purview of the relevant provisions. Thus, for example, sex committed by an employer with a female employee by threats of firing her job is consensual sex and therefore, not rape, because submission under threat to economic survival does not satisfy the essential requirements of rape defined as non-consensual sexual intercourse.[62] In addition, the victims may give their consent when they find that resistance is overcome or the consequences of refusal may be worse than the consequences of acquiescence and it appears to them that fighting is futile, dangerous, or otherwise more expensive.[63] Therefore, since the victim of rape is comparatively less powerful and when she finds that her resistance against sexual intercourse is fruitless; she surrenders herself to the intention of the perpetrator and thus becomes a tool of sexual exploitation. In this respect, Judith Herman rightly describes, "When a person is completely powerless, and any form of resistance is futile, she may go into a state of surrender."[64] However, the relevant law cannot ensure any redress for the powerless victims who have become subject to sexual exploitation, and hence, the courts cannot convict many rapists who hold a powerful position.

5.8. Probability of humiliating the victims

Since due to the definition of rape based on non-consensual sex, the trial courts emphasize more on the conducts of the victim rather than that of the perpetrator to ascertain whether she consented to sex, this definition apparently supports the

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[60] ibid, 123.

[61] David. Archard, 'A Nod's as Good as a Wink": Consent, Convention, and Reasonable Belief' (1997) 3(03), Legal Theory 273, 285.

[62] Catharine A. MacKinnon, 'Rape Redefined' (2016) 10 Harvard Law & Policy Review 431, 443.

[63] ibid.

[64] Judith Herman, Trauma and Recovery: The Aftermath of Violence - From Domestic Violence to Political Terror (1992) 42 cited in Catharine A. MacKinnon (n 62) 447.

tendency to 'put the victim on trial' in rape trials.[65] Since the government of Bangladesh has not yet adopted any 'rape shield statute'[66] to protect the rape victims from being humiliated by disclosing their prior sexual activities with the accused, the definition generates the possibility of such humiliation. As no law prohibits such disclosure, the defence lawyer may bring the issue with a view to proving consent to sexual intercourse alleged to have been committed without her consent. However, the prosecution may argue that previous history of sexual activity with the consent of the victim does not substantially indicate that the alleged subsequent sexual intercourse had been committed with her consent and therefore, disclosure of the previous history is quite irrelevant.[67] Though this disclosure is irrelevant and does not substantially prove the presence of consent to sex, it humiliates the victims, their family members and other nearest relatives.

5.9. Requiring careful investigation

The definition of rape based on non-consensual sexual intercourse requires the courts to focus on the moment before intercourse when the perpetrator and the complainant (victim) may or may not agree to sex. Committing sexual intercourse with the consent of the complainant, who is not less than sixteen years of age, is not punishable under the relevant laws.[68] However, in order to determine whether sexual intercourse amounts to rape or not, careful investigation of the relationship between the accused and the victim is required.[69] Since this investigation humiliates the victims and their family members, many of the victims do not show their interest to file rape cases against rapists and do not cooperate with the investigating officer in fear of losing their social dignity. This situation makes it more difficult for the prosecution to prove the case.

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[65] Victor Tadros (n 5) 517.

[66] Rape shield laws protect rape victims from being humiliated by disclosure of the details of their prior sexual activities. These laws are enacted with a view to restricting a criminal defendant's ability to present to the jury or judges' evidence of past sexual history.' The main objective of these laws is to eliminate a common defense strategy of trying the complaining witness rather than the accused. The result of this strategy was harassment and further humiliation of the victim as well as discouraging victims of rape from reporting the crimes to law enforcement authorities." State v. Williams, 224 Kan. 468, 470, 580 P.2d 1341, 1343 (1978). Cited in J. Alexander Tanford and Anthony J. Bocchino, 'Rape Victim Shield Laws and The Sixth Amendment' (1980) 128 University of Pennsylvania Law Review 544, 544.

[67] Husak and Thomas hold the same view arguing- "a person can consent to intercourse with the same person 99 times and refuse consent on the 100th occasion. D. N. Husak and G. C. Thomas (n 27) 124.

[68] However, as per section 497 of the Penal Code 1860, if any man has sexual intercourse with a woman who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both.

[69] Victor Tadros (n 5) 530.

5.10. Other negative impacts of the definition

Apart from the above-mentioned drawbacks of the definition, it has some other negative aspects. This definition does not trace the offence as a crime of violence, though in most of the rape cases, the perpetrators use violence for obtaining consent of the victims to sexual intercourse. Victor Tadros rightly commented-

> Defining rape around consent does not mark the offence out as a crime of violence even where there has been violence. Violence, it appears, is merely evidence of something else in such cases: a lack of consent.[70]

Furthermore, it supports the manipulation of the case by the defence lawyers. Since the concept of consent is flexible, it creates an undue advantage in favour of the accused and opens the door of acquittal for the accused as his counsel can very easily convince the courts to be doubtful about lack of consent, particularly in the case of the prior relationship between the accused and the victim. Thus, the defence counsel may manipulate the trial.[71]

6. Re-thinking rape as non-consensual sexual intercourse

Defining rape as non-consensual intercourse has several drawbacks as evident from the aforementioned words. More particularly, this definition often persuades the Courts to concentrate attention on the conduct and attitude of the victims instead of the criminal conduct of the accused. It also gives rise to complexity in proving the offence of rape beyond a reasonable doubt. Besides, due to this type of definition, the defence party may humiliate the victims by disclosing the previous sex history of the accused with the victim. Furthermore, since the prosecution is required to prove physical resistance by the victim, this definition ultimately necessitates not only proof of non-consent of the victim but also that of force used by the perpetrator to overcome her resistance. Moreover, it does not criminalize sexual intercourse where force is used but consent exists and thus allows the perpetrator who committed sexual intercourse by using force against the victim to argue in a more or less unrestricted style that the complainant (victim) consented to sexual intercourse.[72] Therefore, this type of definition is largely accused-friendly as it strengthens his argument to justify sexual conduct though it is forced and it causes serious harms including both the psychological[73] and physical injuries to the complainant.

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[70] ibid, 516-517.

[71] ibid, stating, "...the concept of consent is particularly malleable, and is commonly subject to manipulation by defence counsel".

[72] ibid, 527.

[73] For better understanding the psychological impact of rape victims, see Rebecca Campbell, 'The Psychological Impact of Rape Victims' Experiences With the Legal, Medical, and Mental Health Systems' (2008) 63(8) American Psychologist 702.

The most reasonable solution to these drawbacks would be simply to redefine the offence abandoning the concept of consent as the central element in the definition of rape.[74] The relevant law, therefore, should redefine the offence by introducing an intelligible definition so that the prosecution can easily prove the offence and play an important role in ensuring justice for the victims and convicting the actual rapists. It should define the offence in comprehensible and unambiguous words so that common people have notice as to what kind of conduct or act amounts to rape and can easily distinguish between criminal and innocent conduct.[75]

7. The necessity to redefine the offence of rape

The role of any criminal law is not only to describe who is guilty of any offence but also to portray appropriately the criminal act and conduct of the accused that constitutes an offence. Therefore, the law should define any offence in a way that reflects what makes the conduct of the perpetrator crime and publicly wrongful.[76] However, deviating from this common fashion of criminal law, the relevant laws of Bangladesh dealing with the offence of rape have persuaded the courts to emphasize the conduct of the victims by defining rape as non-consensual sexual intercourse. Hence, an accused will not be guilty of rape, if the complainant consents to sex. Thus, consent plays a very important role in the trial of rape cases, but it should not be treated as the central element of the offence. Victor Tadros has rightly argued, "If consent is to play a role in the law of rape, it ought not to be central to the definition of the offence".[77] Therefore, the relevant law should define rape in such a way that emphasizes the conduct of the perpetrators instead of that of the victims.

In order to avoid the difficulties in proving the offence and overcome other drawbacks in the existing definition, the relevant criminal law of Bangladesh should be amended by redefining the offence of rape as forced sexual intercourse reflecting the criminal conducts of the accused.[78] The offence may be defined as committing sexual acts with use of force [79] or threat of using force compelling the

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[74] Victor Tadros (n 5) 515.

[75] See, *Connally v. General Constr.* Co., 269 U.S. 385, 393 (1926) (in which the US Court observed, "…criminal statute must not be so vague that ordinary persons cannot distinguish between criminal and innocent conduct".) cited in Dana Berliner (n 17) 2691-2692.

[76] Victor Tadros (n 5) 524.

[77] ibid, 519.

[78] MacKinnon also supports defining rape as forced sex and treats the element of lack of consent along with force as unnecessary as she states "Rape should be defined as sex by compulsion, of which physical force is one form. Lack of consent is redundant and should not be a separate element of the crime". Catharine A. MacKinnon, Toward a Feminist Theory of the State (First Harvard University Press paperback edition, Harvard University Press 1991) 245.

[79] However, Scott A. Anderson prefers defining rape based on "coercion" arguing that the term 'coercion' denotes a broader range of activities. Scott A. Anderson, 'Conceptualizing Rape as

victims to participate in the said sexual acts.[80] The definition should criminalize any sexual intercourse, including any sexual penetration by any object, rather than only vaginal-penile penetration, committed through use of direct force, violence, threats thereof or through any behaviour or expression that intimidates the victims into committing sex with the perpetrators.[81] The law should clarify what constitutes this type of sex so that no ambiguity arises in proving the offence and require the prosecution to prove that the perpetrator had committed sexual intercourse with the victim forcefully denying her desire of not engaging in sexual activity with the accused. Besides, it should also provide less punishment for forced sex that is committed with the consent of the complainant, so that no forced sex can be deemed excusable.

However, the proposed definition is not free from limitation. In contrast to the recommendation, someone may argue that this definition will narrow down the scope of convicting many perpetrators of rape; i.e. in the case where sex is committed without the consent of the victim and without using force. In response to this argument, we can assert that narrowing the scope down does not matter. The purpose of the rape law is to ensure justice for the victims by punishing the actual rapists in order to give satisfaction to the victims and their family as it expresses the sympathy and solidarity of society for the victims and furthers their re-socialization.[82] The proposed definition can better serve this purpose, as it can be more easily proved compared to the definition based on non-consensual sexual intercourse for the following reasons. First, it persuades the Courts to emphasize

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Coerced Sex' (2016) 127 Ethics 50, 73. It may be mentioned here that the words "force" and "coercion" are synonymous (see https://www.merriam-webster.com/dictionary/coerce) and are often used interchangeably as both the terms refer to ideas of compulsion, constraint, and overtaking by means of superior power.

[80] Scott A. Anderson supports to define the offence of rape in almost the similar words. See Scott A. Anderson (n 79) 53. Moreover, the common law crime of rape also requires proof of force. Colin Colt, 'Sexual Consent as a Common Law Doctrine' (2019) 19 (2) Wyoming Law Review 453, 454. Some authors, however, favours to provide 'conjunctive definition' of rape by terming rape as sex that is non-consensual and forced. See David Archard (n 5) 374.This type of definition will pave the way of exonerating many rapists, since according to this definition, sex that is forced will not be rape if the victim consents to it, and sex that is nonconsensual will not be rape if the perpetrator does not use force while having intercourse. Robin West (30) 233. In addition, the conjunction may lead to anomalous and unfair results: since sex by using lots of force but with "consent" defeats the rape charge. See, J. McGregor (n 5) 181.

[81] This proposed definition is very much similar to that suggested by Afroza Begum. She recommends for replacing the term 'rape' by the expression of 'sexual assault' including all types of penetration by any object, rather than only vaginal-penile penetration, and other sexual contact such as sexual touching and introducing a varying degree of punishment based on the severity of the crime. Thus, she argues for making the definition wider that enhances the possibility of increasing the rate of arrest and conviction resulting in discouraging the accused of sexual touching from involving in more severe crimes like rape. See, Afroza Begum, 'Rape: A Deprivation of Women's Rights in Bangladesh' (2004) 5(1) Asia-Pacific Journal on Human Rights and the Law 1, 11.

[82] Elena Maculan and Alicia Gil Gil, 'The Rationale and Purposes of Criminal Law and Punishment in Transitional Contexts' (2020) 40 (1) Oxford Journal of Legal Studies 132, 137.

the conduct of the accused rather than that of the complainant.[83] Secondly, it requires the prosecution to prove force used by the perpetrator instead of proving lack of consent that is more difficult to be proved. Thirdly, proving forced sex is less difficult in comparison to the difficulty and complexity faced by the prosecution in proving non-consensual sexual intercourse. Fourthly, since there is no necessity of proving lack of consent, the defense lawyer cannot easily convince the courts to be doubtful about the commission of rape. Moreover, there is less possibility of humiliating the victims by the defense lawyer. Furthermore, this definition is, to some extent, victim-friendly as it exonerates the victim from facing any embarrassing questions that might affect her re-socialization. In addition, compared to defining rape as nonconsensual sex, conceptualizing rape as forced sex helps us to understand rape as typically violence pattern of crime, as well as its devastating impacts on the victims and other women. This understanding helps the police, prosecutors, judges, and the public recognize the sexual intercourse with use of force as a crime and thus, convince the judges to criminalize the forced sex and punish the perpetrators.[84]

8. Conclusion

From the legal point of view, it is very much crucial to have a clear and unambiguous definition of any crime consisting of specific elements for the prosecutors, judges and parties involved to understand, comply with and implement the relevant provisions, otherwise, they encounter many difficulties in ensuring justice for the concerned parties. This is undeniably true in the case of defining rape as demonstrated in the above-mentioned discussion. Since the existing relevant laws define rape as having sexual intercourse by a man, without lawful marriage, with a woman without her consent or against her will, a man will not be guilty of rape if he commits sex with the consent of a woman who is not under sixteen years of age. Thus, consent to sexual act usually exonerates the perpetrator from the liability even when sexual interaction is one-sided, non-mutual, unwanted, and non-voluntary. Hence, if the prosecution, in a rape case, fails to prove beyond a reasonable doubt that the accused has sexual intercourse without the consent of the complainant, the court will not hold the perpetrator guilty and as such, not convict him. The study shows that this non-consensual sex-based definition generates many complexities in proving the offence beyond a reasonable doubt, even often makes impossible for the prosecution to prove it due to such complexities. Particularly, in case of relationship between the perpetrator and the victim, it is more difficult to prove lack of consent, because a prior relationship increases the degree of doubt about whether or not the offence has been committed. Consequently, the courts cannot convict many actual rapists.

[83] Rebecca Whisnant (n 31).

[84] Scott A. Anderson (n 79) 58.

Therefore, the definition based on non-consensual sex provides an undue advantage to the perpetrators to escape punishment and causes injustice to many actual victims.

In order to overcome the shortcomings arising out of the existing definition of rape, this article recommends that the term 'non-consensual sexual intercourse' should be replaced with 'forced sexual intercourse'. This proposed definition can play a significant role in protecting the victims from being humiliated by the defence lawyer, convicting the actual rapists and ensuring justice for the victims. Therefore, it is expected that the law-making authority of Bangladesh will amend the relevant law considering the recommendation made by this paper. It will definitely help the prosecution to prove the offence of rape in a convenient manner and the courts to convict the actual rapists. Otherwise, the most expected justice for the victims of rape will remain a rhetoric as it has been for the last hundred and sixty-one years, and will not become a reality.

State Control versus Individual or Common Property Rights: The Most Sustainable and Efficient Use of the Natural Resources in Context

Bonosree Rani*

Abstract: Human beings are blessed with different kinds of natural resources, appropriate use of which can give us enormous convenience. At the same time, unsustainable uses can turn them into curse for us. Additionally, limited nature of natural resources is a strong push to ensure sustainable use of them so that human beings can be benefited for long time. In line with this need, there is a continuous debate about who can ensure the most sustainable and efficient uses of natural resources, state control or other alternatives (such as individual or common property rights). This essay attempts to resolve the debate by examining to what extent each approach is successful in ensuring sustainable use of natural resources along with their limitations. In so doing, the way of exploration and exploitation of some resources (such as water, air, and land) by different stakeholders has been specifically focused on. Finally, this essay concludes that each approach has both success and constraints, while state alone in some cases can better ensure sustainable and efficient use of resources by eliminating its constraints, and in other cases, a combined control is required.

Keywords: Common property, environmental sustainability, individual property rights, natural resources, public trust doctrine, and state control.

1. Introduction

Natural resources, for their fundamental significance, always remain in the centre of domestic and international concern. In fact, because of their contribution towards economic development, every stakeholder is resolute to ensure maximum use of both renewable and non-renewable natural resources. Consequently, stakeholders sometimes even do not hesitate to ignore scarcity of those resources. Therefore, sustainable use and management of natural resources is a crucial issue. Unfortunately, the idea of sustainable use was not strongly linked with the concepts of private property rights and common property rights over natural resources, which are nothing new rather originated during Roman empire.[1] After 1972 Stockholm conference, international community for the first time realised the importance of ensuring sustainable development that includes

* The author is a Lecturer at the department of Law and Justice, Jahangirnagar University. She can be reached at: bonosreelaw@juniv.edu.

[1] Patricia Kameri-Mbote, 'The Use of the Public Trust Doctrine in Environmental Law' (2007) 3/2 Law Environment and Development Journal 195, 197-200.

sustainable use of natural resources to ascertain long-term benefit. Since then, the question of best way that can ensure sustainable and effective use of these resources has gained significant importance. The urgency and importance of ensuring sustainable management and efficient use of natural resources have also been emphasized under the United Nations Sustainable Development Goals.[2] In line with this need, some proponents argued on behalf of state control, while others emphasized on individual or common property rights. This essay analyses the contentions including the possibilities and limitations to reach a conclusion whether state control compared to individual or common property rights can better ensure sustainable use of natural resources. To this end, it examines how natural resources (such as air, water, and land) are controlled, managed, explored, and exploited under different stakeholders.

2. State control over natural resources

Under international law, states are entitled to exercise sovereign rights over natural resources within their territory, where no other state can access to explore those resources.[3] Additionally, every state confirms its ownership both above and below the surface by law of the country. And, state is supposed to explore and exploit natural resources for the greatest prosperity of people and country. The United Nations General Assembly holds that the rights of peoples and nations to permanent sovereignty over national natural resources must be exercised in the interest of their national development and for wellbeing of the people of state concerned.[4] To this purpose, states still exercise control while contracting with different companies in order to extract and use these resources. Thereby, domestic economic interest is served well by state's eminent power over national natural resources.

However, question of sustainable use of natural resources by states becomes a vital one especially in case of resources, which do not fall under national sovereignty rather under 'common concern of humankind' or 'common heritage of humankind' or 'shared resources', such as high-seas, biodiversity, watercourses, migratory species, etc. These resources cause conflict between sovereign states because aftereffects of their unsustainable uses do not maintain any territorial limitation.[5] To mitigate the conflict, prevent environmental

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[2] United Nations, 'Transforming Our World: The 2030 Agenda for Sustainable Development' (adopted 25 September 2015) UN Doc A/RES/70/1 (UNSDGs), goal 12.

[3] Rio Declaration on Environment and Development (adopted 14 June 1992) UN Doc A/CONF.151/26, principle 2; United Nations Conference on the Human Environment, UNGA Res 2994 (adopted 15 December 1972) UN Doc A/RES/2994 (Stockholm Conference), principle 21.

[4] United Nations General Assembly Resolution 1803 (XVII) (14 December 1962).

[5] Quoted in Philippe Sands and Jacqueline Peel, Principles of International Environmental Law (3rd edn, CUP 2012) 12 (as cited in Virginie Barral, 'National Sovereignty over Natural Resources: Environmental Challenges and Sustainable Development' in Elisa Morgera and Kati Kulovesi

damage, and ensure sustainable conservation and use of natural resources, some governing principles practiced in international forum are incorporated in natural resource related legal instruments. These international legal instruments ask and sometimes compel states to respect others in using their own as well as common resources. For example, principle 2 and 21 respectively of Rio Declaration and Stockholm Conference though recognise states' sovereign right to exploit own resources, emphasize on states' obligations not to cause damage to the environment of other states or of areas fall out of national sovereignty.[6] Therefore, it prioritise sustainable use of natural resources over the idea of sovereignty for the common good of nature and human being. In this regard, Barrel rightly opined that "the principle of permanent sovereignty over natural resources should include a duty of environmental protection, and thus sustainable use would be an integral element of the exercise of national sovereignty."[7] Thus, state can ensure sustainable use of common resources and shared property by taking appropriate measures under international cooperation.

In regard of sustainable use of natural resources, the case of 'air' seeks special consideration over which stakeholders are fighting each other to establish their rights and exploit it. Specifically, privatisation and commercialisation of air is now an emerging issue around the world. For example, My Baggage (a British luggage shipping company) is currently selling bottles of "authentic" air from England, Scotland, Wales, and Northern Ireland to provide UK residents overseas with the scent of home.[8] Even before My Baggage, some other companies (such as Aethaer, Swissbreeze) have been selling air.[9] Such air commodification seems to be a central push to national and international authorities for mitigating air pollution, specially caused by large-scale industries. To maintain quality of air, many states apply 'command and control environmental regulation'.[10] However, many proponents argued that market-

(eds), *Research Handbook on International Law and Natural Resources* (Edward Elgar Publications 2016) 4).

6 See Rio Declaration (n 3) and Stockholm Conference (n 3).

7 Barral (n 5) 4.

8 Tamara Hardingham-Gill, 'UK Company Launches $30 Bottled Air Range for Homesick Expats' *CNN* (22 December 2020) <https://edition.cnn.com/travel/article/uk-company-launches-30-bottled-air/index.html> accessed 25 December 2020.

9 ibid.

10 The use of Command and Control in regulation involves the government or similar body to "command" the reduction of pollution (e.g., setting emissions levels) levels and to "control" the manner in which it is achieved (e.g., by installing pollution-control technologies). This approach differs from other regulatory techniques, e.g., the use of economic incentives, which frequently includes the use of taxes and subsidies as incentives for compliance. For details, please see Bonosree Rani and ANM Wahid, 'Accommodating Sustainable Development Policy in Business Regulations of Bangladesh' [2020] Journal of Business Studies 1, 11. Also, see K. S. Coplan, 'Public

based environment regulations, such as effluent taxes or emissions trading scheme are more effective in mitigating air pollution and maintaining air quality. Though the command and control regulation is being criticised in terms of its efficiency, Cole and Grossman showed that it rather can be more efficient and effective than market-based mechanisms for environmental protection, especially in those cases, where high monitoring cost is involved.[11] Besides, in case of market-based mechanisms, there is a strong argument that carbon traders first hold a temporary property rights over air pollution, which can later turn into permanent one at any time.[12] Additionally, the government has a growing pressure from pollution traders to increase the limit of cap[13] that might be uncontrollable if traders once can establish their permanent rights over it. Ultimately, it would severely decrease air quality and cause environmental damage. Even in some cases, applying 'cap and trade'[14] regulation has severely caused carbon emission increase. For instance, a report shows that carbon emissions from California's oil and gas industry rose 3.5% once cap and trade began.[15] However, market mechanisms can also be effective where monitoring cost is comparatively low.[16] Therefore, in question of sustainable management of air, Cole and Grossman's view that both these mechanisms can run simultaneously seems quite reasonable. This is because every case is different and required to be solved differently. And, choice of mechanism should be made based on cost and benefit analysis of each case.

It is contested that state's eminent power over natural resources impedes people from accessing the resources, specifically access to the land-based

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Trust Limits on Greenhouse Gas Trading Schemes: A Sustainable Middle Ground?' (2009) 35(2) Columbia Journal of Environmental Law 287.

[11] Daniel H. Cole and Peter Z. Grossman, 'When Is Command-And-Control Efficient? Institutions, Technology, and the Comparative Efficiency of Alternative Regulatory Regimes for Environmental Protection' [1999] Wisconsin Law Review 887.

[12] Larry Lohmann, 'Carbon Trading: A Critical Conversation on Climate Change, Privatisation and Power' [2006] Development Dialogue No. 48.

[13] Cole and Grossman (n 11).

[14] Cap and trade is an approach that is designed to limit, or cap, the total level of emissions of certain chemicals, particularly carbon dioxide emerged from industrial activities. Under this approach, A legislature puts a "cap," or ceiling, on emissions, which is lowered each year in alignment with the program's structure to reach pollution-reduction goals. The "trade" part of the equation relates to the development of markets in which program participants reduce their emissions and sell unused permits to other participants. For details, see Rani and Wahid (n 10) 11. Also, see Alan Murray, 'Why Key Executives are Warming to Legislation on Climate Change' *The Wall Street Journal* (7 February 2007) <https://www.wsj.com/articles/SB117080756478000233> accessed 30 March 2021.

[15] Lisa Song, 'Cap and Trade Is Supposed to Solve Climate Change, but Oil and Gas Company Emissions Are Up' *ProPublica* (USA 15 November 2019) <https://www.propublica.org/article/cap-and-trade-is-supposed-to-solve-climate-change-but-oil-and-gas-company-emissions-are-up> accessed 28 December 2020.

[16] ibid.

resources via the state's power of land acquisition. This allegation would not arise if it always happened for greater benefit of the people maintaining a balance among environmental issue, land rights of the public, and sustainable use of land resources. But in practice, especially in Global South, states frequently appropriate private or community properties and allocate them to some private entities (companies or industries) prioritising economic benefit over environmental crisis thereof. For example, in Delhi, government evicted slum dwellers and used their lands for commercial and infrastructural purposes where 'environmentalism of the poor' was totally ignored.[17] Even using wider meaning of "public purpose", Indian government now can acquire agricultural lands for private companies if the later want to build infrastructure.[18] In USA as well, Supreme Court ruled on behalf of land appropriation for economic development even when the said development corporation was a private entity.[19] What is clear from these examples is that states broadly define the 'public purpose' to acquire private lands in guise of economic development, but in reality they consider short-term political gains denying long-term deterioration of environment.[20] States, thereby, change the way of using land that has potential impact on other factors, such as climate change, soils, flora and fauna, etc. Hence, state provided rehabilitation or compensation to displaced land owners is regarded a part-solution to a mass problem[21] because issue of environmental crisis and land degradation still remain unaddressed. To mitigate these circumstances, application of Public Trust Doctrine (PTD) may efficiently prevent governments from illegal conveying public resources (especially those which are inherently public) to private enterprises and guarantee the public access to natural resources after legal and necessary appropriation.[22] The High Court of Kenya explained PTD by stating that:

> state, as trustee, is under a fiduciary duty to deal with the trust property, being the common natural resources, in a manner that is in the interests of the general public and it should maintain a proper balance between the economic benefits of development with the needs of a clean environment.[23]

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[17] Amita Baviskar, 'The Politics of the City' [2002] Journal of Germanic Studies 516 <https://eprints.soas.ac.uk/17278/1/2002/516/516%20amita%20baviskar.htm> accessed 23 December 2020.

[18] Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act 2013 (Act No. XXX of 2013).

[19] *Kelo v New London* [2005] 545 U.S. 469.

[20] Dhanmanjiri Sathe, 'Land Acquisition Act and the Ordinance: Some Issues' (2015) 26 & 27 Economic & Political Weekly 90.

[21] Usha Ramanathan, 'A Word on Eminent Domain' [2009] International Environmental Law Research Centre 133, 139-142.

[22] Kameri-Mbote (n 1).

[23] *Peter Waweru v The Republic of Kenya*, Misc. Civil Application No. 118 (2004).

Application of PTD in natural resource management has been emphasised in India also.[24] However, questions still remain in determining public interest and maintaining a balance between public need and sustainable management of land resources. Therefore, besides PTD, states need to focus on other technical issues like developing green technology and enhancing capacity to use them appropriately so that sustainability of land resources can be ensured. Furthermore, sustainable use of land should be prioritised in land acquisition laws. Otherwise, it may push for increasing and stronger role of individual people as well as private sector and other non-state actors in sustainable and equitable management of resources.

3. Individual property rights

Extensive support for individual property rights came from great philosophers like Aristotle, St Thomas Aquinas, etc. Since the period of their writings, individual property rights have prioritised the development of human potential and virtue over ensuring sustainable use of natural resources.[25] Therefore, state authorities sometimes need to ignore individuals' rights and their access to natural resources for the sake of 'efficient and sustainable management' of resources. Besides the concept of sustainable development, Ezirigwe also identified human rights considerations, public participation, and corporate responsibility for curtailment and limitation in the property rights to natural resources development.[26]

It is incontestably true that sustainable use of natural resources cannot be entirely ensured without giving possession of the property to the people at least in some cases. Without tittle over property, people naturally would be conscious only about their apparent interest, neither of others nor of environment. But, every individual is required to respond to environmental crisis. In this regard, Hudson strongly opined that individual obligations already inherently exist in private property rights in the name of 'social obligations', violation of which attracts a remedy under tort law, and such inherent existence only needs to be explicitly recognised.[27] However, the tort system cannot serve the purpose well because of its case to case approach and inability to resolve disputes where information is limited.[28] As an alternative to tort system, Hudson prescribed 'two-way street' theory and referred to German Constitutional provision for

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[24] *M. I. Builders Pvt Ltd v Radhey Shyam Sahu* [1999] AIR (SC) 2468.

[25] Ben France-Hudson, 'Surprisingly Social: Private Property and Environmental Management' (2017) 29 Journal of Environmental Law 101, 110.

[26] Jane Ezirigwe, 'Human Rights and Property Rights in Natural Resources Development' (2017) 35 Journal of Energy & Natural Resources Law 201, 202, 212.

[27] France-Hudson (n 25) 127.

[28] Marcia R. Gelpe, 'Organizing Themes of Environmental Law' (1990) 16 William Mitchell Law Review 897, 899.

instance.[29] Under this theory, failure of positive obligations imposed on property owners to benefit community justifies state intervention to change the parameters of ownership.[30]

However, the most serious concern regarding private property rights is that 'individual interest' gets preference over common good, and thus obligations towards others cannot be appropriately attributed to individual property holders. Moreover, individual property may be used inappropriately or even underused. Consequently, this right more or less causes environmental degradation in some ways and hinder sustainable use of resources. As Hardin claims that "our particular concept of private property, which deters us from exhausting the positive resources of the earth, favours pollution."[31]

Moreover, in case of some natural resources like water, energy etc., common people themselves do not want these to be privatised. For instance, due to poor service, high prices, and generous pay-outs to shareholders, 83 percent of respondents of the frontrunner country in privatisation (the United Kingdom) favoured the nationalisation of water, and it was 77 percent for energy.[32] The success and failure of individual property rights in maintaining sustainability of resources can be better analysed by examining water management under current legal framework.

In recent times, privatisation and commercialisation of water has become a controversial and emotive topic, which asks for private entities' or/and individual's ownership over this resource. The policy of commercialising water was reflected in the Dublin Statement 1992 though it did recognise the basic right of all human beings to have access to clean water and sanitation.[33] However, the Dublin Statement was highly contested by NGOs and human rights activists because of making water an economic good for the sake of achieving efficient and equitable use. Therefore, in 2002, the United Nations Committee recognising water as a public good, a limited natural resource, and a human right as well, requires state parties to protect water.[34] And, many countries have already

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[29] France-Hudson (n 25) 114.

[30] Basic Law for the Federal Republic of Germany 1949, art 14.

[31] Garrett Hardin, 'The Tragedy of the Commons' (2009) 1 Journal of Natural Resources Policy Research 243, 247.

[32] Jonathan Ford and Gill Plimmer, 'Pioneering Britain has a Rethink on Privatisation' *Financial Times* (22 January 2018) <https://www.ft.com/content/b7e28a58-f7ba-11e7-88f7-5465a6ce1a00> accessed 22 December 2020.

[33] Dublin Statement on Water and Sustainable Development 1992, principle 4.

[34] Committee on Economic, Social and Cultural Rights Holds Discussion on Right to Water, UN General Comment No. 15 (25 November 2002) Press Release HR/4630.

recognised water as a human right by their supreme law.[35] However, the rationales behind water privatisation and commercialisation are some specific constraints of state-based water service such as poor management, failure to ensure sustainable use of water, negligence towards scarcity of water, reluctance to subsidise infrastructure development, etc.[36] Besides, politics of strong branding and powerful marketing campaigns combinedly influence the emergence and sustenance of new bottled water markets.[37] Thereby, a free good after packaging did become a luxury one.[38] At the end, all these things made water a highly contentious political issue.[39] However, accepting all the limitations of state control over water service even cannot entirely justify privatisation or commercialisation of water. To whatever extent these contentions address diverse problems of state-based water service such as economic, social, and environmental, the dominant feature behind it is commodification for profit gaining. Swyngedouw appropriately demonstrated how profit-centred actors (water companies) can be driven by the inherent factors to private market economy, such as takeovers, disinvestments, class conflict, corrupt practice, inefficient operations, political risk, etc.[40] In fact, uncertainties and liquidities of privatisation question long-term sustainability of market-based water supply systems.[41] For instance, Coca-cola had to withdraw its new Dasani product (the biggest-selling bottled water brand in the UK) from UK shops after knowing that the drink was found to contain levels of bromate- a substance linked with an increased cancer risk.[42] In the question of commercialisation of water, Bakker mentioning it as an 'adaptive and transformative' process concluded that water is an 'uncooperative commodity' and it is difficult to commercialise.[43] Even if it is possible to efficiently commoditise water and supply it according to demand, undoubtedly some people would make profit out of this natural resource when everyone is entitled to have access to it as human right. Whereas, many people around the world are

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[35] As of 2020, Democratic Republic of Congo, Egypt, Kenya, Morocco, Niger, Somalia, South Africa, Tunisia, Bolivia, Ecuador, Maldives, Fiji and so on have recognized water as human right under their Constitutions.

[36] Karen J. Bakker, *An Uncooperative Commodity: Privatizing Water in England and Wales* (Oxford Geographical and Environmental Studies Series, OUP 2004).

[37] Raul Pacheco-Vega, '(Re)theorizing the Politics of Bottled Water: Water Insecurity in the Context of Weak Regulatory Regimes' (2019) 11(4) Water 658.

[38] Toby McCasker, 'Turning Water into Wine: Hoe Did Simple H20 become a Luxury Commodity?' *The Guardian* (2 January 2019) <https://www.theguardian.com/culture/2019 /jan/02/turning-water-into-wine-how-did-simple-h2o-become-a-luxury-commodity> accessed 31 December 2020.

[39] ibid.

[40] Erik Swyngedouw, 'Dispossessing H2O: The Contested Terrain of Water Privatization' (2005) 16 Capitalism Nature Socialism 81, 96.

[41] ibid.

[42] George Wright, 'Coca-cola Withdraws Bottled Water from the UK' *The Guardian* (19 March 2004) <https://www.theguardian.com/uk/2004/mar /19/foodanddrink> accessed 29 December 2020.

[43] Bakker (n 36).

not even getting pure drinking water. Though privatisation or corporatisation of water or any limited resource may be proved effective in some regards like strong and efficient management, it neither can guarantee of removing all the limitations of state control nor ensure its sustainable use. Because their main concern is neither sustainable management nor equitable distribution of resources but making profit out of that. State rather can effectively eliminate its drawbacks by adopting appropriate management system recognising water as universal need, which requires that water be used sustainably for the greater benefit of humankind. The significance of recognising water as universal need for ensuring its sustainable use can be understood from Hiskes' reading, where he showed how even a golf course (that uses a huge quantity of water) of any specific country can affect right to water of others living in other parts of the world.[44]

4. Common property rights

With the growing concerns of both state control and individual property rights, large-scale public participation and common property rights have gained special focus in natural resource literature. Common property or community rights refer to the rights of a group of users over common property resources (such as common lands, wildlife, fisheries, forests, pastures, protected areas, etc.), not necessarily of a specific clan or ethnic community. Idea of common property rights specifically emphasised on peoples' voices and communities' participation in decision making processes for natural resource conservation. The issue of public participation has been stated in principle 10 of Rio Declaration which asks for citizens' access to information and justice concerning environment and opportunity to participate in decision-making processes.[45] Later, Arhus Convention advocated for citizen's right to involvement in environmental governance.[46] One of the strongest rationales of common property rights and communities' participation in policy decision is that environment, nature, and natural resources in question can be well conserved by applying communities' traditional knowledge. Moreover, participation in the decision-making process creates a sense of 'ownership' in the decision itself,[47] that helps encouraging

[44] Richard P. Hiskes, 'Missing the Green: Golf Course Ecology, Environmental Justice, and Local "Fulfillment" of the Human Right to Water' (2010) 32 Human Rights Quarterly 326.

[45] Rio Declaration (n 3) Principle 10.

[46] UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (adopted 25 June 1998, entered into force 30 October 2001) 2161 UNTS 447, arts 4-9.

[47] Patricia Kameri-Mbote and others, *Ours by Right: Law, Politics and Realities of Community Property in Kenya* (Strathmore University Press 2013) 18.

sustainable use of natural resources.[48] Otherwise, communities may use resources destructively if they are not involved in resource management. Emphasising on community participation, Razzaque rightly stated that:

> if they are provided with adequate technical and institutional support, their participation can help achieving better quality environmental decision and can also offer a high-quality natural resource management for the country.[49]

Many scholars have shown common property rights as sustainable alternative to state and private management of resources.[50] Among them, Hardin did not entirely support common property rights. He rather described tragedy of the common in the sense of 'open access' that results in inefficient overuse of, and suboptimal investment in, the resource.[51] Hardin rightly exemplified the oceans of the world, which continue to suffer from the survival of the philosophy of the commons,[52] because every state has open access to the oceans. How open access to a common property inconsiderately exploit natural resources and cause environmental damage can be easily comprehended from present condition of the Mount Everest. Recent reports reveal that the slopes are littered with discarded empty oxygen canisters, abandoned tents, food containers, and even human faeces trashing the natural environment.[53] Even, micro-plastic pollution has been discovered in snow close to the peak of Mount Everest.[54] In a word, "freedom in a commons brings ruin to all."[55] Therefore, Ezirigwe argued that Hardin's concept of the 'tragedy of commons' has justified state control over natural resources.[56] But this 'freedom in common' or 'open access' is entirely different from 'common property rights' or 'public/community participation'. Under the theory of 'common property rights' property can be kept under state control so as to ensure a balanced, equitable, and environment-friendly access of common people through strategies and legal instruments.

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[48] Elizabeth Ashamu, 'Centre for Minority Rights Development (Kenya) and Minority Rights Group International on Behalf of Endorois Welfare Council v Kenya: A Landmark Decision from the African Commission' (2011) 55 Journal of African Law 300.

[49] Jona Razzaque, 'Participatory Rights in Natural Resource Management: The Role of Communities in South Asia' in Jonas Ebbesson and Phoebe Okowa (eds), *Environmental Law and Justice in Context* (CUP 2009) 123, 133.

[50] Arun Agrawal and Clark C. Gibson, 'Enchantment and Disenchantment: The Role of Community in Natural Resource Conservation' (1999) 27 World Development Journal 629.

[51] Hardin (n 31).

[52] ibid.

[53] National Geographic Society, 'Trash and Overcrowding at the Top of the World' *National Geographic Society* (USA 1 October 2019) <https://www.nationalgeographic.org/article/trash-and-overcrowding-top-world> accessed 20 December 2020.

[54] Damian Carrington, 'Microplastic Pollution Found near Summit of Mount Everest' *The Guardian* (20 November 2020) <https://www.theguardian.com/environment/2020/nov/20/microplastic-pollution-found-near-summit-of-mount-everest> accessed 20 December 2020.

[55] Hardin (n 31) 246.

[56] Ezirigwe (n 26) 206.

However, common property rights may create conflicts between different cultures and communities, which is difficult to be dealt with. Because they utterly depend on those resources and everyone desires to establish rights over and secure access to resources. They also significantly lack scientific knowledge that may sometimes cause environmental damage. Additionally, internal conflict may arise in the question of 'who will lead the community to the institutional level'. Consequently, it may lead people to use natural resources unsustainably. Besides, it is difficult to materialize community participation in field level so efficiently as it can be recognised theoretically or legally. In some cases, it lamentably failed to ensure communities' participation in real sense even after combined patronisation of states, human rights advocates, and environment conservation activists. For instance, the idea of Community-Based Natural Resource Management (CBNRM) failed to ensure community participation and became more like other neoliberal market-based solutions strengthening interests of the state though CBNRM was developed to foster relationships among different stakeholders.[57] Also, in India, Water User Association (WUA) was formed for sustainable water management under the principle of participatory irrigation management through representation of marginalised people in executive level.[58] But after few years, it was revealed that WUA severely failed to fulfil its main purpose of engaging community in policy making for sustainable use of water because they were kept grossly under-represented in the highest position.[59]

5. Conclusion

Therefore, it cannot be generalised that one single approach is best to ensure sustainable end effective use of natural resources in all cases. It rather can be said that one way is better than other in a specific case. For instance, resources under common concern or shared property are possible to be explored and exploited sustainably by states through properly implementing international legal instruments made in this regard. If individual rights or open access is given here, it will create a haphazard situation, as everyone will then use them without even thinking about sustainability of these resources. With regards to water, state can ensure sustainable use better than others. Herein, absolute private or common property rights can never be a better alternative. However, some cases demand for combination of state control and other alternative ways. For example, in case of air and land, private rights under direct state control by regulations can be

[57] Wolfram Dressler and others, 'From Hope to Crisis and Back Again? A Critical History of the Global CBNRM Narrative' (2010) 37 Environmental Conservation Journal 5.

[58] V. Ratna Reddy and Pulluru Prudhvikar Reddy, 'How Participatory Is Participatory Irrigation Management? Water Users' Associations in Andhra Pradesh' (2006) 40 Economic and Political Weekly 5587, 5588.

[59] ibid.

proved more sustainable. However, in land regulations- specifically in acquisition law- a balance between legitimate aim and public need should be strictly maintained. Again, common property rights alone may fail to utilise resources sustainably because of their internal and external conflict and unscientific system as well. Nonetheless, common property rights with appropriate regulatory support from state and other concerned authorities can play their role significantly. It may be called a 'giving and taking' process, where communities should be provided with technical and non-technical support and in exchange other stakeholders will take ideas and experiences from communities to use and conserve natural resources. Though to some extent private or common property rights can serve the interest of sustainability in certain cases, they can do so better if accompanied by state control. Therefore, the state control for management of every natural resource is a must to the best extent possible.

The Refugee Convention and Recognition of Climate Refugees

KMS Tareq*

Abstract: Millions of peoples across the world continue to be internally and internationally displaced due to numerous adverse impacts associated with climate change. It is consequently demanded to extend the scope of the Refugee Convention to recognise climate refugees. This research focuses on the essences of the definition of refugees under the Refugee Convention. It also assesses the justification of the claim to reform the Convention to encompass climate refugees under its mandate. The approach adopted in this study is the black-letter law research reviewing the Refugee Convention, pertinent journal articles, seminal books and websites of some international organisations including the UNHCR and IDMC. The findings of the study show that the Convention definition of a refugee has specific challenges to recognise climate refugees under its mandate and it is thus ill-suited to recognise climate refugees. It is concluded that the Convention definition of a refugee is outdated; however, despite the obsolescence of the definition, this is not the time to reform the Convention extending its scope to climate refugees for several practical reasons. The paper recommends for designing a separate device to address the vulnerabilities of climate refugees leaving the Convention to deal with its existing mandate.

Keywords: Climate refugee, convention, international border, persecution, reform, and refugee.

1. Introduction

The 1951 Refugee Convention[1] and the 1967 Protocol[2] are the core instruments to defend the rights of refugees under the international refugee legal regime. Although the Refugee Convention was originally signed to defend a group of people of post-Second World War across Europe,[3] the Protocol made the Convention universal removing its territorial and temporal limitations. Even after signing the Protocol, the Convention is criticised for its narrow definition of refugees as the treaty has failed to address vulnerabilities of a large number of

* The author is an Associate Professor at the Department of Law, University of Rajshahi. He can be reached at: tareqlaw87@gmail.com.

1 Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention or Convention).

2 Protocol relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267 (Refugee Protocol or Protocol).

3 Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, OUP 2007) 35.

displaced persons around the world.[4] Since the number and diversity of displaced people are increasingly high across the global, the limitation of the Convention definition of refugees has become intense in recent time. Although many categories such as 'climate refugees' are popularly termed as 'refugees', they are hardly identified as refugees under refugee law.[5] At the same time, it is also false to allege that 'there is a single, immutable legal category of the "refugee" in international law'.[6] It is consequently claimed to amend the Refugee Convention updating the definition of a refugee so that it can encompass all displaced persons.

This paper aims to underscore that the definition of a refugee under the Refugee Convention is outdated to recognise, in particular, climate refugees. Nevertheless, it is emphasised that this is not the time to reform the Convention for specific challenges. The study follows the doctrinal research methodology analysing primarily the international treaties and relevant judgments. It is worth noting that despite the paper recommends for designing a separate device to address the vulnerabilities of climate refugees leaving the Convention to deal with its existing mandate, the research will not provide a proposal for the governance of the climate refugees under international law.

To this end, this article is divided into three sections. The first section will set the scene with regard to the definition of refugees and climate refugees. The essences of crossing international borders and problems with the perception of persecution will be highlighted in the second section to expose the obsolescence of the definition of refugees. Finally, the third section underlines that although the definition of refugees is outdated in addressing protection for climate refugees, it is not the time to revisit the Convention due to the political unwillingness of the international community and prospective adverse effects upon the rights of 'Convention refugees'.[7]

2. Refugees and climate refugees: setting the scene

The sense of a refugee is not limited to a single connotation, rather it has a multiplicity of meanings.[8] The climate refugee is cataegorised another class of

[4] Andrew Shacknove, 'Who Is a Refugee?' (1985) 95 Ethics 274.

[5] Maxine Burkett, 'Climate Refugees' in Erika J Techera (ed) *Routledge Handbook of International Environmental Law* (Routledge 2012)717.

[6] Simon Behman and Aviden Kent, 'Overcoming the legal impasse? Setting the scene' in Simon Behrman and Avidan Kent (eds), *Climate Refugees: Beyond the Legal Impasse?* (Routledge 2018)10.

[7] In this essay, the 'Convention refugees' refers to those persons who are qualified to be recognised as refugees under the present definition of the Convention.

[8] Beemanand Kent (n 6) 11.

refugees;[9] however, the meaning of a climate refugee is distinct from the traditional meaning of a refugee.

Regarding the denotation of a refugee, Article 1 of the Convention provides the definition of refugees. Notably, the provision contains nearly 850 words to define refugees encompassing clauses A to F. While clauses B to F deal with some relevant issues including cessation of refugee status in clause C and denial of refugee status in clause F, the definition of refugees is clarified in clause A counting the applicability of the Convention. This clause is further divided into paragraphs 1 and 2 in the Convention. Whereas Paragraph 1 recognises refugees as persons who have already been identified under the mandate of earlier treaty arrangements,[10] Paragraph 2[11] enumerates that a person is qualified refugee if he/she

> … owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.[12]

Analysing Article 1A (2), it is deduced that to be considered refugees under the Convention, one person is required to, firstly, cross an international border and secondly, such crossing will be under a well-founded fear of persecution for the reason of race, religion, nationality, political opinion and, membership of a particular social group.[13] However, neither the Convention nor any other instruments including the Protocol, and the UNHCR Handbook[14] define the terminologies including persecution. Consequently, there always exists an uncertainty to limit the status of a refugee. It is claimed, on the one hand, that all refugees can be protected under the Convention definition, and on the other hand, it is argued that there is hardly any scope to extend the definition of refugees to cope with the vast majority of displaced persons including climate refugees across the globe.

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[9] Frank Biermann and Ingrid Boas, 'Preparing for warmer world: Towards a global governance system to protect climate refugees' (2010) 10(1) Glo Envt'l Pol 60, 74.

[10] Article 1A (1) (n 1).

[11] The starting phrase of this paragraph 'As a result of events occurring before 1 January 1951' has been disregarded since the 1967 Protocol removed the temporal and geographical limitations of the Convention.

[12] Article 1A (1) (n 1).

[13] ibid.

[14] UNHCR, Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees (UNHCR Handbook or Handbook) UN doc HCR/1P/4/ENG/REV3 (4thedn 2019).

Regarding the meaning of climate refugees, these people are argued as one of the categories of multiple meanings of a refugee. It is worth noting the term 'climate refugees' is hugely debated and there is a good deal of other names to identify these people. Terminski shows 39 alternative names used by various researchers and institutions to refer to climate displaced persons.[15] Therefore, the problem is not the absence of a name, rather the problem is the abundance of names and this abundance of identities ultimately leaves them in a place of no clear legal recognition under international law.[16] The disagreement regarding the nomenclature is also 'a key problem that hinders research' on these people.[17] However, it is discovered that two mostly used terms in the literatures are 'climate refugees' and 'environmental refugees'[18] and this study prefers climate refugees to others.

To note, Lester Brown of the Worldwatch Institute coined 'environmental refugee' for the first time in 1970s.[19] However, in 1985, the term 'environmental refugee' was firstly popularised and defined by El-Hinnawi at a United Nations Environmental Programme (UNEP) report.[20] El-Hinnawi remarks that

> environmental refugees are those people who have been forced to leave their traditional habitat, temporarily or permanently, because of a marked environmental disruption (natural and/or triggered by people) that jeopardised their existence and/or seriously affected the quality of their life.[21]

In addition, Myers and Kent identified 'environmental refuges' as the people

> … who can no longer gain secure livelihood in their traditional homelands because of environmental factors of unusual scope, notably drought, desertification, soil erosion, water shortage and climate change, also natural disasters such as cyclones, storm surges and floods.[22]

Furthermore, Atapattu classifies climate refugees as the new category of refugees signifying peoples who are displaced internally or internationally due to various

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[15] BogumilTerminski, 'Towards recognition and protection of forced environmental migrants in the public international law: Refugee or IDPs umbrella?' (2012) <https://nbn-resolving.org/urn:nbn:de:0168-ssoar-329056> accessed 15 March 2021.

[16] Burkett (n 5) 720.

[17] Bierman and Boas (n 9) 52.

[18] Terminski (n 15).

[19] L W Marshal, 'Toward a new definition of 'refugee': is the 1951 convention out of date?' (2011) *37*(1) Euro J Trauma Emerg Surg 63.

[20] ibid.

[21] EssamEl-Hinnawi, 'Environmental refugees' United Nations Environmental Program (UNEP) (1985) 4.

[22] Norman Myers and Jennifer Kent, 'Environmental exodus: an emergent crisis in the global arena' (1995) Climate Institute, Washington DC as cited by Biermann and Boas (n 9) 62.

aspects of climate change like 'drought, floods, severe weather events and sea-level rise'.[23]

Given that there is a divergence regarding the nomenclature as well as definition concerning peoples who are displaced due to adverse impacts of climate change, this study prefers 'climate refugees' to denote climate change displaced persons. Again, where the concept of a refugee under international law refers to only cross-border persons,[24] climate refugees signify in this paper both internally and internationally displaced persons. Although it is claimed that the 'concept of climate refugee might limit, rather than expand protection' to the displaced people,[25] Biermann and Boas underscore that 'the protection of climate refugee will receive the legitimacy and urgency it deserves' if these persons are called climate refugees.[26] Behrman and Kent further argue that there is no strict legal restriction to categorise climate refugees as an additional group of refugees.[27] Moreover, the crucial benefit of using climate refugees is that it highlights the 'seriousness of their predicament, their agency and the deserving nature of their claim to protection'.[28] On the above, this paper uses climate refugees signifying persons who are displaced internally and internationally due to adverse impacts associated with climate change.

To sum up, there are certain essences of the definition of a refugee under the Refugee Convention and conversely, there is a divergence regarding the nomenclature of climate refugees. To test the scope of the definition of refugees regarding recognition of climate refugees, the elements of refugee status under Article 1A Paragraph 2 of the Convention are focused below.

3. Antiquated definition of refugees: analysing requirements

The Convention definition of a refugee as provided in Article 1A(2) is obsolete to protect all displaced persons of today's world and to contend the arguments, crossing international frontiers and perception of persecution are analysed respectively.

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[23] Sumudu Anopama Atapattu, 'A New Category of Refugees? "Climate refugees" and a gaping hole in international law' in Simon Behrman and Avidan Kent (eds), *Climate Refugees: Beyond the Legal Impasse?* (Routledge 2018) 41.

[24] Guiding Principles on Internal Displacement, UN Doc E/CN.4/1998/53/Add.2 (11 February 1998, para 2).

[25] Platform on Disaster Displacement (PDD), 'State-led, regional and consultative processes: opportunities to develop legal frameworks on disaster displacement' in Simon Behrman and Avidan Kent (eds), *Climate Refugees: Beyond the Legal Impasse?* (Routledge 2018) 129, 130).

[26] Beeman and Kent (n 6) 66.

[27] ibid.

[28] Beeman and Kent (n 6) 12.

3.1 Crossing international border and inability or unwillingness to return

The key element to be considered a refugee is crossing an international border. It further requires the person who crosses the border to remain out of the border owing to either of his/her inability or unwillingness to return.

The UNHCR Handbook has explained that to be treated as a refugee a person has to cross the border of the country of nationality.[29] For stateless persons, however, it suffices if he/she is outside the frontier of the country of his/her former habitual residence.[30] Again, the person who possesses dual nationality has to prove that he/she cannot avail protection in either of the country of his/her nationality.[31] Notably, the country of nationality is the country of which the applicant is a citizen and the passport presupposes the assumption of such nexus between the person and his/her country of nationality.[32] In other words, the applicant has to be present in the border of the country where he/she applies for the refugee status. This, however, does not mean that the person must leave the country of nationality under a well-founded fear of persecution from the very beginning.[33] When the dread of persecution arises after leaving of the country, the refugee is known as refugee "sur place".[34] Although Shacknove rejects the requirement of crossing international frontier outright claiming it as 'an unnecessary condition for establishing refugee status',[35] the Handbook contends that 'there are no exceptions to this rule'.[36]

As the definition of refugees requires that the question of getting protection under the Convention does not arise unless the person crosses an international border, hundreds of thousands of people being displaced internally across the world are left outside the protection of contemporary refugee definition.[37] To illustrate, according to the UNHCR, there are 70.8 million people who are forcibly displaced worldwide.[38] Among these people 58.33% are internally displaced and remaining 41.67% are cross-border displaced persons.[39] It is noteworthy that among the cross-border displaced persons, 36.58% are refugees under the mandate of the UNHCR and UNRWA, and 4.94% are

[29] UNHCR Handbook (n 14) 25.
[30] Article 1A (2) (n 1).
[31] ibid.
[32] ibid.
[33] UNHCR Handbook (n 14) 26.
[34] ibid.
[35] Shacknove (n 5) 277.
[36] UNHCR Handbook (n 14) 25.
[37] Angela Williams, 'Turning the tide: recognizing climate change refugees in international law' (2008) 30(4) Law & Policy 502, 510.
[38] UNHCR, '*Figures at a glance: Statistical Yearbooks*' (19 June 2019) <https://www.unhcr.org /uk/figures-at-a-glance.html> accessed 19 February 2021.
[39] ibid.

asylum-seekers.[40] Again, the Internal Displacement Monitoring Centre (IDMC) exposes, for a period of a decade since 2008, some 6.13 million people are displaced internally for conflicts and violence, and other 26.27 million people are dislocated within their countries for disasters.[41] This huge number of displaced persons who reside within their home country are left outside the scope of contemporary definition of refugees.[42]

In addition to crossing the border of the country of nationality, the definition further requires establishing that the person is 'unable' or 'unwilling' to avail the protection of his/her country of nationality.[43] Notably, inability of the person will be proved if there prevails circumstances like 'a state of war, civil war or other grave circumstance' which by themselves prevent the country from the protection irrespective of the will of the applicant.[44] Again, unwillingness will be established if the applicant is unwilling to return to his/her country of nationality for 'the well-founded fear of being persecuted'.[45] Thus, the definition requires that the person is unable or unwilling to return to the country of nationality because of the persecutory acts of the government.[46] This suggestion is outweighed since the government is not the sole persecutor for all displacement in contemporary world.

To summarise, the present definition of a refugee is outdated as it fails to accommodate the people who remain within the frontier of their own country. Again, many people crossing the border are left outside the protection under the Convention since they are failed to prove specific type of persecution which will be examined in following sub-section.

3.2 Well-founded fear of persecution and the causal nexus

After crossing the international border, the person has to prove that he/she flees the frontier under the 'well-founded fear of being persecuted for reasons of race, religion, nationality, membership to particular social group and political opinion'.[47] Notably, the concept of well-founded fear of persecution is inherently objective.[48] To illustrate, along with the subjective element of 'fear', the objective element of 'well-founded' is required establishing that the action or non-action is

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[40] ibid.

[41] IDMC, '*Global Internal Displacement Database*' <https://www.internal-displacement.org/database/displacement-data> accessed 25 February 2021.

[42] Williams (n 37) 510.

[43] Article 1A (2) (n 1).

[44] UNHCR Handbook (n 14) 26.

[45] ibid, 27.

[46] Katrina Miriam Wyman, 'Responses to Climate Migration' (2013) 37 Harv Envtl L Rev 167, 179.

[47] Article 1A (2) (n 1).

[48] Forough Ramezankhah, 'A Tale of Two Men: Testimonial Styles in the Persecution of Asylum Claims' (2017) 29(1) Int'l JLJ 110,117.

persecution for a specific reason.[49] Although the notion of 'well-founded fear' is quite settled, disagreement as to the implication of persecution and the restricted grounds are still evident. It is therefore significant to analyse the controversy regarding the meaning of persecution and the reasons of such persecution.

Despite persecution is the key essence to be considered a refugee, neither the Convention nor the Protocol and the UNHCR Handbook defines 'persecution'.[50] Lord Hoffmann mathematically illustrates that 'persecution = serious harm + failure of state protection'.[51] Again, the UNHCR Handbook points out that 'a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group is always persecution. Other serious violations of human rights – for the same reasons – would also constitute persecution'.[52] Considering the etymological and conventional meaning, there are two suggestions in respect of the sense of persecution. While one suggestion claims that there is a scope to extend the concept of persecution to encompass all refugees even after 70 years of the draft, the second suggestion contends that the perception of persecution as it is used in the treaty is inadequate to address the displaced persons in the modern time.

Concerning the claim that the existing definition of persecution is sufficient to address the vulnerabilities of the present world, Marshal alleges that 'definition, by necessity, may change or need to be changed to accommodate situations that arise'.[53] Agreeing with the suggestion Fitzpatrick claims that 'as the nature and motivations of the persecutors evolve, the definition of persecution could likewise be adapted'.[54] It is thus attempted that the term persecution is 'elastic' and it does not necessarily confine it only the political state-led persecution.[55] Since a treaty is required to be construed 'in good faith in accordance with its ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose',[56] the endeavour to expand the meaning of persecution contradicts with the rules of interpretation of treaty law. This is because the UNHCR Handbook enumerates the ordinary meaning of persecution is the state-led political persecution.[57] Again, as the

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[49] UNHCR Handbook (n 14) 19.

[50] Andreas Zimmermann and Claudia Mahler, 'Article 1A, para. 2: Definition of the term 'Refugee' in Jonas Dorschnerp and Felix Machts (assistant eds) *The 1951 Convention Relating to the Status of Refugees and its1967 Protocol*, (OUP 2011) 281-465.

[51] *R v Immigration Appeal Tribunal and Another; Ex parte Shah*, [1999] 2 AC 629 (UKHL, Mar. 25, 1999) 653 (per Lord Hoffmann).

[52] UNHCR Handbook (n 14) 21.

[53] Marshal (n)63.

[54] Joan Fitzpatrick, 'Revitalizing the 1951 Refugee Convention' (1996) 9 Harv Hum Rts J 229, 240.

[55] ibid.

[56] Vienna Convention on the Law of Treaties (adopted 23 April 1969, entered into force 27 January1980) UN doc A/CONF 39/27 (VCLT) Article 31(1).

[57] UNHCR Handbook (n 14) 21.

Convention was drafted to protect 'the civil and political rights of people from persecution of oppressive governments,' the expansion of the definition is also inconsistent with context, object and purpose of the Convention as well.[58]

The other suggestion highlights that the concept of persecution is too narrow to accommodate the various forms of persecution of the contemporary world.[59] The Convention originally identifies government as persecutor and equates persecution with political persecution.[60] The UNHCR Handbook also clarifies that the authorities of a country are the agents of persecution.[61] The agent of persecution even might extend to any section of population[62] or to a non-state actor.[63] However, rather than the authorities of a country or a non-state actor, there are other agents whose identity is obscure as persecutors under the contemporary refugee definition.[64] To illustrate, it is hardly possible to make responsible any particular government or any other actor for the climate change impacts which causes thousands of people displaced internally and internationally.[65] In *Ioane Teitiota v Chief Executive of the Ministry of Business Innovation and Employment* case, Teitiota claimed climate change refugee status in New Zealand arguing that his government of Kiribati is unable to stop sea-level rise in the one hand, and the international community is responsible as persecutor for global warming causing sea-level rise in his country, on the other.[66] However, the High Court of New Zealand rejects the claim pointing out that 'the international community simply lacked to any elements of motivation to harm low-lying states like Kiribati'.[67]

In addition to persecution, the reason of such persecution is also required to analyse the definition of refugee under the Convention.[68] Reasons for persecution, as stated in the Convention, are race, religion, nationality, membership to a particular social group and political opinion.[69] Although the

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[58] Tellina Jolly and Nafees Ahmad, 'Climate Refugees under International Climate Law and International Refugee Law: Towards addressing the Protection Gaps and Exploring the Legal Alternatives for Criminal Justice' (2014-2015) 14 ISIL YB Int'l Human & Refugee L 216, 243.

[59] Frank Biermann, 'Global Governance to Protect Future Climate Refugees' in Simon Behrman and Avidan Kent (eds), *Climate Refugees: Beyond the Legal Impasse?* (Routledge 2018) 267.

[60] Jessica B Cooper, 'Environmental Refugees: Meeting the Requirements of the Refugee Definition' (1998) 6 NYU Envtl LJ 513.

[61] UNHCR Handbook (n 14) 22.

[62] ibid.

[63] William Thomas Worster, 'The Evolving Definition of the Refugee in Contemporary International Law' (2012) 30 Berkeley J Int'l L 94, 97.

[64] Fitzpatrick (n 54) 240.

[65] Tellina Jolly and Nafees Ahmad (n 58) 245.

[66] [2013] NZHC 3125, 30, 46, 55.

[67] Xing-Yin Ni, 'A Nation Going under: Legal Protection for Climate Change Refugees' (2015) 38 B C Int'l & Comp L Rev 329.

[68] Article 1A (2) (n 1).

[69] ibid.

Convention does not explain, the Handbook elucidates the meaning of the restricted grounds and it admits that the meanings frequently overlap with each other.[70] Notably, among the five categories of reasons of persecution, 'social group' is the widest one and its basis includes others.[71] It is therefore argued the 'social group' protects the refugees who are persecuted for 'unforeseen' reasons.[72] However, the appraisal to extend membership to a particular social group to encompass all dislocated persons might be ill-suited in many cases.[73] By way of example, the attempt to cover the environmentally displaced persons as members of particular social group is criticised arguing it as 'a matter of academic interest only'.[74]

For the limitations of the notion of persecution under the Convention, some regional instruments are adopted to widen the scope of persecution. To illustrate, 1969 OAU Convention,[75] and the 1984 Cartagena Declaration[76] accept a broader definition of persecution stating events or circumstances which seriously disturbing public order as persecution.[77] These regional instruments convincingly highlight that persecution is not the only, but one of the 'diverse ways' for the termination of 'the normal bond between the citizen and the state'.[78] It is therefore submitted that the meaning of persecution under the Convention definition of refugee is confined to state-led political persecution.

To recap, considering the traditional meaning of persecution and the object and purpose of the Convention, it is difficult to extend persecution beyond 'political persecution'.[79] As the definition of refugee requires crossing international frontier in the one hand and provides narrow meaning of persecution on the other, it is therefore underscored that the existing definition of a refugee under the Convention is antiquated to encompass climate refugees displaced internally and internationally in the contemporary world. Consequently, the Convention is claimed to be reformed to update the definition of a refugee.

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[70] UNHCR Handbook (n 14) 23.

[71] Cooper (n 60) 521.

[72] ibid, 522.

[73] David Hodgkinson and others, 'The Hour When the Ship Comes In: A Convention for Persons Displaced by Climate Change' (2010) 36 Monash U L Rev 69, 76.

[74] ibid.

[75] Organisation of African Unity (OAU), Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Convention) 10 September 1969.

[76] Cartagena Declaration on Refugees (22 November 1984) in Annual Report of the InterAmerican Commission on Human Rights, OAS Doc OEA/Ser.L/V/II .66/doc.10, rev. 1, 190–193 (1984–1985) (Cartagena Declaration).

[77] OAU Convention (n 58) Art 1(2); Cartagena Declaration (n 59) Para III (3).

[78] Shacknove (n 5) 276.

[79] Williams (n 37) 508.

4. Amendment of the refugee convention to recognise climate refugees

Although the conventional definition of a refugee is obsolete to address the vulnerabilities of growing number of climate displaced people in the modern world, it is argued that this is not the time to reform the Convention. This is because there are three specific challenges of such proposal: firstly, the political unwillingness of the international community; secondly, the potential adverse impacts on the existing Convention refugees; and thirdly, the special characteristics of climate refuges.

Regarding the first argument, the state governments strongly oppose to reform the Convention concerning that it would open the 'refugee floodgate'.[80] Without the support of vast majority of states, the amendment of a Convention is practically impossible. It is known that treaty law is one of the main sources of international law and in case of treaty, it follows negotiation, signing and ratification to take its effect.[81] To date, the reform of the Convention is at negotiation level. There is a vivid non-consensus among states. To illustrate, the Maldives proposed the amendment of Article 1A to expand its scope to address climate refugees in 2006, and after more than a decade it achieved hardly any support from international community.[82] It is again assumed that even it becomes possible to sign a new treaty amending the Refugee Convention; there is barely any chance of its ratification by countries of the global North.

With regard to the second challenge of reforming the Convention, it would devalue the current protection mechanism of refugees.[83] As the UNHCR is the principal body to deal with 'refugees under the Convention, the reform might 'produce a trade-off' between various displaced persons who require separate type of protection.[84] To illustrate, disaster displaced persons do not require the similar type of rights and protection like a politically persecuted refugee since most of them reside within the border of their own country or in a neighbouring country.[85] Therefore, there are several suggestions for sui generis conventions to protect different types of refugees. By way of illustration, the 1998 UN Guiding Principles on IDPs is an attempt to protect all internally displaced people.[86] Again, 2015 Nansen Initiative aims at protecting cross border climate

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[80] ibid, 509.

[81] VCLT (n 56) Articles 7-24.

[82] Behrman and Kent (n 6) 4.

[83] David Keane, 'The Environmental Causes and Consequences of Migration: A Search for the Meaning of Environmental Refugees' (2004) 16 Geo Int'l Envtl L Rev 209, 215.

[84] Frank Biermann and Ingrid Boas, 'Preparing for warmer world: Towards a global governance system to protect climate refugees' (2010) 10(1) Glo Envtl Pol 60, 74.

[85] ibid.

[86] Guiding Principles on Internal Displacement, UN Doc E/CN.4/1998/53/Add.2 (11 February 1998).

change refugees.[87] Finally, a number of researchers including Williams,[88] Bierman and Boas,[89] and Hodgkinson and others[90] suggest protection mechanisms separate from the Refugee Convention for the recognition and protection of the vulnerabilities of climate refugees. It is, therefore, submitted that the attempt to reform the Convention to clothe protection to all persons displaced will undermine the rights of the refugees who are now being governed under the Convention.

About the third challenge for the reform of the Refugee Convention, the issue of the recognition of climate refugees is apparently different from those of political refugees. The climate refugees are mainly displaced internally[91] and therefore, those who claim for the amendment of the Convention disregards the internally displaced climate refugees.[92] Again, the issue of climate refugees is also related with prevention of the climate change and adaptation of the displaced persons. Furthermore, the aspect of vulnerabilities is different in different region of the world. To illustrate, while the island states are under the threat of total loss of statehood, African countries have been suffering in the crisis of water and deforestation.[93] Consequently, the reform of the Refugee Convention will not afford efficacious solution for the climate refugees.

In sum, although it sounds very pleasant to reform the Convention encompassing climate refugees, considering the practical problems of political unwillingness, prospective adverse impacts upon the existing recognised refugees and both internal and international displacement of climate refugees, it is submitted that the reform of the Refugee Convention would not serve the purpose of recognising vulnerabilities of climate refugees.

5. Conclusion

The study argues that despite the Protocol removed the geographical and temporal limitations of the Convention, the definition of refugee as provided in the Convention is outdated. Owing to the requirement of alienage, a good number of internally dislocated persons are left beyond the protection of the

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87 Nansen Initiative, Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change Volume 1 (The Nansen Initiative 2015).

88 Williams (n 37) 502.

89 Bierman and Boas (n 84) 74.

90 Hodgkinson and others (n 73) 69.

91 IDMC (n 41).

92 Williams (n 37) 65.

93 Walter Kälin and Nina Schrepfer, 'Protecting people crossing borders in the context of climate change: Normative gaps and possible approaches' (2011) Study on behalf of the Swiss Ministry of Foreign Affairs (Political Division IV) <https://www.shareweb.ch/site/Migration/ Resources_ Migration/library/...resourcessharewebResource_en_9245.pdf p 13> accessed on 24 July 2020.

Convention. Moreover, for the restricted meaning of persecution, the people who are forced to flee being persecuted by circumstances other than those directly caused by their government cannot seek the protection of the Convention. In addition, the reasons for such persecution are confined to race, religion, nationality, political opinion and membership to particular social group. Among these limited reasons of persecution, the 'social group' is sometimes alleged the widest one and attempted to extend to all displaced persons. This attempt is, however, vitiated as it is not supported by the objective of the Convention. Consequently, the definition of the Convention describing refugees has become outdated. Nevertheless, the amendment of the Convention is not suggested because of some pragmatic challenges. Notably, the reform will adversely impact the existing recognised refugees since the refugee regime is based on the concept of political refugees in the one hand and the diversity of the reasons of displacement in modern times, on the other. Furthermore, the international community has also less appetite for reforming the Convention. It is therefore highlighted to establish separate mechanisms for the protection and recognition of various climate refugees leaving the Convention to continue its existing definition of refugees. It is worth noting although there are a number of proposals from different researchers to recognise climate refugees,[94] no study is still adopted at international legal regime. As such, further study is suggested to identify or propose the proper mechanism to overcome the crisis of the recognition of climate refugees at international level.

[94] Williams (n 37) 502; Biermann and Boas (n 9) 60; Bonnie Docherty and Tyler Giannini, 'Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees' (2009) 33 HarvEnvtl L Rev 349; Hodgkinson and others (n 73)69;Michel Prieur, 'Draft convention on the international status of environmentally-displaced persons' (2010) Urban Lawyer 247.

Necessity of Inserting Climate Change Clause in the Transboundary Water Agreements of South Asia

Ferdousi Begum*

Abstract: The transboundary water agreements are created worldwide in negotiation among different States to avoid any conflict relating to shared water resources and South Asia is not an exception. South Asia isa region having conflict over shared water resources due to water scarcity for an over growing population. One of the major challenges associated with the management of transboundary water resources is to develop suitable mechanisms for managing shared water resources while adapting the impact of climate change as climate change has a major impact on water scarcity. The amount of water may increase or decrease due to climate change in any shared water resources of South Asia creating impact on water allocation system; the consequence of which is conflict over shared water in South Asia. Therefore, the impact of climate change should be taken into consideration for water resource planning, management and decision making in the transboundary water agreements of South Asia which is absent until now. This study unveils the legal as well as institutional arrangements to allocate shared water in transboundary water agreements of South Asia. It suggests some flexible mechanisms or climate change clause to be included in the transboundary water agreements of South Asia and the necessity behind doing so to adapt the impact of climate change.

Keywords: Climate change, flexible mechanisms, institutional mechanisms, South Asia, shared water resources, and transboundary water agreements.

1. Introduction

South Asian region bears a long history of hydro-politics.[1] Most of the rivers in this region are transboundary in nature originating either from the Himalayas or the Tibetan Plateau and then flowing to the soil of the member States of South Asia from upper riparian States (i.e., India) to lower riparian States (i.e., Pakistan, Banglades) [2] The member States of South Asia have been entered into transboundary water agreements (hereinafter TWAs) for allocation of water

* The author is a Senior Lecturer at the Department of Law, American International University-Bangladesh (AIUB). She can be reached at: rina425@gmail.com.

1 James Kraska, 'Sharing Water, Preventing War—Hydro diplomacy in South Asia' (2009) 20 Diplomacy & Statecraft <http://dx.doi.org/10.1080/09592290903293852> accessed 22 June 2021.

2 Douglas Hill, 'Alternative Institutional Arrangements: Managing Transboundary Water Resources in South Asia' (2006) 14 Harvard Asia Quarterly <https://afghanwaters.net/wpcontent/uploads /2017/08/2012-Alternative-insts-for-tbw-mgm-in-SA.pdf> accessed 23 June 2021.

among themselves. This paper limits its discussion to the Indus Waters Treaty,[3] the Ganges Water Treaty,[4] the Mahakali Water Treaty[5] and the Helmand Water Treaty[6] and articulates these treaties as the TWAs of South Asia. Although the Ganges Water Treaty and the Mahakali Water Treaty have been executed in 1996, both of them have a duration of thirty and seventy five years consecutively.[7] The Indus Waters Treaty executed in 1973 and on the basis of this treaty the Permanent Court of Arbitration gave an arbitral award in 2013.[8] Afghanistan and Iran have assigned a joint Helmand River Commissioners Delegation on 2020 to promote bilateral cooperation on water on the basis of the Helmand Water Treaty.[9] Therefore, although these TWAs of South Asia have been executed a long time ago, any discussion on all of these are still relevant.

Water is a dire need for sustainable development.[10] There is a huge demand of water in South Asia as most of the States have extensive plans to construct dams for power, irrigation, and flood control by using water from these shared water resources (hereinafter SWRs) creating aggravating tensions among themselves.[11] Water sharing in South Asian region is significant as well as contentious due to cumulative demand of water, continuation of developmental work irrespective of environmental damage, exploitation of ecosystem, mismanagement of resources, lack of regional cooperation, inadequate water policies, climate change and many other factors.[12] There are various SWRs in

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[3] The Treaty between the Government of India and the Government of Pakistan Concerning the Most Complete and Satisfactory Utilisation of the Waters of the Indus System of Rivers, 1960 is termed as the Indus Waters Treaty.

[4] The Treaty between the Government of People's Republic of Bangladesh and the Government of the Republic of India on Sharing of the Ganga/Ganges Waters at Farakka, 1996 is termed as the Ganges Water Treaty.

[5] Treaty between His Majesty's Government of Nepal and the Government of India Concerning the Integrated Development of The Mahakali River Including Sarada Barrage, Tanakpur Barrage and Pancheshwar Project, 1996 is termed as the Mahakali Water Treaty.

[6] The Afghan-Iranian Helmand-River Water Treaty, 1973 is termed as the Helmand Water Treaty.

[7] Article XII of the Ganges Water Treaty, 1996 and article 12 of the Mahakali Water Treaty, 1996.

[8] *Pakistan v India* [2013] PCA. It is termed as the 'Award in the Arbitration regarding the Indus Waters Kishenganga between Pakistan and India', popularly known as the Indus Waters Kishenganga Arbitration.

[9] 'Transboundary Water Disputes between Afghanistan and Iran', (Climate Diplomacy) <https://climate-diplomacy.org/case-studies/transboundary-water-disputes-between-afghanistan-and-iran> accessed 19 May 2020.

[10] Stephen E. Draper and James E. Kundell, 'Impact of Climate Change on Transboundary Water Sharing' (2007) 133 Journal of Water Resources Planning and Management <https://www.researchgate.net/publication/248880215_Impact_of_Climate_Change_on_Transboundary_Water_Sharing> accessed 20 June 2021.

[11] Muhammad Nawaz Khan, 'Geopolitics of Water in South Asia' (2016) 1 Journal of Current Affairs <https://www.ipripak.org.../uploads/2016/11/Article5_Nawaz-Khan.pdf> accessed 23 May 2021.

[12] Mabroor Hassana, Manzoor Khan Afridi and Muhammad Irfan Khan, 'Environmental Diplomacy in South Asia: Considering the Environmental Security, Conflict and Development Nexus' (2017)

South Asia and many challenges are associated with the management of these SWRs. Two of the major challenges are to measure the impact of climate change on these SWRs and to develop suitable mechanisms in TWAs for allocation of water while adapting the impact of climate change. Making effective principles and procedures to manage and protect SWRs on the face of climate change is a challenge that include many things, i.e., defining transboundary water, jurisdictional issues, procedure to control over extraction of water, technical know-how to manage this water allocation, and conflicting interests of States sharing SWRs. In case of defining transboundary water, different terms have been used by States in different agreements which make things more complex.[13] Many agreements added emphasis upon surface water even if groundwater is mentioned in those agreements.[14] States also have to ensure that no one over extracts water and no pollution has been made to water and environment.[15] Sometimes low level of technical knowledge on groundwater renders legal agreements difficult to arrive at between States whereas sometimes conflicting interests of States make it difficult to be a part of such TWAs.

Climate change can increase or decrease the amount of water on SWRs. Although South Asian States have national climate adaptation plans, few of these States have attempted climate adaptation policies in these TWAs.[16] There are very limited scope in existing TWAs of South Asia for climate proofing initiatives.[17] Most of the TWAs of South Asia focused on rigid water allocation and infrastructure development; they do not incorporate any mechanism to mitigate the impact of climate change.[18] Whatever measures have been taken so far in these TWAs of South Asia to mitigate the impact of climate change are regarded as inadequate and inefficient. Some of these TWAs establish joint water commission with decision-making power or enforcement power while others include provisions concerning exchange of information, monitoring and evaluation, conflict resolution mechanism and water quality management. Institutional mechanisms although exist in a number of treaties; few treaties

82 Geoforum <https://www.sciencedirect.com/science/article/abs/pii/S0016718516302615> accessed 29 May 2021.

13 This scenario is prevalent in the TWAs of South Asia, i.e., Indus Waters Treaty, the Ganges Water Treaty, the Mahakali Water Treaty, the Helmand Water Treaty.

14 ibid.

15 Pollution by one State to any other State needs to pay compensation which is a general principle of international environmental law known as the 'polluter pays principle'.

16 Noah D. Hall, Bret B. Stuntz and Robert H. Abrams, 'Natural Resources & Environment' (2008) 22 American Bar Association <https://www.jstor.org/stable/40924924?seq=1#metadata_info_tab_contents> accessed 28 May 2020.

17 P. H. Gleick, *Confronting Climate Change: Risks, Implications and Responses* (Irving M Mintzered, 1st edn, CUP 1997).

18 Gretta Goldenman, 'Adapting to Climate Change: A Study of International Rivers and Their Legal Arrangements' (1990) 17 Ecology Law Quarterly 741 <http://scholarship.law.berkeley.edu/elq/vol17/iss4/3> accessed 21 May 2020.

possess the flexibility to reform those mechanisms to cope up with the impact of climate change. Sometimes monitoring, enforcement, and conflict resolution mechanisms are also absent in a large number of TWAs. Some TWAs often overlook the evaluation mechanism, enforcement mechanism and public participation. There are few TWAs that include international climate adaptation fund. In this scenario, resilience and adaptability into TWAs of South Asia are essential to address the uncertainties and variabilities associated with climate change. Existing legal and institutional arrangements require to be critically reviewed to determine whether they are resilient in the face of extreme climate events or they fail to meet the challenge of adaptation. Experts have offered suggestion to incorporate flexible allocation and responsive mechanisms, amendment procedure, and cooperative management mechanism in the TWAs to reduce the risks of possible conflict and lessen vulnerabilities to climatic change.[19]

The TWAs of South Asia have many mechanisms to distribute water among themselves yet water allocation will not be easy in the absence of any flexible mechanism to adapt the impact of climate change. These TWAs offer the potential for flexible mechanisms to adapt the impact of climate change while allocating water which can engender a sustainable future by ensuring peaceful distribution of water in this region. A flexible and adaptive transboundary water management system in these TWAs can enable effective climate adaptation. Otherwise the impact of climate change may create unavailability of sufficient water in these SWRs of South Asia causing conflict[20] (i.e., lack of water in SWRs may obstruct any development work plan of any State of South Asia which may led to conflict in this region).[21] Against this backdrop, this paper signifies inclusion of climate change clause or flexible mechanisms in these TWAs of South Asia as a possible means of mitigating and adapting to the impact of climate change. Critical review of the importance of adaptation of flexible mechanisms or insertion of climate change clause in these TWAs of South Asia has been made in this paper.

Besides the introductory and concluding remarks, this article has four sections. After the introduction, the second section articulates the general principles of law governing TWAs of South Asia (i.e., the Indus Waters Treaty,

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[19] Heather Cooley and P. H. Gleick, 'Climate-Proofing Transboundary Water Agreements' (2011) 56 Hydrological Sciences Journal; Gabriel E. Eckstein, 'Commentary on the UN International Law Commission's Draft Articles on the Law of Transboundary aquifers' (2007) 18 Colorado Journal of International Environmental Law and Policy; Stephen C. McCaffrey, 'The Need for Flexibility in Freshwater Treaty Regimes', (2003) 27 Natural Resources Forum.

[20] Gareth Price (ed), *Attitudes to Water in South Asia, Chatham House Report* (The Royal Institute of International Affairs 2014).

[21] Iram Khalid, 'Trans-boundary Water Sharing Issues: A Case of South Asia' (2010) 17 Journal of Political Studies 79.

the Ganges Water Treaty, the Mahakali Treaty and the Afghan-Iranian Helmand Water Treaty). It discusses the international legal principles and basic legal mechanisms of the TWAs of South Asia. The third section provides an outline of the impact of climate change on SWRs of South Asia. It encompasses the data of carbon emission provided by the Inter-governmental Panel on Climate Change (hereinafter IPCC) and discusses the final award of Kishenganga Arbitration where the Permanent Court of Arbitration gives importance to consider the impact of climate change while allocating water for any State in the TWAs made between India and Pakistan. [22] The fourth section articulates the existing institutional mechanisms of the TWAs of South Asia fails to cope up with the impact of climate change. The fifth section ascertains the necessity to include some flexible mechanisms or to insert a climate change clause in the TWAs of South Asia. The last section contains the concluding remarks.

2. General principles of international law governing transboundary water agreements

There are some general principles of law governing TWAs which delimit the rights and obligations of riparian states over SWRs.[23] The principles that are emerged in transboundary water governance include absolute territorial sovereignty, absolute territorial integrity, limited territorial sovereignty and limited territorial integrity, equitable and reasonable utilization of water and many more.[24] Reliance on non-navigational uses of rivers such as irrigation and hydropower was increased due to over population in 19th century discovering various rules to entry into force like 'Harmon Doctrine' which was also known as the principle of 'absolute territorial sovereignty'.[25] This doctrine opined that, "a state can exercise sovereignty over its transboundary water resources irrespective of any adverse impact of such usage to other states."[26]

The principle of 'no harm' and the principle of 'polluter pays' originated in environmental jurisprudence later on abolishing the principle of 'absolute territorial sovereignty' prohibiting riparian States from causing harm to other States, and called for cooperation and peaceful resolution of disputes.[27] Another

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[22] Climate Diplomacy (n 9).

[23] Ferdousi Begum, 'Transboundary Water Agreements in South Asia: Does the Principle of Equitable and Reasonable Utilization of Water Exist' (2020) 18 Bangladesh Journal of Law 179.

[24] Charles B. Bourne, *International Water Law* (Patricia Woutersed, 1st edn, Kluwer Law International 1997).

[25] *United States v Rio Grande Dam & Irrigation Co.,* [1899] USA 690.

[26] ibid.

[27] Muhammad Mizanur Rahaman, 'Principles of Transboundary Water Resources Management and Water-related Agreements in Central Asia: An Analysis'2012 International Journal of Water Resources Development 28:3, pp 475-491, (2012) <https://www.researchgate.net /publication/230854803_Principles_of_Transboundary_Water_Resources_Management_and_Water -related_Agreements_in_Central_Asia_An_Analysis> accessed 20 May 2021.

known principle at that time was the principle of absolute territorial integrity.[28] It established the right of a lower riparian State to demand continuation of the natural flow of an international river into its territory from the upper riparian States.[29] Any development work causing bar to this natural flow should be banned.[30] Both of these principles were rejected on reasonable grounds. Another principle named limited territorial sovereignty or limited territorial integrity[31] had been emerged. It proclaimed the equality of usage of water in any transboundary water resources and enumerated no harm principle. The principle of 'equitable and reasonable utilization of water' ensures the same rule yet there are different opinion regarding what is equitable utilization.[32] States still dispute what should be the common standard for sharing of water and the proper application of the agreed standard.[33]

Among all of these, the most significant rules of SWRs of modern era are 'equitable and reasonable utilization of water', 'environmental protection', 'no harm', 'duty to notify and exchange of information'. International rules regarding shared water resources are made by the Institute of International Law (IIL), the International Law Association (ILA), as well as the International Law Commission (ILC).[34] The works of the ILA include the Helsinki Rules, 1966 and the Berlin Rules, 2004. The work of the ILC includes the 'Convention on the Law of the Non-navigational Uses of International Watercourses, 1997'. Some of these

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[28] Muhammad Mizanur Rahaman, 'Principles of Transboundary Water Resources Management and Water-related Agreements in Central Asia: An Analysis' (2012) 28 International Journal of Water Resources Development <https://www.researchgate.net/publication/230854803_Principles_ of_ Transboundary_...Asia_An_Analysis> accessed 20 May 2021.

[29] Muhammad Mizanur Rahaman, 'Principles of Transboundary Water Resources Management and Ganges Treaties: An Analysis' (2009) 25 Int. Journal of Water Resources Development 159.

[30] Tamar Meshel, 'Swimming Against the Current: Revisiting the Principles of International Water Law in the Resolution of Fresh Water Disputes' (2020) 61 Harvard International Law Journal 135.

[31] It asserts that every riparian State has a right to use the waters of the international river yet at the same time, it is under a corresponding duty to ensure that, such use does not harm other riparian States. It asserts the equality of all riparian States in the usage of the water of the international river.

[32] See, (n 25).

[33] Joseph W. Dellapenna, 'The Berlin Rules on Water Resources: A New paradigm for International Water Law' (2006) World Environmental and Water Resources Congress <https://ascelibrary .org/doi/abs/10.1061/40856%28200%29250> accessed 30 May 2021.

[34] The IIL and the ILA are both non-governmental organizations established in 1873. The IIL is a smaller organization whose membership is made by election and invitation. The ILA is comparatively a larger organization and its membership is open to all international lawyers through recommendations. Both institutions adopt resolutions and rules which aim at codifying international law. However, those resolutions and rules do not have a formal standing and are not legally binding *per se* though they possess a considerable authority as they reflect the established customary principles of international water law from the expertise and respectability of the members of both institutions. The resolutions of the IIL emphasize the obligation not to cause significant harm to other riparian States. The resolutions and rules adopted by the ILA emphasize the principle of reasonable and equitable utilization of shared water resources.

principles are the basis for management of water of any SWRs of South Asia yet the main problem is ensuring supply of adequate water in the era of climate change.

3. Impact of climate change on shared water resources

Climate change has widespread impact on the water cycle of a region which will adversely affect agricultural production, ecosystem, quality and quantity of water and water-related infrastructure. The demand of water is increasing in South Asia for hydropower, irrigation, navigation, fisheries, ecosystem etc. while the availability of water is decreasing for many reasons; one of which is climate change.[35] Rising temperature of the earth due to climate change will impact the overall environment and ecosystem including wildlife, flora and fauna.[36] In the Paris Agreement, 2015, the world leaders agreed to reduce 'global temperature rise' below 1.5-2°C.[37] The Intergovernmental Panel on Climate Change (hereinafter IPCC)[38] publishes reports on global warming. It has the scientific basis of proving the impact of climate change and it is doing so on a regular basis. Increase of carbon emission led to global warming is provided by the sixth assessment report of IPCC.[39] "The likely range of total human-caused global surface temperature increase from (1850–1900) to (2010–2019) is 0.8°C to 1.3°C, with a best estimate of 1.07°C."[40] "Global mean sea level increased by 0.20 [0.15 to 0.25] m between 1901 and 2018."[41] This scenario of changing climate has an overall impact upon the ecosystem including SWRs.

Climate change can impact the shared water resources in two ways; long term impact which threatens the balance of ecosystem or short term impact which can cause flood, drought or any other impact on water.[42] It may cause water scarcity by reducing rainfall; or water availability by increasing it in some region; sometimes heavy flow of water may occur due to melting of

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[35] Golam Rasul and Bikash Sharma, 'The nexus approach to water–energy–food security: An option for adaptation to climate change' (2015) 16 Climate Policy 682.

[36] Gareth price, Rethinking Water-Climate Cooperation in South Asia, (2016) 13 ORF Issue Brief.

[37] The Paris Agreement, 2015 is an international treaty on climate change.

[38] In 1988, the United Nations Environment Programme (UNEP) and the World Meteorological Organization (WMO) established IPCC. The United Nations General Assembly endorsed it to provide periodic scientific assessments concerning climate change, risks associated with it, its implications, procedure for adaptation and mitigation strategies.

[39] Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change (IPCC) (2021).

[40] ibid.

[41] ibid.

[42] M. Monirul Qader Mirza and Q. K. Ahmad (eds.), *Climate Change and Water Resources in South Asia* (A.A. Balkema Publishers 2005).

glacier or snow which may create flood to the banks of the river.[43] Geographically the South Asian region is integrated by rivers which mean that if Nepal is affected by flood, it will also affect India; if India is affected by flood, then it will affect Bangladesh and Pakistan.[44] Climate change can also cause decrease of water, which can create drought.[45] The frequency and intensity of flood and drought may increase due to climate change which will insecure the life of the inhabitants residing besides the river basin of Indus, Ganges, Brahmaputra, Meghna and many other river basins of South Asia.[46] Changes in temperature and rainfall have a long term impact on the ecosystem of water.[47]

Most TWAs of South Asia are based on the assumption that future water supply and quality of water will remain unchanged.[48] Existing mechanisms in the TWAs of South Asia never address any solution to the long term impact of climate change although some mechanisms are mentioned there to face short term impact, i.e., flood and drought.[49] "These international agreements fail to have adequate mechanisms for addressing changing climate conditions."[50] Absence of institutional mechanisms to manage these events make these TWAs weak. The parties to these TWAs of South Asian region should modify these TWAs as per the requirement to adapt the impact of climate change.[51] The law of treaties itself will not ordinarily permit unilateral modification or withdrawal under changing circumstances, including climate change rather parties will be required to work within the framework of existing treaties to respond to any change.[52]

The impact of climate change has been taken into account in a dispute between Pakistan and India regarding water distribution by Indus Waters Treaty, 1960. The Permanent Court of Arbitration (PCA) has taken into account the impact of climate change on the flow of water of the Kishenganga/Neelumwhile giving the final award on 20 December, 2013 in that

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[43] David Michel Amit Pandya (eds.), *Troubled Waters: Climate Change, Hydro politics, and Transboundary Resources* (The Henry L. Stimson Center 2009).

[44] Golam Rasul and others, 'Beyond hydropower: towards an integrated solution for water, energy and food security in South Asia' (2019) 37 International Journal of Water Resources Development 466 <https://www.tandfonline.com...019.1579705?needAccess=true> accessed 23 June, 2021.

[45] Anton Earle, Ana Elisa Cascao, Stina Hansson, Anders Jägerskog, Ashok Swain, and Joakim Öjendal (eds), *Trans-Boundary Water Management and the Climate Change Debate* (Routledge 2015).

[46] Ibid n 7.

[47] Richard Davis and RafikHirji, 'Review of Water and Climate Change Policies in South Asia' (2019) International Water Management Institute <http://www.iwmi.cgiar.org/Publications/Other/PDF/sawi-paper-2.pdf> accessed 12 May 2021.

[48] ibid.

[49] ibid, n 14.

[50] ibid, n 19.

[51] ibid, n 11.

[52] Vienna Convention on the Law of Treaties, 1969.

arbitration. The Court has observed that, flow of water may differ significantly due to many factors including climate change and minimum flow requirement needs to be reconsidered due to the impact of climate change.[53] This case establishes our argument that, the TWAs of South Asia should take into account the impact of climate change on SWRs.

4. Institutional mechanisms fail to adapt the impact of climate change on the transboundary water agreements of South Asia

This section discusses how the prevailing mechanisms are structured and failed in terms of handling climate change implications on water allocation in the TWAs of South Asia. Two kinds of mechanisms are prevailing in the TWAs of South Asia to adapt the impact of climate change; i.e. institutional mechanisms and flexible mechanisms. There are many institutional mechanisms in TWAs of South Asian region including joint basin development and joint river management procedure, dispute resolution procedure, amendment procedure and many more that might enhance the efficacy of regional cooperation to ensure just and equitable distribution of water in South Asia yet these mechanisms are not sufficient enough to mitigate the impact of climate change. These mechanisms are discussed in this section to understand how they have been failed to adapt the impact of climate change on the TWAs of South Asia.

4.1. Joint river management procedure

TWAs create 'joint river management organizations' that are expected to manage these rivers jointly. It is an example of inter-state co-operation, public participation, and exchange of information in these TWAs. These commissions work to resolve disputes between States depending upon how much power they possess, i.e., they may possess the power to negotiate between States. The effectiveness of these commissions depends upon their independent authority, decision making power, sufficient resources and ability to balance between interests of States and overall interests of the SWRs. Developing formalized communication between parties through the establishment of joint management institutions can overcome the rigidity of TWAs and serve as a venue for conflict resolution. The TWAs of South Asia can include any provision to mitigate the impact of climate change on SWRs if the members of these Commissions cooperate each other. Against this backdrop, the Permanent Indus Commission[54] (Pakistan-India), the Mahakali River Commission[55] (India-Nepal), and the Indo-Bangladesh Joint Rivers Commission [56] (Bangladesh-India) are established

[53] Para 117 and 118 of the Final Award of the Indus Waters Kishenganga Arbitration. See, ibid n 9.
[54] Indus Waters Treaty 1960, art VIII.
[55] Mahakali River Treaty 1996, art 9.
[56] Ganges Water Treaty 1997, art VII and IV.

respectively under the provisions of Indus Waters Treaty, Mahakali Water Treaty and Ganges Water Treaty. The Helmand River Water Treaty does not include any provisions of joint river mechanism although it has provided that, both the Member States of this Treaty should appoint a Commissioner and a Deputy Commissioner who will work as the representatives of the respective States while implementing the provisions of the Treaty and distributing specific amount of water between these States. [57] Inclusion of the provision of granting specific amount of water to the other Party in the treaties of this South Asian region is an indicator that, these joint river management procedure is a failure to cope up with the impact of climate change as water variability in this SWRs of South Asian region can be changed due to the impact of climate change that reduces the chance of allocating fixed amount of water in any season. Existing procedure of joint river mechanism in the TWAs of South Asia is inadequate to address this issue as impact of climate change can be a bar to specific water allocation to any State causing dispute between States. An effective joint river commission can help to change the present rigidity of the TWAs of South Asia.

4.2. Dispute resolution procedure in the TWAs of South Asia

There are some available mechanisms in the TWAs of South Asia for settlement of disputes, i.e. negotiation, mediation and adjudication. All of the TWAs of South Asia have the provision of allocating fixed amount of water without any provision of taking into account the impact of climate change that has a huge impact on water allocation. Providing less or more water than the fixed amount of water as has been mentioned in these TWAs of South Asia originates dispute between States. The existing dispute resolution procedure prevailing in the TWAs of South Asia fails to address this impact of climate change. Moreover, there is no amicable way to resolve this dispute (that has been arising as States are getting less or more water due to climate change) in these TWAs of South Asia.

Any question concerning the interpretation or application of Indus Waters Treaty or any existence of fact which might constitute a breach of this Treaty must be examined by the Indus Water Commission first.[58] Then any neutral expert may examine it. In case of any dispute, the Commission should inform it to the Government. Both of the Governments will try to resolve it by negotiation and mediation. There must be a 'Court of Arbitration' to resolve this issue. The Indus Waters Treaty is an example of a successful mediation yet the unforeseen threat of climate change challenges it as in case of arising dispute due to distribution of water between States, there is no immediate provision to resolve the dispute.

[57] Helmand Water Treaty 1973, art 2 of the Protocol No. 1.
[58] ibid n 11.

The scope for dispute resolution provided in the Ganges Water Treaty is very limited. It does not include a specific dispute resolution mechanism. The preamble of the Treaty mentions that both Parties wish to find a fair and just solution without affecting the rights and entitlements of either State. The Joint Committee (comprised of an equal number of representatives from both Parties and answerable to the Indo-Bangladesh Joint Rivers Commission) is responsible for examining any difficulty arising out of the Treaty implementation.[59] If the dispute still remain unresolved, it should be referred to both the governments that would meet urgently at an appropriate level to resolve it by mutual discussion. Both the governments recognize the need to cooperate with each other to find a solution to the long-term problem of augmenting the flows of the Ganga/Ganges during the dry season.[60] It therefore does not give the Joint Committee any power to resolve any dispute and there is no provision for mediation or arbitration. The Treaty chose diplomatic means rather legal procedure to resolve any dispute arising from its implementation. It does not specify the time frame for the settlement of any dispute. There is no obligation for the Parties to seek resolution of the dispute. The dispute resolution mechanism of the Ganges Treaty has been extensively criticized as it does not provide any flexible room for arbitration to settle any dispute which makes it less effective. The treaty does not settle down any procedure to resolve any dispute arising due to the impact of climate change.

The Mahakali Treaty provides a detailed dispute resolution and arbitration mechanism if any dispute is not resolvable by the Mahakali Commission. An arbitration tribunal composed of three members conducts all arbitration.[61] One arbitrator must be nominated by Nepal, one by India, with neither country able to nominate its own national, and the third arbitrator is to be appointed jointly, who shall preside over such tribunal.[62] In the event that the Parties are unable to agree upon the third arbitrator within 90 days after receipt of a proposal, either Party may request that the Secretary-General of the Permanent Court of Arbitration at 'The Hague' to appoint an arbitrator, who shall not be a national of either country. The decision of the arbitration tribunal is final, definitive and binding.[63] There is no provision for the venue of arbitration, the administrative support of the arbitration tribunal and the remuneration and expenses of its arbitrators which must be agreed upon by exchanging notes between the Parties.[64] Both the Parties may also agree by such exchange of notes

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[59] Mark Zeitoun and NahoMirumachi, 'Transboundary water interaction I: reconsidering conflict and cooperation' (2008) 8 International Environmental Agreements: Politics, Law and Economics.

[60] Ganges Treaty 1996, art VIII.

[61] Mahakali Treaty 1996, art 11(2).

[62] ibid.

[63] ibid, art 11(3).

[64] ibid, art 11(4).

on alternative procedures for settling differences arising under this Treaty. The Mahakali Treaty offers an elaborate and advanced mechanism for dispute settlement yet it does not take into account the long term impact of climate change and has no flexible provision to settle disputes arising due to the impact of climate change.

Under the Helmand river treaty, in case of any difference in the interpretation or the application of the treaty, the parties should make an attempt to solve the issue through diplomatic negotiation; in case if it is not resolved, then the parties should use the good offices of a third party.[65] Lastly, the treaty seeks the help of arbitration to resolve the dispute.[66] It has the provision to make an 'Arbitral Fact Finding Mission' and then an 'Arbitral Tribunal' if the dispute does not resolve through the previous procedure mentioned above. The provision of diplomatic negotiation is criticized on the ground of political instability in both of these States. This Helmand treaty also does not bear any provision taking into account the impact of climate change.

The above-mentioned dispute resolution procedure in the TWAs of South Asia is time-consuming, rigid and expensive. Under any treaty of South Asian region, these dispute resolution mechanisms do not have the power to settle any dispute arising for not providing fixed amount of water mentioned in the TWAs of South Asia due to the impact of climate change.

4.3. Amendment procedure of the TWAs of South Asia to include better provisions to mitigate the impact of climate change

An easily accessible amendment procedure in these agreements can help States to include any necessary provisions to adapt the impact of climate change, i.e., climate change clause. States can make special provisions to define the changing nature of climate and periodic review of it in the TWAs. For example, the 1944 Water Treaty of the river Colorado[67] has the provision of adding 'Minutes' in their treaty. They can put any provision in the frame of 'Minutes' which later on becomes the part of the original treaty. In case of changing circumstances of climate, the treaty makers can input provisions in the treaty to adapt the impact of climate change as per the situation demands and it becomes the provision of the original treaty. But the TWAs of South Asia do not have any provision of amending these agreements in case of necessity to include any better arrangement to transboundary water management.

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[65] Afghan-Iranian Helmand-River Water Treaty 1973, art IX.

[66] Protocol 2 of the Afghan-Iranian Helmand-River Water Treaty, 1973.

[67] The Colorado River is predominantly in the United States and crosses the Mexican border on its way to the Gulf of California. The Colorado River Treaty is signed between USA and Mexico on February 3, 1944 and it was entered into force on November 1945. It is popularly known as the 1944 Water Treaty.

There is no amendment procedure in the Indus Waters Treaty and the Helmand Water treaty although the latter one has provisions for short term impact of climate change.[68] The Ganges Water Treaty provides that both of the Governments can make a review of the water sharing arrangement after every five years (or before that, if necessary) on the basis of equity, fairness, and no harm principles.[69] They can make necessary adjustments of water sharing management by doing this. The Mahakali Water Treaty provides that, both the Parties can make a review of the treaty after every ten years (or earlier, if necessary) and make necessary amendment.[70] Therefore, the TWAs of South Asia bears rigidity in terms of inclusion of any new provision to mitigate the impact of climate change.

All of these institutional arrangements (i.e., joint river management, dispute resolution procedure and amendment procedure) are necessary yet new institutional arrangements must be put in place to reduce the impact of climate change. For example, to establish a regional institution for cooperation among states in case of dispute arising from the allocation of water. There are many examples of such institutions in South Asia although those are not operational, i.e., South Asia Water Initiative (SAWI). There should be some space for participation of civil society, i.e., South Asian Solidarity on Rivers and Peoples (SARP), Imagine New South Asia (INSA), South Asia Social Forum (SASF), Climate Action Network South Asia (CANSA). The capacity of these institutions depend upon the cooperation from the member states of TWAs of South Asia.

5. Necessity to include flexible mechanisms or climate change clause in the transboundary water agreements of South Asia

Adapting to the impact of climate change is going to require changes in the institutions and policies that have been put in place under the TWAs of South Asia.[71] The capacity of countries to adapt to the impact of climate change and ensuring water flow depends on the degree of flexible mechanisms that are incorporated in their TWAs. Inclusion of flexible mechanisms in any such TWAs means the ability to cope up with the impact of climate change easily and in time of necessity. Flexible mechanisms include climate related water management issues i.e., water allocation mechanism, maintenance of water quality, availability of water and minimum water flow mechanism, provisions of flood control and protection of environmental ecosystem.

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[68] Helmand Water Treaty 1973, Article XI.
[69] Ganges Water Treaty 1996, Article X.
[70] Mahakali Treaty 1996, Article 12.
[71] Ibid n 39.

5.1. Water allocation mechanism in the TWAs of South Asia

Allocating water in a manner acceptable to all parties in time of limited availability of water is one of the most difficult aspects of TWAs of South Asian region. Water allocation mechanism includes water availability, water flow variability, getting minimum water, maintenance of water quality and many more things. Water allocation rules and mechanisms can be done by including a provision in the TWAs of South Asia (i.e., climate change clause) or through separate instruments in the same treaty (i.e., annexure). All of the TWAs of South Asia have the provision of fixed water allocation. The impact of climate change can result a decrease in water flow of the SWRs in time of dry season; thus, changes may happen to the supply, quality and demand of water. Therefore, States may not be able to draw that fixed amount of water from the SWRs. It may cause dispute between States.

There is inequality in South Asian region in terms of usage of water. Climate change in this case makes the situation more vulnerable. There is a concern about water flow variability. Management of flow variability has often been an important component of TWAs. Generally lower riparian States depend on water availability in the basin. Sometimes upper riparian states also stressed to get development projects occurring on the bank of the SWRs using its water as every state in South Asia wants to make barrage or dam by using the water of SWRs either for irrigation or for producing electricity. Sometimes these agreements give priority of water usage but may not have provisions to cope up with the actual need for a growing population. Bangladesh and India stated their intention to increase water supply of the Ganges River during dry period but did not specify how or when such work would take place. These TWAs of South Asia do not make any joint effort or develop any infrastructure to supply water to the other states in a situation of water scarcity.

5.2. Extreme drought and flood control mechanism in the TWAs of South Asia

Vulnerability increases due to constant water variability and scarcity. The establishment of joint water management or joint commission for creating flood-control mechanism to manage unexpected over flow of water is a major concern for any TWAs of South Asia. South Asian States should address this issue in their TWAs to enhance their capacity to face these circumstances as it is a flood or drought prone area. Almost all of the TWAs of South Asia provides mechanisms to this short term impact of climate change (i.e., flood control mechanism) yet existing provisions to control flood or drought in the TWAs of South Asia is not adequate enough to manage this.

5.3. Protecting environmental ecosystem

TWAs of South Asia put little attention to ecosystem or long-term sustainability of the SWRs while making provisions for using water. There is a need to preserve fisheries, natural species, flora and fauna in case of international water management on the face of climate change which is imperative for sustainable development. This should be included in the climate change clause of the TWAs of South Asia.

The need of incorporating flexible mechanisms in the transboundary water agreements of South Asian region is obvious as flexible and adaptive transboundary water management can enable effective climate adaptation. These flexible mechanisms can be included as a climate change clause in the TWAs of South Asia to mitigate the impact of climate change.

6. Concluding remarks

Existing provisions of TWAs of South Asia are inadequate to mitigate the impact of climate change. Moreover, lack of participation, transparency, exchange of information and advanced technology made these treaties unworthy to some extent. New arrangements for such agreements are necessary in the context of a changing climate. Building regional transboundary water management institutions through co-operation among States to adapt the impact of climate change is necessary from the view point of water crisis in South Asia. Every SWR has its own special characteristics and those of South Asian States are not any exception. It needs unique solution to meet up the need of the people living beside this basin area. The member States of these TWAs can think of taking into account the inclusion of flexible mechanisms or climate change clause to mitigate the impact of climate change on these SWRs. They can include the provision of creating an effective negotiation between States to create an adaptation procedure to settle any kind of dispute in an easy and quicker way. There is a significant and proactive role for international development institutions to provide technical assistance and funds to strengthen this region while dealing with transboundary water governance. It can nurture the relationships among States and find long-term solution for managing their SWRs in a manner that would reasonably and equitably address the need and demand of all of them. Therefore, transboundary water management of South Asia needs cross border large scale collaboration among States, joint implementation of research agenda, technology transfer to the developing countries, systemized monitoring and integrated policy approach. The time is ripe for the countries of South Asian region to consider new clauses in such TWAs to develop, design and strengthen their legal regime regarding the SWRs in order to adapt the impact of climate change on the basis of principles established by customary law, the codified law and prevailing international practices.

Unaccompanied Asylum Seeking Children (UASC) in the UK: Protecting their Best Interests in the Controlled Migration Regime

Shuvra Chowdhury*
Ahmed Ehsanul Kabir**

Abstract: In every year, unaccompanied children from different parts of the world are looking for asylum in the UK because of socio-economic and policitial reasons in their home countries. Due to the hostile environment policy of the UK government against the unaccompanied asylum-seeking children (UASC), they are treated as 'undeserving' by the immigration authority. Though the UK government has ratified the UNCRC, but the best interests of the UASC have not been ensured in many instances. Consequently, the protection of the UASC is basically considered as a last resort when no other alternatives are available. With a view to uphold the rights and interests of the UASC in the light of the core principles of the UNCRC, the Children Act, 1989 has already incorporated certain provisions. But, this protective framework of law is not free from flaws. As a result, the apex courts in the UK are providing a path for the UASC to combat with the hostile environment policy and to secure the protection by upholding their rights and interests. So, this article depicts how to ensure the best interest of the UASC within the framework of law relating to children in the antagonistic and controlled migration regime.

Keywords: Best interest principle, children law, hostile environment, immigration and asylum law, unaccompanied asylum-seeking children, and UNCRC.

1. Introduction

In every year, a good number of unaccompanied children are arriving in the UK, leaving their country of origin for many reasons i.e. armed conflict, political upheaval, family abuses, female genital mutilation, trafficking for labour or sexual exploitation, domestic violence, accusation of witchcraft, force marriage, etc.[1] They are treated as illegal asylum seekers and their age is often

* The author is an Assistant Professor at the Department of Law, Stamford University Bangladesh. She can be reached at: shuvrachowdhury83@yahoo.co.uk.

** The author is an Assistant Professor at the Department of Law, Jagannath University. He can be reached at: kabirlcls@yahoo.com.

[1] Farhat Bokhari, 'Separated Children in the UK Policy and Legislation', in Emma Kelly and Farhat Bokhari (eds), *Safeguarding Children from Abroad: Refugee, Asylum Seeking and Trafficked Children in the UK* (Jessica Kingsley 2012) 156.

challenged by the immigration authority, consequently, their claims discredited by the helpless and hostile situations.[2] In 2011, 6% (1,277) applications for asylum were made on behalf of the unaccompanied children. The total number of unaccompanied asylum seeking children rise significantly in the year 2015 and 2016 with over 3000 new arrivals each year. In 2016, the Home Office's record showed that 2084 asylum applications were made by unaccompanied children,[3] most of them were granted of Unaccompanied Asylum Seeking Child (UASC) leave[4], a temporary status granted only on the basis that they were still under 18, following a refusal of asylum or humanitarian protection. Due to the government's hostile environment policy, unaccompanied children in the UK will have limited protection in the immigration and asylum process. The unaccompanied asylum seeking children (UASC) are not only experiencing risks and uncertainty in their journey from the country of origin but also facing unfavourable treatment in the immigration system after their arrival in the UK. Though, the government of the UK has ratified the United Nations Convention relating to the protection of the the Rights of the Child (UNCRC), but it would not have any direct impact on the domestic legislation because of the dualist nature of the British Constitution. Some of the basic principles of the UNCRC have already been adopted in the domestic legislations for the protection and safeguard of the UASC. On the other hand, a number of legislations have been enacted to curtail the rights and protection of the UASC under the punitive framework and treated them as 'undeserving'. So, the protection of the UASC is considered at the end without giving any primary importance to the best interest of the children as enshired in the UNCRC.[5] These perilous conditions of the UASC in the UK have propelled us to write down an article on this topic and also encouraged us to initiate an endeavor how to uphold the best interest of the UASC within the framework of law relting to children in the antagonistic and controlled migration regime.

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[2] Francesca Meloni and Rachel Humphris, 'Citizens of Nowhere? Paradoxes of State Parental Responsibility for Unaccompanied Migrant Children in the United Kingdom', 2019 Journal of Refugee Studies 34.

[3] Home Office, *2016 National Statistics: Asylum, April to June 2016 25 August*, <www.gov.uk/government/publications/immigration-statistics-april-to-june-2016/asylum#unaccompanied-asylum-seeking-children> accessed 19 April 2020.

[4] Unaccompanied Asylum Seeking Child Leave, Immigration Rules 11 para 352ZC, Until 6 April 2013 Discretionary leave was granted on the same basis but outside the immigration rules.

[5] Lisa Shamseldin, 'Implementation of the United Nations Convention on the Rights of the Child 1989 in the Care and Protection of Unaccompanied Asylum Seeking Children: Findings from Empirical Research in England, Ireland and Sweden' (2012) 20 Int'l J Child Rts 90, 94.

2. The best interest principle and unaccompanied asylum seeking children

The best interest principle has been enshrined in art. 3 of the UNCRC. Except the USA, all the member States of the UN have been ratified the UNCRC. The provisions of the UNCRC are dedicated to all children irrespective of their background and status. There are four basic principles of the UNCRC which have been identified by the Committee formed to oversee the effective implementation of the rights and interests of the children as enshired in the UNCRC at national levels i.e. best interest principle (art. 3(1)), prohibition of discrimination (art. 2), right to life, development and survival (art. 6) and freedom of expression (art. 12). Article 3 of the UNCRC guarantees that all States will protect the best interests of the chlildren on a primary basis. To comply with the art. 3 obligation, it is the responsibility of the UK to identify and ensure the best interests of the children.[6] Though the UNCRC does not provide a definition of best interests but it refers to the general well-being of children which will include a number of factors, such as the personal opinion of the child, the importance of safe and child-friendly environment, unification with family and identity needs.[7] Baroness Hale confirmed *in ZH (Tanzania) v Secretary of State for Home Department (SSHD)* that the best interests principle is a 'binding international obligation'.[8] In addition, the best interest principle is a rule of procedure as well as substantive rights.[9] After the withdrawl of UK's reservation to the applicability of the UNCRC to immigration and asylum issues with effect from 18 November, 2008, the best interest principle has been incorporated in s. 55, Border, Citizenship and Immigration Act (BCIA), 2009. If any decision has been taken by the immigration authority without considering the best interest principle, that decision will become unlawful.[10] Further, the best interest principle has been described by the Department for Education (DfE) as a holistic idea which will embarce the psychological, physical, religious, ethical, social and educational development of the children.[11] So, the UASC who is deprived of their

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[6] Jane Fortin, 'Are Children's Best Interests Really Best' – *ZH (Tanzania) (FC) v Secretary of State for the Home Department* (2011) 74 Mod L Rev 947.

[7] UNHCR, *Guidelines on Determining the Best Interests of the Child*, <http://www.refworld.org/docid/4848c342.html> accessed 20 April 2020.

[8] Judith Ferby, 'A Legal Analysis of Child-sensitive Asylum Procedures', Journal of Immigration, Asylum and Nationality Law (2014) 28 IANL 255.

[9] UN Committee on the Rights of the Child General Comment No 4, para 74 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3 para. 1) CRC/C/GC/14.

[10] ibid.

[11] Department for Education, *Care of Unaccompanied Migrant Children and Child Victims of Modern Slavery: Statutory Guidance for Local Authorities* (2017) <http://consult.education.gov.uk/chidlren-in-care/care-of-unaccompanied-and-trafficked-childr...0guidance_final.pdf> accessed 20 April 2020.

family are eligible to receive special support and protection measures under the best interests principle.

Under s.55 BCIA it becomes the responsibility of the Home Seceretry of UK to protect the best interest of the UMC, so, the apex courts in the UK are giving directions by upholding the rights and interests of the UASC wihtin the prevailing hostile environment policy.[12] From the case laws,[13] it can be traced the embodiment and manifestation of the best interest principle of the UASC in the UK. Nonetheless, there are some obstacles to the effective implementation process of the UNCRC obligations in the UK, which are vague and poorly defined best interest principle, insufficient and less-standardized care and support measures as well as absence of specific target of services.[14]

Unaccompanied migrant children include the UASC, victims of trafficking and those who have been arrived in the UK[15] for safety from persecution or economic reasons.[16] When an unaccompanied child is appeared before the Immigration officer, it is the responsibility of the officer to comply with the requirements as embodied in s.55, BCIA, 2009 i.e. to ensure and safeguard the well-being of unaccompanied children.[17] Nonetheless, the experiences of the UASC in the UK immigration have been depicted as 'confusing, stressful and degrading'[18]. In order to get the protection, unaccompanied migrant children must satisfy the judicial criteria of UASC[19] that

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[12] Ruth Brittle, 'A Hostile Environment for Children? The Rights and Best Interests of the Refugee Child in the United Kingdom's Asylum Law' (2019) Human Rights Law Review 772.

[13] *ZH (Tanzania) v Secretary of State for the Home Department (SSHD)* [2011) UKSC 4[23]; 2 AC 166, *Zoumbas v Secretary of State for the Home Department* [2013] UKSC 74, *JO and Others (Section 55 duty) v Nigeria* [2014] UKUT 517 [LAC], *MM (Lebanon) and Others v Secretary of State for the Home Department* [2017] UKSC 10, *EV (Philippines) v Secretary of State for the Home Department* [2014] EWCA Civ 874, *Kaur v Secretary of State for the Home Department* [2017] UKUT 14.

[14] Shamseldin (n 5) 90.

[15] Helen Connolly, 'For a while out of Orbit: Listening to what unaccompanied asylum-seeking/refugee children in the UK say about their rights and experiences in private foster care" (2014) Adoption and Fostering, vol. 38(4), 334.

[16] Katia Bianchini, 'Unaccompanied asylum-seeker children: Flawed process and protection gaps in the UK', (2012) <http://www.fmreview.org/youan-and-out-of-place/> accessed 21 April 2020.

[17] Anna Gupta, 'Caring for and about unaccompanied migrant youth', in Sue Clayton, Anna Gupta and Katie Willis (eds), *Unaccompanied Young Migrants* (Bristol University Press 2019) 79.

[18] Children's Commissioner for England, *Children's Voices: A Review of Evidence on the Subjective Wellbeing of Children subject to Immigration Control,* (Office of the Children's Commissioner 2017) <www.childrencommissioner.gov.uk/up-content/uploads/2011/Voices-Immgration-Control-1.pdf> accessed 20 April 2020.

[19] P. Rigby and others, 'Problematising separated children: a policy analysis of the UK safeguarding Strategy: Unaccompanied asylum Seeking and refugee children" (2019) Journal of Ethnic and Migration Studies 2.

means under the age of 18 and has no parental authority.[20] After passing the assessment procedure, the UASC shall be protected and guided by the local authority in the UK as mandated under s.20 of the Children Act (CA), 1989.[21]

3. Restrictive framework of law

The UK's punitive or restrictive framework of law is evident in the hostile environment policy and the complicated asylum process for the UASC.

3.1. Hostile environment policy

The unaccompanied migrant children are the main victims of the 'hostile environment' policy introduced by the UK government. Simon identified certain Acts of immigration and asylum law[22] which restricted the access to benefits and services to the UASC and also portrayed them as 'under-serving'.[23] The Localism Act, 2011 also treated the migrants as undeserving. This hostile environment policy undermines the availability and benefits of the rights of health, education, social security and standard of living of the UASC. Ruth believes that the 'hostile environment' policy[24] of the UK government is applied to the UASC who arrive in the UK illegally and their rights to stay have not been granted by law. He argues that this attitudes towards UASC infringe the internationlly recognised obligations set by the UNCRC.[25] The hostile environment policy has also been manifested in the following activities of the UK's immigration and local authorities.

Restrictions on carriers and employers: It is the responsibility of all airliners carrying passengers to the UK to check properly the pre-boarding formalities and the visa status before boarding them to the concerned airlines, otherwise the carriers will have to face penalty.[26] In addition, if the employers fail to inspect the category of visa of the employees whether the visa permits them to work in the

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[20] Francesca Meloni and Rachel Humphris, 'Citizens of Nowhere? Paradoxes of State Parental Responsibility for Unaccompanied Migrant Children in the United Kingdom' (2019) Journal of Refugee Studies 4.

[21] Jo Wilding, 'Unaccompanied Children Seeking Asylum in the UK: From Centre of Concentration to a Better Holding Environment' (2017) International Journal of Refugee Law, vol 29, no 2 271.

[22] The Asylum and Immigration Act 1996, The Asylum and Immigration Appeals Act 1993 and Immigration and Asylum Act 1999.

[23] Simon Guentner, Sue Lukes, Richard Stanton, Bastian A Vollmer and Jo Wilding, 'Bordering Practices in the UK Welfare System' (2016) 36 Critical SocPol'y 391.

[24] The phrase 'hostile environment' was first used by Theresa May (in her capacity as Home Secretary) in an interview in 2012 with the Daily Telegraph newspaper. The creation of this hostile environment agenda is implemented through legislation i.e. s 20 – 28 and 38 – 47 Immigration Act 2014 and s 34 – 35 and s 39 – 45 Immigration Act 2016.

[25] Brittle (n 12) 753.

[26] The Immigrations (Carriers Liability) Act 1987, The Immigration and Asylum Act 1999, Nationality, Immigration and Asylum Act 2002 sch 8, and Carriers' Liability Regulations 2002.

UK or not, then the employer will be penalised under the both civil and criminal jurisdictions.[27] In 2014, the Immigration Act imposed an obligation on the landlords to confirm the status of the prospective tenant otherwise the landlords have to face a penalty.

UASC discretionary leave: Sheona and Richard identify that in most of the cases of asylum claims by the unaccompanied migrant children, 'UASC leave' has been granted rather than providing asylum or humanitarian protection.[28] There is a clear difference between right of the asylum holders and UASC discretionary leave. In discretionary leave, after attaining the age of 17.5 years, they should be refused leave and prepared to return. The perception is once they have attained 18, the 'best interest' consideration will not be applicable to them, so they can be detained or removed. As a result, many abscond from local authority care.[29] These provisions of Immigration Act, 2014 and 2016 are the glaring example of 'hostile environment'.[30]At present, all children in UK are eligible to get the support under the heading of 'leaving care' till to attain the age of 21 or 25 if they are engaged in the educational institutions on full time basis. But this is not applicable for the UASC those have refused leave to remain.

Detention: The UK immigration will have the authority to detain people if they enter into the UK without leave and also detain when they are waiting for removal and deportation.[31]When the asylum seekers are waiting for their claims to be resolved, they can be placed in detention.[32] Moreover, the government may detain a person if he commits any activities which are amounting to a threat to national security or breaches the conditions of stay in the UK.[33] In addition to detention, destitution and deportation can be used as sanctions in the asylum system.[34] Though, the Home office guidance[35] recommends that the method of detention can be exercised on a rare situation but in reality detention is used on a regular basis and for a long duration of time. Sometimes, the UASC are detained

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[27] Asylum and Immigration Act 1996, s 8, Asylum and Immigration Act 1996, s 8(1), 8(4). Section 8 has been amended by both Section 21 of the Immigration, Asylum and nationality Act 2006 and Section 35 Immigration Act 2016. Immigration, Asylum and Nationality Act 2006, s 15.

[28] Sheona York and Richard Warren, 'Dilemma and Conflicts in the Legal System" in Sue Clayton, Anna Gupta and Katia Willis (eds), Unaccompanied Young Migrants (Bristol University Press 2019) 43.

[29] ibid, 46.

[30] Proposed and introduced by Theresa May at that time Secretary of State for the Home Department.

[31] Immigration Act 1971, sch 2 para 16.

[32] The Asylum and Immigration Appeals Act 1993.

[33] ibid, Nationality, Immigration and Asylum Act, 2002, s 62 introduced a free-standing power for the Secretary of State to authorize detention.

[34] Ala Sirriyeh, 'Sanctuary or sanctions: children, social worth and social control in the UK asylum process', in Malcolm Harrison and Teela Sanders (eds), *Social Policies and Social Control* (Bristol University Press 2014) 81.

[35] Home Office, *Enforcement Instructions and Guidance*, para 55.1.3 <assets.publishing.service.gov.uk> accessed on 20 April 2020.

because of the assumption that they are not 'genuine asylum seekers but abusers of the system'.[36] There is a duty on UKBA under section 55 BCIA, 2009 to protect and uphold the well-being of the children. So, the UK government has initiated new policy which is alternative to detention in the name of 'pre-departure accommodation' for the UASC.

3.2. Difficulties in the Asylum Process

There are specific legal barriers faced by the UASC in the asylum process i.e. credibility test, lack of legal advice and delay in decision giving. Moreover, assessment of age is also very crucial for the UASC to receive the protection under the protective framework of law.

Credibility Test: In immigration and asylum applications, decisions have been taken considering the credibility of the UASC as in civil matters, burden of proof lies with the applicant. Sheona and Richard argues that the decisions making about the UASC is always guided by credibility though, this is applicable to the adult asylum seeker. The focus on the credibility can be found in the primary legislation[37] and also in the Home Office guidance.

The UASC should not be required to give details of their experiences like a matured person. In the UK's Immigration Rules, there is a particular section on the UASC regarding their procedural rights. Judith Ferby argues that there should be three particular characteristics of the meaningful assessment of UASC i.e. flexibility that means procedures not unduly restrictive, shared responsibility and benefit of doubt.[38] Unfortunately, these features are rarely seen in the entire assessment process of the UASC.

After arrival in the UK, UASC are the subject of screening interview to know about the personal information, brief history of journey to the UK and the causes of the claim. It was held in *AN (a Child)* & *FA (a child) v SSHD*[39] that a child can be interviewed when an apporpriate adult is present but the reports show that interviews are carried out without a solicitor or a responsible person.

John acknowledges that asylum process is a 'double hybrid' as it blends the ingredients and ideas from executive and punitive law involving the procedures of inquisitorial and adversarial systems. Whereas, Immigration courts are required to assess the testimony of the UASC but the government has not drafted any guidelines for assessing the credibility.[40] Moreover, the

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[36] Bokhari (n 1) 3.

[37] Asylum and Immigration (Treatment of Claimants) Act 2004, s 8.

[38] Ferby (n 8) 254.

[39] [2012] EWCA Civ 1636.

[40] John R Campbell, 'Examining Procedural Unfairness and Credibility Findings in the UK Asylum System', (2020) Refugee Survey Quarterly 39, 60.

caseworkers in the Home office are not properly trained up to conduct a thorough interviews of the UASC. Due to the hostile and confrontational nature of the interviews, the UASC are unwilling to provide information which may have crucial importance to their applications. There is a strict time constraint on the part of the interviewers which forced them to conclude the interview promptly and to reach a decision without assessing all the essential evidences.[41]

Even the Immigration judges are facing obstacles to communicate with the UASC for assessing the credibility effectively because of wrong translation, interpretation difficulties in oral hearing and improperly maintained serial of transcription of interviews.[42] According to Bryne, the direct application of conventional features of credibility i.e. 'demeanour, corroboration, consistency and accuracy' will distract the information gathering process and lead to inappropriate decision in the asylum process.[43] Now, the 'core principles' enunciated by the Court of Appeal in AM (Afghanistan) and SSHD and Lord Chancellor[44] will play as a guide to the determination of asylum application made by a UASC who is unable or less-able to participate effectively in the asylum proceedings.

Complicated Age Assessment Process: Crawley states a 'culture of disbelief' that pervades the asylum process generally. The UASC are experiencing particular hostility because of the assumption that they have lied about their age and not getting the benefits of child-focused interviewing techniques, legal representation or the presence of an appropriate adult. The worse thing is that the UASC was treated like 'a slave in the slave market' by the immigration officer of the Heathrow airport.[45]

To entitle the services offered by the CA 1989, the UASC have to face subsequent interview by the local authorities if there is any doubt about the age of the UASC. But local authorities are conducting interviews on regular basis even where no causes of suspicions or doubts are evident. In absence of any documentary evidence to prove the age of the UASC and subsequent doubt by the Home Office about their age, the age assessment procedure will be conducted by the local authority on the basis of the appearance and demeanour of the UASC. If the home office treats them as an adult, the local authority will have the

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41 ibid, 61.

42 Evidentiary barriers include giving less weight to initial interviews, different versions of statements, less importance to the full account of the applicants and inconsistency in the examination process.

43 R. Bryne, 'Assessing Testimonial Evidence in Asylum Proceedings: Guiding Standards from the International Criminal Tribunals' (2007) International Journal of Refugee Law 19(4) 609.

44 [20017] EWCA Civ 1123.

45 Heaven Crawley, 'Between a rock and a hard place: negotiating age and identity in the UK asylum system', in Nigel Thomas (ed),*Children, Politics and Communication,* (Bristol University Press, Policy Press 2009) 90.

right to assess the age of the UMC further for determining their entitlement under the CA, 1989. Where the child disagrees with the outcome, the legal remedy is to challenge this by judicial review.[46]

The home office guidance for the measurement of age now have to follow the Merton Judgement[47] which includes a number of basic principles. Finally, the Association of Directors of Children's Services (ADCS, 2015) has ben publisehd the best practice guidance for social workers on condcuting age assesment compliant with the Merton judgement and other relevant case laws. For the purpose of assessing age, the use of skeletal, dental X-rays and radiography have been raised the question of ethics because it exposes radiation without therapeutic value.

Lack of legal aid: There is a significant reduction in the availability of legal aid for immigrant advice, after introducing amendment in 2013 in the Legal Aid, Sentencing and Punishment of Offenders Act (LASPO), 2012. As a result, UASC were not eligible for legal aid in their asylum claims.[48] Sheona and Richard believes that this change deteriorates the immigration delivery service for the UASC. Two initiatives were taken in 1999[49] and 2004[50] to upgrade the quality of legal service in this area but both schemes were flawed from the beginning. It has been rightly remarked by Crawly that reform project relating to the UMC becomes ineffective because of the assumption that most of the UASC are taking chance in the asylum process.[51] Meanwhile, the provisions on reduction of legal aid has already been amended in 2019[52]. This amendment provides guidelines for separated children[53] who are entitled to receive the legal aid for civil legal services in their asylum claims. In addition, it is evident that initial claims made by the UASC are failed because of the poor case preparation and wrong case strategies.[54]

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[46] Gina Clayton and Georgina Firth, Immigration and Asylum Law(8thedn, OUP 2018) 78.

[47] *B v London Borough of Merton* [2003] EWHC 1689 [Admin.].

[48] Ayesha Christie, 'The Best Interests of the Child in UK Immigration Law' (2013) 22 Nottingham L.J. 39.

[49] Immigration and Asylum Act 1999 introduced a new regulatory body "office of the Immigration Supervision Commissioner (OISC).

[50] The Services Commission (LSC) introduced a separate accreditation scheme.

[51] Crawley (n 46) 90.

[52] The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Legal Aid for Separated Children) (Miscellaneous Amendments) Order 2019, Art. 2 of the Amended Order 2019 amends Sch 1 of the LASPO, 2012. http://www.legislation.gov.uk/ukdsi/2019/97801-11188903 last accessed 20 April 2020.

[53] s 3(b) – separated means not being cared for by a parent, not being cared for by a person with parental responsibility for the Child (within the meaning of s 3 of the CA, 1989 (4) or looked after by a local authority (within the meaning of s. 107(6)(5) The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Legal Aid for Separated Children) (Miscellaneous Amendments) Order 2019 <http://www.legislation.gov.uk/ukdsi/2019/97801-11188903> accessed 20 April 2020.

[54] York and Warren (n 28) 44.

Lack of participation: Prof. Helen identifies that there is an abundance of evidences portray lack of participation on the part of the UASC at every level of the asylum process,[55] which is a clear defiance of art. 12(1) of the UNCRC.[56]The UASC's non-participation in the asylum process have been utilized to devalue their claims.[57] Prof. Helen further identifies that adversarial nature of asylum proceedings also undermines the UASC's right to participation. Without giving little attention to the children's opinions, thoughts, feelings and desires rather the immigration officials are framing questions by using vague, confusing and closed question techniques. Moreover, they are not focusing questions which might support the UASC's claims rather concentrate on peripheral details inappropriately and intrusively i.e. the child's sexuality, intimate relationships and experiences of abuse, etc. This questioning procedure can be termed as hostile and interrogatory, where the UASC's are feeling attacked and intimidated. Consequently, the Home office guidance proves ineffective to safeguard the right to participation of the UASC.

Delay in decision making: Though the Home Office guidance provides the best practice model for a UASC's case but in practice the reality is different. There is specific time-limit for a decision to be given but statistics show that a significant number of cases have been waiting for more than two years. Consequently, the appeals are refused when the UASC have turned into 18. Therefore, long delay in the litigation process are causing disadvantage to the asylum claims of the UASC.

4. Protective framework of law

It is the responsibility of the local and also the immigration authorities to safeguard and look after the rights and welfare of the UASC. With a view to uphold the rights of the UASC in the light of the best interest principle of the UNCRC, the CA, 1989 has already incorporated certain provisions. The protective framework of law is not free from flaws, as a result, the UASC have been deprived of their statutory rights and protection.

4.1. Exclusion from the care leaver support

S.17 of CA 1989 provides a general duty on local authority to safeguard and promote the welfare of the UASC and to undertake an assessment of their needs and provide accommodation, education and therapeutic services. Most separated

[55] Asylum processes include: initial reception and screening, social work assessment and family tracing, care placement and access to schools and appropriate accommodation.

[56] UNCRC, art 12(1) provides, the child who is capable of forming his or her own views has the right to express those views freely in all matters affecting the child.

[57] Helen Stalford, 'David and Goliath: Due Weight, the State and Determining Unaccompanied Children's Fate'(2018) Journal of Immigration, Asylum and Nationality Law, 32 IANL 258.

children are given support under section 20 of the CA, 1989 and will be looked after by the local authority. It is expected from the local authority to provide support to the UASC following the 'Hillingdon Judgement',[58] but exceptions have been seen in many circumstances.

Earlier unaccompanied children who have turned 18 and have been granted leave to remain, or who have an outstanding asylum or other human rights claims or appeal, are entitled to the same level of care and support from the local authority as any other care leaver.[59] After the Immigration Act, 2016 now the unaccompanied migrants children are excluded from leaving care support who were earlier supported and protected by the local authority. Anna states that major factors relating to the treatments of UASC are the tension between the child welfare and immigration control, culture of disbelief, suspicion and racism towards the UMC and the cuts to local authority budgets.[60] Moreover,the UASC are deprived of their rights because of the combined effects of discrimination in the local authority and lack of knowledge at the social worker level.

4.2. Risks in the private foster care[61]

For the care of a child who is under the age of 16 or under the age of 18 if disabled are placed under the private foster care without the direct affiliation of the local authority. This foster care provider must be someone other than the parent or close relative[62] and the care providing period will extend beyond the 28 days timeframe. If the child has been recognized as a 'child in need'[63] then the local authority will give financial support to the private foster care. The UASC have been experiencing a lot of difficulties in the private foster care among them some are prevalent i.e. poor and overcrowded accommodation, lack of educational, recreational and health facilities, financial and sexual exploitation, discriminatory attitude, physical and psychological abuses and negligence to

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[58] *London Borough of Hillingdon v Secretary of State for Education and Skills* [2007] EWHC 514. According to Hillingdon judgement 'All accompanied children should, on arrival, be supported under section 20 of the CA 1989 until an assessment has been completed, based on assessment on need, most unaccompanied children including 16 and 17 year olds, should be provided with section 20 support, the majority of unaccompanied young people will be entitled to leaving care services, sec. 17 (which generally provides less care and support than section 20) can be used to accommodate unaccompanied children in exceptional circumstances.'

[59] Care Leavers (England) Regulations 2010 as amended in 2014.

[60] Gupta (n 17) 83.

[61] Children Act 1989, s 66.

[62] ibid, s 105 defines close relative as parents, step-parents, siblings, brothers or sisters of a parent, grandparents and aunts and uncles (whether full blood, half-blood, by marriage or civil partnership).

[63] ibid, s 17.

their needs and demands.[64]Jo Wilding concludes that the laws and practices which exist for the protection of the UASC do not fully comply with the 'best interests' principle as enshrined in the UNCRC, because of insufficient funding and mismanagement in care services.[65]

5. Recommendation

To protect the best interests of the UASC in the prevailing hostile environment, a number of intiatives to be taken to improve their conditions.

First, a comprehensive guidance can be issued to uphold the wellbeing of the UASC throughout their stay in the UK. In addition, the best interests principle must be considered properly during the asylum and immigration process. To improve the existing decision-making model in the asylum process, a formal best interest determination process can be introduced. Moreover, a child-focused independent advisory group can be established composing of experts from voluntary organisations, academia and practice, to provide guidance how to consider the best interests of the UASC most effectively. All the future legislations and policies affecting the UASC must be given due regard to the best interest principle and the provisions of the UNCRC. The government can work with child welfare and safeguarding experts to develop a specific training programme to improve awareness and understanding of the UNCRC and its application to the UASC, particularly with respect to properly considering children's best interests.

Second, there should be a strategy document for dealing with the UASC which outlines the responsibility and detailed service standards in relation to the protection, health and development of children, as well as long-term care planning in their best interests. The Department for Education can be tasked with coordinating the development and continuing oversight of the strategy, and appointing a national lead for its implementation. The responsibility to grant funding to the local authorities should be in the hand of the Department of Education for the care of the UASC. Such funding should be allocated according to the real costs that arise in safeguarding the UASC within each local authority area.

Third, there must be a clear focus on welfare needs as well as immigration control when gathering information from the UASC relating to an asylum claim. A well-understood distinction between the screening process and substantive information-gathering must be drawn. Screening a child should be expressly limited to gathering biographical and biometric data at the outset of a claim, while gathering information with which to assess a claim should begin

[64] Connolly (n 15) 335.
[65] Wilding (n 21) 270.

only when children are settled and supported. Furthermore, children must be provided with proper access to interpreting facilities and rest periods, and should be engaged with in a way that takes proper account of their age, status and background.

Fourth, the Government should record and publish statistics of all those who claim to be children whose age is disputed. As part of developing age assessment guidance, the Government should evaluate how to incorporate a greater range of expert input into the process. In particular, the Royal College of Paediatric and Child Health (RCPH) can be commissioned to develop guidelines for a stronger contribution from paediatric consultants in assessing age. In addition, x-rays should not be used in assessing age.

Fifth, the UASC should be provided with funded specialist legal advice and representation during the asylum process. During a period of discretionary leave, decision-making should be encouraged as soon as there is sufficient evidence against which to evaluate a claim. Where it is in the best interests of the child to remain in the UK, indefinite leave to remain should be granted as early as that judgment can be made, to enable children to access higher education and enter the labour market. Where return is considered to be appropriate, a care plan should be constructed to inform and prepare a child for return in adulthood. In either case, support should persist until the objectives of a properly considered care plan are met. Moreover, the government should affirm its commitment to uphold Articles 29 and 30 of the UNCRC and ensure equal access to education to children regardless of their immigration status. It should assess how primary and secondary education is provided to the UASC, with a view to ensuring that their educational needs are met.

Sixth, a pilot tribunal can be established with adapted procedures, drawing on expertise from both the child and family and immigration courts, to take on responsibility for the decision-making, welfare and support arrangements of unaccompanied asylum-seeking children in a small number of cases. Its work can be independently reviewed, in order to identify possible adaptations to the decision-making framework more generally that may emerge.

Seventh, all decisions on returning children to their country of origin should be made only after a full assessment of whether return is in the best interests of the child. Such a decision should be made in the light of a full country-of-origin report framed according to the UNCRC, and after a full assessment of the needs of the child and the care arrangements that they will return to. Return arrangements should also be subject to independent evaluation afterwards to determine their suitability.

Eighth, A legal guardian can be appointed for unaccompanied asylum seeking children who should provide support in relation to the asylum and

immigration process, support services and future planning, help children develop wider social networks, and ensure that children's views are heard in all proceedings that affect them.

Nineth, the Government should conduct or commission a mapping exercise that sets out a comprehensive picture of local authority support services for the UASC. This exercise should in particular seek to identify the best performing local authorities in order to develop them as centres of excellence for the benefit of unaccompanied migrant children throughout the United Kingdom.

Tenth, the UASC must be properly supported in the transition to adulthood. The Government must ensure that children receive bespoke and comprehensive plans that focus on educational goals, reintegration and rehabilitation. Such plans should give proper consideration to all possible outcomes for the child, including family re-unification and reintegration whether in the home country, the UK or a third country. Care plans should take full account of the wishes of the child, and remain applicable up to the age of 21, or 25 if the young person remains in education, to enable children to realise their maximum potential.

6. Conclusion

The UASC are the most vulnerable segment of the British society, who do not have their own voice to raise about their rights and deprivation. There are some provisions of laws, rules and regulations to protect and safeguard their rights in compliance with the best interest principle of the UNCRC but unfortunately the promulgation of those provisions is heavily influenced by the culture of disbelief and 'hostile environment' policy. The UASC have been stigmatized as 'precarious' and facing a lot of obstacles and barriers in the entire journey from their initial interviews to final disposal. So, this article tries to propagate the rights of these less-privileged and deprived part of the British community who are staying on the basis of discretionary leave and passing their adolescence under the veil of immigration restrictions and welfare limitations. Finally, effective implementation of the above-mentioned recommendations can safeguard and promote the rights of the UASC in compliance with the best interest principle of the UNCRC and pave the way to establish a better system for the UASC in the UK.