

THE IMPACT OF SITUATIONAL FACTORS ON FORUM CHOICE AND CRIMINAL JUSTICE SYSTEM DEVELOPMENT IN BANGLADESH

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ABSTRACT

Using a survey by the World Bank's Justice and Development Initiative, Bangladesh Citizen's Experiences of the Legal System 2009, this paper examines whether crime victims' choice of dispute resolution forum is constrained more by social factors, such as socioeconomic status, or by event-specific factors, such as direct economic loss caused by the crime itself. In Bangladesh's pluralist legal environment of competing traditional and state venues, neoinstitutionalist-inspired development strategies may overlook important factors in play and strategies that could improve access to justice for those most hurt by crime. This study finds that crime victims who suffer greater economic harm resulting directly from the crime, as well as victims of violent crime, tend to engage with the state criminal justice system versus the traditional system alone. After undertaking a subsequent historical comparison in order to identify possible omitted structural variables, this result highlights the need to look at crime-event-specific factors, and not just social-level problems, when designing rule-of-law programs in developing countries.

INTRODUCTION

In countries with pluralistic legal systems where state, NGO-sponsored, and international financial institution (IFI)-sponsored reformist criminal justice systems compete with local, traditional mechanisms, the right choice of venue for redress is not necessarily clear to the average crime victim. Further, many IFIs and international nongovernmental organizations (INGOs) that implement needed justice reforms do not necessarily apply culturally-appropriate

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remedies. Many, especially those charged with promoting democracy, prefer to simply impose western models as the solution for justice system problems.¹ Ewa Wojkowska, writing for the United Nations Development Program (UNDP), states that while “justice sector reform is a rapidly expanding area” and these issues are beginning to be addressed, “informal justice systems still remain largely neglected” by most multi-lateral and bi-lateral development assistance programs even though, for the majority of people around the world, “informal justice systems usually resolve between eighty and ninety percent of disputes.”² Yet this is in line with how much of the rest of “development” is approached, particularly since converting people to the state legal system eases private property rights enforcement.

One case of a pluralistic legal system where these disconnects are evident is that of Bangladesh. The World Bank and the United States Agency for International Development (USAID) have been working for a number of years to strengthen Bangladesh’s criminal justice system based on the idea that a well-functioning judiciary that enforces laws uniformly is a “necessary precedent to economic development and poverty alleviation.”³ But, they admit that few returns have been achieved so far from these investments in both civil and criminal institutions. Local, long-standing social customs override newer constitutional or governmental protections for marginalized groups and women.⁴

Political economy literature emphasizes the importance of context and buy-in from local populations and interest groups for success,⁵ but there is often a gap between theory and practice when real-life politics enter into play. We hypothesize that if citizens do not feel physically safe and protected, they are less likely to take measures to improve their economic situations at home—thus taking a more ground-up view of the question compared to more macro-level studies.⁶ Indeed, other studies from comparative politics and new agency

¹ See Saku Akmeemana, *Disputes, Crimes, and Pathways of Redress: A Household Survey on Citizens’ Perceptions and Experiences of the Justice System in Bangladesh* 14 (2012) (unpublished manuscript) (on file with the World Bank).

² EWA WOJKOWSKA, *DOING JUSTICE: HOW INFORMAL JUSTICE SYSTEMS CAN CONTRIBUTE* 5 (United Nations Development Programme Oslo Governance Center 2006).

³ Janice H. Lam, *The Rise of the NGO in Bangladesh: Lessons on Improving Access to Justice for Women and Religious Minorities*, 38 *GEO. WASH. INT’L L. REV.* 101, 119 (2006).

⁴ See *id.* at 121.

⁵ See, e.g., Todd A. Eisenstadt, *Thinking Outside the (Ballot) Box: Informal Electoral Institutions and Mexico’s Political Opening*, 45 *LATIN AMERICAN POLITICS AND SOCIETY* 25, 45–48 (2003).

⁶ See generally WILLEM VAN SCHENDEL, *A HISTORY OF BANGLADESH* (2009).

studies are finding that reforming informal, native institutions is far more effective than trying to install foreign ones.⁷

In this study, we specifically test whether the severity of economic harm *caused by the crime event itself* shapes individual choices *independently* of socioeconomic factors, citizen expectations, and the fees and/or bribes associated with obtaining justice. We predict that the greater the economic harm, the more likely a person will be take action, and also the less likely he/she will be to use the criminal justice system because the economic harm suffered reduces his/her ability to pay the costs associated—both financial and social. We focus on measures of individuals' perceptions and interactions with the system for the insight they provide into the processes behind the trends, as a complement to several studies of national-level data in this area.⁸ If our hypothesis is correct, the implications are that *at the moment* when an individual who has suffered a crime needs help the most, the system(s) in place to provide that help are not performing in a way that satisfies that victim *regardless* of his/her position in Bangladeshi society, that institutional-replacement strategies may be based on some false assumptions, and that procedures might be introduced that can address these specific event-related needs.

This study proceeds in two major parts with several sections in each. In the first part, which contains the quantitative study, we begin with a brief synopsis of relevant literature from the disciplines of law, political science, and international relations, followed by an overview of the legal system in Bangladesh. We then outline our research methodology. Next we present and discuss the results of our analysis, which show even stronger evidence in support of an independent effect for the economic harm of the crime event than anticipated, and also some important revelations about when the state criminal justice system is preferred.

⁷ See generally STEPHEN GOLUB, NON-STATE JUSTICE SYSTEMS IN BANGLADESH AND THE PHILIPPINES (2003); Akmeemana, *supra* note 1; EDGARDO BUSCAGLIA, INVESTIGATING THE LINKS BETWEEN ACCESS TO JUSTICE AND GOVERNANCE FACTORS: AN OBJECTIVE INDICATORS' APPROACH (United Nations Office on Drugs and Crime 2001); Claudia R. Williamson, *Informal Institutions Rule: Institutional Arrangements and Economic Performance*, 139 PUBLIC CHOICE 371 (2009).

⁸ See generally William Easterly, Ross Levine & David Roodman, *Aid, Policies, and Growth: Comment*, 94 AM. ECON. REV. 774 (2004); Dani Rodrik, Arvind Subramanian & Francesco Trebbi, *Institutions Rule: The Primacy of Institutions Over Geography and Integration in Economic Development*, 9 J. ECON. GROWTH 131 (2004); Claudia R. Williamson, *Informal Institutions Rule: Institutional Arrangements and Economic Performance*, 139 PUB. CHOICE 371 (2009).

In the second major part of this work, we attempt to place these revelations in a more historical context by comparing judiciary institutional evolution in Bangladesh to a similar process in the Philippines that identifies potential structural variables that may also impact the menu of choices available to crime victims. We end by discussing implications and outlining opportunities for future research.

I. BACKGROUND

A. *The Rule-of-Law Movement*

There has been quite a bit of motion in the international sphere over the last couple of decades to accelerate the “rule-of-law” movement.⁹ Beginning after World War II, international development efforts sought to reform weak and/or corrupt institutions to support economic growth and foreign investment,¹⁰ and while some efforts focus on state-centric established legal systems,¹¹ others focus on context-specific and informal norms and rules.¹² Still others fall in the middle of that continuum. Helmke and Levitski discuss how a coherent definition of the formality of what constitutes institutions is not shared by all economists.¹³ While many political scientists define norms as being institutions in and of themselves,¹⁴ this policy-oriented paper takes a more narrow view defining formal state-affiliated entities as formal institutions, local and traditional enforcement bodies as informal institutions, and rights and socially shared rules as norms.

Regardless of definitions, neoinstitutional logic lies behind much of modern international development activity and also behind the theories of Haugen and Boutros,¹⁵ Dam,¹⁶ and the more general theory of Dani Rodrik et

⁹ Olufemi Taiwo, *The Rule of Law: The New Leviathan?*, 12 CAN. J. L. & JURIS. 151, 151 (1999); Thomas Carothers, *Promoting the Rule of Law Abroad* 5 (Carnegie Endowment for Int'l Peace, Working Papers No. 34, 2003).

¹⁰ KENNETH W. DAM, *THE LAW-GROWTH NEXUS: THE RULE OF LAW AND ECONOMIC DEVELOPMENT* 3–5 (2006).

¹¹ Gretchen Helmke & Steven Levitsky, *Informal Institutions and Comparative Politics: A Research Agenda*, 2 PERSPS. ON POLS. 725, 725 (2004).

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 727.

¹⁵ *See generally* GARY A. HAUGEN & VICTOR BOUTROS, *THE LOCUST EFFECT: WHY THE END OF POVERTY REQUIRES THE END OF VIOLENCE* (2014).

¹⁶ *See generally* DAM, *supra* note 10.

al. in their seminal 2004 article, “Institutions Rule.”¹⁷ In that article, Rodrik and colleagues maintain that once institutions (and norms, by our definition) are controlled for, factors such as geography and trade have limited impact on development.¹⁸ North elaborates on how ineffectiveness of institutions and political and macroeconomic instability lead to decreased flow of capital and decreased economic development, primarily due to capital being diverted to transaction costs.¹⁹ Further, when combined with concomitant reforms in other types of institutions, rule-of-law reforms can remove roadblocks to economic development, and quality of life for the citizenry will improve—although Rodrik et al. admittedly offer no prescriptions for how this is to be achieved.²⁰ While they make strong arguments about the importance of context and about the flexibility possible in institutional form and definition as long as certain functions are met (such as providing market legitimacy and stabilization),²¹ practitioners have sometimes used this idea to specifically support “Westernization” of institutions.²²

But many disagree with Rodrik and colleagues. Jeffrey Sachs, in his 2004 response article *Institutions Don’t Rule*, denounces this theory and says that the most powerful causal influences on development are geography and natural resource endowment.²³ Schiller²⁴ posits that additional determinants of development include effective welfare provision (generally speaking) and lower levels of ethnic discrimination.²⁵ Adherents to Sachs’ and Schiller’s positions within the development and legal communities argue that deficiencies in these areas constrain the development of legitimate legal institutions *and* economic development, and thus the poor’s ability to pay up-front fees associated with legal assistance or the often-required bribes is also constrained, which hinders access to justice.²⁶ Acemoglu and Johnson refute

¹⁷ Dani Rodrik, Arvind Subramanian & Francesco Trebbi, *Institutions Rule: The Primacy of Institutions Over Geography and Integration in Economic Development*, 9 J. ECON. GROWTH 131, 131–65 (2004).

¹⁸ *Id.* at 131.

¹⁹ Douglass C. North, *Institutions*, 5 J. ECON. PERSP. 97, 98 (1991).

²⁰ Rodrik, *supra* note 17, at 136.

²¹ *See id.* at 157–58.

²² DAM, *supra* note 10, 16–17.

²³ Jeffrey D. Sachs, *Institutions Don’t Rule: Direct Effects of Geography on Per Capita Income* 2–3 (Nat’l Bureau of Econ. Research, Working Paper No. 9490, 2003).

²⁴ *See generally* BRADLEY R. SCHILLER, *THE ECONOMICS OF POVERTY AND DISCRIMINATION* (10th ed. 2008).

²⁵ *Id.* at 233–34.

²⁶ SCHILLER, *supra* note 24; Gordon Barron, *The World Bank and Rule of Law Reforms* 17 (Dev. Studies Inst., London Sch. of Econ. and Political Sci., Working Paper No. 05-70, 2005). *See generally* Sachs, *supra* note 23.

Sachs' argument by pointing to Botswana, which has similar resource endowment to many other African countries, but better economic development because of stronger precolonial participatory institutions.²⁷

The problem with these arguments is that primary causality is difficult to tease out: many of these aspects of development are endogenous and correlated with one another. But, regardless of which factor(s) may actually be at the root of poor economic development, the result of a dysfunctional institutional system for the average poor person is “functional lawlessness”—a set of conditions that result in stagnated economic growth *and* in punishment for being poor should one suffer a crime.²⁸ In other words, when a poor person is the victim of a crime, the justice system adds insult to injury by not helping her in her hour of need.

Adding her voice to the debate, Claudia Williamson argues in “Informal Institutions Rule” that the “presence of informal institutions is a strong[er] determinant of development” and that “formal institutions are only successful when embedded in the informal system.”²⁹ Sally Merry looks to history and points out the tension between colonially-imposed law and traditional dispute resolution mechanisms, and asks whether the system of the “ruling” power is the one that will deliver the justice desired by the people or not.³⁰ For example, many non-Western countries are more concerned with compromise and conciliation than they are with Western constructions of adversarial and retributive justice.³¹ Bangladesh falls in this category.³²

But the rule-of-law approach to policy so far “has tended to focus on institutions rather than people, has been top-down . . . and has not been cognisant of where people actually go to seek justice.”³³ Of course there have

²⁷ Daron Acemoglu, Simon Johnson, & James A. Robinson, *An African Success Story: Botswana* 20 (Massachusetts Inst. Of Tech. Dep't of Econ. Working Paper Series, Paper No. 01-37, 2001), available at <https://archive.org/details/africansuccess+00acem>.

²⁸ See FRANCESCA RESTIFO, WORLD ORG. AGAINST TORTURE, ADDRESSING THE ECONOMIC, SOCIAL AND CULTURAL ROOT CAUSES OF TORTURE IN KENYA 6–15 (2008); HAUGEN & BOUTROS, *supra* note 15, at 51 (2014).

²⁹ Claudia R. Williamson, *Informal Institutions Rule: Institutional Arrangements and Economic Performance*, 139 PUB. CHOICE 371 (2009).

³⁰ Sally Engel Merry, *Legal Pluralism*, 22 LAW & SOC'Y REV., 869, 869–72 (1988).

³¹ See DAM, *supra* note 10, at 17.

³² Jahan Ferdous, *From Rule of Law to Legal Empowerment of the Poor in Bangladesh: Towards and Agenda for Change 4* (unpublished manuscript).

³³ EWA WOJKOWSKA, UNITED NATIONS DEV. PROGRAMME OSLO GOVERNANCE CENTER, *DOING JUSTICE: HOW INFORMAL JUSTICE SYSTEMS CAN CONTRIBUTE* 5 (2006).

been exceptions to this in Bangladesh: the recent efforts to strengthen the *UP-shalish*, described below, resulted in somewhat of a shift in justice forum choice among the populace even if several of the problems with traditional *shalish* persist.³⁴ Whether this shift has survived the dismantling of the most recent Caretaker government remains to be seen. But, Barron posits that sectoral reform does not necessarily generate systemic rule of law, which is much more elusive than simply reforming institutions.³⁵ Thus, judicial institution reform efforts failed to move beyond rhetoric and so far have had limited success in improving access to justice for the poor with concrete reform actions and positive results.³⁶ Smaller, local NGOs have had greater success in this regard.³⁷

Buscaglia and Cappelletti argue that it is crucial for judicial institutions, including the criminal justice system, to remove cultural, socio-economic, geographic, and political barriers to access in order to attract those poor and marginalized parties *who have no other way to pursue grievances*.³⁸ While there is ongoing academic debate on what “justice” and “access to justice” mean,³⁹ Buscaglia’s concept is an effective way to define access to justice within a pluralistic legal reality. Defining these terms is important for policy because if we can articulate the desired end result—in this case, ensuring that every crime victim has access to at least one legitimate, recognized dispute resolution forum⁴⁰ then perhaps reformers may become more open to alternative (and less expensive) solutions. Kenneth Dam sums it up well: “[T]he first instinct of lawyers . . . is simply to transplant world-class legal institutions to developing countries . . . [but institutions] are more likely to bear fruit if they evolve out of roots already growing in the soil.”⁴¹ In the next section, we describe what that soil looks like in Bangladesh.

³⁴ See Akmeemana, *supra* note 1, at 13.

³⁵ Barron, *supra* note 26, at 32.

³⁶ *Id.* at 25, 28.

³⁷ MOHAMMED ALIM & TARIQ ALI, BRAC RESEARCH AND EVALUATION DIVISION, NGO-SHALISH AND JUSTICE-SEEKING BEHAVIOUR IN RURAL BANGLADESH 4 (2007).

³⁸ BUSCAGLIA, *supra* note 7, at 2; Mauro Cappelletti, *Alternative Dispute Resolution Processes within the Framework of the World-Wide Access-to-Justice Movement*, 56 MOD. L. REV. 282, 283–84, 294–95 (1993) (discussing “obstacles which make civil and political liberties non-accessible to so many people”).

³⁹ Mauro Cappelletti, *Alternative Dispute Resolution Processes within the Framework of the World-Wide Access-to-Justice Movement*, 56 MOD. L. REV. 282, 282–83 (1993).

⁴⁰ Tom R. Tyler, *Legitimacy and Criminal Justice: The Benefits of Self-Regulation*, 7 OHIO ST. J. CRIM. L. 307, 307–09 (2009) (discussing the importance of voluntary compliance with law due to widespread non-compliance thereof, such as traffic and copyright laws).

⁴¹ DAM, *supra* note 10, at 6.

B. *Crime and Redress in Bangladesh*

Bangladesh's Bureau of Statistics estimates its population to be about 156.6 million, with 40% living below the national poverty line as of 2005.⁴² Bangladesh is divided into six territories, or divisions: Barisal, Chittagong, Dhaka, Khulna, Rajshahi, and Sylhet.⁴³ Fully 80.3% of Bangladeshis live on less than USD \$2.00 a day.⁴⁴ This structural poverty is assumed to be one cause of the inability to access judicial institutions:

The formal legal system is inundated with corruption, delays . . . complicated procedures, exorbitant costs, class bias which favors the rich and socially elite, and gender bias which favors men over women . . . As a result, issues of land rights, wrongful termination of employment, dowry demands, failure to provide maintenance, domestic abuse, denial of rightful inheritance, and similar kinds of cases frequently exacerbate already adverse conditions for the poor⁴⁵

Many of these problems exist in traditional fora as well, and organizations have formed via regional and INGO partnerships to help strengthen justice institutions.⁴⁶

Bangladesh's current legal structure includes the state justice system as well as local religious or political leaders; government officials; the village *shalish*, which is traditionally a local official or committee of officials and is exclusively male in the traditional form and which provides dispute resolution and other public goods separately from the state.⁴⁷ Also included in Bangladesh's legal structure are NGOs active in the area⁴⁸ that provide legal aid services and that have set up their own *shalishes* as fairer workarounds for the local *shalish*.⁴⁹ The traditional *shalish* has given way in recent years to a

⁴² *Bangladesh Socioeconomic and Demographic Data*, WORLD BANK, <http://data.worldbank.org/country/bangladesh>.

⁴³ BANGL. BUREAU OF STATISTICS, POPULATION AND HOUSING CENSUS 2011: SOCIO-ECONOMIC AND DEMOGRAPHIC REPORT 23–24 (2012).

⁴⁴ See *Bangladesh Socioeconomic and Demographic Data*, WORLD BANK, <http://data.worldbank.org/country/bangladesh>.

⁴⁵ *Access to Justice: Best Practices Under the Democracy Partnership*, ASIAN FOUND., 1 (2002).

⁴⁶ See *id.*

⁴⁷ See generally GOLUB, *supra* note 7.

⁴⁸ SAKU AKMEEMANA ET AL., WORLD BANK, SURVEY: CITIZENS' EXPERIENCES OF THE LEGAL SYSTEM 1 (2008).

⁴⁹ Habib Zafarullah & Mohammad Habibur Rahman, *Human Rights, Civil Society and Nongovernmental Organizations: The Nexus in Bangladesh*, 24 HUM. RTS. Q. 1011, 1012 (2002).

more hybridized Union Parishad-run *shalish*, headed by local elected officials who answer in limited form to the government but who are not part of the official criminal justice system.⁵⁰ How well this is working in Bangladesh is not yet determined. While UP-*shalish* may not enforce Muslim religious laws in the same way as traditional *shalish*, many of the discrimination, harsh punishment, and bias problems of traditional *shalish* are replicated in the UP-*shalish*.⁵¹ Traditional and NGO-run *shalish* also continue to operate, creating multiple incarnations of traditional fora operating in the same locales.⁵²

Thus, choice of dispute resolution forum in Bangladesh is not an either/or decision. Citizens often seek assistance from multiple institutions,⁵³ as shown below. Overall, citizens prefer to bring the bulk of their civil and criminal disputes to the Union Parishad or traditional *shalish*, or to handle the matter privately.⁵⁴ Because they are separate from the state criminal justice system (CJS),⁵⁵ these two categories of dispute resolution fora (family and/or local leaders) are referred to as the “traditional” option henceforth, and are grouped together in the analyses. There, 44.5% of crime victims sought redress through traditional means alone.

Grouped in the state system are the CJS, including police, courts, military police (the Royal Army Battalion, which is known for violence but which has filled in some gaps in service not met by the civilian police), the Upazila Nirhabhi Officers (higher-level elected officials) and legal aid; and NGOs, who, like BRAC, sometimes sponsor their own *shalish*.⁵⁶ “NGOs’ ability to concentrate solely on [justice] issues have turned them into quasi-state actors” because they now perform functions that used to be solely reserved for government,⁵⁷ and even those that operate *shalish* based on the mediation/arbitration model may still be viewed by local people as extensions of the state if they try to draw people away from their traditional system.⁵⁸

⁵⁰ Akmeemana, *supra* note 1, at 83–87.

⁵¹ *Id.* at 13.

⁵² *Id.* at 73–76.

⁵³ ALIM & ALI, *supra* note 37, at 2.

⁵⁴ *Id.* at 3, 8–10.

⁵⁵ *Id.* at 3.

⁵⁶ *Id.* at 2.

⁵⁷ Janice H. Lam, *The Rise of the NGO in Bangladesh: Lessons on Improving Access to Justice for Women and Religious Minorities*, 38 GEO. WASH. INT’L L. REV. 101, 116 (2006).

⁵⁸ ALIM & ALI, *supra* note 37, at 3.

Formal courts and ancillary institutions are grouped on the district and superior levels.⁵⁹

However, only *seven* of the crime victims answering this very large survey sought assistance through one of these NGOs and just eleven crime victims went to the Upazila. While there is an official police and court system in Bangladesh,⁶⁰ just 2.66% of surveyed crime victims went to the state system as their sole means of redress. An additional 10.82% utilized the criminal justice system *in combination with* traditional mechanisms. Akmeemana, BRAC and the World Bank believe it is institutionalized corruption that makes citizens wary of formal institutions, while local *shalish* officials are considered accountable to the community.⁶¹ Meanwhile, NGOs and IFIs continue to puzzle over why local governments do not take over responsibility for maintaining the more inclusive replacement institutions they create.

The obvious question here is *why* do these new institutions not take root? It cannot be as simple as corruption, even though many government officials will not perform their job or help without a bribe.⁶² Under what conditions do Bangladeshi citizens name wrongs they have suffered as crimes, blame perpetrators for what happened, and then decide that it is important enough to pursue a claim in a judicial forum⁶³ outside of traditional venues? Despite the structural and political dimensions to it, this choice is ultimately an intensely personal decision, particularly for individuals who have also just suffered a violent crime. Further, neither set of institutions presents a perfect solution. Understanding the decision process employed by individuals who pursue criminal cases in both types of venue is important because the eleven percent of individuals who utilize both traditional and state mechanisms do not engage them simultaneously, but in succession—moving from one institution to the other and back again after each one fails to deliver the justice sought.⁶⁴

Alim and Ali, writing for BRAC in 2007, provide valuable process-tracing evidence of how this works. The poor particularly prefer to go to the local elected leaders or traditional *shalish* first for reasons of community solidarity,

⁵⁹ *Id.* at 9 fig.2.

⁶⁰ *Id.* at 11.

⁶¹ *Id.* at 13; Akmeemana, *supra* note 1, at 70 tbl. 5.10.

⁶² Habib Zafarullah & Noore Alam Siddiquee, *Dissecting Public Sector Corruption in Bangladesh: Issues and Problems of Control*, 1 PUB. ORG. REV. 465, 468 (2001).

⁶³ William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming...*, 15 LAW & SOC'Y REV. 631, 631 (1980).

⁶⁴ ALIM & ALI, *supra* note 37, at 5.

accessibility (time, distance, cost, and knowledge about options), and especially fear of the social sanctions that community elites levy against victims who do not try to resolve their case locally first.⁶⁵

Also, women's rights in Bangladesh are circumscribed by Muslim Personal Law and, as such, are framed not as "individual and inalienable," but as "community and religious rights" tied to the family unit.⁶⁶ NGOs and Bangladeshi legal aid have set up parallel *shalish* to try and draw people away from these structures and toward new ones that are familiar in structure, but designed to be more inclusive of women and the poor.⁶⁷ However, community and religious sanctions are very strong and people continue to go to the traditional *shalish* even though it fights implementation of national laws such as the Women and Children Repression Acts of 1995 and 2000, the Anti-Dowry Prohibition Act of 1980, and the Cruelty to Women Law of 1983.⁶⁸

In the villages profiled by Alim and Ali, bribery and graft were endemic throughout traditional *shalish* operations, which is why BRAC set up parallel *shalishes* to perform mediations.⁶⁹ Many of those who went to a BRAC *shalish* wound up returning to the local *shalish*. They became impatient with the unfamiliar, ill-planned procedures—such as a fifteen-day mandatory wait between filing a complaint and scheduling mediation, which leaves the plaintiff subject to intimidation by the opposing parties and the community during said waiting period. Separately, the concept of retributive justice as carried out in the Western-style state CJS is also foreign to Bangladeshi communities.⁷⁰ To discover why Bangladeshi citizens choose the dispute resolution forum they do after suffering crimes, and specifically which factors influence the decision to depart from traditional *shalish* given their partiality for it, we turn now to the data.

⁶⁵ *Id.* at 8.

⁶⁶ Janice H. Lam, *The Rise of the NGO in Bangladesh: Lessons on Improving Access to Justice for Women and Religious Minorities*, 38 GEO. WASH. INT'L L. REV. 101, 122 (2006).

⁶⁷ *Id.* at 124.

⁶⁸ ALIM & ALI, *supra* note 37, at 13–15.

⁶⁹ *Id.* at 13.

⁷⁰ *See id.* at 16.

II. METHODOLOGY

A. *The Data and Sampling*

The household survey used in this study was conducted by the World Bank in March 2009 and sampled 10,710 households from all six geographic divisions in Bangladesh.⁷¹ A two-stage stratified cluster sampling design was followed using the Integrated Multipurpose Sample (IMPS) design developed by the Bangladesh Bureau of Statistics (BBS) from the Population Census 2001 sampling frame.⁷² The IMPS design consisted of 1000 Primary Sampling Units (PSUs) of around 200 households each.⁷³ In the first stage, 357 PSUs (of which 250 were rural and 107 were urban) were selected from twelve different strata consisting of the rural and urban portions of each division.⁷⁴ In the second stage, thirty households from each selected PSU were randomly drawn.⁷⁵ Additional purposive sampling was conducted to ensure a representative sample of ethnic and religious groups, and rural and urban households.⁷⁶ An equal number of women and men were interviewed, each representing their households.⁷⁷ All respondents were over 18, with 46% of respondents falling in the 31–50 age range.⁷⁸ Using the recall method, interviewees were asked about their experiences with the legal system between 2007 and 2009.⁷⁹ After thorough cleaning, the final sample size was 9753 households.⁸⁰ The draft survey instrument was “pilot-tested to ensure that concepts presented and the terminology used could be understood by all,” with adjustments made accordingly.⁸¹ Interviewers were then trained for several days to administer the finalized questionnaire in person at each household.⁸²

⁷¹ Akmeemana, *supra* note 1, at 8–9.

⁷² MITRA & ASSOCS., *BANGLADESH—CITIZEN’S EXPERIENCES OF THE LEGAL SYSTEM 2009: SAMPLING CHARACTERISTICS AND METHODOLOGY 1* (World Bank 2009).

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ MITRA & ASSOCS., *supra* note 72, at 2.

⁷⁹ Mitra & Assocs., *Bangladesh—Citizen’s Experiences of the Legal System 2009: Overview*, www.microdata.worldbank.org/index.php/catalog/616/study-description (last visited Sep. 2, 2014).

⁸⁰ MITRA & ASSOCS., *supra* note 72, at 1.

⁸¹ *Id.*

⁸² *Id.*

The survey asked about many types of interactions with the justice system, both civil and criminal.⁸³ For this analysis of forum choice by crime victims, we selected only the subset of households where one or more members had been victims of a crime. Questions 4.10.1 through 4.11 ask respondents about a number of specific crimes, from domestic violence to robbery to gun violence, murder, rape, ethnic violence, etc.⁸⁴ In cases where more than one crime had happened to any household member, respondents were then asked which incident was the most important to the household.⁸⁵ All subsequent questions about forum choice, case outcomes, etc. were then asked about that incident only.⁸⁶ A total of 3616 crimes were reported by 1912 households. This number may be underreported for a number of cultural reasons such as shame or education level, particularly crimes against women such as rape or dowry-related crimes, and the incident named as most serious may also be impacted by these factors. After eliminating cases where no subsequent questions about forum choice or case disposition were answered, or where a non-crime incident was listed as most important (so all subsequent questions were answered about that incident and not a crime), the final number of households in our sample was 1128. Descriptive demographics showed that our subsample reflected approximately the same demographics as the larger sample.⁸⁷

B. Variables

The dependent variable is dispute resolution forum. It contains four categories: Traditional (including private/self-help and traditional *shalish*), State/CJS (Criminal Justice System)/NGO, *both* Traditional and CJS, and—importantly—*Did Nothing*. Nearly as many people chose to do nothing as those that chose the traditional route in response to suffering a crime—a full 42% of crime victims. Of the rest, 10.82% engaged with both types of judicial fora at different points in their pursuit of redress, while only 2.66%, or 30 respondents, chose to engage in the CJS alone.

Question 12.2 captured the reasons given by individuals who did nothing.⁸⁸ 162 households said “it (the incident) was not very important,” and 117

⁸³ See generally MITRA & ASSOCS., BANGLADESH—CITIZEN’S EXPERIENCES OF THE LEGAL SYSTEM 2009: QUESTIONNAIRE (World Bank 2009).

⁸⁴ *Id.* at 10–12.

⁸⁵ *Id.* at 13.

⁸⁶ *Id.* at 13–21.

⁸⁷ See Table 1.

⁸⁸ MITRA & ASSOCS., *supra* note 83, at 18.

persons responded with “it would be useless anyway (poor person).” These were the two most common reasons given, and it is telling that so many did not even try to obtain justice simply because they perceived themselves as too poor. Even though the *shalish* system is easier and cheaper to use, it is composed of almost exclusively male members who wish to preserve their relational ties and positions of power. They are subject to bribes by corrupt “musclemen” desiring to preserve the status quo, even if victims do not need to pay bribes or fees to access *shalish*.⁸⁹

Our variable of interest is the economic harm suffered by a victim as a direct result of the crime incident. The most widely-cited literature examining the economic impacts of crime in developing countries tends to choose macro-level measures such as national spending on the judiciary and GDP.⁹⁰ Buscaglia offers a more comparable household-level measure, calculating impact on the family’s net worth by comparing income and assets before and after a civil or property-related dispute,⁹¹ but income levels were not specifically asked about in our survey. So, to measure this, we built an ordinal index using the responses to Question 8.5, which asks: “Did the incident have any economic/livelihood impact on your household?” The question is then followed by fourteen possible responses, beginning with zero impact and then including choices such as “stopped business,” “changed/quit jobs,” “reduced current or lifetime income due to death or injury” and six other crime-related responses.⁹² The others were only applicable to civil incidents.⁹³ We also included one of the items in Question 8.6: “stopped sending children to school.”⁹⁴ The full list of possible responses is found in the questionnaire, of which the respondent could choose multiple answers.⁹⁵ We took the responses and created a simple index consisting of the number of economic impacts

⁸⁹ Sumaiya Khair et al., *Access to Justice: Best Practices under the Democracy Partnership* 8–9 (The Asia Foundation, Apr. 2002).

⁹⁰ See generally Caroline C. Beer, *Judicial Performance and the Rule of Law in the Mexican States*, 48 *LATIN AM. POLS. & SOC’Y* 33 (2006).

⁹¹ BUSCAGLIA, *supra* note 7.

⁹² MITRA & ASSOCS., *supra* note 83, at 15.

⁹³ Responses excluded for inapplicability to crime and/or because they do not capture direct economic consequences were prolonged sickness due to inattention by public health care or consumption of adulterated foods, reduced household income due to crop damage from environmental factors or pesticides, time or costs from landlord/tenant disputes, land/property disputes, divorce/separation or inheritance disputes, compensation not given for land expropriated by government or private individuals, distress, loss of social respect/family name, and restricted mobility of HH members. *Id.* at 15–16.

⁹⁴ *Id.* at 16.

⁹⁵ *Id.* at 15–16.

suffered by the family. The response of “reduced current or lifetime income due to death or injury” was given a weight of two points, while all other impacts were given one point on the scale.⁹⁶ A household could theoretically have scored as high as eleven on the index (ten items, with reduced current or lifetime income weighted at two points), but the highest score manifested by any household was six. As one would expect, the distribution of values for this variable skewed towards the lower end because the variable measured the number of different economic impacts experienced, rather than the monetary value of that impact. 45.39% of respondents scored zero on the economic harm scale as a result of the crime (no harm), while 39.98% rated one and 10.64% scored two. An initial cross-tabulation of economic harm on forum choice, before controls, is shown in Table 1.

Table 1: Impact of Economic Harm on Dispute Resolution Forum Choice

Forum	Economic Harm Index (# of Harms Experienced as Direct Result of the Crime)							Total
	0	1	2	3	4	5	6	
Did Nothing	265 51.76	167 37.03	32 26.67	8 22.22	2 25.00	0 0.00	0 0.00	474 42.02
Traditional Only	209 40.82	220 48.78	58 48.33	13 36.11	2 25.00	0 0.00	0 0.00	502 44.50
CJS/State/ NGO Only	7 1.37	16 3.55	6 5.00	1 2.78	0 0.00	0 0.00	0 0.00	30 2.66
Both Trad & State	31 6.05	48 10.64	24 20.00	14 38.89	4 50.00	0 0.00	1 100.00	122 10.82
Total	512 100	451 100.00	120 100.00	36 100.00	5 100.00	0 100.00	1 100.00	1,128 100.00

Control variables added into the analysis include other crime-related variables, such as whether the crime was violent, whether the victim knew the perpetrator (and thus may have been subject to threats), and who the respondent thought *should* have been responsible for responding to and

⁹⁶ *Id.* at 15.

preventing crime.⁹⁷ According to the United States Code, a violent offense is any “that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or that, by its nature, involves the substantial risk that physical force against another person or property may be used in the course of its commission.”⁹⁸ Using this definition, which includes an implied threat of violence, only petty property theft/burglary qualifies as nonviolent of the 16 different crimes.⁹⁹ Petty property theft/burglary was also the highest frequency crime committed, comprising 52.66% of crimes in our subsample. These proportions were similar in the larger sample as well, as seen in Table 2.

⁹⁷ *Id.* at 21–22.

⁹⁸ 18 U.S.C. § 16 (2012).

⁹⁹ Some might argue that dowry solicitation, sexual harassment in public or extortion are not violent crimes, and cultural differences certainly play a role in how “violent” and “nonviolent” crimes are defined. The dominant victimization surveys, including the ICVS, do not address these crimes explicitly. *See* U.N. DEP’T OF INT’L ECON. & SOC. AFFAIRS, MANUAL FOR THE DEVELOPMENT OF CRIMINAL JUSTICE STATISTICS, at 2, 23, U.N. Doc. ST/ESA/STAT/SER.F/89, U.N. Sales No. E.03.XVII.6 (2003); JOHN VAN KESTEREN ET AL., CRIMINAL VICTIMISATION IN SEVENTEEN INDUSTRIALISED COUNTRIES: KEY FINDINGS FROM THE 2000 INTERNATIONAL CRIME VICTIMS SURVEY 89–90 (Wetenschappelijk Onderzoeken Documentatiecentrum 2000); John van Kesteren, Pat Mayhew, and Paul Nieuwbeerta, *Criminal Victimization in Seventeen Industrialised Countries. Key findings from the 2000 International Crime Victims Survey* (WODC, 2000). “Domestic violence and dowry are considered together because of a close link between them—the escalation of dowry demands over the last half century among Muslims and Christians in Bangladesh has created another manifestation of violence against women. . . . The qualitative research in this area suggests that some men explicitly claim that the inadequate dowry gives them a right to abuse their wives.” Akmeemana, *supra* note 1, 41. Mitra & Associates still separate these crime incidents from violent incidents that occur afterward, but we stick with the official code’s definition that includes implied threats. *See generally* MITRA & ASSOCS., *supra* note 72.

Table 2: Crimes experienced by survey respondents

Crime	Violent Y/N	Most Impt. Incident (as ID'd by respondent in final sample)		Total Crimes Exper. (Multiple possible per household)	
		Freq.	Percent	Freq.	Percent
Payment/Solicitation of Dowry	Y	153	13.56	463	12.80
Domestic Violence	Y	80	7.09	272	7.52
Sexual Harassment in Public Places	Y	14	1.24	45	1.24
Personal Property Theft/Burglary	N	594	52.66	1948	53.87
Robbery	Y	74	6.56	242	6.69
Mugging	Y	127	11.26	340	9.40
Extortion	Y	22	1.95	66	1.83
Kidnapping/Ransom	Y	9	0.80	20	0.55
Violence using Firearms	Y	5	0.44	13	0.36
Murder	Y	13	1.15	30	0.83
Rape	Y	5	0.44	9	0.25
Acid Violence	Y	2	0.18	4	0.11
Arson	Y	15	1.33	93	2.57
Assault by non-family member	Y	12	1.06	53	1.47
Religious/Ethnic Violence	Y	3	0.28	18	0.51
N =		1128	100.00	3616	100.00
		%Violent = 47.34		%Violent = 46.13	

For the second crime-related control variable, 27.82% of crime victims reported knowing their perpetrator prior to the incident. Finally, there was no correlation between those whom people *thought* should be responsible for responding to crime and where people actually went after experiencing victimization. Logically, if one thinks that the police should respond if one is mugged in the street, then that person would go to the police if mugged.

Sixty-six percent of respondents felt local traditional mechanisms should be responsible for crime, while thirty-two percent said it should be the criminal

justice system or the Upazila. On the surface, that reflects a mere twelve percent difference in proportion between perception and practice. However, if the system was working as citizens believed it should, then the respondents who perceived the criminal justice system to be responsible for the crime would have been the ones to use it. Crosstabulations (see Table 2) show no apparent correlation between perceived responsibility and where that individual chooses to go. For our purposes, this interesting pattern seems to imply a lack of legitimacy of Bangladesh's criminal justice system and warrants exploration in later research.

Seven socio-economic variables are also included as controls. First, gender is included. Women are thought by many to be disproportionately more victimized and discriminated against in most societies, particularly related to domestic abuse.¹⁰⁰ However, the International Crime Victimization Survey says that young men are harder to contact for interview and therefore may be under represented,¹⁰¹ so the gender variable is important to account for. Our subsample is 47.34% female and 52.66% male. Second is occupation, a categorical variable with a long list of occupations grouped into several categories including household (over 50%), agricultural, day laborer, student and professional.¹⁰² Third, education is an ordinal variable divided into categories of no education, primary, secondary and tertiary. Sixty-five percent of respondents fell in the lower two categories. Several measures for economic wellbeing were asked about in the survey, such as home construction materials, television ownership and type of lavatory, but the most easily understood and used by Mitra & Assocs. in their report is food security (Question 3.13).¹⁰³ We followed their lead and used the same measure. Fifth is religion; in this mostly Muslim country, traditional *shalish* is known to administer religious and

¹⁰⁰ See generally Ruchira Tabassum Naved et al., *Physical violence by husbands: Magnitude, disclosure and help-seeking behavior of women in Bangladesh*, 62 SOC. SCI. & MED. 2917 (2006); Khandoker Aklimunnessa et al., *Prevalence and correlates of domestic violence by husbands against wives in Bangladesh: evidence from a national survey*, 4 J. MEN'S HEALTH & GENDER 52 (2007); DEBASISH KUMAR KUNDU ET AL., BRAC RESEARCH AND EVALUATION DIVISION, UNDERSTANDING ALTERNATIVE DISPUTE RESOLUTION FOR THE RURAL WOMEN IN BANGLADESH: SOME ILLUSTRATIONS FROM BRAC HRLS PROGRAMME (2007); M. Kapil Ahmed et al., *Violent deaths among women of reproductive age in rural Bangladesh*, 59 SOC. SCI. & MED. 311 (2004).

¹⁰¹ JAN VAN DIJK ET AL., WETENSCHAPPELIJK ONDERZOEKEN DOCUMENTATIECENTRUM, CRIMINAL VICTIMIZATION IN INTERNATIONAL PERSPECTIVE: KEY FINDINGS FROM THE 2004–2005 ICVS AND EV ICS 39 (2007). These differences might be attributed to method of survey execution affecting women's comfortable level in answering, as well as whether crimes like domestic abuse or dowry are addressed by the survey at all.

¹⁰² MITRA & ASSOCS., *supra* note 83, at 15. Then, using what was collected in the survey, I created my own categories and reported the statistics I ran from the raw data based on these.

¹⁰³ MITRA & ASSOCS., *supra* note 72, at 4.

secular law.¹⁰⁴ Sixth is rural or urban location, and seventh is division or district of residence.

Two additional important influences on forum choice include bribes paid to police and others, and high fees/expenses involved with pursuing a case. In an attempt to capture this, we included measures of legal fees paid and bribes/speed money paid in the model, both measured in *taka* (local currency), using questions 14.3a and 14.3b (see Tables A3 and A4 in the Appendix). However, concerns arise with use of these variables as captured. The first is endogeneity; respondents are asked about fees and bribes paid *after* pursuing their case, rather than knowledge about this practice beforehand and the impact of that knowledge on forum choice. Other studies support this notion.¹⁰⁵ The other issue with the bribes-paid variable is that, like crime experiences, bribes-paid may be underreported for a number of reasons.¹⁰⁶ The data initially appears to show that the number of crime victims that paid fees or bribes was very small and highly skewed toward the criminal justice system, particularly when utilized in conjunction with traditional mechanisms versus on its own. This suggests that perhaps bribes solicited are higher when the two systems are in competition with one another during a case. However, the N's are very small (just fifty three respondents reported paying bribes and forty-four individuals reported high fees out of 1128 respondents). Further testing of these variables would have to include the entire sample of 9753 households, not just crime victims. However, we still feel these are important to include.

C. *The Models*

In this paper we test two models using multinomial logit with “Traditional Only” as the base outcome (choice) compared against three other choices: Did Nothing, CJS/State, and Both.¹⁰⁷ The equation below shows the corruption and fees variables in brackets to indicate their inclusion in one version of the model and exclusion in the other. Our hypothesis is that the economic harm caused by the crime event has a significant independent effect on forum choice, and our null hypothesis is that it has no independent effect.

¹⁰⁴ See MITRA & ASSOCS., *supra* note 72, at 14; ALIM & ALI, *supra* note 37, at 3.

¹⁰⁵ See generally TRANSPARENCY INTERNATIONAL BANGLADESH, CORRUPTION IN BANGLADESH: A HOUSEHOLD SURVEY—SUMMARY FINDINGS (2005); ALIM & ALI, *supra* note 37; Akmeemana, *supra* note 1.

¹⁰⁶ VAN DIJK, *supra* note 101, at 89–90.

¹⁰⁷ We also ran the model with “Do Nothing” as the base, and got similar results, but went with “Traditional Only” because theoretically we are interested in what makes people deviate from the traditional system.

$$\text{Forum} = \beta_1 + \beta_2 \text{Econharm} + \beta_3 \text{ViolentCrime} + \beta_4 \text{KnewPerp} + \beta_5 \text{ThinkResponsible} + [\beta_6 \text{FeesPaid} + \beta_7 \text{BribesPaid}] + \beta_8 \text{Education} + \beta_9 \text{Occupation} + \beta_{10} \text{FoodSecurity} + \beta_{11} \text{Gender} + \beta_{12} \text{Religion} + \beta_{13} \text{Urban} + \beta_{14} \text{Division} + \mu$$

A correlations matrix of the variables in the model showed, as expected, that the socioeconomic variables strongly correlate with one another, which is not a problem since the variables are controls. Economic harm and forum choice are strongly correlated with a value of 0.27, as is forum choice, whether the crime is violent, and fees/bribes paid. Also strongly correlated were whether the crime was violent and whether the victim knew the perpetrator (0.27), and economic harm was correlated with fees/bribes paid (0.20 in both cases). None of these are unexpected. Finally, the fees and bribes variables were strongly correlated with each other (0.59), as expected.

III. RESULTS

As shown in Table 3, economic harm shows a substantively significant independent effect on forum choice in both versions of the model. Comparing traditional (base category) vs. do nothing, each additional economic harm suffered by the crime victim *reduces* the odds of doing nothing and *increases* the odds of choosing traditional fora by 0.26:1. There was little difference between the models for this comparison, since almost no bribes were paid by crime victims to traditional fora. Gender and knowing the perpetrator were statistically significant among those who decided to do nothing, with being female and knowing the perpetrator personally both *increasing* the odds that the crime victim would do nothing about what happened to them. Bribes and fees were also significant, but the odds ratios associated were infinitesimally small, due to the very small number of crime victims who reported paying bribes and fees as well as the endogeneity problem—crime victims reported paying bribes and fees when the CJS was engaged and less often otherwise. Odds of turning to the CJS *at the exclusion of* traditional venues increased by 1.42:1 for each additional economic harm suffered when bribes/fees were included in the model and by 1.57:1 when they were not, which is opposite of what was predicted but may simply reflect endogeneity.

Increased economic harm led to *increased* use of the CJS over traditional means, despite cost prohibitiveness or traditional norms, and this is an important indicator of citizen expectations and desires when harmed by crime. For the thirty individuals who selected CJS/state alone, the significant control

variables were education, fees in the model included, and division of residence in the model where fees were not included—suggesting that some divisions may charge higher fees. It is also noteworthy that education level was the only other significant predictor for choice of CJS alone. Given that only thirty-five percent of the sample completed education above the primary level, the authors proposed that this could mean two things: that education teaches people how the state justice system works and to prefer it over traditional means or those who complete secondary education, perhaps college/university or above specifically, become personally connected to elites in the state justice system via their networks. This question merits inquiry in a future study. The odds ratio for payment of fees is subject to the endogeneity problem, since using the CJS is likely to result in more fees, but the fact that the bribery variable was *not* significant here is interesting. It may be partially due to the small number of people who reported paying bribes, or it might be for another reason explored below.

Table 3. Multinomial logit of economic harm caused by crime event on choice of forum

Forum	With Bribes/Fees Variables			Without Bribes/Fees Variables		
	Relative Risk Ratio	P-Value	Robust Standard Error	Relative Risk Ratio	P-Value	Robust Standard Error
Traditional Only (Base Outcome) Did Nothing						
Economic Harm/Crime	0.74	.001	0.07	0.73	.001	0.07
Violent/Nonviolent Crime	0.80	.165	0.13	0.81	.197	0.13
Knew Perpetrator	1.27	.050	0.16	1.28	.037	0.15
Think Responsible for Crime	0.87	.311	0.12	0.85	.241	0.12
Legal/Other Fees Paid	0.0000093	.000	0.00001			
Bribes/Speed Money Paid	0.0000038	.000	0.0000002			
Education	1.06	.469	0.09	1.06	.486	0.09
Occupation	1.08	.095	0.05	1.09	.080	0.05
Food Security	1.02	.784	0.08	1.01	.896	0.08
Sex	1.91	.000	0.33	1.87	.000	0.32
Religion	0.98	.925	0.21	0.98	.937	0.21
Rural/Urban	1.27	.214	0.24	1.27	.211	0.24
Division	1.13	.057	0.07	1.13	.058	0.07
CJS/State/NGO Only						
Economic Harm/ Crime	1.42	.068	0.27	1.57	.012	0.28
Violent/Nonviolent Crime	1.29	.517	0.51	1.43	.331	0.53
Knew Perpetrator	1.27	.200	0.23	0.90	.752	0.32
Think Responsible for Crime	0.94	.880	0.40	1.11	.786	0.42
Legal/Other Fees Paid	6.45	.000	2.09			
Bribes/Speed Money Paid	1.38	.206	0.35			
Education	2.62	.000	0.70	2.51	.000	0.65
Occupation	1.08	.647	0.17	1.11	.448	0.16
Food Security	0.93	.742	0.20	1.01	.952	0.20
Sex	1.21	.752	0.72	1.39	.538	0.73
Religion	0.23	.125	0.22	0.21	.093	0.19
Rural/Urban	2.11	.094	0.94	1.86	.133	0.77
Division	1.33	.084	0.22	1.41	.026	0.22
Used Both Traditional & CJS						
Economic Harm/ Crime	1.52	.001	0.20	1.77	.000	0.19
Violent/Nonviolent Crime	4.04	.000	1.07	4.68	.000	1.18
Knew Perpetrator	1.04	.870	0.26	0.62	.195	0.23
Think Responsible for Crime	0.96	.864	0.25	1.07	.774	0.25
Legal/Other Fees Paid	5.42	.000	1.66			
Bribes/Speed Money Paid	1.65	.019	0.35			
Education	1.74	.000	0.25	1.75	.000	0.23
Occupation	1.09	.291	0.08	1.10	.213	0.08
Food Security	1.03	.831	0.14	1.06	.668	0.14
Sex	0.86	.583	0.25	0.98	.925	0.26
Religion	0.62	.197	0.23	0.57	.102	0.20
Rural/Urban	1.55	.085	0.39	1.28	.328	0.32
Division	0.94	.499	0.09	0.96	.647	0.08
	N = 1125 Wald Chi-Square = 1808.87 P-value = 0.0000 Pseudo R ² = 0.1643 AIC = 2081.19 BIC = 2292.27			N = 1125 Wald Chi-Square = 230.33 P-Value = 0.0000 Pseudo R ² = 0.1014 AIC = 2219.52 BIC = 2400.44		

Intercepts calculated but not reported.

Finally, the odds of choosing to engage *both* fora increased by 1.52:1 for each additional economic harm when bribes/fees were included, and by 1.77:1 when they were not. Education was statistically significant for people who engaged in both fora, as well as whether the crime was violent; both increase the odds of pursuing this combination. The corruption variables were also significant in the model in which they were included. While this appears to support the idea that more bribes may be solicited when both types of fora are made to compete against one another than when the CJS is used exclusively, or that faced with paying a bribe in one institution, one would switch to the other, the number of respondents who reported paying bribes and fees is too small to draw any conclusions from this evidence.

Most striking is that in both models, if the crime is violent, the odds of a citizen pursuing his case in both the CJS and traditional mechanisms increase between *three to four times*. It is impossible to tell how this propensity fits into any sort of trend without panel data, but it is striking that a significant number of individuals fight back when the crime is violent and that they want state intervention in such cases. It also provides some initial quantitative support for Haugen and Boutros's theory, which states that a functional state criminal justice system is necessary to deal specifically with violent crime, especially for the poor,¹⁰⁸ even if they prefer *shalish* for the majority of other disputes. While the results of this study cannot necessarily be generalized beyond Bangladesh, this evidence certainly opens the door for future research.

IV. DISCUSSION: A HISTORICAL COMPARISON

If these results are to be believed, the question becomes less about crime victims' unwillingness to use the state criminal justice system, as would be the concern of organizations like the World Bank, who conducted this survey to investigate why their reforms of same have not taken root,¹⁰⁹ or even about forum choice generally. It becomes more about why a crime victim would deviate from social expectations to resolve all disputes through *shalish* and what is necessary for these individuals to trust the state criminal justice system in these types of cases. Thus, the second major part of this article will explore these issues by taking a historical look at the development of these institutions in Bangladesh to see if an explanation can be found for these unexpected results.

¹⁰⁸ See generally HAUGEN & BOUTROS, *supra* note 15.

¹⁰⁹ See Akmeemana, *supra* note 1.

Specifically, we will examine the evolution of justice institutions in Bangladesh, where *shalish* is still preferred over the state in all but the most violent or economically damaging cases, and compare that to another case where creating a more unified and less fragmented judicial system was less difficult. We then ask the following questions: What determines which institutions persist or change, particularly in countries where individuals have multiple formal and informal judicial fora from which to choose? What causal variables determine these institutions' fates, their impacts, and how people and groups interact with them to resolve disputes? How does this impact who can access justice or receive fair treatment? If results were typically unsatisfactory for women or members of marginalized groups in Bangladesh, why did they still choose *shalish* first despite rampant problems? What shapes both the nature of disputes and how people interact with judicial institutions to settle them?

Following the lead of Stephen Golub (2003), writing for DFID in the United Kingdom, we use the *Barangay* Justice System (BJS) of the Philippines as a comparison case. The purpose of these comparisons is to first trace these institutions' historical development, and then to identify structural variables that would not be captured in a survey such as the World Bank survey employed in the analyses above, but that may also be salient in shaping the menu of choices available to crime victims. The histories of both reveal that while these two cases are comparable in some ways, they are also very different, but the comparisons are still instructive for understanding the resulting interactions between informal judicial institutions and formal ones of the state.

A. *Bangladesh Shalish*

The *shalish* in Bangladesh is an age-old, unofficial dispute resolution institution that goes back hundreds of years and typically uses a blend of mediation, negotiation and arbitration to settle disputes over land, family, and minor criminal issues such as petty theft.¹¹⁰ Many Bangladeshis rely more heavily on the element of arbitration because they believe that no one will be made completely happy by the compromise of mediation.¹¹¹ Apology is a

¹¹⁰ Bashir Ahmed & Mohammad Tarikul Islam, *The Role of Union Parishad in Rural Dispute Resolution in Bangladesh: an Evaluation in the Light of People's Perception*, 3 *STUD. ON ASIA* 188, 191, 195 n.1 (2013); Amadea M. Gores, *Paving the Road to a More Free World: ADR as Sustainable Development—A Look at Bangladesh*, 9 *PEPP. DISP. RESOL. L.J.* 251, 260–61 n.2 (2012).

¹¹¹ Ahmed & Islam, *supra* note 110, at 195.

typical part of the remedy in *shalish* similar to the Philippines, but in Bangladesh the emphasis is on reconciliation that reinforces the power structure.¹¹²

Traditional *shalish* typically consists of village elders and community leaders, the members of which are involved in handling a number of public and social goods in the community.¹¹³ Despite many waves of colonialism, *shalish* received no challenge to its jurisdiction over local-level matters until the British passed the Bengal Village Self Government Act of 1919.¹¹⁴ This act established two rural, village-level justice institutions: the Union Bench and the Union Courts.¹¹⁵ These were much like today's Union Parishad. During the Pakistan period, the Muslim Family Laws Ordinance of 1961 and the Conciliation Courts Ordinance of 1961 made provisions for an Arbitration Council to operate in both urban and rural areas.¹¹⁶ Post-Independence, the Village Courts Ordinance of 1976 established courts to handle petty civil and criminal disputes.¹¹⁷ None of these ousted *shalish* in the community, although *shalish* remained unrecognized by the state.¹¹⁸

In the 1990s, as radical Islam began sweeping much of South Asia, Jaamat-e-Islami (JeI) and the Awami League took over many of the local *shalish* and expanded their traditional purview to cover several criminal matters as well as fatwas against specific individuals.¹¹⁹ Islamist groups therefore managed to significantly impact local *shalish*, leading to an increase in the issuances of *fatwas* by *shalish*, or religious edicts.¹²⁰ This particularly impacted women,¹²¹ with *shalish* serving out especially violent punishments for perceived extramarital violations or for taking advantage of women's empowerment programs at NGOs.¹²² Although this was more in line with ancient custom than *sharia* law, it served the militant Islamists' goal of political control in the countryside and the goals of local moneylenders and strongmen who wanted to keep

¹¹² See *id.* at 193.

¹¹³ GOLUB, *supra* note 7, at 6–7.

¹¹⁴ Ahmed & Islam, *supra* note 110, at 192.

¹¹⁵ *Id.*

¹¹⁶ Goresh, *supra* note 110, at 260.

¹¹⁷ *Id.* at 260–61.

¹¹⁸ *Id.* at 260.

¹¹⁹ Ali Riaz, *Traditional Institutions as Tools of Political Islam in Bangladesh*, 40 J. ASIAN & AFRICAN STUD. 171, 171 (2005).

¹²⁰ *Id.*

¹²¹ *Id.* at 184 n.3.

¹²² ALIM & ALI, *supra* note 37, at 3.

control of the peasants.¹²³ *Fatwas* were further directed toward entire organizations, such as *shalish*-enforced orders to hundreds of thousands of citizens to pull their children out of “un-Islamic” schools.¹²⁴ In 2001, the High Court declared the issuance of *fatwa* illegal, but the Islamists publicly protested and the state ultimately retreated from enforcing the ban.¹²⁵ Thus, the tie between Islamist political groups and the local *mullahs* was exposed.¹²⁶ As a result, most women prefer to handle problems within the family, because even the *shalish* is viewed as corrupting young women, since it means bringing their family issues into the public sphere.¹²⁷

Bangladesh’s current legal structure includes the state justice system as well as local religious or political leaders, government officials, and the village *shalish*.¹²⁸ Also included are NGOs active in the area that provide legal aid services¹²⁹ and they have set up their own *shalish* as fairer workarounds for traditional *shalish*.¹³⁰ Traditional *shalish* gave way in the mid-2000s, under the Village Courts Act of 2006, to a third type, a *Union Parishad*-run *shalish* (*UP-shalish*) headed by local elected officials who answer in limited form to the government but are not part of the official criminal justice system. However, citizens and UP members themselves had little knowledge of the details of the Act and how these hybrid institutions were supposed to work, and with the dismantling of the 2007-2009 Caretaker government, the brief rise of *UP-shalish* appears to have given way as people regressed back to the mean and traditional *shalish* became dominant again, although *UP-shalish* are still operating in parallel.¹³¹

While *UP-shalish* may not enforce Muslim religious laws in the same way as traditional *shalish*, many of the discrimination and bias problems of traditional *shalish* are replicated in the *UP-shalish*. *UP-shalish* provides the benefits of legal validity and written records, but the process is prolonged and

¹²³ Riaz, *supra* note 120, at 184.

¹²⁴ *Id.* at 183–84.

¹²⁵ *Id.* at 188–89.

¹²⁶ *Id.* at 177–78.

¹²⁷ Sidney Ruth Schuler, Lisa M. Bates & Farzana Islam, *Women’s Rights, Domestic Violence, and Recourse Seeking in Rural Bangladesh*, 14 *VIOLENCE AGAINST WOMEN* 326, 337 (2008); David Lewis & Abdul Hossain, *A Tale of Three Villages: Power, Difference and Locality in Rural Bangladesh*, 3 *J. S. ASIAN DEV.* 33, 39, 46 (2008).

¹²⁸ GOLUB, *supra* note 7, at 1, 3.

¹²⁹ Akmeemana, *supra* note 1, at 3–4.

¹³⁰ Zafarullah, *supra* note 49, at 1030.

¹³¹ See Ahmed & Islam, *supra* note 110, at 195.

subject to delays, bribery and political pressure.¹³² All three forms of *shalish* also continue to operate, creating multiple incarnations of *shalish* competing for “business” in the same locales.¹³³ It does appear that more people are starting to use the formal legal system, despite significant barriers to access and high transactions costs, but it is still far more common for people to *threaten* to “do case” than to actually file one, since women’s economic, physical and social wellbeing is so dependent on marriage and conformance with traditional norms.¹³⁴

B. Filipino Barangay Justice System (1978–)

Unlike the word *shalish*, which refers to a community provider of public goods, the word *barangay* refers to an ancient autonomous *social organizational unit*, like a tribal municipality or village.¹³⁵ Going back to the 11th century, the concept of *barangay* was common to a great number of tribes and ethnicities in Filipino society.¹³⁶ The *barangay* was run by the local *datu*, a wealthy person of a different class than the *timawa* (Tagalog commoner class) or the *alipin* (Tagalog slave class).¹³⁷ The title was inherited, although there was some class mobility before Spanish colonization,¹³⁸ in contrast to the history of castes in Bangladesh.

The *barangay* was co-opted by the state and made up the lowest level government, like the Bangladeshi Union Parishad (UP), during the Marcos regime.¹³⁹ They constructed an NSJS (non-state judicial system) within the *barangay* based on traditional amicable dispute settlement customs.¹⁴⁰ Like *shalish*, the BJS employs both mediation and arbitration for lower-level disputes.¹⁴¹

Given cultural emphasis on settling all but the most heinous crimes within the village and through informal means, the attempt to codify and formalize

¹³² See *id.* at 199, 203.

¹³³ See Akmeemana, *supra* note 1, at 66.

¹³⁴ See Schuler, *supra* note 128, at 337–38.

¹³⁵ See G. Sidney Silliman, *A Political Analysis of the Philippines' Katarungang Pambarangay System of Informal Justice Through Mediation*, 19 LAW & SOC'Y REV. 279, 282 n.2 (1985).

¹³⁶ See KATHLEEN NADEAU, *THE HISTORY OF THE PHILIPPINES 16–17* (Frank W. Thackeray & John E. Findling, series eds., 2008).

¹³⁷ *Id.*

¹³⁸ *Id.* at 18.

¹³⁹ Silliman, *supra* note 136, at 283.

¹⁴⁰ GOLUB, *supra* note 7, at 12–13.

¹⁴¹ *Id.* at 12–13.

barangay-level justice was initially resisted. Printed rule guides, specially-built judicial buildings, and *barangay* captain uniforms all went unused. Rules were bent if it seemed to serve justice better, such as stretching the fifteen-day period allotted before having to convene a council to allow disputants time to cool off (the same length of waiting period that resulted in opportunities for intimidation in Bangladesh), or allowing resolution at the *purok* level, which is a social unit even smaller and less formal than the *barangay* (of which there are almost 42,000), in order to avoid filing paperwork. It is common in many tribal cultures in the Philippines to view resorting to official means of dispute resolution as failure,¹⁴² also similar to Bangladesh. However, by 2009, surveys show that the state-affiliated BJS has become largely acceptable for cases that cannot be solved privately—particularly landlord/tenant and labor disputes.¹⁴³

C. NSJS Procedures Compared

Dispute resolution processes within the BJS and *shalish* are somewhat similar. Sessions take place in the captain's home or a makeshift office, very often with community members present. Proceedings begin with investigation into the facts of the case and inquiries to both sides. Levels of recordkeeping and standards of evidence vary wildly, depending on the law or local custom being upheld. In Bangladesh, this can be loud and raucous¹⁴⁴ normally ending in an arbitrated result handed down by the *shalish*, while in the Philippines all disputants must consent to the outcome. In both cases, apology and asking forgiveness are normal parts of the reconciliation process.

The contemporary Philippine BJS can involve more formalized procedures and multiple layers, if need be—for example, if the *barangay* captain does not solve the problem within fifteen days, a conciliatory panel of neighborhood residents (a *Pangkat ng Tagapagkasundo*) may be convened to settle the case, but still with no lawyers allowed, nor formal rules of evidence.¹⁴⁵ It is also *required* for people to go through the BJS first before going to the state for disputes under a certain pecuniary value, to reduce backlogs in the courts.¹⁴⁶

¹⁴² W. Timothy Austin, Conceptual Confusions Among Rural Filipinos in Adapting to Modern Procedures of Amicable Settlement, 11 INT'L J. COMP. & APPLIED CRIM. JUST. 241, 245 n.2 (1987).

¹⁴³ Simon Butt et al., *Looking Forward: Local Dispute Resolution Mechanisms in Timor Leste*, 13 (Sydney Law School Legal Studies Research Paper No. 09/33, 2009), available at <http://ssrn.com/abstract=1401105>; Silliman, *supra* note 136, at 283 n.2.

¹⁴⁴ GOLUB, *supra* note 7, at 4.

¹⁴⁵ *Id.* at 12; Silliman, *supra* note 136, at 284–85.

¹⁴⁶ GOLUB, *supra* note 7, at 13; Silliman, *supra* note 136, at 297.

The idea is to speedily restore harmonious community relationships while also providing a legitimate outlet and preventing people from going to rival political Communist or guerilla parties for justice, as well as keeping the people's focus on individual disputes rather than collective grievances.¹⁴⁷

Both NSJS institutions may have coercive powers of enforcement, but in the BJS such powers involve threatening to bring in higher courts to enforce their recognized judgments while traditional *shalish* has no binding legal authority in criminal or marriage and dowry cases.¹⁴⁸ The UP-*shalish*, however, is recognized fully by the state and thus can call on state enforcement powers as the BJS can—or at least they could until the recent Caretaker government was overthrown in 2010.¹⁴⁹ Both could be said to meet the people's social needs for face-saving, local dispute settlement *and* the state's need to maintain social control and legitimacy.¹⁵⁰ Bases of power for Bangladeshi officials have long lain in instrumental patron-client relationships, whereas BJS captains won't last long without legitimacy among the people no matter how powerful their patronage.¹⁵¹

D. NSJS Institutions: Benefits and Problems

The Bangladeshi *shalish* in all its forms (traditional, UP or NGO) and the BJS both provide a number of benefits to society, including reduction of transactions costs (both financial and time) by bringing low-cost justice to people in remote areas (increasing access), and conducting proceedings in the local language, using familiar procedures.¹⁵² Both institutions are perceived as at least partially fair—among men in Bangladesh, and among the poor in the Philippines.¹⁵³ In both cases, perceptions of fairness result from familiarity—continuity in the face of constant political upheaval in Bangladesh, and historical-cultural resonance in both countries.¹⁵⁴ Bangladeshi *shalish* also provides several public and social-insurance goods in addition to justice, and it

¹⁴⁷ *Id.* at 286, 288.

¹⁴⁸ Akmeemana, *supra* note 1, at 8; Butt et al., *supra* note 144.

¹⁴⁹ Akmeemana, *supra* note 1, at 84. See generally TALUKDER MANIRUZZMAN, *THE BANGLADESH REVOLUTION AND ITS AFTERMATH* (1980); VAN SCHENDEL, *supra* note 6.

¹⁵⁰ See generally GOLUB, *supra* note 7.

¹⁵¹ Butt, *supra* note 144, at 57–58; Silliman, *supra* note 135, at 295.

¹⁵² See GOLUB, *supra* note 7, at 6, 12; Ahmed & Islam, *supra* note 110, at 191, 193.

¹⁵³ See Fauzia Erfan Ahmed, *The Compassionate Courtroom: Feminist Governance, Discourse, and Islam in a Bangladeshi Shalish*, 25 FEMINIST FORMATIONS 157, 158 n.1 (2013).

¹⁵⁴ GOLUB, *supra* note 7, at 12.

competes with the secular state and NGOs in this area.¹⁵⁵ In the Philippines, the NSJS fills a more complementary role, in that local and state institutions are layered and divide the labor of public good provision in a way that solves the collective action problem.¹⁵⁶ Credible commitment is achieved with the availability of state enforcement of informal BJS judgments.¹⁵⁷

Different groups in both countries have promoted perceptions of legitimacy by co-opting the NSJS. By co-opting traditional *shalish*, Muslim political groups in Bangladesh solidified legitimacy and established a platform for promoting their ideas and credibly competing with the state to provide local public goods.¹⁵⁸ The Philippine BJS also provides legitimacy and an ideological platform, but for the central government.¹⁵⁹ By making the population feel heard, respected and cared for, the BJS also serves the function of state mouthpiece—communicating state objectives to the people under the direction of the Ministry of Local Government.¹⁶⁰

Problems with the Bangladesh *shalish*, mentioned earlier, include its bias against women and marginalized groups; corruption, rent-seeking, clientelism and vulnerability to local musclemen; the fact that it competes with many layered or competing institutions¹⁶¹ on civilian, state, NGO and military levels; incompetence or ignorance about local and national laws; withholding of other vital social services if disputant does not comply; and post-1991, use of violence to enforce *fatwas* and *sharia* law on individuals. UP-*shalish* has many of the same problems, but tends to impose less-harsh penalties.¹⁶² The NGO version is also based on the traditional model but encourages mediation over arbitration, provides legal training, and encourages recordkeeping and participation and protection for women.¹⁶³ While it is accessible, low-cost and fast, *shalish* is elitist and perpetuates existing power structures, extra-legal and traditional norms with little appreciation for rule of law.¹⁶⁴ Problems with the

¹⁵⁵ See *id.* at 3; see Schuler, *supra* note 127, at 338 (explaining that women were often able to use the threat of legal action in order to prevent domestic violence or reclaim their dowries).

¹⁵⁶ See Silliman, *supra* note 136, at 288.

¹⁵⁷ GOLUB, *supra* note 7, at 13.

¹⁵⁸ See Ali Riaz, *Traditional Institutions as Tools of Political Islam in Bangladesh*, 40 J. ASIAN & AFR. STUD. 171, 172 (2005).

¹⁵⁹ See Jennifer C. Franco, *Peripheral Justice? Rethinking Justice Sector Reform in the Philippines*, 36, WORLD DEV. 1858, 1860 (2008).

¹⁶⁰ See Silliman, *supra* note 136, at 284.

¹⁶¹ See generally JAMES MAHONEY & KATHLEEN THELEN, *EXPLAINING INSTITUTIONAL CHANGE* (2010).

¹⁶² See Akmeemana, *supra* note 1, at 86.

¹⁶³ Butt et al., *supra* note 144, at 58–59.

¹⁶⁴ See *id.* at 57–58.

Filipino *Barangay* Justice System mainly include patron-client dynamics, particularly the pressure that local elites and national/international business interests bring to bear on *Barangay* captains when disputants have differential financial resources, and patrimonial repressive forces such as private security and the threat of involving powerful lawyers and the state judicial system.¹⁶⁵

The various forms of *shalish* in Bangladesh and the *Barangay* Justice System in the Philippines are non-state judicial systems that are comparable on some levels, but not others. *Shalish* is the age-old, default dispute resolution institution that has survived numerous governments and waves of colonization. Its authority is not recognized by the state, and it has been co-opted in recent decades by hard-line Islamist political groups to solidify their authority in the countryside, over the secular state and against NGOs that would propagate liberal institutions, but *shalish* is also the institution that survives political upheaval again and again.¹⁶⁶ Various other forms of *shalish* have been attempted in order to dislodge the traditional, but despite all its problems, governments come and go while *shalish* remains.¹⁶⁷ The BJS is a similar system, resembling the UP-*shalish* in its relationship to the state, and also building on ancient traditions of amicable dispute settlement within the community, but rather than existing in competitive relationship with the state, the BJS acts as a complementary institution and has been largely accepted by the people since its original launch.¹⁶⁸

In the second half of this historical section, we look at variables that contributed to how the *shalish* and the BJS came into existence as institutions, why they persist, and why people interact with these institutions in the manner that they do. After this exploration, we tie these findings back to our earlier statistical analyses examining forum choice by crime victims in Bangladesh.

E. Five Structural Variables that Impact Judicial Institution Formation, Stability, and Change

In this exploratory exercise, we discuss each variable in the detail needed to understand how it may impact criminal justice forum choice, but we recommend consulting the various histories cited for more detailed description

¹⁶⁵ GOLUB, *supra* note 7, at 14.

¹⁶⁶ Riaz, *supra* note 120, at 176; Schuler, *supra* note 128, at 336.

¹⁶⁷ Ahmed & Islam, *supra* note 110; Sumon K. Chakrabarti, *Bangladesh Mutiny Ends, Mystery Remains*, IBNLIVE (Mar. 4, 2009), <http://ibnlive.in.com/news/bangladesh-mutiny-ends-mystery-remains/86374-2.html>.

¹⁶⁸ See Silliman, *supra* note 136, at 298–99.

should the reader so desire. The purpose here is not to give complete histories, but to identify salient variables for inclusion in future studies that may result from the findings here.

The five main causal variables we identified are geography, economy, colonial history, key modern historical events, and power structure and cleavages. We also studied each nation's religious composition, cultures, and forms of government, but these revealed to be of intermediate importance because they trace back to one or more of the first five variables.

1. Geography

In both Bangladesh and the Philippines, unique geographic and climate characteristics shape how people live together and relate to one another, the nature of their disputes, and their responses and objectives in solving them. Both countries have warm, tropical climates with water as central to trade, transportation and agriculture.¹⁶⁹ However, while the Philippines is composed of over 7100 islands stretching over 1150 miles off the southeast coast of mainland China, between Brunei and Indonesia to the south and Taiwan to the north,¹⁷⁰ Bangladesh lies in the delta of the Ganges, Brahmaputra and Meghna rivers on the Bay of Bengal.¹⁷¹ It is the floodplain for snow and glacier melt from the Himalaya and is also subject to floods from rising sea levels.¹⁷² More than seventy percent of the country can be underwater during the peak of monsoon season. People are used to this, but force and duration of the floods can be very destructive of crops and property.¹⁷³ The result is constantly moving frontiers between land and water in this densely populated country (over 1000 people per square kilometer).¹⁷⁴ People end up building on swamps and may often be on the move in response to flood, continually exposed to danger.¹⁷⁵ This has led to a transience in settlements and village life that has manifested in continually shifting alliances and fragmented Bangladeshi

¹⁶⁹ JAMES K. BOYCE, *AGRARIAN IMPASSE IN BENGAL: INSTITUTIONAL CONSTRAINTS TO TECHNOLOGICAL CHANGE* 2–3 (1987); NADEAU, *supra* note 137, at xi.

¹⁷⁰ LUIS H. FRANCA, *A HISTORY OF THE PHILIPPINES: FROM INDIOS BRAVOS TO FILIPINOS* (2010); NADEAU, *supra* note 137, at xi.

¹⁷¹ BOYCE, *supra* note 170, at 3.

¹⁷² VAN SCHENDEL, *supra* note 6, at 3.

¹⁷³ *Id.* at 7.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

politics, village lines, and institutions which make it difficult for the state to influence or control much beyond the capitol.¹⁷⁶

Further, this constant movement combined with very dense populations even in rural areas (up to five different tenants on the average two-acre farm) means that competition over scarce resources can be intense and that conflicting parties are forced into close physical proximity¹⁷⁷ in contrast to the Philippines, where their island nature means that disputing parties can simply stay away from one another and cool down in the face of conflict.¹⁷⁸ Climate change has resulted in less glacier runoff during the summer melts in South Asia, and this combined with India's decision to siphon off more fresh water before rivers enter Bangladesh, threatens Bangladesh's food security.¹⁷⁹ This means that water management problems are a critical source of disputes, on top of the land, labor and tenancy disputes that occur in both countries.¹⁸⁰ One might hypothesize that these geographical, structural characteristics provide part of the explanation for why Bangladeshi dispute resolution is instrumental, competitive, and non-trusting in nature while in the Philippines, people tend to seek more harmonious outcomes. These geographic influences have clear implications for how each country's judicial system evolved. This finding is in line with Sachs' earlier proposition that geography is a determinant of economic and institutional development, although we do not put forth any prediction one way or the other whether geography determines if formal or informal institutions will be dominant in a given society based on these analyses. This is worth exploring in future studies.

2. *Economy*

Bangladesh and the Philippines, given their lush, fertile climates, are both rice cultures.¹⁸¹ Other crops include sugar and tobacco in the Philippines¹⁸² and jute in Bangladesh.¹⁸³ Pre-colonialism, people on the islands of the Philippines worked cooperatively in trade relationships with each other and throughout

¹⁷⁶ BOYCE, *supra* note 170. See generally Maitreyi B. Das & Vivek Maru, *Framing Conflict and Justice in Bangladesh* (The World Bank, Policy Research Working Paper No. 5781, 2011).

¹⁷⁷ BOYCE, *supra* note 170, at 38. See generally Das & Maru, *supra* note 177, at 9–10.

¹⁷⁸ NADEAU, *supra* note 137, at 1.

¹⁷⁹ See VAN SCHENDEL, *supra* note 6, at 243, 250.

¹⁸⁰ BOYCE, *supra* note 170, at 46–47; NADEAU, *supra* note 137, at 72; VAN SCHENDEL, *supra* note 6, at 3–7.

¹⁸¹ BOYCE, *supra* note 170, at 1.

¹⁸² SAMUEL K. TAN, *HISTORY OF THE PHILIPPINES* (1987).

¹⁸³ BOYCE, *supra* note 170, at 4.

Southeast Asia, while different tribes still maintained their individual identities and traditions.¹⁸⁴ Today the Philippines have a liberal market economy and a history of cooperative relationships.¹⁸⁵ Industrially, they participate in light manufacturing for export.¹⁸⁶ A large proportion of Filipino companies are held by a few families, however, that also control Congress.¹⁸⁷

Economic disputes thus center on land, natural rights and labor disputes.¹⁸⁸ Provisions have been made in the 1987 Filipino Constitution, however, to protect communal land rights of indigenous groups in a number of different circumstances.¹⁸⁹ This has offered beneficial protections to tribal groups, though the list of exceptions is the source of many disputes.¹⁹⁰ Fishing and lumbering without replanting led to massive deforestation by end of 20th century, which means that typhoons now have more devastating impacts than they used to.¹⁹¹ The country has high literacy rates and receives high remittance income from people working abroad, and thirty-four percent of Filipinos live in poverty.¹⁹²

By contrast, over eighty percent of Bangladeshis live on less than \$2.00 USD per day.¹⁹³ Agriculture comprises over seventy percent of the economy, with rice production accounting for seventy percent of that.¹⁹⁴ As well, Bangladesh's textile industry, with its highly-skilled, plentiful and cheap labor, remains as significant to Bangladesh's economy today as it did when Ibn Battuta and Bernier explored the region between the 14th and 17th centuries.¹⁹⁵

Private property rights were not common in Bengali culture originally, but with the arrival of the British and land disputes became a major source of conflict.¹⁹⁶ The resulting disarticulation of farmland into smaller and smaller pieces, combined with the tendency of landlords to extract rents only and not

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at xiv.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ Franco, *supra* note 160; NADEAU, *supra* note 137.

¹⁸⁹ NADEAU, *supra* note 137, at 95–96.

¹⁹⁰ *Id.*

¹⁹¹ NADEAU, *supra* note 137, at xii.

¹⁹² *See id.* at xiv.

¹⁹³ *See* World Bank, *supra* note 44.

¹⁹⁴ BOYCE, *supra* note 170, at 1.

¹⁹⁵ *Id.* at 3–4.

¹⁹⁶ *Id.* at 26.

to invest, hindered technological advancement in agriculture.¹⁹⁷ Related, collective water management is also thwarted as powerful landlords siphon off the maximum possible from state-provided irrigation that is supposed to be shared by all farmers—self-interest is favored over group interest, and public management of collective goods has been stymied.¹⁹⁸ Power is seen as a zero-sum game, and this manifests also in how disputes are viewed and resolved—arbitration between individual, group, and class interests is preferred to mediation that seeks a compromise.¹⁹⁹ Adam Smith’s “invisible hand” does not work here, as stronger groups exercise resource extraction resembling stationary banditry to control resources takes precedence.²⁰⁰ We see here that economic structure is a determinant of the shape that criminal proceedings will take and cultural preferences for types of solutions, but again we cannot predict whether economics alone will determine preference for formal or informal structures, beyond whether there is a preference for private or communal property rights. This, too, is worth testing in future studies.

3. Colonialism

Colonialism played out in Bangladesh very differently than it did in the Philippines. As an East-West thoroughfare, the Bengal region was colonized repeatedly for over 2000 years by everyone from Ethiopians to Turks and Afghans.²⁰¹ The most recent empire before the British came was the Muslim Mughal Empire, which ruled from the 17th through the 18th centuries.²⁰² Others, such as the Portuguese, Dutch, French, and many others, simply set up large trade operations in the ports but did not attempt full colonization.²⁰³ It is important to note that Bangladesh is used to having large numbers of diverse people moving in and out of the region as economic and military forces, and

¹⁹⁷ See generally TIMUR KURAN, *THE LONG DIVERGENCE: HOW ISLAMIC LAW HELD BACK THE MIDDLE EAST* (2010).

¹⁹⁸ ELINOR OSTROM, *UNDERSTANDING INSTITUTIONAL DIVERSITY* (2005); BOYCE, *supra* note 170; VAN SCHENDEL, *supra* note 6.

¹⁹⁹ SUMAIYA KHAIR, *LEGAL EMPOWERMENT FOR THE POOR AND THE DISADVANTAGED: STRATEGIES, ACHIEVEMENTS, AND CHALLENGES: EXPERIENCES FROM BANGLADESH* 8 (2008); Alim & Ali, *supra* note 37, at 4.

²⁰⁰ See generally Mancur Olson, *Dictatorship, Democracy, and Development*, 87 *AM. POL. SCI. REV.* 567 (1993).

²⁰¹ VAN SCHENDEL, *supra* note 6, at 33.

²⁰² *Id.* at 49.

²⁰³ See *id.* at 43.

that the Eastern part of Bengal (which is what would eventually split off to become Bangladesh) was deeply penetrated by and converted to Islam.²⁰⁴

In 1764, the British East India Company officially declared victory over the Mughals in Bangladesh, and they switched the official language of government from Mughal to English and introduced private property rights—previously, land could not be bought or sold.²⁰⁵ Under the Mughals, peasants held the right to till the soil while the landlords, or *zamindars*, held the right to collect taxes²⁰⁶ in the same way that Muslim settlers did in the Philippines during the same period.²⁰⁷ In Permanent Settlement Act of 1793, however, the British gave actual land ownership to the *zamindars* and required *them* to pay an annual tax under penalty of having their land seized and auctioned off if they fell into arrears.²⁰⁸ Under this foreign system, but the *zamindars* did not become economic managers that would grow the tax base, as the British had envisioned, but rather they extracted the rents, re-leased the lands to mid-level landlords, and further squeezed the peasantry despite British implementation of executive, judiciary, and police institutions meant to facilitate economic growth.²⁰⁹ Instead, development was stifled and nationwide famine arrived by 1776.²¹⁰ Thus, we can see that rent-seeking and instrumental behavior with regard to dispute resolution in Bangladesh is not a new phenomenon, but runs deep and goes back centuries as a political *modus operandi*. Former smallholders became mere tenants that could be evicted at any time, and they could transfer tenancy only by inheritance.²¹¹ Under partible inheritance laws, this meant continual subdivision of land into smaller and smaller plots and disarticulation of wealth.²¹²

Beginning in the colonial period, a few key events occurred that left irrevocable marks on Bangladesh, impacting how people dealt with one another in dispute situations. First, the British split Bengal into East and West

²⁰⁴ *Id.* Religion in both Bangladesh and the Philippines appears important because of how it has been used as a political tool, so we choose not to analyze it as a causal force separate from colonialism or power structure, but rather as a tool used by them to achieve various goals.

²⁰⁵ *Id.* at 56, 59, 64.

²⁰⁶ BOYCE, *supra* note 170, at 5.

²⁰⁷ NADEAU, *supra* note 137; TAN, *supra* note 183.

²⁰⁸ VAN SCHENDEL, *supra* note 6, at 58–59.

²⁰⁹ BOYCE, *supra* note 170, at 5.

²¹⁰ *Id.* at 8.

²¹¹ VAN SCHENDEL, *supra* note 6, at 59.

²¹² *Id.* at 63.

Bengal in 1905 with the intent to divide and rule.²¹³ Vocal opposition came from Kolkata in the West, since this division of governance interrupted jute, tea and other industries in the East that were managed by absentee owners living the high life in Kolkata; flood control, power supply, and seasonal water distribution mechanisms were also disrupted.²¹⁴ Partition split the largely Muslim East from the largely Hindu West, solidifying Muslim and Hindu into clear *political* categories, with the division amplified by the clear preference the British showed to Hindus.²¹⁵ The Muslims in the East established Dhaka as their new capital, with its own new governing institutions, while Hindu nationalism grew in the West.²¹⁶ Educated rich Muslims and the uneducated poor stereotyped each other as dangerous or exploitative, which played itself out in conflict.²¹⁷

In the Philippines, the colonial story was quite different. Owing to its island geography, the Philippines held a variety of trade relations with different Hindu and Buddhist-oriented polities, as well as with the Chinese, and Islam arrived between the 12th and 14th centuries courtesy of Arab and Persian traders and slavers.²¹⁸ However, they were not actually colonized until the 16th century, when the Spanish brought the economic institutions of *encomiendas*, *haciendas*, taxation, monopolies, and *polos y servicios* (forced labor), as well as Roman Catholic Christianity.²¹⁹ *Encomienda* land ownership only benefited the Spanish, and included rights over the people on the land as well as the land itself; prior to the arrival of the Spanish, the idea that land could be owned by anyone was thought ludicrous.²²⁰

The profitable Filipino trade networks were also taken over by the Spanish, but due to lack of personnel, administration of political power was split between the Spanish and the locals, with a ceiling on upward mobility by locals.²²¹ The Spanish found the preservation of certain local structures efficient in terms of exacting taxes, and engaged members of the Chinese

²¹³ *Id.* at 79.

²¹⁴ MAHMUD S. ALI, UNDERSTANDING BANGLADESH (2010).

²¹⁵ See generally Lamia Karim, *Democratizing Bangladesh: State, NGOs, and Militant Islam*, 16 CULTURAL DYNAMICS 291 (2004). See also VAN SCHENDEL, *supra* note 6, at 80–81.

²¹⁶ VAN SCHENDEL, *supra* note 6, at 81.

²¹⁷ *Id.* at 83.

²¹⁸ NADEAU, *supra* note 137, at 5–6.

²¹⁹ TAN, *supra* note 183, at 31–33.

²²⁰ See NADEAU, *supra* note 137, at 28, 30; FRANCA, *supra* note 171, at 72.

²²¹ ANDREW WILSON, AMBITION AND IDENTITY: CHINESE MERCHANT ELITES IN COLONIAL MANILA, 1880–1916, at 28–35 (2004).

minority in the practice tax farming since they were familiar with it from China.²²² Meanwhile missionaries of the Roman Catholic Church (RCC) served numerous other political administrative functions related especially to social control, via propagation of unified normative standards and administration of judiciary and policing.²²³ Due to Chinese Confucian influence and historical inter-tribal cooperation norms, ideas of duty and law-abiding were not foreign to tribal Filipinos.²²⁴

The group of tribes that became known as the *Indios* found outward assimilation into Christianity to their benefit, eventually blending it with local traditions into a folk Christianity by about 1900.²²⁵ The *Moros* opposed the Spanish from the beginning and maintained their Islamic faith in the southern part of the country.²²⁶ Other tribal groups, or *Infieles*, simply withdrew and stayed on their islands and interacted as little as possible with the Spanish.²²⁷ This kind of geographic withdrawal was simply not possible in most of Bangladesh, because of crowding and because flooding forces people to move. Thus, allowing Filipinos to maintain or transform their identities, rather than suppressing them, was important for institutional development pathways. The result was a “partial Hispanization”²²⁸ and a pattern of adaptive institutional behavior.

In the Treaty of Paris in 1898, Spain ceded the Philippines to the United States as part of the peace settlement after the Spanish-American War—despite independence movements that were active in the archipelago.²²⁹ The American response to these movements was military suppression, despite their peace overtures and lip service paid to establishing self-government in the Philippines, the dominant strategy was divide and rule.²³⁰ The Philippines were devastated by World War II, after which the Americans pulled out, but they

²²² *Id.* at 30.

²²³ *Id.* at 32.

²²⁴ WILSON, *supra* note 222.

²²⁵ FRANCIA, *supra* note 171, at 94–95.

²²⁶ NADEAU, *supra* note 137, at 27.

²²⁷ *Id.* at 27–31.

²²⁸ JOHN D. BLANCO, FRONTIER CONSTITUTIONS: CHRISTIANITY AND COLONIAL EMPIRE IN THE NINETEENTH CENTURY PHILIPPINES 12 (2009).

²²⁹ RICK BALDOZ, THE THIRD ASIATIC INVASION: EMPIRE AND MIGRATION IN FILIPINO AMERICA, 1898–1946, 21 (2011).

²³⁰ *See id.*

rebounded economically until the rise of the Marcos military dictatorship in the 1960s.²³¹

So, we see that despite the Christianization of the Philippines and the tensions with the Islamist minority factions in the South, colonialism did not decimate identities quite as thoroughly in the Philippines as it did in Bangladesh, and it did not destroy norms of cooperation and conciliation that seem absent in much of Bangladesh today. Both countries were exploited and subjugated by their colonizers, but whereas Bangladeshis define themselves by who they are *not*, (*not* Indian, *not* Pakistani, *not* Hindu), Filipinos tend to see more commonalities between groups while still maintaining their historical tribal traditions—even if those traditions have been transformed by the colonial experience. Bangladeshis have also had to rebuild state institutions from scratch with each regime change, with only the unaffiliated *shalish* remaining a constant for dispute resolution, while Filipinos seem better able to adapt imported institutions to local conditions so that they do not need to start from scratch with every regime change. These pre- and post-colonial legacies align with our earlier discussions about how the shape of pre-colonial institutions can impact post-colonial outcomes,²³² and about how closely institutions are viewed as respectful and inclusive of identities and customs versus imposed by an unwanted colonial power can greatly impact the success of reforms.²³³

4. *Key Events in Post-Colonial History*

After World War II, colonial powers around the world pulled out of their colonies, with mixed consequences. In the Philippines, the two decades following the end of the war brought economic boom but uncertain political structures.²³⁴ In 1966, Ferdinand Marcos rose to power in the name of reclaiming Filipino culture and sovereignty, but instead ushered in constitutional authoritarianism, clientelist politics and military dictatorship by 1972.²³⁵ As part of his regime's larger strategy to solidify power and quiet

²³¹ See SAMUEL K. TAN, *A HISTORY OF THE PHILIPPINES* (1987); EPIFANIO SAN JUAN, JR., *TOWARD FILIPINO SELF-DETERMINATION: BEYOND TRANSNATIONAL GLOBALIZATION* (2009); NADEAU, *supra* note 137.

²³² Daron Acemoglu & Simon Johnson, *Unbundling Institutions*, 113 *J. POL. ECON.* 949, 953, 960, 971 (2005).

²³³ Sally Engle Merry, *Legal Pluralism*, 22 *LAW & SOC. REV.* 869, 869–70; Peter J. Boettke et al., *Institutional Stickiness and the New Development Economics*, 67 *AM. J. ECON. AND SOC.* 331, 331 (2008).

²³⁴ See BENJAMIN T. TOLOSA JR., ed., *SOCDEM: FILIPINO SOCIAL DEMOCRACY IN A TIME OF TURMOIL AND TRANSITION, 1965–1995* (2011).

²³⁵ *Id.* at 2.

insurrectionary movements, Marcos instituted the BJS in 1978.²³⁶ Marcos was ousted by peaceful revolution in 1986, in the name of rooting out graft and corruption, defending democratic institutions, and harnessing latent energy into same while limiting the growth of the opposing Communist movements,²³⁷ but the BJS survived.

Youth especially were disaffected by patronage politics at the national level, and this is where the still-powerful influence of Catholic social justice teaching served as political glue for many to stick to democratic ideals.²³⁸ The 1986 fall of Marcos had particularly raised questions of how to incorporate indigenous people's concerns and ideas into formal political institutions.²³⁹ They were successful in protecting certain indigenous land and resource rights in the constitution, and used the established BJS to help maintain continuity with past tradition and to bridge local institutions, the state, and civil society.²⁴⁰ The Philippines has had a constitutional, multiparty, presidential system of government with three branches including executive, bicameral legislature, and Supreme Court since 1987.²⁴¹

Bangladesh was also under transformation at this time, although at the end of WWII it was still known as East Bengal.²⁴² Soon after the British pulled out of India in 1947, Bangladesh and Pakistan entered into their own bloody secession conflict against India in order to create a Muslim homeland.²⁴³ Despite the 1000-plus miles of Indian subcontinent separating them geographically, East Bengal and Pakistan established themselves as East and West Pakistan in 1948.²⁴⁴ An experiment in long-distance state-making, these two territories had to build completely new institutions, and yet they disagreed on everything from the official language to which Muslim factions were "most pure."²⁴⁵ By 1952, they experienced a rupture, and a bloody conflict between them ended in the establishment of Ayub Khan's military dictatorship in 1958

²³⁶ See Silliman, *supra* note 136, at 279.

²³⁷ NADEAU, *supra* note 137, at 93.

²³⁸ See TOLOSA, *supra* note 235, at 2–3.

²³⁹ See generally KEN FULLER, A MOVEMENT DIVIDED: PHILIPPINE COMMUNISM, 1957–1986, 393 (2011).

²⁴⁰ *Id.* at 395; Franco, *supra* note 160, at 1861; GOLUB, *supra* note 7, at 13–15.

²⁴¹ See TOLOSA, *supra* note 235; KEN FULLER, A MOVEMENT DIVIDED: PHILIPPINE COMMUNISM, 1957–1986 (2011); TAN, *supra* note 183; NADEAU, *supra* note 137.

²⁴² See generally ALI, *supra* note 215, at 2.

²⁴³ TALUKDER MANIRUZZAMAN, THE BANGLADESH REVOLUTION AND ITS AFTERMATH 5 (1980).

²⁴⁴ See generally MANIRUZZAMAN, *supra* note 244.

²⁴⁵ See *id.* at 15, 54–57.

and a complete distrust of power in East Pakistan.²⁴⁶ Politics in East Pakistan became polarized between left and right: the Awami League, spearheaded by Sheikh Mujibur Rahman, was fairly conservative and did not envision big changes for Bangladesh, while leftists included the National Awami Party with its separate pro-China and pro-USSR factions.²⁴⁷ State demands to consolidate lands in both East and West Pakistan were resisted due to partible inheritance norms, which led to agricultural stagnation and dependence on foreign aid.²⁴⁸

Pakistan's experiment in state-making ended when Bangladesh achieved independence in 1971.²⁴⁹ Before ending, the conflict brought out latent internal cleavages along gender lines and with minority ethnic and religious groups.²⁵⁰ It also gave expression to local vendettas, personal scores, regional variations in nationalism, and population displacement—all in the shadow of Indo-Pakistani politics, monsoon season, and the Cold War.²⁵¹ The war had also broken the barrier between civilians and military—*jawans* and officers fought side by side with students and activists.²⁵² Islam was used to unite the people although politics in Bangladesh were more secular at that time than they were in Pakistan.²⁵³ Indian intervention to help Bangladeshis expel the Pakistanis and end the war, due to desire to end refugee flows and minimize instability, turned it into an international conflict with a patron-client dimension²⁵⁴ and also thwarted the potential for the Bangladeshi revolution to have been a complete social revolution²⁵⁵ with completely transformed institutions, and not just a war for independence. Radicals saw Indian intervention as an interference with political development even while it brought an end to the slaughter.²⁵⁶

After the war, Awami League leader Sheikh Mujibur Rahman was released from Pakistani prison, returned to Bangladesh, and made president.²⁵⁷ He

²⁴⁶ ALI, *supra* note 215, at 17; MANIRUZZAMAN, *supra* note 244, at 10.

²⁴⁷ MANIRUZZAMAN, *supra* note 244, at 19.

²⁴⁸ See VAN SCHENDEL, *supra* note 6, at 179.

²⁴⁹ ALI, *supra* note 215, at ix.

²⁵⁰ See generally MANIRUZZAMAN, *supra* note 244.

²⁵¹ See generally MANIRUZZAMAN, *supra* note 244.

²⁵² See generally MANIRUZZAMAN, *supra* note 244.

²⁵³ *Id.*

²⁵⁴ See generally RICHARD SISSON & LEO E. ROSE, WAR AND SECESSION: PAKISTAN, INDIA, AND THE CREATION OF BANGLADESH 4 (1990).

²⁵⁵ See generally THEDA SKOCPOL, STATES AND SOCIAL REVOLUTIONS: A COMPARATIVE ANALYSIS OF FRANCE, RUSSIA AND CHINA (1979).

²⁵⁶ SISSON & ROSE, *supra* note 255, at 44.

²⁵⁷ *Id.* at 3.

committed (in public) to parliamentary democracy, nationalism, secularism, and socialism in the new government, and reconstruction efforts were internationally financed.²⁵⁸ Politically unstable Indian regions surrounding Bangladesh, with various leftist and other groups fighting for their own independence, also threatened to upset Bangladesh.²⁵⁹ Institutions were weak and disorganized and struggled to cope with post war challenges. Government mismanagement led to falling real incomes, massive inflation, famine, and mass disappointment with the Awami League, whose charismatic image did not make up for inexperience in government, internal political dysfunction and patronage networks. Elections were rigged, general strikes reappeared, and politics took to the streets. After Sheikh Rahman's assassination, various military dictator regimes followed, interrupted by a parliamentary democracy that lasted from 1990-2006.²⁶⁰ The military is more trusted and keeps order in between governments and elections, however, and routinely takes over during periods of instability even though the constitution calls for democratic institutions and independent judiciary.²⁶¹

Thus, in contrast to the adaptive nature of the Philippines with regard to institutions, Bangladesh seems to be in the position of continually starting over and requiring military intervention whenever the most recent patronage-based regime changes. National and international NGOs, such as BRAC, fill many public service gaps and have been seen by some to be states-within-states.²⁶² As recently as 2010, the transitional Caretaker regime was also overthrown for corruption, and the progress made in bridging formal and informal dispute resolution via the UP-*shalish* was at least partially undone—it is too early to tell.²⁶³ But again, while regimes (and accompanying state judicial institutions) come and go, non-state traditional *shalish* remains.

5. *Power Structure*

The deeper one goes into these histories, the power structures in Bangladesh and the Philippines start to reveal themselves, and with them, group and individual motivations behind dispute resolution behavior. As

²⁵⁸ *Id.* at 3–4.

²⁵⁹ See VAN SCHENDEL, *supra* note 6, at 175.

²⁶⁰ ALI, *supra* note 215, at 189.

²⁶¹ VAN SCHENDEL, *supra* note 6; SISSON & ROSE, *supra* note 255; ALI, *supra* note 215. See generally BOYCE, *supra* note 170.

²⁶² VAN SCHENDEL, *supra* note 6, at 150.

²⁶³ Akmeemana, *supra* note 1, at 65.

mentioned above, there are more than fifty different tribes or ethnicities in the Philippines, but in modern politics they have typically grouped together between the Christianized *Indios* in the North, the mostly Muslim *Moros* in the South, with a mix in the middle islands between the first two groups and the *Infieles*, or largely Malay indigenous groups that do not fall into the first two categories and which amount to about twenty percent of the population.²⁶⁴ The Chinese are the largest ethnic minority and own a disproportionately large proportion of business holdings, given their population size.²⁶⁵

Previously, the Roman Catholic Church acted alternately as an agent of the colonial state, or as a check on the state's power such as when the Spanish wanted the missionaries to force everyone to speak Spanish instead of their local languages, and the Church's teaching about and participation in social justice activities is still important today.²⁶⁶ Before the Spanish arrived, men and women were relatively equal and simply separated work roles in a complementary rather than competitive fashion, but the Spanish and the RCC kicked women out of leadership positions they formerly held.²⁶⁷ The biggest interreligious conflict presently is actually political in nature, with the Muslim *Moros* more interested in political and ethnic self-determination than in the religious conversion of others.²⁶⁸ The usual rich-poor divides exist, with a small, oligarchical upper class that controls most business and the national government, and the lower classes, which tend to band together on a number of issues—particularly land and labor disputes.²⁶⁹ The Philippines had maintained a culture of “ancient liberties,” and today emphasizes trans-ethnic membership in society with simultaneous cultures of preservation and strong oral historical traditions within each tribe.²⁷⁰ While the BJS certainly has a number of problems, particularly patron-client relations between *barangay* captains and industry that manifest when disputants in a conflict are from different classes, it is still a helpful institution for dealing with disputes between people of equal status.²⁷¹

²⁶⁴ NADEAU, *supra* note 137, at xi–xii.

²⁶⁵ *See id.*; AMY CHUA, WORLD ON FIRE: HOW EXPORTING FREE MARKETS AND DEMOCRACY BREEDS ETHNIC HATRED AND GLOBAL INSTABILITY 3 (2002).

²⁶⁶ *See generally* BLANCO, *supra* note 229.

²⁶⁷ FRANCIA, *supra* note 171, at 69–75; NADEAU, *supra* note 137, at 27.

²⁶⁸ Julkipli M. Wadi, *Islamic Nationalism and Philippine Politics*, in PHILIPPINE POLITICS AND GOVERNANCE: CHALLENGES TO DEMOCRATIZATION AND DEVELOPMENT 89–104 (Teresa S. Encarnacion Tadem and Noel M. Morada eds., 2006).

²⁶⁹ *See* TAN, *supra* note 183, at 61–65.

²⁷⁰ *Id.* at 74.

²⁷¹ Wadi, *supra* note 269, at 89–104.

A number of volatile, interacting cleavages are at play in Bangladesh, however. On the agrarian front, hoe farmers cultivating on temporary plots in the hill regions compete with settled, irrigated plough agriculture that involved clearing of forest over water resources and ability to expand their plots.²⁷² With the end of the frontier in the 19th century, competition played itself out via intensification of production on existing land, encroachment on areas belonging to other ethnic groups in India and Burma, and ethnic movements against Bangladeshi immigrants to these regions continue today.²⁷³ On the state front, urban areas sprung up once there was enough settled agriculture to support them, but state institutions did not often beat out village institutions until well after British military defeat. Even today, alliances between political groups and village leaders are often small-scale, fragile, and changeable.²⁷⁴ Worse, political leaders change parties or alliances at the drop of a hat, depending on who is in power at the moment, which further erodes public confidence.²⁷⁵

On the religious front, the Bengal region has a Sanskritic heritage of Hinduism, Jainism and Buddhism, and even now some regional deities still survive alongside Allah.²⁷⁶ This may have something to do with why Pakistanis felt that Bengali Muslims required “purification” during their rule. Islam entered in two waves: first by sea, with the Arab and Persian traders that also brought it to the Philippines between the 8th and 12th centuries, and second by land when Turkish invaders brought it in the 13th century.²⁷⁷ By the arrival of the Mughals in the 16th century, most Bengalis had adopted Islam as their religion, unlike the rest of India and unlike the Philippines.²⁷⁸ In Bengal, Islam became associated with wet-rice plough cultivation implemented by the Mughals to deal with changing river channels and to collect more taxes.²⁷⁹

These overlapping cleavages led to multi-layered identities in Bangladesh, with tensions greatest between people who identify stronger with their Muslim or with their secular Bengali heritages (which manifests in differences regarding religious and state institutional legitimacy), and between mobile and

²⁷² See VAN SCHENDEL, *supra* note 6, at 67.

²⁷³ ALLI, *supra* note 215, at 266, 267.

²⁷⁴ VAN SCHENDEL, *supra* note 6, at 251–53, 260–63.

²⁷⁵ See Farid Hossain & Tim Sullivan, *Bangladesh Owner Is at Nexus of Politics, Business*, YAHOO! NEWS (Apr. 28, 2013), <http://news.yahoo.com/bangladesh-owner-nexus-politics-business-051832391.html>.

²⁷⁶ ALLI, *supra* note 215, at 12; VAN SCHENDEL, *supra* note 6, at 26–27.

²⁷⁷ VAN SCHENDEL, *supra* note 6, at 27.

²⁷⁸ *Id.* at 28–31.

²⁷⁹ *Id.* at 30.

sedentary peoples when groups are forced by floods to move.²⁸⁰ Women, the poor, and non-Muslims get caught in the crossfire of these tensions when they engage *shalish* or state judicial institutions, particularly with the rise of more Taliban-style Islamic nationalism since the 1990s; disputes tend to be over local control of land, political power framed as religious propriety, control of women (almost as property), and water management for agriculture.²⁸¹ Corruption and rent-seeking is standard operating procedure in Bangladesh, going back centuries as mentioned, and conspiracy theories abound as to who is responsible for what corruption.²⁸² Conflict often turns bloody when it gets out of hand, sometimes in the guise of bringing “war criminals” and corrupt politicians to justice as it did when the Bangladesh Rifles (BRD) attempted to oust the recent Caretaker government.²⁸³ This contributes to lack of public confidence in formal institutions and bitter resentments due to consistent gaps between stated objectives of authorities and what actually happens.²⁸⁴

Part V examined a number of variables that influenced the formation of the Bangladeshi *shalish* and the Filipino *Barangay* Justice System. These included each nation’s geography, economy, colonial history, key modern historical events, and power structure and cleavages. Religious composition, cultural factors, and forms of government were also discussed with regard to how they fit into the context created by the five main variables. Table I summarizes the previous section, showing each variable, the level of analysis, its general value, and whether comparisons of the two cases on it are useful. In Part VI below, we propose how these variables should be incorporated into future studies of judicial forum choice among crime victims.

²⁸⁰ See ALI, *supra* note 215, at 284–87; VAN SCHENDEL, *supra* note 6, at 37–38, 39.

²⁸¹ ALI, *supra* note 215, at 309–18.

²⁸² M.B. Kashem, *The Social Organization of Police Corruption: The Case of Bangladesh*, in POLICING CORRUPTION: INTERNATIONAL PERSPECTIVES 237–46 (Rick Sarre, Dilip K. Das & H.J. Albrecht, eds., 2005).

²⁸³ Sumon K. Chakrabarti, *Bangladesh Mutiny Ends, Mystery Remains*, IBNLIVE (Mar. 4, 2009), <http://ibnlive.in.com/news/bangladesh-mutiny-ends-mystery-remains/86374-2.html>.

²⁸⁴ ALI, *supra* note 215, at 224–25.

Table 4: Variable Summary in terms of Building a Theoretical Model

Variable	Level of Analysis/ Impact on individuals	Impact on Philippines BJS	Impact on Bangladesh <i>shalish</i>	Comparable / Variation Useful? Other variables impacted?
Geography	Structural	Island structure shapes nature of disputes, cultural response by giving people space to maintain identities.	Water issues causing pop. mobility, centrality on trade routes → conflict	Yes. Impacts culture, economy, colonial history
Economy	Structural	Rice agriculture, sea trade networks within Philippines & SE Asia, light mfg. for export after colonialism	Rice and labor intensive farming culture, textile industry, overcrowding on land, partible inheritance → conflict	Yes. Impacts colonial structure, culture, cleavages, & institutional structure
Colonial History	Group-level	Full colonial subjugation did not occur until the Spanish, followed by Americans. Identities not wiped out, institutions adapted.	Repeatedly colonized for over 2,000 years, with institutional decimation & fractionalization with each wave. British brought private property rights & associated problems.	Yes. Impacts religious conflicts, culture, economy, cleavages, institutional structure
Post-Colonial Events	Group-level	Series of dictatorships. Marcos regime founded BJS for own reasons, with inspiration from trad. dispute resolution. Has stuck while Filipinos work to strengthen democratic inst.	Pakistan period and post-Independence political instability cemented distrust in government, increased reliance on trad. <i>shalish</i> and rise of Islamist political groups	Yes—variation useful for examining differences, as well as similarities between BJS and UP version of <i>shalish</i> . Impacts cleavages, culture, economy, institutions
Power Structure/ Cleavages	Group-level	Religious, ethnic & class struggles bet. <i>Indios, Moros, & Infeles</i> impt. in inter-class disputes. Cooperative solutions approved of bet. equals.	Religious, ethnic, political differences, and mobile vs. sedentary populations. Constant competition, power a zero-sum game	Yes. Impacts culture, individual goals, institutions

V. DISCUSSION: POLICY AND RESEARCH RECOMMENDATIONS

Justice-focused INGOs and intergovernmental organizations are emphasizing improved governance as a key to spurring economic growth and greater world security, and many include strengthening criminal justice systems as part of this strategy.²⁸⁵ Neoinstitutionalism-guided structural reforms, such as institution-building projects in the Balkans, Bangladesh, and Peru by the World Bank and the United Nations, are subject to international political pressures regarding what “democratization” should look like and the resulting reforms are perhaps too Western-centric to the exclusion of local concerns.²⁸⁶ While ADR and mediation are preferred for most disputes in many cultures,²⁸⁷ these findings show that some populations desire an effective state criminal justice system in cases of violence and crimes that cause greater economic harm to the victim, at least in Bangladesh.

But many reforms, as implemented until the point of this study, do not seem to consider event-specific drivers (such as economic impact directly resulting from the crime) that also influence people’s decisions about how and whether they will participate in these systems although they have begun including informal systems in their overall plans more in recent years. Nor, as we have seen, do they all take into consideration structural variables from a long-enough historical perspective during program design that also impact the menu of choices available to crime victims.

What we propose here is that the institutional structure that shapes the choices available to crime victims should be understood through a long historical lens, and that if understood within this framework, the event-specific drivers uncovered in the statistical analysis here are immediate issues that can be addressed by policy. Rule of law and access to justice encompass a lot more than just sectoral reform,²⁸⁸ but an approach like this may help toward creating access to justice where everyone has access to at least one legitimate criminal justice institution.²⁸⁹

²⁸⁵ Akmeemana, *supra* note 1, at 14–15; ALIM & ALI, *supra* note 37, at 3–17; BUSCAGLIA, *supra* note 7; *see, e.g.*, DAM, *supra* note 10, at 52.

²⁸⁶ *See* DAM, *supra* note 10, at 96.

²⁸⁷ GOLUB, *supra* note 7, at 5; *see* Sally Engel Merry, *Legal Pluralism*, 22 L. & SOC’Y REV., 869, 882, 885 (1988).

²⁸⁸ *See* Gordon Barron, *The World Bank and Rule of Law Reforms*, 32 (Dev. Stud. Inst., London Sch. of Econ. and Pol. Sci., Working Paper No. 05-70, 2005).

²⁸⁹ *See* BUSCAGLIA, *supra* note 7, at 11–13.

By focusing on relatively recent social causes only for these programs' failure to meet expectations, it becomes easy to overlook complementary, simpler strategies that might be undertaken quickly. In addition to awareness campaigns and better addressing corruption, other measures might be taken to help right away such as instituting case triage procedures that prioritize cases where the victim has suffered an inordinate amount of harm (financial or to their person) and waiving fees for those who cannot pay. However, rather than pushing pure Westernized criminal justice, agencies should consider data such as that from this survey analysis and from the historical exploration here and continue the shift toward supporting both formal *and* informal, indigenous systems to achieve desired results, and reforms to strengthen state systems should be sensitive to local context. If the state criminal justice system in its current form has not become dominant in the 200 years it has existed in Bangladesh,²⁹⁰ post-Independence corruption and abuse is not likely the sole reason.

For these reasons, criminal justice development policies in Bangladesh based on building parallel or replacement institutions for traditional *shalish*,²⁹¹ instead of working directly with them, appear to be based on incomplete assumptions. In trying to root out corruption and strengthen human rights, IFIs have focused on supplanting a centuries-old culture and system from long before Bangladesh's independence from Pakistan and India before that. Better coordination between bottom-up, yet state-approved projects of NGOs, top-down initiatives of IFIs, and local, indigenous institutions used by most crime victims - combined with an increase in awareness campaigns - might help to ameliorate some of the issues caused by having so many parallel projects. It might also improve the performance of NGO-run services; NGOs argue that they have filled an important role for many years,²⁹² and yet only seven people in our sample of over 1,100 chose to use their services. The *shalish* system has problems, but building parallel institutions has clearly not been a popular solution thus far. As we see from the Philippines comparison, building a system that incorporates citizens' identities and problems, rather than attempting to draw them away from the culturally familiar and longstanding (especially when reformers are viewed as here today, gone tomorrow), may have better results for judicial reform.

²⁹⁰ See ALIM & ALI, *supra* note 37, at 3, 7.

²⁹¹ See *id.* at 16-17; GOLUB, *supra* note 7, at 17.

²⁹² See, e.g., ALIM & ALI, *supra* note 37, at 16.

A better program of criminal justice reform might involve encouraging a cooperative rather than competitive relationship between the state and *shalish*²⁹³ by acknowledging the legitimacy of traditional fora, and then conditioning the autonomy of traditional *shalish* on consistent enforcement and administration of relevant state laws within the context of local institutional processes. Exceptions, perhaps, would include crimes such as trafficking, where the nature of the crime involves more than one village or jurisdiction, but the Union Parishad has been just such an attempt to join elected government and *shalish* together to create a hybrid institution.²⁹⁴ Its apparent failure thus far in Bangladesh can be attributed to imposing the village court on top of existing institutions, attempting to prescribe the form of the institution, and enacting processes that are still more time-consuming and bureaucratic than traditional alternatives.²⁹⁵ It also placed both executive and judicial power in the Union Parishad, breaching the separation of powers in their Constitution.²⁹⁶

Additionally, both state and traditional justice systems appear to have graft and corruption problems that must be addressed in their own right, because they are not just enforcement problems, but culturally-embedded political norms. While traditional means are still employed as the default, it appears that this pattern may be due more to fear of sanctions than to actual trust that *shalish* will hand down fair decisions.²⁹⁷ Reforms to the state CJS are also critical to meet citizen expectations that there also be an effective and fair state system available in cases of greater economic harm and violence.²⁹⁸

We posit that by instead working with the Bangladeshi government to reduce corruption and build trust with local communities, and then helping to design solutions that work with and affirm the general legitimacy of the historical system while also addressing some of its problems (like corruption, graft and discriminatory treatment of female crime victims within local norms), perhaps the success rate of access-to-justice programming might improve. A line of literature most recently advanced by Agnes Batory²⁹⁹ shows that anti-

²⁹³ Mohammed Abdul Alim, *Shalish and the Role of BRAC's Federation: Improving the Poor's Access to Justice* 42–43 (2004) (Master's Thesis, Bangladesh Rural Advancement Committee) (on file with BRAC).

²⁹⁴ GOLUB, *supra* note 7, at 1.

²⁹⁵ Akmeemana, *supra* note 1, at 15 (2009).

²⁹⁶ *Id.* at 87–88.

²⁹⁷ GOLUB, *supra* note 7, at 9.

²⁹⁸ VAN SCHENDEL, *supra* note 6, at 253.

²⁹⁹ Agnes Batory, *Why Do Anti-Corruption Laws Fail in Central Eastern Europe? A Target Compliance Perspective*, 6 REG. & GOVERNANCE 66, 78–79 (2012).

corruption initiatives that do not pay attention to local norms, that do not raise awareness among target groups, and that do not employ carrots as well as sticks to incentivize compliance, will *increase* corruption rather than reducing it.³⁰⁰ This is valuable to remember when devising cooperative strategies to create more equitable access to justice systems and fair outcomes regardless of forum. Underneath all of these challenges in Bangladesh lies the need for a stable government that lasts more than a few years.

However, what is important to note from this study is that there are immediate things that can be done to improve the delivery of justice. Important on this list, as described above, is reforming the triage of cases for those who have suffered the greatest loss. If the economic harm suffered as the result of a crime, combined with whether the crime was violent, increases the odds of bucking the norm of *shalish*-only and bringing the state into the matter by almost four times, then Bangladesh's multiple justice fora should cooperate to prioritize those cases for disposition, and provide a more victim-centered approach that addresses citizen expectations for justice regardless of forum and regardless of victim or perpetrator position in society. This is not a substitute for institutional reform, but a re-focusing of strategy and tactics. It is easier to look at systemic failures and to think that dismantling the old and building new is the only solution. The problem with that is that people stay with the familiar and only try the new system as a last resort.

This paper also serves as a beginning analysis to inform a number of future scholarly studies. On the survey level, future questionnaires might be revised and retested to induce more forthright answers about crimes suffered, particularly gender-based, religious or family violence, and about bribes and corruption. Questions about reasons for forum choice and satisfaction with procedures and outcomes (questions 9c, 13.9 and 13.11)³⁰¹ should also be asked about *all* fora, not just the state system. More detailed measures of corruption and qualitative examination of which aspects of a legal system may induce individuals to behave in an honest fashion when they otherwise would pursue self-interest³⁰² are also worth exploring. Vicarious or personal experience of abuse at the hands of government or law enforcement should also be included in future analyses, as the numbers here were insufficient to

³⁰⁰ *Id.*

³⁰¹ Saku Akmeemana et al., Survey: Citizens' Experiences of the Legal System (Questionnaire) 15–16 (July 2008) (draft for comment).

³⁰² DAM, *supra* note 10, at 8, 67.

support such exploration. However, these are important variables that should be explored in future studies with different data, as well as in studies that look at the entire justice system (civil and criminal). Additionally, data should be included in future analyses that captures the impact of important structural variables such as geography, national economics, colonial experience, post-colonial events and power structures in order to understand how these things also shape the decisions made by crime victims over where to seek redress for the wrongs they have suffered.

CONCLUSION

In sum, this evidence shows that the economic harm suffered as a direct result of the crime itself has a significant independent effect on dispute resolution forum choice for crime victims, and the effect is statistically significant in all versions of the model while structural variables such as occupation, religion and food security are not. This means that reforms responsive to event-specific factors that might be quick and easy to implement should be explored. Of course, both event specific and more structural reforms must be pursued concurrently because, if corruption is not reduced for example, implementing new case triage rules or reducing fees are likely to be red herrings. However, we also see that previous strategies of simply trying to supplant old institutions with new, externally imposed ones have not been effective in achieving access to justice and rule of law, nor in securing legitimate, stable legal systems that facilitate economic development. Traditional local and religious structures are too strong to be so easily replaced, and there are many endogenous factors correlated with criminal justice forum choice, economic development, and with each other that must be considered.³⁰³

At this time, policy and investments are still being pursued in several countries based on the idea that simply conforming states' criminal justice systems to one standard will guarantee the rights of poor and marginalized people, reduce criminal violence by more effectively punishing offenders and creating deterrence, and improve citizens' overall physical and economic security, although this is beginning to change.³⁰⁴ This evidence supports the idea that the greater the economic harm caused by the crime, particularly if the

³⁰³ Daron Acemoglu & Simon Johnson, *Unbundling Institutions*, 113 J. POL. ECON. 949, 958–59 (2005); Douglass C. North, *Institutions*, 5 J. ECON. PERSPECTIVES 97, 107 (Winter 1991); Dani Rodrik, Arvind Subramanian & Francesco Trebbi, *Institutions Rule: The Primacy of Institutions Over Geography and Integration in Economic Development*, 9 J. ECON. GROWTH 131, 149 (2004); Sachs, *supra* note 23, at 4.

³⁰⁴ Akmeemana, *supra* note 1, at 14–15.

crime was violent, the greater the odds that the victim will seek redress with the state if the traditional system does not provide the fair results sought.³⁰⁵ What it does not prescribe, however, is the specific form that state justice should take; people in this sample generally prefer their traditional system and only seek alternative fora (and risk the sanctions of doing so) if their traditional system fails them to a level they cannot tolerate. Whether the outside redress desired consists of mediation or retributive, adversarial justice is another matter. Based on these results and on other studies cited here, it appears that preferences about desired judicial form are not uniform for victims across all crime types. Thus, the call for more creative policy thinking is clear if we wish to support countries in developing legal institutions that make individuals feel safe from crime and feel secure enough to pursue economic advancement.

Few would disagree that having a legal system that protects the rights of the poor in property and against violent abuse is essential to any peaceful society. Moreover, many would argue that justice for the poor is a moral imperative. But, current international strategies for promoting such rights and legal protections need examination because forum choice in a pluralistic legal system, despite having major political and structural aspects affecting it, is still a highly personal decision—especially when it involves going against entrenched societal norms after one has already been victimized. Considering the event-specific factors that affect crime victims' decisions about which justice institution they will turn to can assist in designing reforms that meet their concerns. Supporting homegrown reforms in both informal local bodies and in formal state institutions may generate a far better return on donor investment, while helping crime victims to feel less endangered when seeking redress.

³⁰⁵ See ALIM & ALI, *supra* note 37, at 3–4.