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Bangladesh in 2015: Challenges of the *iccher ghuri* for learning to live together.

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This article builds on earlier theoretical and development-related work about the practical relevance of legal pluralist theorising, a field of comparative law in which there is presently much and quite significant progress.[2] *It presents law as an increasingly interdisciplinary and highly dynamic field, which therefore needs to be analysed by plurality-conscious methodologies rather than traditional monist, state-centric perspectives to find 'the right law' and to explore possible options for any particular scenario. The main part, in several sub-sections, applies such analytical efforts to continuing struggles over the fine-tuning of basic law-related development visions for Bangladesh. It examines how the four major elements of the iccher ghuri vision of Bangladesh, the nation's wish kite, namely nationalism, democracy, socialism and secularism, are not only interconnected, but all present continuing complex challenges. The article demonstrates the analytical and practical usefulness of pluralist theoretical perspectives. Built on respect for the various differences and hybridities that characterise the nation of Bangladesh, their highly competitive legal actors, and various kinds of interconnected ambitions, this method can help all concerned to understand better to what extent and why the four major elements of the iccher ghuri have not been secured by now. In view of continuing troubles, the unfortunate foregone conclusion is that all four elements of the national vision remain contested. As this contestation often involves brutal force, rather than constructive discussion and democratic methods, the result is that the nation as a whole does not prosper as much as it might do otherwise. The concluding message is, therefore, that more efforts need to be made by Bangladeshis to learn to live together in a spirit of constructive engagement to facilitate mature national growth.*

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2 Brian Z. Tamanaha, Caroline Sage and Michael Woolcock, *Legal pluralism and development. Scholars and practitioners in dialogue* (Cambridge: Cambridge University Press, 2012) the first major law-focused study that connects legal pluralism theorising constructively to development literature.

Introduction

At 44 years, a normally developed person is supposed to be mature, maybe at the peak of creativity, perhaps just a few years away from a potential midlife crisis, but certainly no longer immature and unsure of his or her visions and aims. As much as for an individual, for a state personality, too, these kinds of developmental expectations may not work out, either. Something may be wrong with the genetic structure, or there are too many competing pushes and pulls, with the potential or actual effect that healthy development is held back. Efforts to divide a nation and turn its people against each other may be identified and need to be addressed. Apart from risking serious harm and much trouble for individuals living in such a state, confusions over visions and the direction of development result in negative impacts on the identity construction of the nation as a whole. If, as we know, individuals may be confused and torn, despite reaching a certain age and physical maturity, the same can be said about states. If a troubled individual may ultimately commit suicide, a troubled nation may erupt in self-destructive violence, creating a climate of fear, mistrust and confusion over visions for the future.

I am convinced that Bangladesh as a nation has a very healthy gene pool and am by no means negative or pessimistic about the country and/or its development. It is not a poor country anymore, on many counts. However, since Bangladesh remains manifestly confused over its identity and hence is deeply troubled in many ways, the main purpose of the present article is to assess various aspects of maturity in the nation-building processes in Bangladesh. The analysis seeks to identify the scope for removing blockages and turbulences that seem to still trouble the country and its development despite more than four decades of self-rule and formal independence.

Having worked for many years on Muslim law in South Asia and also specifically on Bangladeshi law, I have been to Dhaka and other places in Bangladesh many times and have also written about Bangladeshi laws.[3] My experience suggests that

3 Werner Menski and Tahmina Rahman, 'Hindus and the law in Bangladesh', *South Asia Research*, 8(2) (1988),: 111-131; David Pearl and Werner Menski, *Muslim family law*, (London: Sweet and Maxwell,1998). More recently, see Werner Menski 'Flying kites. Managing family laws and gender issues in Bangladesh', *Stamford Journal of Law*, 2 (2011): 109-134. Most recently in February 2015, I chaired a Researcher Link Workshop, arranged by the British Council, which sought to assess the wide theme of 'Governance and Management of Gender Relations: A Comparative Study of Law and Society'. We began that Workshop, held in memory and honour of BRAC Chief Engineer Abul Monsoor, with a power point presentation that offered a comparative legal framework for the analysis of Bangladeshi legal development.

while the vision of Bangladesh is sound and strong, significant problems of implementation remain because of lingering confusions among the people and their leaders over key concepts, as well as petty abuses of power. Basically, there are too many narrow-minded and selfishly competing pushes and pulls, including much corruption. Bangladeshis are evidently hardworking people, but always concerned that disaster may strike any moment, which creates what Pièrre Legrand and others would call a certain *mentalité*, reflected also in the locally applicable laws.[4]

Concern for the higher national interest is of course never only based on formal legal structures. It remains far too often sidelined by selfish, narrow and reductionist agenda and actions, which continue to generate much mindless violence and destruction. Focusing here on the vision of Bangladesh as an independent nation state and its dreams and hopes for a better future, as indicated, the main purpose is to examine through legal pluralist methodology what problems remain in fulfilling those ambitious aspirations. Before we can assess the four major elements of the Bangladeshi national vision, one by one, we need to acknowledge at once that they are in fact connected in many ways, and that the climate within which we operate is no longer the same as in 1971. Next now, a few more explanations are needed for readers about pluralist legal theorising, the application of the kite model of law and recent progress in understanding its implications.

Progress in pluralist legal theorising

The theme for the initial powerpoint presentation in the British Council Workshop ('Does the *iccher ghuri* have a gender?') was based on the kite model of legal pluralist analysis that I have been developing over the past two decades or so, together with a team of researchers, including several Bangladeshis and other South Asians.[5] The approach has been strengthened by, and has in turn influenced,

4 See on this theme very insightfully James J. Novak, *Bangladesh. Reflections on the water* (Dhaka: The University Press Ltd,1994)

5 Most recently, the kite model was tested in the as yet unpublished doctoral thesis of Sonia Z. Khan, "Democratic transition and the Caretaker Government in Bangladesh: A culture of mistrust"(PhD diss., London: SOAS, 2015)

significant advances in global theorising of legal pluralism.[6] The still evolving kite model of law has by now reached a mature stage of theorising, discussed further below.[7] We also find that it works remarkably well in all kinds of applied scenarios, including the Bangladeshi-dominated environment of the Borough of Tower Hamlets in East London[8], as well as judicial training initiatives in several countries. The model has over the past decade turned from a triangular structure,[9] based on a Japanese prototype emphasising the interaction of official law and unofficial law with various forms of ethics and values,[10] into a significantly revised image with four corners. This notable change occurred because I was ultimately persuaded that in this day and age, human rights and international law cannot really be left out of any globally relevant model of law. Comprehensive development-focused legal analysis is supposed to reflect the lived realities of ensuing disputes and tensions that impact on people's daily lives as individuals, members of social groups, citizens or residents in nation states, or as global citizens. As all levels are visibly and invisibly interconnected, researchers and commentators need to remember those macro-level connections even while they focus on micro-analysis – a huge challenge. Being aware of the kite image helps, as the four corners of this flimsy structure are

6 See in particular Werner Menski, 'The liquidity of law as a challenge to global theorising'. *Jura Gentium*, Vol. XI: *Pluralismo Giuridico*. Annuale 2014 (2014): 19-42; Werner Menski. 'Remembering and applying legal pluralism: Law as kite flying' in *Concepts of law: Comparative, jurisprudential, and social science perspectives*, edited by Séan Patrick Donlan and Lukas Heckendorn Urscheler, (Farnham: Ashgate, 2014), 91-108; and Werner Menski. 'Relative authority in a new age of chaos'. In Roger *Authority in transnational legal theory: Theorising across disciplines. Dedicated to the memory of Professor Patrick Glenn*, edited by Roger Cotterrell and Maksymilian Del Mar (Cheltenham: Edward Elgar, 2015), forthcoming.

7 For the earlier stage of theorising in relation to Bangladesh, see (Menski 2011), see note 3 above.

8 In fact it works so effectively there in supporting the affirmative action visions of the local authority team that activist interventions have brought about significant changes for ethnic minority residents. The deeply political nature of such interventions is obvious, and indeed this has now led to the removal of the Bangladeshi Executive Mayor of Tower Hamlets, officially because of alleged malpractices in relation to elections and fund allocations. A rather different assessment may be that the impact of these affirmative action programmes has been so effective that this removal action can be seen as a form of 'establishment backlash', or efforts to reclaim white supremacy, in a scenario where pluralising demographic developments speak their own language now and consequent action is required to protect what is ubiquitously traded as 'rule of law'.

9 For illustrations, see (Menski 2006, 185-189 and 612), as note 1 above, and (Menski 2011,114-117) as note 3 above.

10 This comes from Masaji Chiba, *Asian indigenous law in interaction with received law* (London and New York: KPI, 1986) and with regard to 'identity postulate specifically, Masaji Chiba, *Legal pluralism: Towards a general theory through Japanese legal culture* (Tokyo: Tokai University Press, 1989).

clearly always connected. In view of wise warnings by Professor William Twining,[11] I was concerned that this four-cornered model structure should not be treated or perceived as a static or rigid square or a kind of 'black box'. For law is everywhere highly dynamic, a living entity, subject to many competing pushes and pulls, and always moving, indeed like a kite in the sky, or maybe an octopus in water.[12]

While this macro-level theoretical model of the kite seems to apply and work everywhere, it clearly takes culture-specific forms in Bangladesh. I was fascinated to discover during an extended journey in Bangladesh, that the image of the *iccher ghuri,* the wish kite, is not just an attractive piece from a romantic film song, but can easily be transferred to the national dreams of a bright future for the whole country. Intriguingly, this image is closely connected to the notion of a journey or a path, which then seamlessly becomes a widely known Islamic concept, nothing else but *shari'a*, or also its local Bangla association with *dharma.*[13] The basic rationale of this wish kite in relation to the four key elements of Bangladesh's national vision is easily made clear. Corner 1 at the top, the realm of ethics, values, identity and psychology, refers to the internal pluralities of people's belief systems and values. It thus relates most closely to the vision of secularism, but also has important connections to nationalism. Corner 2 on the right hand side concerns social normativities, including customs and various local traditions, the fields of sociology and anthropology as much as socio-economic concerns. It thus fits, above all, the vision of socialism and the envisaged methods of distribution of social and material resources. Corner 3 on the left hand side concerns the state and its laws, and thus also politics. From a legal positivist perspective, this is the 'proper' legal corner, but its management is supposed to be based on power sharing and negotiation within the wider political arena. Thus it accounts for and relates mainly to the national vision relating to democracy. Finally, at the bottom we have corner 4, the vast, internally

11 W. Twining, *Globalisation and legal theory* (London: Butterworths,2000)

12 Lecturing about this model in many parts of the world, I discovered various culture-specific meanings of kite-flying and its relation to navigation, in particular. See now Werner Menski, 'Legal simulation: Law as a navigation tool for decision-making'. In *Report of Japan Coast Guard Academy*, 59(2.1) (2014): 1-22. Available at: http://harp.lib.hiroshima-u.ac.jp/jcga/metadata/12172?l=en. Intriguingly, the Japanese word for kite (*tako*) is the same as the sign for octopus, a living entity moving in water.

13 The *iccher ghuri* image comes from a romantic song composed by Fuad featuring Topu in 'Yaatri' from the music album 'Bondhu bhabo ki?' but can easily be transferred to nationalistic dreams of a bright future for the country. It can be accessed at https://www.youtube.com/watch?v=BlB-8bpNmAg.

plural realm of international law and human rights norms and processes, and thus international relations.

The element of the national vision that would appear to match this corner of the *iccher ghuri* best is actually nationalism, the assertion that the nation of Bangladesh should have the right to speak with its own voice. As already indicated, however, this is closely connected to issues of identity in corner 1.

That said, advanced global theorising of the kite methodology now suggests several important additions of deep relevance for the Bangladesh scenario. Firstly, legal pluralism is not merely a combination of four interconnected elements as outlined above. We are not just comparing apples and oranges, as some critical observers have interjected, but are dealing with law as a basket of fruits, maybe even a fruit salad in which the individual elements are still present as part of a larger whole.[14] Deep legal pluralism is therefore much more than a simple 1-2-3-4 addition.[15] Notably, we need to be aware that all of four corners of the kite are already partly composed of elements of the other corners; in addition they all influence each other. For example, the state law of Bangladesh is not only composed of rules and processes made by the state, but contains building blocks that come from religious norms, dominantly of course Islam, but also the minority religions and colonial heritage, whether Christian or secular. The state laws of Bangladesh are also composed of or influenced by local cultural norms and customs, and are these days increasingly guided – or put under stress and pressure - by various competing understandings of human rights and international law. Since a similar analysis of the plurality within each kite corner can be undertaken for all the other elements, this has led me to suggest that 'law' in lived reality is everywhere a plurality of pluralities (POP), which clearly cannot be analysed appropriately by monist perspectives and methodologies.[16]

Secondly, in processes of making decisions about law and applying the available tools in the shape of rules, processes and values/ethics, legal actors pick up such tools from around the kite structure but often appear to do so in particular sequences, depending on who or what they are. In judicial training seminars, thus, it takes judges who may never have heard before of the kite methodology a few minutes to realise that as agents of the state, they are expected to start their decision-making processes from a position located within corner 3 and with the tools available to them within that corner. For a member of a body known as *shalish* in Bangladesh, this would not be so clear-cut, as that legal actor would perceive himself first of all as a member of the local society or community, or maybe even as a religiously inspired individual or spokesperson. Similarly, for a *mufti* issuing a *fatwa* or advising someone, the starting point is more often than not within the realm of corner 1.

Two important consequences arise from this practice-focused understanding of the methodologies of sequencing in decision-making processes. No matter how much any decision making agents perceive themselves as rooted in one specific corner of the kite, and may seek to speak with authority from that specific corner, such an agent cannot avoid the responsibility to consider also and account for the presence of the other elements of the kite structure. It may be only to dismiss them as allegedly or actually irrelevant or least important, but such an agent has to engage even with what is hated and is not liked. We shall see below that this is quite crucial, especially in the adversarial political scenario of Bangladesh. Otherwise there is actually an act of violence involved, generating feelings and perceptions that a particular voice was not considered or taken account of. In practice, then, to recapitulate, any decision-making process is necessarily plural in its basic structure and is normally structured in such a way that what is hated most, or what is least liked, is actually picked up and considered last, often with considerable disgust and reluctance. In the simple language of the kite image, this means that cutting out any one of the four corners of the kite leads inevitably to a crash scenario for the whole structure. It is simply not sustainable.

The second important consequence of accounting for the internal plurality of decision-making processes is the realisation that we need to do further solid work now on establishing sound sustainability tests for such decision-making processes. Every single corner of the kite, applied in isolation or without due consideration of balance, risks the creation of harm. No element of law, certainly not even state law itself, can be completely trusted to be just 'good law'. For, as is universally known, decision-making is a form of exercise of power. Such powers, however, are

14 This follows clearly from (Donlan and Urscheler 2014), see note 6 above.

15 This was already evident from (Menski 2006, 612), note 1 above and also (Menski 2011, 114-117) note 9 above.

16 See in detail (Menski 2014), note 3 above.

inherently dangerous, as they can all too easily be abused and misused. We may think about lack of accountability, or simply dictating certain agenda and riding roughshod over the voices of others. Military rule tends to be perceived as such a form of abuse of power, though this may not always be the right conclusion. Any monist approach to claiming authority to make decisions, then, risks generating further problems, which I tend to view now as turbulences in the journey of a kite.

We are at this moment not yet able to provide comprehensive tests of sustainability for all possible scenarios, but certain patterns are emerging from existing research which shows us the way for making progress in this particular direction. To start with, a major sociological scholar who was until recently ignored by lawyers and not directly involved in pluralist analysis has firmly established through his life's work what we all vaguely know, namely that faulty application of laws and processes can result in discrimination.[17] In the specific terminology of this experienced scholar and his truly fascinating work, the result is the creation not of a Marxist 'proletariat', but of what he calls a 'precariat', an endangered class of people systematically disadvantaged by the operation of a specific rule system or a set of processes, or the impact of particular value systems. Professor Wacquant hence draws attention to the lurking legal harm of 'precariousness' resulting from certain legal actions. Evidently, this critical approach is of deep relevance for Bangladeshi discourses about the visions of the nation.

Other authors have begun to test the limits of tolerance when it comes to ascertaining the boundaries of pluralist navigation. Without analysing this intriguing finding, Professor William Twining established as a major result from his intense conversations with four leading human rights activists that they were all scared and deeply concerned about ending up 'tolerating the intolerable'.[18] This conclusion establishes a kind of human rights test, focused at corner 4 of the kite structure. But what is 'intolerable' to some may be simply disagreeable or disgusting to others.[19]

17 The most recent reference here is to Loïc Wacquant, 'Marginality, ethnicity and penalty in the neo-liberal city: An analytic cartography', *Ethnic and Racial Studies*, 37(10) (2014): 1687-1711, which contains important pointers to this author's earlier work and related studies.

18 William. Twinning, *Human rights, Southern voices* (Cambridge: Cambridge University Press, 2009), 218.

19 Tests I am working on here with a number of young scholars at the moment refer to assessments of what is considered *haram* in terms of Islamic law, clearly in some cases a matter of much *ikhtilaf*, or tolerated diversity of opinion, the most prominent Islamic form of internal pluralism.

Perhaps such assertions are merely a devious device to forcefully assert one's own authority and position and/or to claim one's own moral or other kind of superiority. Bangladeshis have the long spectacle of the 'Battle of the Begums' as a prime example of how such a contest of alleged intolerabilities may hold an entire nation to ransom, playing havoc with democracy and constantly risking that the kite of law crashes and the nation slips into turmoil. Other tests would appear to be directed at testing whether something is 'sociable' and passes a 'sociability test',[20] or whether a particular action, process or view is authentic in terms of some religious or moral doctrine. Lawyers, of course, are deeply familiar with the test of whether something is actually 'legal' and passes the hurdle of legality assessments.

While there is much progress currently in global legal theorising, I have earlier been critical of law teaching in Bangladesh and other parts of South Asia. It remains almost everywhere deficient because it gives too much importance to state-centric rule making and offers too little attention to processes of operating those rules and to the underlying value systems that influence such processes of generating and managing rules.[21] Unfortunately, also in 2015 such criticism still needs to be directed at most law teaching all over the world, though engagement with legal pluralism and its interdisciplinary methodologies is gaining some strength here and there, notably now in South Africa and again in Italy. Anywhere in the world, it is certainly not sufficient to merely go down the now fashionable route of transnational law teaching and to be only concerned with conflicts of state laws with international law and related human rights principles. To reiterate, all four corners of the kite have to be coordinated together all the time, which is indeed a massive challenge, wherever we go in the world.

But then, law is clearly everywhere culture-specific, and we do know about the crucial role of the concept of 'identity postulate',[22] also in relation to the partly pluralising effects of legal transplants, more so in different parts of Asia.[23] Closely related,

20 This seems to motivate the conceptual framework of (Cotterrell and del Mar 2015), see note 6 above.

21 (Menski 2011, 111), as note 3 above. See also Werner Menski, 'Flying kites in a global sky: New models of jurisprudence'. *Socio-Legal Review* (Bangalore) 7 (2011): 1-22.

22 See (Chiba1989), see note 10 above.

23 See Alan Watson, *Legal transplants. An approach to comparative law.* (Edinburgh: Scottish Academic Press, 1974). Alan Watson, *Legal transplants. An approach to comparative law* (Athens, GA: University of Georgia Press, 1993). Critical comments are found in Pierre Legrand, 'The impos-

the message coming from specialist scholars of globalisation is pretty clear-cut in this regard, too.[24] One rather prominent effect of globalisation has been the impact of the local on the global. This means in the lived reality of sustainable global diversity in law that 'there are a number of globalizations going on'.[25] The result is that the overall effect is not globalisation as world domination of any one legal tradition, but the pluralising, but still rather less well known phenomenon of 'glocalisation', a phenomenon that is also of utmost relevance to directing Bangladesh's *iccher ghuri*. For analysts have forgotten to remember that the Bangladeshi wish kite flies today in quite different times and conditions than in 1971. It is not merely a non-Pakistani kite, or a general global Islamic kite, or something pretending to be a modern Western kite, but it is indeed a colourful culture-specific *Banglar ghuri*. So the lawyers of Bangladesh, whether as judges, advocates or law teachers and their students, have their work cut out as socio-legal scholars.

Other law-related actors, whether we think of civil society activists, NGO staff, and the general public, everyone has a role in this navigational journey, in seeking to identify and finetune the nation's vision. It is completely unsurprising that there should be major disagreements. But the methods and nature of handling the tensions and conflicts remain unfortunately seriously marred by much patriarchal power-play in which two leading ladies call the top shots, and by much remarkable selective blindness when it comes to assessing the deep pluralities involved in the legal structures and law-related visions of Bangladesh.

Learning to live together: The four elements of the *iccher ghuri*

To reiterate, the four key elements of the vision for a golden successful Bangladesh relate to and focus on nationalism, democracy, socialism and secularism. They were written into the Constitution in 1972 under the guidance of the Awami League,

sibility of "legal transplants", *Maastricht Journal of European and Comparative Law*, 4 (1997): 111-124. See also David Nelken and Johannes Feest, *Adapting legal cultures* (Oxford and Portland, OR: Hart, 2001); The new *Asian Journal of Law and Society* (ISSN 2052-9015) has since 2014 quickly established itself as a leading forum for such debates.

24 See Robbie Robertson, *The three waves of globalization. A history of a developing global consciousness* (Nova Scotia and London: Fernwood Publishing and Zed Books, 2003).

25 See on this H. Patrick Glenn, *The legal traditions of the world. Sustainable diversity in law* (Oxford: Oxford University Press, 2007), 49.

and have recently been reiterated by the same party in ways that have led some experienced observers to compose fiercely critical writing.[26] A major task in the remaining sections below is to assess such recent critical writing by Bangladeshi lawyers from a pluralist perspective. Are such commentators like frogs in a well, not able to see the wider perspectives and the changing, pluralist dimensions of how their country develops?

I have explained earlier how the four key elements of the vision may be seen and treated in relation to the four major corners of the kite. The sequence in which they are going to be analysed below does not follow the numbering of the kite corners as it presently exists. Instead it is informed by the sequence in which they appear in the Constitution. As we begin with nationalism, it appears that the discussion also follows a roughly historical development, starting with the independence of Bangladesh in 1971. However, as indicated, all elements are interrelated and none of the four ambitions or agenda can be signed off as completed or fully achieved.. Moreover, new irritations and major turbulences constantly appear, and I apologise in advance for some inevitable overlaps, confusions and mistakes of assessment that will arise in discussing the messy scenarios we seem to find before us.

Nationalism as an element mainly of corner 4 of the *iccher ghuri*

It is evident that the blood-stained birth of the country in 1971 following a virtual war of independence from Pakistan continues to have huge implications today for the kite journey of Bangladesh. Specifically the un-redressed war crimes committed at that time, and the current government's efforts to make some progress in this regard have led to violent recent reprisals against certain sections of the minority communities, which reportedly brought back memories of what went on in 1971. This has made it clear that perhaps still not everyone agrees that Bangladesh actually has a right to exist as an independent nation, but also confirms grave problems over the other three elements of the *iccher ghuri* of Bangladesh. Moreover, issues related to nationalism are not exclusively located in one kite corner, anyway.

26 I shall take up and discuss in particular Maimul Ahsan Khan, 'Constitutional disaster and "legal impunity": Constitutional amendments in perspectives', *Counsel Law Journal*, 2(1) (2014): 30-82 and Md. Abdul Halim, 'The Fifteenth Amendment to the Constitution: Concerns and perils of constitutionalism in Bangladesh', *Counsel Law Journal*, 2(1) (2014):83-136.

To be sure, in 1971 it was a worrying new scenario in international law and human rights law that a certain section of a postcolonial nation state should simply be able to declare independence. This strays into debates on self-determination, of course, which are going to resurface further below. Others had tried this route before, Biafra in Nigeria for example, and did not succeed. The costs to Bangladesh, as we know, have been huge, but the country's independence as a nation was in due course achieved and has been celebrated as a globally pioneering achievement. That the role and rule of Pakistan as a virtual oppressor of what was then East Pakistan became increasingly intolerable is well-established.[27] That the memories from that time are painful and remain difficult to deal with emotionally, that the separation process involved huge costs in every respect and that a separation was inevitable is all quite clear, too. It also seems certain that 'almost no one believes Bangladesh would have been better off remaining part of Pakistan'.[28]

But lurking fears that the sovereignty of Bangladesh is at risk are cultivated in certain quarters. Typically for South Asian geopolitics, such apprehensions are partly fed by strategic allegations that the overbearing big neighbour, India, will seek to control or dominate Bangladesh unless one remains extremely alert. The arguments here are partly of an economic nature, and they prominently concern water rights.[29] Water is, indeed, going to be an increasingly important issue, not only in this region of the world. But if India had really ever wanted to take over Bangladesh,[30] the ideal moment would have been in 1971, and evidently this simply did not happen. While it has been asserted that 'the complete story of the Liberation War has not been told',[31] a military insider has documented how in the aftermath of the war, arguments were raised that '[t]he Indian Army should be withdrawn at the earliest from Bangladesh as the Bangladeshis were quite capable of running their own affairs'[32]. Indeed, as confirmed in the same source, the transfer of power to the Bangladesh Government was swift, the Awami League rapidly took control,

27 (Novak 1994, 15) see note 4 above.

28 Ibid, 84.

29 They are less connected to trade dependency, as it is becoming clearer now that China's position is on the rise, while India's is declining. See Pravakar Sahoo, 'Economic relations with Bangladesh: China's ascent and India's decline', *South Asia Research* 33(2) (2013):123-139.

30 Notably, similar assertions of such intolerable agenda are strategically raised in Pakistan, there often to justify large military spending.

31 (Novak 1994, 167) see note 4 above.

32 Lt. Gen. J.F.R. Jacob, *Surrender at Dacca. Birth of a nation* (New Delhi: Manohar, 2001), 149.

and Sheikh Mujibur Rahman returned from captivity in Pakistan in early January 1972, immediately declaring Golden Bengal, *Sonar Bangla,* to be free. The Banglar *iccher ghuri* was afloat in the air. Now the arduous task of running the new country began.

By some accounts, every possible mistake was made by the first administration,[33] but that relates more to the other *iccher ghuri* agenda than nationalism. The heroic 'Father of the Nation' image that the current administration still seeks to bank on, and desires to cement, is there for all to see. That this celebrated father of the nation was soon murdered did not endanger the national sovereignty of Bangladesh, it was an internal matter. What the country seems to struggle with now, however, is how to handle its various internal diversities, which means that the nature of the turbulences experienced relates today more to corner 1 of the kite and identity issues rather than to corner 4 and the international and human rights dimensions, which are of course, as noted earlier, also present in all other kite corners.

Today's challenges to national identity and territory are familiar from other parts of South Asia. They concern not only various more or less illegal cross-border movements of people as an aftermath of 1947[34]. As in north-east India, there are still lingering problems over the allegiance of some ethnic and tribal minorities in the eastern parts of Bangladesh. Everywhere, these people have been badly treated, there can be no doubt about that, but remembering past atrocities is not a good starting point for kite journeys into a better future. On India, a series of recent articles on the Kuki-Naga problems in Manipur, in particular, identifies significant new development in relations between such minorities and the respective Indian state authorities, both central and local[35]. It is clear from insightful locally based research that these significant new developments concern wider geostrategic matters, too, especially in relation to China. Bangladesh can and should learn from this ongoing experience of its immediate neighbour in various aspects of ethnic conflict management.

The Indian experience basically shows that there is no viable long-term scope for

33 (Novak 1994, 169) see note 4 above.

34 For indications and further references see Subhasri Ghosh, 'Population movements in West Bengal: A case study of Nadia District, 1947-1951', *South Asia Research* 34(2) (2014) : 113-132.

35 See Nehginpao Kipgen, 'Politics of ethnic conflict in Manipur', *South Asia Research* 33(1) (2013): 21-38; Telsing Letkhosei Haokip, 'Ethnic separatism: The Kuki-Chin insurgency of Indo-Myanmar/Burma', *South Asia Research* 35(1) (2015): 21-41; L. Lam Khan Piang (2015) 'Overlapping territorial claims and ethnic conflict in Manipur', *South Asia Research* 35(2) (2015), forthcoming.

tribal self-determination that would carve out a new nation station from parts of India, Bangladesh and Burma. Even most of the tribal leaders acknowledge that now. Whatever certain local nationalist leaders may still be arguing, and whatever NGOs and international observers may think and write about these matters, that kind of ambition is not going to be fulfilled. Readers should note that this assessment differs significantly from what the two recent articles in the *Counsel Law Journal* of 2014 report about the local and international reactions in relation to the Bangalee/Bangladeshi controversy.[36]

Since Bangladesh as a nation, too, is not going to give in to any type of pressure to part with territory claimed by any ethnic or tribal group, the ways in which discourses of minority rights are discussed by lawyers in Bangladesh will now need to be revised. As indicated, this debate concerns kite corner 1 as much as kite corner 4, and additionally, the focus has already, in view of recent government action in this regard, shifted to management of this issue through kite corner 3. The key evidence here is found in the recent significant constitutional changes in Bangladesh brought about by the 15th Amendment.[37] I do not interpret the recent changes to mean that nationalism as a fundamental principle of the Constitution has been undermined, has lost its character or 'has been turned into a silly matter of pull and haul at the hand of political parties for their vested interests'[38].

While it seems correct to assert that the politics of nationalism in Bangladesh have now entered into a new phase,[39] I read these new developments as a fresh effort to rebalance the kite of Bangladesh when it comes to minorities of whatever kind. Clearly, the Awami League is more plurality-conscious about such matters than the BNP and is desperately concerned to include minorities in the nation rather than expelling or exterminating them, as apparently many BNP adherents would like to see. In the language of Wacqant, avoidance of precariousness for the various minorities of Bangladesh has now been written into the basic structure of the revised Constitution.

I therefore read the recent constitutional amendments as an acknowledgement

36 See (Khan 2014 and Halim 2014), see note 26 above.
37 See in detail (Halim 2014, 100-111).
38 Ibid., 100.
39 Ibid., 105.

from the top of the leadership that the integration and dutiful protection of the various concerned minority groups, in a country that is clearly dominated by Bangalee Muslims, is a constitutional duty of the nation. Indeed it is an onerous and difficult obligation, which should now be treated as a matter of priority for the central state government and all other concerned authorities. Indian evidence concerning the north east goes exactly the same way. This new attempt at inclusion is now something that should not be reneged on, otherwise the formal laws result in creation of what Wacquant would call a 'precariat'. Indeed, most members of the various minorities in Bangladesh constitute very much a state-created precariat at present.

The negative reactions of many international observers and of the Chittagong Hill Tracts Commission, for example,[40] indicate in my view clear-cut lack of understanding about the current geopolitical dynamics and the complexity and historical depth of the pluralist challenges faced by the nation of Bangladesh. This is a nation today whose people have, for all kinds of reasons, 'a split-level mind. On one level, they are Hindu, Muslim, Buddhist, or Christian; but on a deeper, less rational, repressed level they are Bangladeshi – in a sense that harks back to the pre-Aryan period, before Hindu, Muslim, or Buddhist thought frames existed'[41]. There is, from this plurality-sensitive perspective, simply no contradiction in a Muslim-dominated country to have on the one hand explicit commitment to Islam written into the Preamble of the national Constitution, provided that this same Constitution also contains strong and effective protective mechanisms for religious and other minorities and that Muslims themselves remember and acknowledge their own hybridities.

Following the 15th Amendment, it is now a matter of democratic guarantees that such safeguards for minorities should not only be present on paper, but need to be implemented. This, it appears, is what the basically secular orientation of the Awami League implies as the correct route of action underpinning the most recent constitutional amendments. The trouble is that Bangladesh as a whole, including evidently its lawyers, does not appear to understand what is meant by 'secularism', and how it relates to the plurality-consciousness that legal theorising about the *iccher ghuri* is concerned with.

40 ibid, 108-110.
41 (Novak 1994, 141) see note 4 above.

The basic message that the recent constitutional amendments convey is thus clearly that there is an urgent need for Bangladeshis of all kinds to work together and to learn to live together better. In relation to the various tribal communities, this will mean more effective protection of local and customary tribal land rights, and thus a more considerate and less strong-armed approach by state authorities, given that these are bound to be dominated by Muslims and by central state-centred concerns. That this is a huge challenge for navigation is beyond question. This issue extends far beyond matters of nationalism and identity and strays above all into corner 2 and socio-economic issues. As most of the concerned minorities are not Muslims, this also implicates corner 1 in terms of respect and recognition of minority religions, ethics and values. The state, acting from its power centres in corner 3, has to show a multi-layered responsible attitude here to build sustained trust, a huge challenge. The current debate, as Halim's article so clearly reflects, is marred by inability even among legal professionals to appreciate the complexity of the issues involved, as this is much more complicated than just distinguishing between white and blue, or just presuming that the AL is secular and the BNP is Islamic, or that self-determination is an international mantra.

The current government then, and I suggest this happened in the higher public interest rather than as a desperate effort to stay in power, appears to have finally realised that it needs to include the various minorities into the nation of Bangladesh.[42] The only way forward to achieve this is to acknowledge first of all that these various minorities exist and have their own claims and rights, which now need to be meaningfully protected in all respects. That there will be implementation problems can be foreseen, so there will undoubtedly be further turbulences and more bad news from Bangladesh. But the *iccher ghuri* element of nationalism, in the hybrid nation of Bangladesh, has to acknowledge the multifarious fact of diversity, and notably it now does so explicitly, even in the revised words of the Constitution.

It is quite daring on the part of the present government to have directed the kite of law in this particular direction, and of course this upsets a lot of established perceptions and interests. The same, probably no co-incidence, as concerned parties are

42 People find it remarkable, for example, and are utterly surprised, when I tell them that the current Chief Justice of Bangladesh is a Hindu. Not long ago, even Pakistan had a Hindu Supreme Court judge, who had come up through the ranks from the District Courts. He was even acting CJ in a brief period of crisis during the lawyer's strike.

talking to each other, is happening in India's north east and in Burma. Hence, in my view this revitalised pluralising strategy is positive and dynamic, and is at least pointing in the right direction. It will, Inshallah, strengthen the cohesion of the whole nation in due course, as there seems to be no other constructive way forward.

Democracy as a key element of corner 3 of the *iccher ghuri*

Given that all kite corners contain elements of the other corners, it is almost redundant to reiterate here that democracy connects rather closely to nationalism but also impacts on matters related to socialism and secularism. The previous section established that as long as the vision of nationalism retains a hybrid and plural character, there can be no challenge to the claims of minority members of the nation to have an equally legitimate voice in democratic decision making processes as claimed by the Muslim majority. Some Bangladeshis, however, still do not accept that members of minority communities belong to the body politic and the country's society.

The resulting view is that they should not have a voice, in fact they should be excluded. I do not think one can directly blame a government for such individual deficiencies of plurality-consciousness. But if the government of a plural nation itself subscribes to such an exclusionary vision, there will be deep trouble for millions of Bangladeshis also in terms of democratic participation. We saw that, by the way, in Europe and elsewhere during years of BNP rule when many members of minorities were forced to seek international protection abroad.

Regrettably, both major parties in Bangladesh have strategically engaged in playing bad chess games with democracy, and this is not only an issue of the proverbial 'Battle of the Begums'. In relation to democratic structures and processes, actually, memory of colonial pasts and especially of electioneering atrocities in 1970/71 should have had a therapeutic effect in independent Bangladesh. It should have inspired a sense of responsibility and a commitment not to repeat such grave mistakes of disregarding basic democratic principles. But historical lessons have not been learnt. Maybe history is indeed too painful in Bangladesh to allow rational thinking when it comes to democracy. We know, for example, that just before the

declaration of independence virtually all East Pakistani votes were disregarded and treated as virtually intolerable for the then composite nation of Pakistan, resulting in the acrimonious divorce of East and West Pakistan.

When Bangladeshis became independent, they were at first all 'one' in the sense that they were no longer Pakistanis. But soon awareness of internal differentiations set in, also in political terms and in relation to voting patterns. In recent decades, the country has seemed split roughly 40:40 between adherents of the two major political parties, so that anti-incumbency factors and any minor blips of voting patterns, in a first-past-the post electoral system, have led to regular changes of government. However, Bangladesh has simply not learnt to operate normal decent rules of democracy, where an opposition gracefully accepts defeat and then engages in constructive co-operation with those in power for the next few years. The less said about that the better, as current troubles can be traced back to this very issue, too. However, the resulting discriminatory treatment of the political 'other' in Bangladesh today should itself be seen as completely intolerable.

The underlying problems are, as noted, more complex than 'the Battle of the Begums' and their attempts at dynastic succession planning. It is quite remarkable that after many years of military rule, Bangladeshis agreed across the political spectrum in the 1990s that enough was enough and they co-operated, at least for some time, in the experiment of the Caretaker Government arrangements in efforts to secure fair and free elections[43]. That this institution has now been abolished by the current government, which promptly faces vicious criticism and much disruptive action, has again thrown the nation into a scenario of turmoil. Indeed one could ask many questions about democratic compliance,[44] but these are changed times now, as it appears that the lessons of the Caretaker Government period include awareness that the CTG itself could be manipulated. Hence, it was finally remembered that, after all, the country has a democratic Constitution and an Election Commission that should both be permitted to function and do their respective jobs for the nation as a whole in terms of safeguarding democratic principles.

It is of course rather easy to portray and interpret the new developments as desper-

43 A full analysis of this is found in (Khan 2015), see note 5 above. See also briefly (Novak 1994, 191-193), see note 4 above.

44 See in particular (Halim 2014), see note 26 above.

ate efforts of the current government to cling to power, by hook or crook. However, in light of the earlier discussion about nationalism, my interpretation of the recent activism in relation to the 15th Amendment differs significantly from the assessments provided by writers of the *Counsel Law Journal* and those they quote. In times of turmoil, it may be necessary to crack down on those that use undemocratic means to cause the nation's kite of law to crash. This comment should not be read as justification for dictatorship nor an endorsement of benevolent dictatorship. It is a matter of responsible democratic governance, which includes protection of public safety and maintenance of law and order, as a country with rich RAB experience is all too aware of. Yes, this can be exploited, and mistakes may occur, but it is a matter of sophisticated fine-tuning of the management of the nation's kite journey. Despite many impressions to the contrary, the key concern is still strengthening and protecting the basic democratic structures of the country.

In the same context, it is highly significant that the new rules banning amendments to the Constitution are so loudly crititised by lawyers as blocking the amending power of Parliament.[45] Such protests are familiar from other contexts of law-centric argumentation. However, in a system where standard parliamentary democracy is seen to be largely defunct because the respective opposition is not playing by the rules in the first place,[46] it appears that the realisation finally struck that enough damage has been done and the nation's journey cannot go on like this.

The basic rules of the game itself require modification. Establishing a large part of the nation's law as no longer subject to easy amendment by Parliament becomes, then, an admission of failure of the much-cherished democratic principle of Parliamentary Sovereignty. I wrote earlier about a second declaration of independence for Bangladesh when in December 2009 the country elected a Parliament that stood for inclusionary strategies rather than adversarialism.[47]

The political scenario has significantly changed since then and now seems to include what I see as healthy scepticism of standard Eurocentric blue-eyed optimism about 'rule of law' transplants, which in South Asian conditions were far too eas-

45 (Halim 2014, 117-118), see note 26 above.

46 As noted, over time both major political parties were guilty of that grave offence.

47 (Menski 2011, 126-127), see note 3 above.

ily subverted by undemocratic means. Bangladesh has now finally said goodbye to Parliamentary Sovereignty, because Parliament itself cannot be trusted and it is safer to rely on the national Constitution as a higher form of law. That British-trained legal professionals find this difficult to stomach should not surprise. Indeed, one sees parallels here to the basic structure debates in the Indian Constitution, which indeed my learned Bangladeshi friends have strongly criticised in no uncertain terms as well.[48]

The question now becomes who will control the democratic basic structures if Parliament has been disabled to some considerable extent. Here, again, looking across the borders to India would help all concerned to realise that in fact a strong judiciary, and thus invigorated judicial activism, is the ultimate democratic safeguard that is being suggested by the new amending regime as the most viable strategy forward.[49] Of course there will be many, probably often vicious and confused debates, as there are in India and elsewhere. But in light of rather amazing recent developments in Indian judicial law-making, following on from earlier pioneering public interest litigation and social action litigation – which of course frequent journalistic morphing of judgments often does not represent as what they really were or are – Bangladesh can look forward to interesting times in constitutional development.[50] Some of my former students who are legal experts of Bangladeshi constitutional laws will have brilliant occasions to re-assess these new balances of legal powers.[51] Activist and alert judges as highly skillful legal kite flyers, rather than military intervention, will thus in my hope-inspired prediction allow the *iccher ghuri* of Bangladesh to fly safely in relation to democratic freedom of expression.

48 (Halim 2014, 118), see note 26 above.

49 Similar evidence comes now out of South Africa, where a string of recent judicial decisions confirms that the judicial branch of government can be a most effective legal kite flyer, balancing competing pushes and pulls in constitutional management. Notably this now also involves matters of Muslim law as a minority legal order, matters which were earlier deliberately sidelined. Here, too, the policy is pluralist inclusion, not state-centric segregation.

50 For India, most recently, not to speak of the fascinating story of the aftermath of the *Shah Bano* case of 1985 in relation to the place of Muslim law in the nation's structure, as laid down in *Danial Latifi v. Union of India*, AIR 2001 SC 3958, see how the Supreme Court protected fatwas in *Vishwa Lochan Madan v. Union of India* (2014) 7 SCC 707, provided they remain within democratic boundaries. This happened after Narendra Modi came into power, confirming not only independence of the judiciary, but illustrating India's acute awareness of internal diversity, activating precisely what I refer to as POP-sensitivity. The Supreme Court in fact applied a precariousness test, as well as a sociability test, and thus did not hold that *fatwas* were illegal in India.

51 See in particular Ridwanul Hoque, *Judicial activism in Bangladesh. A golden mean approach* (Newcastle upon Tyne: Cambridge Scholars Publishing, 2011).

That this will be hard work and will require very subtle balancing, as stifling justified criticism and too rigidly curtailing freedom of the press is also an infringement of democratic rights, goes without saying.

Socialism and corner 2 of the *iccher ghuri* of Bangladesh

The key point for their analysis is that they are both concerned with constructive inclusion, rather than division and adversarial positioning. The initial rhetoric of Bangladeshi socialism, originally following China and Russia rather than the US model, raised of course many alarm bells. Novak shows, moreover, that Sheikh Mujibur was not a good implementer of these ideas. It was all rhetoric and a lot of personal grandeur that led to loss of control and his ultimate assassination.[52]

More recently, the nation's concern has become more focused on economics and development, and hence also more equitable distribution of economic benefits, including questions of gender and empowerment that engaged us in the recent Dhaka Workshop. There appears to be no major difference between AL and BNP policies here, except that people from minority communities will probably not get the economic opportunities that they currently enjoy. Here, again, we see how kite elements from different corners influence the management of particular *iccher ghuri* policies. As noted, Bangladesh is not a poor country any more.

While constant risks of an environmental nature will inevitably remain prominent, the major challenge is to avoid famines and to secure more equal distribution of economic benefits and resources. Nationally, development indicators are to some extent measured against global Millennium Goals, and Bangladesh is actually doing amazingly well in some respects and is outshining its South Asian neighbours. Especially export promotion of garments and fisheries products are a main focus, and positive developments here depend again to some extent on corner 4 of the kite, namely international trade relations and conditionalities, and also related human rights debates over child labour and sustainable production techniques. This brief treatment does not suggest that all challenges have been addressed. But there are no major differences between the two major political parties and a quite capi-

52 (Novak 1994, 168-174) see note 4 above.

talist, production-focused approach appears to safeguard the nation's food security and the physical survival of its people.

Secularism and corner 1 of the *iccher ghuri* of Bangladesh

This element of the *iccher ghuri* poses arguably one of the biggest challenges for the nation, as it involves a direct clash between AL and BNP policies. While both major parties are of course Muslim-dominated, given the demographic ground realities of Bangladesh, the markedly adversarial approach that prevails has never ceased to amaze me. To make a potentially extremely long and complex story short and digestible, it must suffice here to state up-front that evidently Bangladesh does not understand the various meanings of secularism.[53] As a result the country has been subject to vicious controversies that are not only leading to precariousness for non-Muslim minorities and non-mainstream Muslims, but to intolerable acts of terror on the part of those who feel entitled to 'protect' a particular religious and political ideology.

However, even in terms of Qur'an and *sunna*, a good Muslim is by definition necessarily a pluralist.[54] Bangladeshis as locally hybrid Muslims know this very well, but have been led astray by many kinds of competing political and other rhetorics, to be seriously confused.

This inability or unwillingness to define and operate secularism for the good of the nation and its people in Bangladesh is quite remarkable. Even (and maybe it would be more appropriate to say, especially) the intellectual elite remains mentally imprisoned by Western concepts that clearly do not work well in South Asian conditions. Prominent among the misconceptions is the alleged possibility that secularism means something anti-religious. In a Muslim-dominated nation, that is obviously *haram* and thus quite intolerable for the overwhelming majority, not only of BNP followers.
While indeed the French model of laïcité suggests the theoretical possibility of

53 There is of course a huge literature on secularism. But as in the case of 'law', there is no globally agreed definition of what this term actually means and implies, and there are clearly various competing approaches.

54 (Menski 2006, 281), see note 1 above.

separating law and religion, or State and Church, and this has influenced the dominant US approach of non-involvement of the state in matters of religion, it is evident that such a theoretical model could not work and/or be acceptable in Asian conditions. It also, readers should note, contradicts the basic structure of the kite model of law, where all elements of the four corners are intrinsically connected. Thus the more productive and realistic approach is to address religious pluralism as well as the connections of religion with politics, society, economics and of course psychology and philosophy, and to put all of this on the table for debate and management. In other words, the way forward is to engage in connectivity, not in separation. This is precisely what the 15th Amendment in Bangladesh has now finally done.

We have already discussed how the authors of the Counsel Law Journal have completely failed to understand that change of direction and policy. It is also evident that the AL as a so-called secular party has been very concerned to present its Islamic credentials by re-introducing an explicit identity commitment for this Islamic majority nation to Islam into the Preamble of the Constitution. Of course this changes the nation's identity chemistry, but it also proves that the allegations that AL is anti-Islamic are merely fake political rhetoric.

Novak explains persuasively how Bangladesh got itself into this kind of confusion in the first place. He relates this back to governance failures in the early days of Bangladesh, when rabid socialist rhetoric created the impression that AL ideology was anti-Islamic.[55] Realising finally that separation of law and religion is an unsuitable strategy, Bangladesh now follows India, again, in seeking to manage a policy of secularism as equidistance. Of course this happens from a starting point of Muslim domination. That both countries' policies in this regard will be misrepresented and misunderstood by those who simply do not like - or for whatever reason fear - religion, or still believe that any one religion may be dominant in any one state, is already evident in the commentators' outcries printed in the *Counsel Law Journal*.

55 (Novak 1994, 170-174) see note 4 above.

Conclusion

Bangladesh in 2015 is again faced with extremely difficult challenges of governance and management of its national identity, but the picture is by no means as bleak as some commentators make it appear. This article has demonstrated that plurality-conscious management of existing, culture-specific diversities in an important Asian nation state throws up huge challenges for whoever is in power, since there will be never be complete agreement over the direction in which the country's vision ought to develop. Recent policy interventions in Bangladesh confirm that methodologies of connectivity have now been chosen by those in power rather than traditional adversarial, division-centred approaches.

Given the hybrid identity of Bangladesh and its people, it is clear that this is the correct policy approach to implement the high ideals of the wish kite for Bangladesh. As managing this diversity will not be easy, the key challenge for legal professionals, law teachers and their students, the present and future legal actors of this country, is to understand first of all that times have changed and we are now in 2015.

While history cannot be forgotten, a bright future is only possible if all the various diverse actors work together rather than against each other. Learning to live together as part of a maturing process for a nation is now the central unfinished business for Bangladesh to keep the *iccher ghuri* afloat. I can only say 'Joy Bangla and Bangladesh Zindabad' in conclusion. For these two labels are no contradiction either. They simply reflect the rainbow colours of the identity of Bangladesh as seen from different perspectives.