

February 2018

Law and Religion in Bangladesh

Dr. Md. Jahid Hossain Bhuiyan

Follow this and additional works at: <https://digitalcommons.law.byu.edu/lawreview>

Recommended Citation

Dr. Md. Jahid Hossain Bhuiyan, *Law and Religion in Bangladesh*, 2017 BYU L. Rev. 839 (2018).

Available at: <https://digitalcommons.law.byu.edu/lawreview/vol2017/iss4/5>

This Article is brought to you for free and open access by the Brigham Young University Law Review at BYU Law Digital Commons. It has been accepted for inclusion in BYU Law Review by an authorized editor of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

Law and Religion in Bangladesh

*Dr. Md. Jahid Hossain Bhuiyan**

The Indian subcontinent (India, Pakistan, and Bangladesh) has been a center for a variety of religious traditions. Its multicultural and multireligious character makes it a crucible for religious tolerance. The resurgence of local cultural and religious consciousness under the influence of modernity and globalization has resulted in increasing complications in relation to the interaction between religious traditions. Religious tolerance in independent Bangladesh also has always been a fundamental value. It has been cherished by the followers of all religions. The object of this article is to trace the history of religious freedom of religious minorities in Bangladesh. It also examines the controversy of the phrase of Bismillah-ar-Rahman-ar-Rahim, meaning “In the name of Allah, the Beneficent, the Merciful,” and the provision recognizing Islam as the state religion in the Constitution of Bangladesh. I argue that these are not inconsistent with secularism properly understood, i.e., a secularism that respects the equal citizenship (with equal human rights) of people of different faiths, but does not seek to banish religion from the public space.

* Associate Professor, Department of Law, Northern University Bangladesh. This article is based on portions of the author’s Ph.D thesis, submitted to the TC Beirne School of Law, the University of Queensland, Australia. The research on which this article is based was funded by the International Postgraduate Research Scholarship (Australian Government Scholarship) and the University of Queensland Centennial Scholarship. The author would like to thank Ann Black and Darryn Jensen for the helpful comments they provided in the course of writing this article. The author would also like to give thanks to Thomas Palmer for his comments on this article.

CONTENTS

I. INTRODUCTION	840
II. THE HISTORICAL CONTEXT OF RELIGIOUS FREEDOM IN BANGLADESH	843
A. Pre-Muslim Period	843
B. Muslim Period	845
C. British Period	845
D. Pakistan Period	853
E. Bangladesh Period	854
III. THE CONTROVERSY OVER ISLAM AS THE STATE RELIGION	857
IV. THE CONTROVERSY ON BISMILLAH AND ITS IMPACT ON RELIGIOUS MINORITIES	859
A. Ceremonial Deism	863
V. CONCLUSION	868

I. INTRODUCTION

The rights of freedom of thought, religion, and conscience are possibly “the most precious” of all internationally recognized human rights.¹ Religious freedom is crucial because it is one means of exercising a person’s autonomy as a human being seeking to make his or her own choices. “Religious devotees” will perhaps become part of a community of “like-minded” individuals (like a church).² They have certain beliefs about their relationship with God that they

1. Arcot Krisnaswami (Special Rapporteur), U.N. Comm’n on Human Rights and the Econ. and Soc. Council, Subcomm. on Prevention of Discrimination and Prot. of Minorities, *Study of Discrimination in the Matter of Religious Rights and Practices*, U.N. Docs. E/CN.4/Sub.2/200/Rev.2 (1960); See John P. Humphrey, *Political and Related Rights, in HUMAN RIGHTS IN INTERNATIONAL LAW* 176 (Theodor Meron ed., 1984); Jose Casanova, *Balancing Religious Freedom and Cultural Preservation*, 6 REV. FAITH & INT’L AFF. 13, 13 (2008) [hereinafter *Balancing Religious Freedom*] (arguing that the right to religious freedom is currently transforming globally).

2. John H. Garvey, *The Real Reason for Religious Freedom*, FIRST THINGS, Mar. 1997, at 13.

follow in their everyday life. They receive protection by rights of religious autonomy to perform such activities.³

Individual freedom stems from religious freedom, signifying that an individual should be given not only respect and protection from being compelled to accept those things that they consider to be false but also the freedom to reject those things that others consider to be true. The historical origin of “liberal” freedom lies in religious freedom (e.g., Locke’s concept of toleration⁴ was a reaction to religious conflict). The First Amendment to the United States Constitution⁵ was adopted in a country in which many of the original European settlers joined the American colonies, not to escape from religion, but to practice their religion freely.⁶ The idea of the “right” of private conscience developed from freedom of religion. People are able to indulge in critical thinking and make decisions for themselves, instead of being coerced. Any society that awards due respect to religious liberty also permits competition between diverse assertions of truth, which lead to an environment of civil discussion, respect, and transparency.⁷ Religious freedom is violated when there are “coercive restrictions” on the freedom of individuals and communities to follow their chosen faith.⁸ At times, violence is used by the state for this purpose, and at other times, a “categorical hostility to any form of independent religious belief” is exhibited.⁹ At other times, an “exclusive version of [a certain] religion” is honored, while all others are denounced.¹⁰ There are several bodies that restrict religious freedom, such as “national and

3. *Id.*

4. JOHN LOCKE, A LETTER CONCERNING TOLERATION (Macmillan Publ’g Co. 1950) (1689).

5. U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .”).

6. JOHN G. GEER ET AL., GATEWAYS TO DEMOCRACY: AN INTRODUCTION TO AMERICAN GOVERNMENT 122 (3d ed. 2014).

7. See R.R. Reno, *The Importance of Religious Freedom*, FIRST THINGS (Sept. 27, 2010), <http://www.firstthings.com/blogs/firstthoughts/2010/09/27/the-importance-of-religious-freedom>.

8. William Inboden, *Religious Freedom and National Security: Why the U.S. Should Make the Connection*, POL’Y REV. (Oct. 2, 2012), <http://www.hoover.org/research/religious-freedom-and-national-security>.

9. *Id.*

10. *Id.*

local governments, majority religious groups, and non-state actors such as terrorist organizations.”¹¹ This has an impact on the stability, security, and progress of many countries, leading to a detrimental impact on the peaceful cohabitation of their residents.¹² The denial of freedom of religion leads to conflict, which affects everyone. It appears that this conflict has been prevalent since ancient times, is still persistent, and creates issues in many countries. There were recent conflicts for religious supremacy in Iran, India, and Sudan. Many Western European countries were also involved in religious conflict during the sixteenth and seventeenth centuries.¹³ Hence, religious freedom is beneficial as it creates an environment of peace, development, democratization, and other human rights. Whereas a lack of freedom of religion leads to socio-economic discrimination and can bring about inter-communal tension and extremism that hampers human development.¹⁴

Freedom of religion means the rights of the individuals to practice their religion without fear of restrictions from any civil authority.¹⁵ Casanova contends that the meaning of religious freedom is not necessarily the same in all places.¹⁶ Different countries may have their own meaning or interpretation of religious freedom that may be in conflict with one another.¹⁷ Policies that intend to implement international religious freedom may find themselves in conflict with some cultures’ understanding and interpretation of the concept of religious freedom. Thus, there is an expectation of resistance to these policies.¹⁸

11. *Id.*

12. WCC Comm’n of the Churches on Int’l Aff., *Study Consultation on Freedom of Religion and Rights of Religious Minorities* (Dec. 2, 2011), <http://www.oikoumene.org/en/resources/documents/wcc-commissions/international-affairs/human-rights-and-impunity/religious-minorities-and-rights-for-religious-freedom.html>.

13. Garvey, *supra* note 2, at 15.

14. The Church of Eng., *Human Rights and Religious Freedom*, <http://www.churchofengland.org/our-views/international-affairs/human-rights-and-religious-freedom.aspx> (last visited Oct. 7, 2017).

15. ELIZABETH WARREN, *GOD CAESAR AND THE FREEDOM OF RELIGION* 9 (2004).

16. *Balancing Religious Freedom*, *supra* note 1, at 13 (arguing that the right to religious freedom is currently transforming globally).

17. *Id.*

18. *Id.*

The object of this article is to trace the history of religious freedom for religious minorities in Bangladesh. It also examines the controversy of the phrase *Bismillah-ar-Rahman-ar-Rahim* (In the name of Allah, the Beneficent, the Merciful) and the provision recognizing Islam as the state religion in the Constitution of Bangladesh. I argue that these provisions of the Constitution of Bangladesh are compatible with religious freedom and secularism, and that faithful Muslims should not feel threatened by secularism (understood as equal citizenship and religious freedom). I also assert that the *Bismillah* statement is not threatening to non-Muslims. The problem remains, however, that there are a substantial number of people on both sides who do not see things in this way. For example, any concession to religions other than Islam is seen by *some* Muslims as anti-Islamic. Similarly, some Hindus, Buddhists, and Christians may see any reference to Islam in the Constitution of Bangladesh as threatening.

II. THE HISTORICAL CONTEXT OF RELIGIOUS FREEDOM IN BANGLADESH

The Indian subcontinent (India, Pakistan, and Bangladesh) has been a center for a variety of religious traditions. Its multicultural and multireligious character makes it a crucible for religious tolerance. The resurgence of local cultural and religious consciousness under the influence of modernity and globalization has resulted in increasing complications in the interaction between religious traditions.¹⁹ Religious tolerance in independent Bangladesh has always been a fundamental value and has generally been cherished by the followers of all religions.

A. Pre-Muslim Period

At different times Buddhist, Hindu, and Muslim rulers reigned over what is today Bangladesh. The rulers, aware of the importance of religious liberty, guaranteed religious liberty to their citizens. However, violations of the right to freedom of religion did

19. Francis-Vincent Anthony, Chris A.M. Hermans & Carl Sterkens, *Interpreting Religious Pluralism: Comparative Research Among Christian, Muslim and Hindu Students in Tamil Nadu, India*, 18 J. EMPIRICAL THEOLOGY 154, 154–56 (2005).

sometimes occur. The rulers in ancient Bengal were Buddhist (commencing with the Maurya Empire under Emperor Asoka the Great, who ruled from 272–232 BCE), and they generally tolerated all religions. The rulers in the Hindu period (which started at the end of the third century and spanned until the start of the thirteenth century) were Hindus, and they also generally followed a policy of religious toleration. In spite of this, religion and state were not separated, as ancient India was not a non-religious or secular state.²⁰ The Hindu kings promoted the Hindu belief of *dharmā*, which did not lead to the emergence of a secular state.²¹ Later, the Muslims (from 1204 until 1757) held power in Bengal and, during their reign, religious freedoms were generally granted to the followers of all religions.²² These rulers also never adopted a policy of separation of religion and state, as it would have gone against the principles of Islam.²³ In Bangladesh, it is widely believed that secularism defies the key principles of Islam because the Bangla meaning of the word “secularism” is *dharmā nirapekshata*, which literally refers to religious neutrality. Consequently, there was a misunderstanding (which still exists) among many Muslims in Bangladesh that secularism equates to the absence of religion.²⁴ This raises the question of whether the standard separation thesis (separate between religion and state), presumed to be prevalent in many western Christian-dominated countries, would be workable to any extent in Bangladesh. The extent to which a nation with a majority of Muslims can manage and include a commitment to Islam as the majority religion and, at the same time, guarantee human rights for minorities must be determined.

20. A secular state does not favor any particular religion, and it ensures the religious freedom of all faiths. On the other hand, a religious state favors a particular religion.

21. DONALD EUGENE SMITH, *INDIA AS A SECULAR STATE* 57–58 (1963); Jose Casanova, *The Secular and Secularisms*, 76 *SOC. RES.* 1049, 1049 (2009) [hereinafter *The Secular and Secularisms*] (“The secular has become a central modern category—theologico-philosophical, legal-political, and cultural-anthropological—to construct, codify, grasp, and experience a realm or reality differentiated from ‘the religious.’”).

22. See SRI RAM SHARMA, *THE RELIGIOUS POLICY OF THE MUGHAL EMPERORS* (2d ed. 1962).

23. SMITH, *supra* note 21, at 62.

24. Shahriar Kabir, *Zia Paved Way for Religion-based Politics*, *DAILY STAR* (June 29, 2013), <http://www.thedailystar.net/news/zia-paved-way-for-religion-based-politics>.

B. Muslim Period

Muslim ruler Emperor Jalal-ud-Din Muhammad Akbar (1562–1605) in the beginning of 1582 attempted to fabricate unity among religions by establishing a new religion known as *Din-I-Ilahi* (Divine Religion), which included both Islam and Hinduism together with elements of Christianity and Jainism.²⁵ He invited scholars of different faiths to have discussions with him on matters of theology and philosophy.²⁶ During the Muslim rule, *maktabs* (considerably similar to the present day elementary schools) were based in almost every mosque and occasionally in private houses.²⁷ The Muslim rulers and affluent people established *madrassahs* (religious schools). Government aid and generous public charity facilitated running these *madrassahs*.²⁸

C. British Period

The British came into power in the Indian sub-continent in 1757 and remained in power until 1947.²⁹ During the British rule of this region, the British followed a religious neutrality policy.³⁰ While the British were governing India, the Religious Endowments Act of 1863, the Charitable Endowments Act of 1890, and the Charitable and Religious Trusts Act of 1920 were enacted successively to manage the operations of endowments and religious or charitable trusts.³¹ The Religious Societies Act of 1880 was enacted during the period of British governance to simplify the way that those responsible for maintaining properties intended for religious worship

25. MUHAMMAD SHAFIQ & MOHAMMAD ABU-NIMMER, *INTERFAITH DIALOGUE: A GUIDE FOR MUSLIMS* 15 (2d ed. 2011).

26. Daniel Monodeep, *Models of Leadership in the Indian Church: An Evaluation*, 13 *STUD. WORLD CHRISTIANITY* 67, 71–72 (2007).

27. MUHAMMAD MOJ, *THE DEOBAND MADRASSAH MOVEMENT: COUNTERCULTURAL TRENDS AND TENDENCIES* 3 (2015).

28. PADMAJA NAIR, *THE STATE AND MADRASAS IN INDIA* 12 (2008), <https://www.birmingham.ac.uk/Documents/college-social-sciences/government-society/idd/research/non-state-providers/india-state-madrassas-final.pdf>.

29. MALCOLM RUSSEL, *THE MIDDLE EAST AND SOUTH ASIA, 2014–2015*, at 40–41 (48th ed. 2014).

30. SMITH, *supra* note 21, at 66.

31. See Religious Endowments Act, 1863, No. 20, Acts of Parliament, 1863 (India) (repealed); Charitable and Religious Trusts Act, 1920, No. 14, Acts of Parliament, 1920 (India).

would take care of the property.³² The enactment of these statutes, effectively allowing all religious groups to establish and maintain places of worship, is consistent with a commitment on the part of the British rulers to religious pluralism—even if, at a practical level, the primary beneficiaries were Christians. Tahir Mahmood states that offering guidelines for dealing with property held in trust by religious bodies was done mainly to benefit the Christians and was not applicable to the Hindus, Sikhs, or Buddhists.³³ The Wakf Act of 1923 was enacted in the period of British governance to supervise the way Muslim religious endowments (known as *wakfs*) were managed.³⁴

In addition to these Acts, the British Parliament passed certain laws that may be interpreted as allowing new faiths into British India. For example, the Charter Act of 1813 allowed missionaries such as the American Christian Mission to spread their religions in India.³⁵ Numerous missionaries took advantage of the Act and came to India to spread the message of Christianity. Consequently, a large number of uneducated and poor Indians embraced Christianity as a religion.³⁶ In a sense, this may not have been in accord with the position that the Roman Catholic Church later espoused in *Dignitatis Humanae*, which states that persons belonging to any religion while spreading their religious faiths should refrain from actions involving coercion or a kind of persuasion that is not honorable or worthy, especially when dealing with poor or uneducated people.³⁷ Nevertheless, the Charter Act of 1813 enlarged religious liberty in the sense that Christian missionaries were able to enjoy their right to propagate their religion. Thus, the Act enlarged

32. See Religious Societies Act, 1880, No. 1, Acts of Parliament, 1880 (India).

33. Tahir Mahmood, *Religion, Law, and Judiciary in Modern India*, 2006 BYU L. REV. 755, 762.

34. See Mussalman Wakf Act, 1923, No. 42, Acts of Parliament, 1923 (India); RAJESWARY AMPALAVANAR BROWN, THE CHINESE AND INDIAN CORPORATE ECONOMIES: A COMPARATIVE HISTORY OF THEIR SEARCH FOR ECONOMIC RENAISSANCE AND GLOBALIZATION 358 (2017) (“The Mussalman Wakf Act 1923 was passed in the midst of pervasive mismanagement of endowments and frauds committed by Mutawallis.”). The act, therefore, was an attempt to benefit Muslims.

35. See Charter Act of 1813, 53 Geo. 3 c. 155 (Gr. Brit.).

36. I N. JAYAPALAN, INDIAN SOCIETY AND SOCIAL INSTITUTIONS 222 (2001).

37. HERMINIO RICO, JOHN PAUL II AND THE LEGACY OF DIGNITATIS HUMANA 84 (2002).

religious freedom by allowing the missionaries to proselytize and gave Indians the choice of converting to Christianity.

The Parliament also passed the Caste Disabilities Removal Act of 1850, which helped Christian missionaries spread their religion by preventing converts from losing their property rights by reason of their conversion.³⁸ “Missionaries had been campaigning for this for years,” but the people of British India strongly opposed the Act.³⁹ In general terms, the Act deemed unenforceable any law that is applicable to any person’s “forfeiture of rights or propert[ies], or may be [considered] in any way to impair or affect any” inheritance right due to (1) “his or her renouncing,” or (2) having been eliminated from the sphere of any religion, or (3) not having a caste.⁴⁰ In Bangladesh, the Act remains applicable. Though the Charter Act of 1833 made government services available to everyone, regardless of religion, place of birth, descent, or color, Indians who did not know English were not generally recruited to higher posts.⁴¹ This shows that the British were committed to religious pluralism and freedom—even if, practically speaking, Christians benefited more than other groups because Christians typically knew English.

The British also enacted the Indian Penal Code of 1860 (currently called the Penal Code 1860 in Bangladesh).⁴² Chapter 15 of the Penal Code 1860 pertains exclusively to punishments for religious offences, which are, to a certain extent, harsh in many instances.⁴³ According to section 295, anyone who “destroys, damages or defiles any place of worship, or any object” considered to be sacred by any groups of individuals, having the intention to insult that religion, will have to face the punishment of imprisonment for a term up to two years, pay a fine, or both.⁴⁴ Section 295A, which was

38. See Caste Disabilities Removal Act, 1850, No. 21, Acts of Parliament, 1850 (India).

39. PENELOPE CARSON, *THE EAST INDIA COMPANY AND RELIGION, 1698–1858*, at 224–25 (2012).

40. Caste Disabilities Removal Act, No. 21.

41. N. JAYAPALAN, *CONSTITUTIONAL HISTORY OF INDIA* 52 (1998); PANKAJ KUMAR, *MARKETING OF INFORMATION AND ITS IMPACT ON LIBRARY SERVICES IN COLLEGE LIBRARIES IN UTTAR PRADESH* 44 (2015).

42. See Indian Penal Code Act, No. 45 of 1860, INDIA CODE, <http://indiacode.nic.in>.

43. See *Id.* ch. 15.

44. *Id.* § 295.

inserted in 1927, provides nearly identical penalties for deliberate and malicious acts intended to outrage religious feelings.⁴⁵ According to section 296, anyone who voluntarily interferes in any group that is legally involved in their religious worship or ceremonies would have to face a punishment of up to one year in prison, pay a fine, or both.⁴⁶ Section 297 provides identical penalties as provided for under section 296, for trespassing into a place of worship or burial site.⁴⁷ Section 298 provides the same penalties for uttering words with deliberate intent to wound religious feelings.⁴⁸

Section 57 of the Information and Communication Technology (Amendment) Act, 2013 provides that “if any person deliberately publishes any material in electronic form that causes”⁴⁹ law and order to deteriorate, (2) prejudices “the image of the State or person,” or (3) offends religious belief, then the offender will be punished for a maximum fourteen years and a minimum of seven years imprisonment.⁵⁰ It also provides that the crime is non-bailable.⁵¹ These laws operate to restrict religious freedom in the sense that they restrict the expression of criticism of the religious beliefs of others. In 2015, attacks on several atheist bloggers has received international concern. Some of these bloggers were killed by Islamic militants and some were sent to jail under these laws for hurting the religious sentiments of Muslims.⁵² Thus, it can be said that the Bangladesh government places restrictions on the right to freedom of religion

45. *Id.* § 295A.

46. *Id.* § 296.

47. *Id.* § 297.

48. *Id.* § 298.

49. *ICT (Amendment) Act, 2013: Right to Information and Freedom of Expression under Threat*, AIN O SALISH KENDRA (ASK) (Oct. 9, 2013), <http://www.askbd.org/ask/2013/10/09/ict-amendment-act-2013-information-freedom-expression-threat/>.

50. Information & Communication Technology Act 2006, 39, § 57 (amended 2013) (Bangl.).

51. *Id.*

52. *Bangladesh*, FREEDOM THOUGHT REP., <http://freethoughtreport.com/countries/asia-southern-asia/bangladesh/> (last visited Oct. 6, 2017); *Statement on the Situation of Freedom of Expression in Bangladesh*, PEN INT’L (Oct. 27, 2015, 1:35 PM) <http://www.pen-international.org/newsitems/statement-on-the-situation-of-freedom-of-expression-in-bangladesh/>.

and that there are very high social hostilities involving religion.⁵³ Therefore, it is necessary to change these laws.

For religious communities, the British continued to employ religion-based personal laws for personal issues such as marriage, dower, and divorce. While the British were governing India in 1866, the Native Converts' Marriage Dissolution Act was enacted, which allowed Christian converts to ask for a divorce from their non-converting spouses who left them due to their conversion.⁵⁴ In response, British rulers enacted the Indian Divorce Act of 1869 and the Indian Christian Marriage Act of 1872, both of which were founded upon ecclesiastical law.⁵⁵ The two Acts (now called the Divorce Act 1869 and the Christian Marriage Act 1872) continue to be applicable in independent Bangladesh. Tahir Mahmood states that the Indian Succession Act of 1865, which was essentially enacted for the Christians, was subsequently included in part V, chapter 2 of the Indian Succession Act of 1925 (presently called the Succession Act 1925), and it continues to apply to Christians in sovereign Bangladesh.⁵⁶

In issues relating to family law and property in nineteenth-century British India, courts referenced various customs and usages of all natives, including Muslims, rather than applying religious laws.⁵⁷ Problems arose because Muslim converts continued to use Hindu customary norms of property law. For example, they did not enjoy certain rights that they would have had as Muslim women. Due to the application of customs and usages, several Muslim women in India were deprived of many rights in property.⁵⁸ In

53. Pew Research Ctr., *Latest Trends in Religious Restrictions and Hostilities*, PEW RES. CTR. (Feb. 26, 2015), http://www.pewforum.org/files/2015/02/Restrictions2015_full_Report.pdf.

54. Converts' Marriage Dissolution Act, No. 21 of 1866, INDIA CODE, <http://india.code.nic.in>.

55. Indian Divorce Act, No. 4 of 1869, INDIA CODE, <http://indiacode.nic.in>; Indian Christian Marriage Act, No. 15 of 1872, INDIA CODE, <http://indiacode.nic.in>.

56. Mahmood, *supra* note 33, at 765–66.

57. TAHIR MAHMOOD, *THE MUSLIM LAW OF INDIA* 17 (LexisNexis Butterworths, 3d ed. 2002).

58. Flavia Agnes, *Politicization of Personal Laws: A Study of Colonia India*, in *WOMEN OF INDIA: COLONIAL AND POST-COLONIAL PERIODS* 19 (Bharati Ray ed., 2005).

response, Muslim leaders initiated a movement in several regions of India to apply Islamic law to all Muslims across the country.⁵⁹

This led to the enactment of the Muslim Personal Law (Shariat) Application Act of 1937 by the central legislature.⁶⁰ This Act gives instructions to the civil courts to apply religious law to Muslims in all issues relevant to succession, women's property rights, marriage, divorce, gifts, dower, maintenance, guardianship, trusts, trust properties, and *wakfs*.⁶¹ The Act establishes the bases on which a woman who has married under Muslim law can ask for a judicial divorce. One of the bases for divorce is if a husband tries to prevent his wife from practicing her religion.⁶² According to this Act, if a woman who had married under Muslim law renounces her religion, her marriage would not be dissolved *ipso facto*.⁶³

The question arose whether Muslim personal law would be applicable to Ahmadiyyas, who are considered non-Muslims by some Muslims. The Madras High Court in *Narantakath v. Parakkal*⁶⁴ ultimately held that Ahmadiyya is a Muslim sect, despite certain differences in their religious beliefs.⁶⁵ The case involved a Moplah woman who remarried after her husband converted to Ahmadiyya.⁶⁶ The inquiry was whether this was equal to bigamy in the form of polyandry.⁶⁷ The lower court decided that conversion to the Ahmadiyya sect is considered by Muslims to be an act of apostasy that severs the marital relationship.⁶⁸ This meant that the woman's second marriage was valid. However, the lower court's decision was reversed by the High Court in Madras, which held that Ahmadiyyas have faith in two key principles of Islam—the unity of God and the Prophethood of Muhammad—meaning that they cannot be called

59. MAHMOOD, *supra* note 57, at 17.

60. *Id.*

61. The Muslim Personal Law (Shariat) Application Act, No. 26 of 1937, INDIA CODE (1937), <http://indiacode.nic.in>.

62. The Dissolution of Muslim Marriages Act 1939, § 2(viii)(c) (Bangl.).

63. *See id.* § 4.

64. 1922 ILR 45 (Mad.) 986 (India).

65. *Id.* at 999.

66. *Id.* at 989.

67. *Id.* at 987.

68. *Id.* at 989–90.

non-Muslims.⁶⁹ Thus in Bangladesh, Muslim personal law is applicable to Ahmadiyyas.⁷⁰

“In 1905, the British Viceroy Lord Curzon decided to partition the province of Bengal for administrative reasons.”⁷¹ Muslims accepted the partition plan with gratitude because they believed that it would benefit the Muslims of Eastern Bengal, who had been subjected to exploitation by Hindu landlords and the businessmen of Calcutta.⁷² On the other hand, the Hindus of Bengal were unhappy with this plan and bitterly opposed it.⁷³ The opposition movement led to an outbreak of Hindu-Muslim communal riots in the Eastern Bengal.⁷⁴ Muslims in India were understandably concerned about this and felt the need to form a Muslim political organization.⁷⁵ Thus, the Muslim League was created in 1906 by Nawab Salimullah of Dacca.⁷⁶ The Muslim League supported Curzon’s Partition of Bengal.⁷⁷ Muslims felt betrayed after the partition was annulled in 1911.⁷⁸ The Congress, which was predominantly Hindu, in 1937 had the chance to form ministries in seven provinces of British India.⁷⁹ The general impression from 1937–1939 “amongst the

69. *Id.* at 992–93.

70. In Pakistan, the Parliament introduced the definition of Muslim in the Constitution in 1974. The amendment clearly “deprived Ahmadis of their identity as Muslims.” GIANLUCA P. PAROLIN, *CITIZENSHIP IN THE ARAB WORLD: KIN, RELIGION AND NATION-STATE* 54 (2007). Therefore, Muslim personal law is not currently applicable to Ahmadiyyas in Pakistan. REFUGEE REVIEW TRIBUNAL AUSTL., *MRT RESEARCH RESPONSE* (Feb. 17, 2005), www.refworld.org/pdfid/4b6fe2cb2.pdf.

71. Aslam Syed, *Dynamics of Religion and Politics in South Asia*, in *THE DYNAMICS OF CULTURAL COUNTERPOINT IN ASIAN STUDIES* 91, 98 (David Jones & Michele Marion eds., 2014). Manish Telikicherla Chary argues that the partition plan of Lord Curzon “divided Bengal on religious lines into Muslim-majority East Bengal and Hindu-majority West Bengal.” MANISH TELIKICHERLA CHARY, *INDIA: NATION ON THE MOVE: AN OVERVIEW OF INDIA’S PEOPLE, CULTURE, HISTORY, ECONOMY, IT INDUSTRY, & MORE* 108–09 (2009).

72. R.N.P. SINGH, *BANGLADESH DECODED* 53–55 (2007).

73. *Id.*

74. MOHINDER SINGH PANNU, *PARTNERS OF BRITISH RULE: LIBERATORS OR COLLABORATORS?* 41 (2006).

75. SINGH, *supra* note 72, at 54.

76. *Id.* at 56.

77. R.C. MAJUMDAR, H.C. RAYCHAUDHURI & KALIKINKAR DATTA, *AN ADVANCED HISTORY OF INDIA* 968 (4th ed. 1978).

78. *SOURCES OF INDIAN TRADITION: MODERN INDIA, PAKISTAN, AND BANGLADESH* 836 (Rachel Fell McDermott et al. eds., 3d ed. 2014).

79. JASWANT SINGH, *JINNAH: INDIA-PARTITION-INDEPENDENCE* 210–32 (Rupa Co., 2009).

Muslims was not at all favorable to the Congress regime. . . . [A] general feeling among the Muslims of all classes was that ‘Hindu *raj*’ [‘Hindu rule’] had arrived.”⁸⁰

In order to escape the rule of the Congress, the historical Lahore Resolution was adopted in 1940 under the leadership of Quaid-e-Azam Muhammad Ali Jinnah.⁸¹ The Resolution demanded an independent state in which Muslims could conduct their daily lives in accordance with the instruction of the *Holy Qur’an* and *Sunnah*.⁸² Jinnah contended that Muslims and Hindus were two separate nations and that they belong to different religious philosophies, social customs, and literature.⁸³ Two such nations under a single state, one as a numerical minority and the other as a majority, would inevitably lead to growing discontent and the eventual destruction of the social fabric of such a state. This statement is known as “two-nation theory.”⁸⁴

The Congress was opposed to dividing the subcontinent on the basis of religion.⁸⁵ According to Gandhi, the Pakistan proposal was a plan to divide India. The Muslim League accused the Congress of not permitting the creation of Pakistan. A Direct Action Day was called by the Muslims on August 16, 1946, which had disastrous consequences.⁸⁶ Thousands of people died in the Great Calcutta Killing, followed by clashes in other parts of East Bengal and the Gangetic plain.⁸⁷ These riots strengthened the view of many Hindus and Muslims that they would be better off separate from the British *Raj*.⁸⁸ Thus the foundation of Pakistan (which included the current Bangladesh as East Pakistan until 1971) in 1947 was arguably on the basis of religious identity. The two-nation theory likely did not stipulate whether both states would continue to maintain their religious minorities, and when India and Pakistan emerged as

80. *Id.* at 200.

81. *Id.* at 232–34.

82. *Id.*

83. *Id.*

84. Donald E. Smith, *The Political Implications of Asian Religions, in* SOUTH ASIAN POLITICS AND RELIGION 24 (Donald E. Smith ed., Princeton Univ. Press 1966).

85. *Id.* at 26.

86. SOURCES OF INDIAN TRADITION, *supra* note 78, at 612.

87. *Id.* at 506–07.

88. *Id.* at 507.

independent states in 1947, both states still contained religious minorities.⁸⁹ Thus, the two-nation theory arguably failed to address the practical reality that both states would have religious minorities.

D. Pakistan Period

The introduction of the Objectives Resolution in 1949 declaring Pakistan as an Islamic state propelled the Islamization process.⁹⁰ During the Pakistan period (1947–1971), the Pakistani government was generally tolerant toward all religions. Due to economic, social, and political oppression, people of Bangladesh protested against the misrule of the Pakistani government. Following the military suppression of East Pakistan in March 1971, Hindus and supporters of the Awami League were mainly targeted by the Pakistani Army. Pakistan considered the war of independence to be an Indian conspiracy, and Bengali freedom fighters were called Indian infiltrators.⁹¹ The Pakistani State's reaction affected around ninety percent of Hindu families in 1971.⁹² Their properties and assets were damaged and they faced physical abuse.⁹³ Following this reaction, there was a stark increase in the proportion of Hindu refugees moving to India compared to the proportion of Muslim refugees.⁹⁴ For instance, "in August 1971, . . . there were 671,000 Hindu refugees [and] 541,000 Muslim refugees."⁹⁵ Bangladesh achieved independence in December 1971 after nine months of a bloody war for independence. Three million Bangladeshis were killed and

89. RAJU G.C. THOMAS, *INDIAN SECURITY POLICY* 20 (1986).

90. Nida Kirmani, *Interactions between Religion, the State and Civil Society in Pakistan: Some Implications for Development* 8 (Lahore Univ. of Mgmt. Scis., Dep't of Humanities and Soc. Sci., Working Paper No. 67, 2011).

91. Meghna Guhathakurta, *Amidst the winds of change: the Hindu Minority in Bangladesh*, in *MINORITY NATIONALISM IN SOUTH ASIA* 126, 128 (Tanweer Fazal ed., Routledge 2013).

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* According to UNHCR Report, during the Liberation War of Bangladesh in 1971 around ten million people of this land had to migrate to India. U.N. HIGH COMM'R FOR REFUGEES, *THE STATE OF THE WORLD'S REFUGEES* 2000, at 59 (2000).

300,000 Bangladeshi women were raped by the Pakistani armies during this Liberation War.⁹⁶

E. Bangladesh Period

The original 1972 Constitution of Bangladesh embodied the principle of secularism.⁹⁷ Sheikh Mujibur Rahman, widely known as the founding father of Bangladesh and Bangabandhu (Friend of Bengal), in 1972 said that secularism does not mean faithlessness, much less atheism. It simply allows the citizens of the country to practice their religion. He explained that the government does not and will never want to ban the practice of religion through the enactment of laws. He said the government would allow members of every religion—Islam, Hinduism, Buddhism, and Christianity—to practice their faith; nobody would prevent or stop them. What the government would not allow is the use of religion as a political weapon or as justification to commit grievous vices, like killings, persecutions, and rapes. He further said that religion is indeed a very sacred thing and that this sacredness of religion must not be used for political advantage. He also said secularism does not curtail people's rights but rather ensures the right of every citizen of the country to practice his religion in accordance with his free will.⁹⁸ However, the Fifth Amendment to the Constitution of Bangladesh abolished secularism in favor of Islam, incorporated *Bismillah-ar-Rahman-ar-Rahim* (meaning “In the name of Allah, the Beneficent, the Merciful”) into the preamble of the Constitution of Bangladesh, and legalized religious political parties.⁹⁹ The amendment took place during the rule of Ziaur Rahman.¹⁰⁰

96. BINA D’COSTA, NATIONBUILDING, GENDER AND WAR CRIMES IN SOUTH ASIA 19 (2011).

97. Casanova states that secularism is a reference to more broadly to a whole range of modern secular worldviews and ideologies that may be consciously held and expressly elaborated into philosophies of history and normative-ideological state projects, as well as into projects of modernity and cultural programs. *The Secular and Secularisms*, *supra* note 21, at 1051.

98. Sheikh Mujibur Rahman, Prime Minister of Bangl., National Assembly Speech, (Oct. 12, 1972). He delivered his speech in Bangla. For an English translation, see MEGHNA GUHATHAKURTA & WILLEM VAN SCHENDEL, THE BANGLADESH READER: HISTORY, CULTURE, POLITICS 334 (2013).

99. BANGL. CONST. amend. V, act 1 of 1979.

100. *Id.*

A further amendment to the Constitution of Bangladesh (known as the Eighth Amendment) declared Islam as the state religion.¹⁰¹ The amendment was passed in 1988 by President Hussain Muhammad Ershad.¹⁰² During that time, the political parties in opposition were vocally opposed to his rule.¹⁰³ Realizing that he would not be able to run the government in that critical situation, Ershad decided to incorporate a provision into the Constitution of Bangladesh that recognized Islam as the state religion.¹⁰⁴ Ershad did this to satisfy the Middle Eastern countries and to get prompt support from pious Muslims.¹⁰⁵ He asked the Prime Minister to bring the eighth amendment of the constitution to Parliament.¹⁰⁶ The amendment was passed and allowed him to maintain power for another two years.¹⁰⁷

At the time Islam was incorporated as the state religion in 1988, Sheikh Hasina and Begum Khaleda Zia lead the two major political parties in Bangladesh, the Bangladesh Awami League and the Bangladesh Nationalist Party (BNP), respectively.¹⁰⁸ Both parties declared that they would annul the Eighth Amendment if they came in to power.¹⁰⁹

Though both Begum Khaleda Zia and Sheikh Hasina became the prime minister of Bangladesh in 1991 and 1996 respectively, they did nothing to change the Eighth Amendment. In 2001, Begum Khaleda Zia again became Prime Minister with a two-thirds majority in the Parliament with the support of Jamaat-i-Islam (JI) and other Islamic political parties, so she felt like her hands were tied because she did not want to make the Islamic political parties upset. In 2009, Sheikh Hasina became Prime Minister again with more than a two-thirds majority. She made a special amendment to the Constitution on June 30, 2011, following the 2010 judgment of the Appellate

101. Constitution (Eighth Amendment) Act, 1988 (Act No. 30 of 1988) (Bangl.).

102. *Id.*

103. TAJ UL-ISLAM HASHMI, *Islam in Bangladesh Politics, in ISLAM, MUSLIMS AND THE MODERN STATE* 100, 114 (Hussain Mutalib & Taj ul-Islam Hashmi eds., 1994).

104. *Id.*

105. *Id.* at 114–15.

106. *Id.* at 116.

107. *Id.* at 113–17.

108. *Id.* at 115–16.

109. *Id.*

Division of the Supreme Court of Bangladesh.¹¹⁰ The Appellate Division in 2010 had affirmed the judgment¹¹¹ of the High Court Division of the Supreme Court of Bangladesh, which held that secularism was one of the fundamental principles of state policy.¹¹²

The original Constitution of Bangladesh, adopted in 1972, had four pillars: nationalism, socialism, democracy, and secularism.¹¹³ Secularism was removed from the Constitution of Bangladesh by President Ziaur Rahman, who was also Chief Martial Law Administrator, through the Proclamations (Amendment) Order, 1977 (Proclamation Order No. I of 1977) on April 23, 1977.¹¹⁴ The Parliament passed the Constitution (Fifth Amendment) Act, 1979 on April 6, 1979.¹¹⁵ The Fifth Amendment Act officially legalized, among others, the Proclamation Order No. I of 1977.

The Fifteenth Amendment of the Constitution of Bangladesh, however, re-instituted all four of the original pillars on June 30, 2011, recognizing that, although Islam is the majority religion, other religions have equal rights.¹¹⁶ Nevertheless, the “secularism” and “Islam as state religion”¹¹⁷ provisions still exist. Werner Menski argues that according to the “plurality-sensitive perspective,” there is no contradiction in a Muslim-majority country like Bangladesh showing a commitment to Islam, provided that it both recognizes equal rights for religious minorities and provides “strong and effective mechanisms” to protect those rights.¹¹⁸

Minorities and progressives in Bangladesh are extremely unhappy with the Fifteenth Amendment of the Constitution.¹¹⁹ The present

110. Khondker Delwar Hossain and others v Bangl. Italian Marble Works Ltd. (*Fifth Amendment Case*), Civil Petition for Leave to Appeal Nos. 1044 & 1045 (2009).

111. Bangl. Italian Marble Works Ltd. v Gov't of Bangl., Writ Petition No. 6016 (2000) (judgment delivered in 2005).

112. *Id.*

113. BANGL. CONST., pmb. (1972).

114. Proclamations (Amendment) Order, 1977 (Order No. 1 of 1977) (Bangl.).

115. Constitution (Fifth Amendment) Act, 1979 (Bangl.).

116. Constitution (Fifteenth Amendment) Act, 2011 (Bangl.).

117. Article 2A of the Constitution of Bangladesh provides that “The State religion of the Republic is Islam, but the State shall ensure equal status and equal right in the practice of the Hindu, Bhuddist, Christian and other religions.” BANGL. CONST., art. 2A.

118. Werner Menski, *Bangladesh in 2015: Challenge of the iccher ghuri for Learning to Live Together*, 1 U. ASIA PAC. J.L. & POL'Y 7, 23 (2015).

119. Haroon Habib, *A Return to Secularism, Almost*, HIMAL SOUTHASIAN (Nepal) (Aug. 2011), <http://old.himalmag.com/component/content/article/4588-a-return-to->

prime minister, Sheikh Hasina, is possibly too cautious about the common Islamic sentiment prevailing in the world and the State of Bangladesh's relationship with Middle Eastern countries.¹²⁰ In Bangladesh politics, Sheikh Hasina follows the footprints of her father, Sheikh Mujibur Rahman, while Begum Khaleda Zia emulates her husband, Ziaur Rahman.¹²¹ Khaleda Zia and Sheikh Hasina did not say that they wanted to establish an Islamic state.¹²² Though Sheikh Mujibur Rahman and Ziaur Rahman did not include state religion Islam provision in the Constitution, it was included by Ershad.¹²³ But Sheikh Hasina did not abolish it from the Constitution.¹²⁴

III. THE CONTROVERSY OVER ISLAM AS THE STATE RELIGION

Though the Constitution of Bangladesh recognizes Islam as the state religion,¹²⁵ it does not recognize the concept of an Islamic state grounded on *shari'a*. The Constitution does not establish *shari'a* courts. Secular courts continue to deal with personal law pertaining to Muslims, Hindus, Buddhists, and Christians. The Awami League, which supports secularism, drafted the Constitution of Bangladesh.¹²⁶ Accordingly, they did not suggest the establishment of an Islamic state. The Constitution endorses the concept of popular

secularism-almost.html; *Inu Bisodgadar: The militants are like animals and Khaleda would be Bismillah and Islam state religion in their shelter constitution If I knew I would not have fought the war: Rana Dasgupta*, THE DAILY AMAR DESH (Bangladesh) (Dec. 28, 2013), <http://www.amardeshonline.com/pages/details/2013/12/28/230148#.U-A7WGPb58E> [https://web.archive.org/web/20131230002326/http://www.amardeshonline.com/pages/details/2013/12/28/230148#.WdZej2hSw2w].

120. Shivam Vij & Jyoti Rahman, *Islamic secularism' in Bangladesh: Jyoti Rahman*, KAFILA (Jan. 11, 2011), <https://kafila.online/2011/01/11/islamic-secularism-in-bangladesh-jyoti-rahman/>.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. BANGL. CONST., art. 2A.

126. See *Letter from the Government of Bangladesh to the Prime Minister of India* (Nov. 23, 1971), in 3 BANGLADESHER SHADHINOTA JUDDHO DOLILPOTRO, PATVOMI (1905-1971) [BANGLADESH LIBERATION WAR DOCUMENTS] 860 (photo. reprint 2009) (Hasan Hafizur Rahman ed., 1982).

sovereignty¹²⁷ and freedom of religion.¹²⁸ It does not enforce any restrictions on non-Muslims regarding the professing and practicing of their religion¹²⁹ and states that “every religious community or denomination has the right to establish, maintain and manage its religious institutions.”¹³⁰ The Constitution prohibits the state from discriminating against any citizen on the grounds of religion.¹³¹ In addition, it guarantees equal access to public entertainment, educational institutions, and public office in the service of the Republic.¹³² The Constitution does not require Islamic principles to be instilled within the laws passed by the Parliament.¹³³

However, although there is no formal requirement that the law reflect Islamic principles, debates surrounding the content of the law might become polarized around religious identity. The Islamic position is more likely to win simply because it can rely on the support of Muslims, who represent almost ninety percent of the country’s population.¹³⁴ This is an example of identity politics. Calhoun sees identity politics as “collective and public struggles that involve both ‘claiming’ certain identities, on the one hand, and questioning and refusing imposed or prescribed identities, on the other hand”.¹³⁵ A political party should not present itself as the “Muslim party” or the “Hindu party” or the “Christian party”—we are all Muslims, Hindus, and Christians, and we therefore all have

127. *Id.* art. 7. The BNP, which was the main opposition party, boycotted the 2014 elections after the government denied transferring power to a Caretaker Government (a neutral government). *Jal vote, Kolongkito Nirbachan*, THE PROTHOM ALO (Bangl.) (Jan. 6, 2014). Therefore, parliamentary sovereignty is not followed by Bangladesh anymore, and there is no fully operational Parliament at this point in the country.

128. BANGL. CONST., art. 41.

129. *Id.*

130. *Id.*

131. *Id.* art. 28.

132. *Id.* art. 29.

133. *See* Che Omar bin Che Soh v. Pub. Prosecutor (1988) 2 MLJ 55 (SC), 57 (Malay.).

134. DAVID LEWIS, BANGLADESH: POLITICS, ECONOMY AND CIVIL SOCIETY 25 (2011). The November 2015 report from the Bangladesh National Bureau of Statistics indicates that the total population of Bangladesh was 16.60 crores (166 million), and of them, Hindus were 1.70 crores (17 million). If we accept these statistics, the religious belief in Bangladesh divides as follows: Muslims 88.5%, Hindus 10.8%, Buddhists 1%, Christians 0.60%. The remainder includes Bahais, Jains and believers in aboriginal religions.

135. SYNNOVE K.N. BENDIXSEN, THE RELIGIOUS IDENTITY OF YOUNG MUSLIM WOMEN IN BERLIN: AN ETHNOGRAPHIC STUDY 257–58 (2013) (quoting Calhoun).

common political interests. If people believe this, then Muslims, Hindus, and Christians will vote as a group. This religious identity politics should be prevented.

In this context, it is important to note the position of Turkey, another Muslim-dominated country. Article 2 of the first Constitution of the Republic of Turkey, which declared Islam the state religion, was abolished in 1928. The Constitution of Turkey in its Article 2 incorporated secularism in 1937.¹³⁶ Article 24 of the Constitution of Turkey guarantees the right to freedom of religion.¹³⁷ It states that “[a]cts of worship, religious rites and ceremonies shall be conducted freely” subject to Article 14, which prohibits the abuse of fundamental rights and freedoms.¹³⁸ It further provides that “[n]o one shall be compelled to worship, or to participate in religious rites and ceremonies, or to reveal religious beliefs and convictions, or be blamed or accused because of his religious beliefs and convictions.”¹³⁹ It also states that “[e]ducation and instruction shall be conducted under state supervision and control.”¹⁴⁰ It also declares:

No one shall be allowed to exploit or abuse religion or religious feelings, or things held sacred by religion, in any manner whatsoever, for the purpose of personal or political interest or influence, or for even partially basing the fundamental, social, economic, political, and legal order of the State on religious tenets.¹⁴¹

The Constitution of Turkey seems to be a response to the fear that religion may become a focus of identity politics.

IV. THE CONTROVERSY ON BISMILLAH AND ITS IMPACT ON RELIGIOUS MINORITIES

Presently, the Constitution of Bangladesh contains both secularism and commitment to Islam. The constitution starts with

136. Law No. 3272 of November 29, 1937 (Law Modifying the Constitution of the Turkish Republic).

137. TURK. CONST., art. 24.

138. *Id.*; *id.* art. 14.

139. *Id.* art. 24.

140. *Id.*

141. *Id.*

the phrase *Bismillah-ar-Rahman-ar-Rahim* which is written in the beginning of every chapter of the Qur'an (except one chapter) and has been translated as "In the name of Allah, the Beneficent, the Merciful" in English.¹⁴² In addition to this translation, the Constitution also included another translation, which is "In the name of the Creator, the Merciful."¹⁴³ The word "Allah" in the translation has been changed to "the Creator" by the Fifteenth Amendment to appease the non-Muslims of Bangladesh who make up about 10% of the total population, particularly Hindus, who make up just more than 9% of the total population.¹⁴⁴ In 1947, Hindus constituted 28% of the population in Bangladesh, but only 13.5% in 1974.¹⁴⁵ Many Hindus have migrated to India because they felt persecuted or less than fully equal with Muslims.¹⁴⁶ This may be a product of government policies such as the adoption of the Vested Property Act of 1965, under which the land of Hindu families was seized by the government.¹⁴⁷ The Pakistani (including the current Bangladeshi) government enacted the Vested Property Act of 1965. In April 2001, the Bangladesh Parliament passed the Vested Property Return Act providing for the return of land still under government control and seized under the Vested Property Act to their original owners or their heirs who have remained citizens in residence.¹⁴⁸ The Act was subsequently amended by the Parliament. The Act did not contain any provision providing for the compensation or return of properties already sold by the government.¹⁴⁹

The Prime Minister of Bangladesh, Sheikh Hasina, said the phrase *Bismillah-ar-Rahman-ar-Rahim* has been retained because it

142. BANGL. CONST.

143. *Id.*

144. LEWIS, *supra* note 134, at 25.

145. Ishfaq Ilahi Chowdhury, *Lengthening Shadow of Communalism*, DAILY STAR (Bangladesh), Mar. 10, 2014; Atanu Mohapatra & Prakash Chandra Sahoo, *Violence Against Minority Hindus in Bangladesh: An Analysis*, VIFINDIA.ORG (July 28, 2014), <http://www.vifindia.org/article/2014/july/30/violence-against-minority-hindus-in-bangladesh-an-analysis>.

146. Chowdhury, *supra* note 145; Mohapatra & Sahoo, *supra* note 145.

147. Enemy Property (Custody and Registration) Order II on December 3, 1965 (Bangl.).

148. Vested Property Return Act, 2001 No 16, Act of Parliament.

149. *Id.*

reflects the faith of the majority; she also told the other leaders of the alliance (the fourteen-party Grand Alliance which is led by the Awami League) to accept that reality.¹⁵⁰ The Jatiya Party, which comprises a prime part of the government led by Sheikh Hasina, was in favor of keeping the phrase before the Preamble, which was strongly opposed by the left-inclined Workers Party, Jatiya Samajtantrik Dal, the Ganotantriy Party, and the National Awami Party because they considered it contrary to secularism.¹⁵¹

President Ziaur Rahman included *Bismillah-ar-Rahman-ar-Rahim* in the Fifth Amendment, which resulted in some people accusing him of being communal.¹⁵² However, according to the BNP, there is a specific reason for the inclusion of the phrase. The Constitution of India did not have any initial mention of the word “secularism.” The word was added in 1976 and came into effect on January 2, 1977. The purpose behind that change remains unclear. However, according to the BNP’s website, if the history and geography of two neighboring countries present no ideological differences, then the separate entity of two states can be questioned. Perhaps this is an attempt to justify the reform by blaming India, but it is possible that this apprehension was the reason behind Ziaur Rahman’s decision to reject secularism and include *Bismillah-ar-Rahman-ar-Rahim* in the Constitution of Bangladesh. Another reason might have been to show respect to the religion of the majority.¹⁵³

The real problem is not with the word *Bismillah* (which is Arabic), but in the application of the word to gain political advantage. When religion is aligned with politics it can lead to extreme devastation. A fearful example of this is the genocide and mass rape in Bangladesh by the Islamist Pakistani army during

150. *Amendment Empowered People: PM*, DAILY STAR (Bangl.), July 1, 2011, at 1; Shakhawat Liton, *JS Body Moves to Play Safe*, DAILY STAR (Bangl.), Feb. 15, 2011, at 20.

151. *Hasina Joins Constitution Talks Today*, DAILY STAR (Bangl.), Apr. 27, 2011, at 20.

152. G.M. Quader, *Communal Versus Secular Bangladesh*, INDEPENDENT (Bangl.), Apr. 24, 2017, <http://www.theindependentbd.com/post/91631> (accessed Nov. 28, 2017). “Communalism” is related to identity politics. Communalism suggests that people have common political interests on account of their membership in a particular religious, racial, or ethnic community.

153. *President Ziaur Rahman’s Political Foresight*, BNPBD (Bangl.) (May 22, 2011) (on file with the author).

1971.¹⁵⁴ Muslim identity-based politics should not be allowed, but arguments based on Islamic principles may be permitted. Islam might be the source of moral arguments that are convincing for people who are not Muslims. There is nothing wrong with making such arguments in a pluralist democracy. What is objectionable is communalism and identity politics that say Hindu interests and Muslim interests are necessarily opposed.

Islamic parties oppose the present translation of *Bismillah-ar-Rahman-ar-Rahim* because they claim it is inaccurate.¹⁵⁵ For instance, the leaders of the Bangladeshi Jatiya Fatwa Board (Bangladeshi National Fatwa Board)¹⁵⁶ said the incorporation of the words “the Creator” rather than “Allah” in the Constitution is against Islamic principles because in Arabic, “the Creator” refers to *Khaliq*, which is just one of the several attributive names of Allah.¹⁵⁷ Hence, if only the word *Khaliq* is used, then it suggests that the Constitution is disrespectful towards Allah.¹⁵⁸

Following the removal of the phrase “absolute Faith and Trust in Allah” from the Constitution, and the misconstruction of the phrase *Bismillah-ar-Rahman-ar-Rahim* in the Fifteenth Amendment to the Constitution, the Islami Andolon Bangladesh called for a day-long *hartal* (i.e., strike or shutdown).¹⁵⁹ The Jamaat Acting Secretary-General ATM Azharul Islam also condemned the government’s decision to restore secularism instead of “absolute trust and faith in Almighty Allah” and claimed that *Bismillah-ar-Rahman-ar-Rahim* was translated incorrectly.¹⁶⁰ Another forty-eight-hour strike was observed by the BNP and its allies in the Jamaat, Islami Oikya Jote,

154. Haroon Habib, *Bangladesh: Restoring Secular Constitution*, HINDU (India) (June 25, 2011), <http://www.thehindu.com/opinion/lead/bangladesh-restoring-secular-constitution/article2132333.ece>.

155. See, e.g., *If the Word of Allah Excludes the Word from the Constitution, the Fire Will Burn All Over the Country - the Fatwa Board of the People*, DAILY SANGRAM, Feb. 28, 2011 [hereinafter *The Fire Will Burn*].

156. Bangladesh Jatiya Fatwa Board is not run by the Government of Bangladesh.

157. *The Fire Will Burn*, *supra* note 155.

158. *Id.*

159. *Today’s Hartal: No BNP Backing*, DAILY STAR (Bangl.), July 3, 2011, at 1.

160. Selim Zahid, *BNP-Jamaater sange dharmovitik daigulur jogajog: Robi-Sombarer hartaler proti samatthon*, PROTHOM ALO, July 9, 2011, at 1.

and Bangladesh Jatiya Parties¹⁶¹ on July 6–7, 2011, in protest of the abolition of the caretaker government system and the phrase “absolute faith in Allah.”¹⁶²

On July 10–11, 2011, eleven Islamic political parties (Bangladesh Khelafat Majlish, Bangladesh Khelafat Andolon, Sammilito Olama Mashayekh Parishad, the National Democratic Party, Islami Oikya Andolon, Bangladesh Muslim League, the Bangladesh National Awami Party-Bangladesh NAP, NAP Bhasani, Jatiya Ganatantrik Party, the Islamic Party, and the Nezame Islami Party) along with the BNP-led opposition also called a thirty-hour-long strike as a protest against the removal of this phrase.¹⁶³ These Islamic parties also protested against the controls on religion-based political parties and the deletion of Article 25(2).¹⁶⁴ Prime Minister Sheikh Hasina, on July 10, 2011, was surprised that the Islamic parties did not notice the word “Allah” in “*Bismillah-ar-Rahman-ar-Rahim*.”¹⁶⁵ A daylong *hartal* (strike) was carried out by Hefajat-e-Islam, a closely-linked alliance of several Islamic organizations, to call for the reinstatement of the phrase “absolute trust and faith in the Almighty Allah” in the Bangladesh Constitution as a fundamental principle of state policy.¹⁶⁶

A. Ceremonial Deism

Bismillah-ar-Rahman-ar-Rahim is translated as “In the name of the Creator, the Merciful” in English. The goal of this phrase is to appeal to members of all religious communities. However, certain

161. The Bangladesh Jatiya Party (BJP), which is led by Andalib Rahman, is not the same as the Jatiya Party, whose chief is Ershad.

162. *Long Hartal On, No Respite in Sight*, DAILY STAR (Bangl.) (July 6, 2011), <http://www.thedailystar.net/news-detail-193062>; *Abdin's Case Not Recorded*, DAILY STAR (Bangl.) (July 8, 2011), <http://www.thedailystar.net/news/detail193343>.

163. A strike was also called separately by Islami Andolon Bangladesh. *Twelve Parties Call Hartal for July 10–11*, DAILY STAR (Bangl.) (July 1, 2011), <http://www.thedailystar.net/news-detail-192388>.

164. Selim Zahid, *BNP-Jamaater sange dharmovitik dalgulur jogajog: Robi-Sombarer hartaler proti samatthon*, PROTHOM ALO (Bangl.), July 9, 2011.

165. Dhaka Unb, *Why Allah, Bismillah Skipped?*, DAILY STAR (Bangl.) (July 11, 2011), <http://www.thedailystar.net/news-detail-193772>.

166. *Govt [sic] Given Three Weeks*, DAILY STAR (Bangl.) (Apr. 7, 2013), <http://www.thedailystar.net/news/govt-given-three-weeks>; see also *Clashes Mark Hefajat Hartal*, DAILY STAR (Bangl.) (Apr. 9, 2013), <http://www.thedailystar.net/news/clashes-mark-hefajat-hartal>.

Muslims, particularly the supporters of religious-based political parties, have shown their dissatisfaction for the word “Creator” as religiously neutral and not explicitly Islamic.¹⁶⁷

It can be argued that *Bismillah-ar-Rahman-ar-Rahim* is a form of “ceremonial deism.” “Ceremonial deism” is a U.S. phenomenon that refers to any statement or action that suggests a mutual belief in God. The term “ceremonial deism” was originally coined by the Dean of Yale Law School, Eugene Rostow, in 1962 in a lecture at Brown University. He defined it as “a class of public activity, which . . . c[ould] be accepted as so conventional and uncontroversial as to be constitutional.”¹⁶⁸ The U.S. Supreme Court has referred to this term in three different cases. The U.S. phenomenon of ceremonial deism and *Bismillah-ar-Rahman-ar-Rahim* are analogous concepts. The verbal formula of *Bismillah-ar-Rahman-ar-Rahim* is sufficiently neutral to be considered ceremonial deism.

In his dissent in *Lynch v. Donnelly*, Justice Brennan asserted that practices such as the national motto, “In God We Trust,” or the naming of God in the Pledge of Allegiance can be understood most appropriately as a kind of “ceremonial deism,” the term used by Dean Rostow.¹⁶⁹ Such forms of ceremonial deism are “protected from Establishment Clause scrutiny chiefly because they have lost through rote repetition any significant religious content.”¹⁷⁰ Justice Brennan also included Christmas, Thanksgiving, the judicial invocation “God save the United States and this Honorable Court,” religious works on display at the National Gallery, and the mentioning of God in a president’s inaugural address as constitutionally acceptable forms of ceremonial deism.¹⁷¹ Justice Brennan stated that these practices serve entirely secular objectives—for example, solemnizing public events or inspiring the nation—in

167. *The Fire Will Burn*, *supra* note 155.

168. Arthur E. Sutherland, *Religion and American Constitutions*, by Wilber G. Katz, 40 IND. L.J. 83, 86 (1964) (reviewing WILBER G. KATZ, RELIGION AND AMERICAN CONSTITUTIONS (1963)).

169. *Lynch v. Donnelly*, 465 U.S. 668, 716 (1984) (Brennan, J., dissenting).

170. *Id.* at 716. The Establishment Clause states, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .” U.S. CONST. amend. I.

171. *Lynch*, 465 U.S. at 714–17.

a way that cannot be done if the government had to use purely non-religious terms.¹⁷² He continued, such practices “are therefore probably necessary to serve certain secular functions, and that necessity, coupled with their long history, gives those practices an essentially secular meaning.”¹⁷³

In *County of Allegheny v. American Civil Liberties Union*, Justice Blackmun distinguished the crèche from permissible forms of ceremonial deism,¹⁷⁴ such as the references of God in the national motto and the pledge.¹⁷⁵ The plurality opinion also described legislative prayers, commencing court sessions with the phrase “God save the United States and this Honorable Court,” and imprinting “In God We Trust” on coins as examples of “ceremonial deism.”¹⁷⁶ Such “government acknowledgments of religion serve, in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society.”¹⁷⁷ According to the plurality opinion, those practices should not be “understood as conveying government approval of particular religious beliefs.”¹⁷⁸ Justice O’Connor agreed by stating that specific religious beliefs are not endorsed because their non-sectarian nature is such that the practices are normally considered to be “a celebration of patriotic values” instead of an endorsement of certain religious beliefs.¹⁷⁹

Justice O’Connor expounded the notion of ceremonial deism in her concurring opinion in *Elk Grove Unified School District v. Newdow*.¹⁸⁰ According to Justice O’Connor, the Court should apply a four-factor endorsement test to determine whether “government-sponsored speech or displays” are constitutional.¹⁸¹ These factors

172. *Id.* at 717.

173. *Id.*

174. *Cty. of Allegheny v. Am. Civil Liberties Union*, 492 U.S. 573, 595–96 n.46 (1989).

175. *Id.* at 602–03.

176. *Id.* at 595–96 n.46, 625, 630.

177. *Id.* at 596 (quoting *Lynch*, 465 U.S. at 693 (O’Connor, J., concurring)).

178. *Id.* at 596 n.46 (quoting *Lynch*, 465 U.S. at 693 (O’Connor, J., concurring)).

179. *Id.* at 630–31 (O’Connor, J., concurring).

180. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 33–45 (O’Connor, J., concurring).

181. *Id.* at 33–34.

include: (1) the “[h]istory and [u]biquity” of the practices, (2) “[a]bsence of worship or prayer,” (3) “[a]bsence of reference to particular religion,” and (4) the amount of religious content.¹⁸² If the endorsement test establishes a secularized context for the government-sponsored action, then the practice would not constitute the governmental endorsement of religion.¹⁸³

Government religious ceremonies such as “In the name of the Creator, the Merciful,” may generally seem harmless. The use of “In the name of Allah, the Merciful” by the government appears to be harmless for the Muslims as well as the Christians of Bangladesh. However, in reality, they may not be so harmless to earnest nonbelievers, earnest “particularistic believers,”¹⁸⁴ or other religious minorities.¹⁸⁵ People belonging to the religious mainstream could “better appreciate this reality by replacing ‘Allah’ for God” or with Ishwar or Bhagwan (Hindu names for God), for example.¹⁸⁶ But that would not be acceptable in Bangladesh because Muslims would not accept replacing “Allah” for “God” or with Ishwar.

At least some Hindus regret supporting the independence of Bangladesh. The Secretary-General of the Bangladesh Hindu-Buddhist-Christian Unity Council (BHBCUC), Rana Dasgupta, stated that even though he had fought with Ziaur Rahman at the time of the liberation war, he would not have done so had he known that *Bismillah-ar-Rahman-ar-Rahim* was to be included in the Constitution.¹⁸⁷ Religious minorities are concerned with the use of *Bismillah-ar-Rahman-ar-Rahim* because the Constitution, being the supreme law of the land, is applicable to all citizens, including non-

182. *Id.* at 37–45.

183. *Id.* at 34, 43.

184. *See, e.g.*, Douglas Laycock, *Summary and Synthesis: The Crisis in Religious Liberty*, 60 GEO. WASH. L. REV. 841, 843 (1992). Earnest “particularistic believers” could be believers in any religion. They differ from other believers in the strength of their belief that their religion is the true religion. In Bangladesh, there are many people who are “cultural Muslims” but who do not have a deep understanding of Islamic doctrines or any particular preference for Islam apart from the fact that they grew up as Muslims. There are other Muslims who have a deep understanding of Islamic doctrines and who believe that Islam offers a better insight into the truth than other religions. The latter group are the “earnest particularistic believers.”

185. *See id.*

186. Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083, 2168 (1996).

187. *Sangbidane Bismillah o Islam Rastradarma hobe janle muktijoddo kortamna: Rana Dasgupta*, DAILY AMAR DESH, Dec. 28, 2013 [hereinafter *Sangbidane Bismillah*].

Muslims. They think that keeping *Bismillah-ar-Rahman-ar-Rahim* in the Constitution is a direct invitation by the state to accept Islam.¹⁸⁸ They want a secular Bangladesh,¹⁸⁹ perhaps as per the strict separation model of secularism. According to this model, religion is an individual's personal affair; the state remains neutral with regard to religious affairs and does not interfere in religion-based matters.¹⁹⁰

The position of the Awami League (who are currently in power in Bangladesh) towards secularism was modified due to the demographic facts within Bangladesh, which is a Muslim-majority country. Therefore, the Awami League did not want to hurt the sentiment of the majority.¹⁹¹ The party does not stand for either secularism in accordance with the cooperationist model (under which the state provides no special status to a majority religion), strict separation model (under which religion is considered an individual's personal matter), or *Bismillah-ar-Rahman-ar-Rahim*. If the Constitution is to preserve secularism as per the cooperationist model of secularism or strict separation model of secularism, then it is not rational to have *Bismillah-ar-Rahman-ar-Rahim* and secularism provisions in the Constitution, and any inclinations toward religion conflict. Neither of these models is desirable in Bangladesh. It has been argued earlier, that *Bismillah-ar-Rahman-ar-Rahim* is an expression of ceremonial deism and presents an appeal to followers of all religions. If that was the case, it would not be essential to delete it from the Constitution. But a non-Muslim in Bangladesh might think that she or he is less of a citizen than a Muslim is.

188. See Crowley Says Minority Rights Must Be Protected, DAILY STAR (Feb. 22, 2006), <http://archive.thedailystar.net/2006/02/22/d6022201022.htm>.

189. *Id.*; Sangbidane Bismillah, *supra* note 187.

190. See STEPHEN V. MONSMA & J. CHRISTOPHER SOPER, THE CHALLENGE OF PLURALISM: CHURCH AND STATE IN FIVE DEMOCRACIES 10 (1997); Shimon Shetreet, *The Model of State and Church Relations and Its Impact on the Protection of Freedom of Conscience and Religion: A Comparative Analysis and a Case Study of Israel*, in RELIGION IN THE PUBLIC SPHERE: A COMPARATIVE ANALYSIS OF GERMAN, ISRAELI, AMERICAN AND INTERNATIONAL LAW 87, 89 (Winfried Brugger & Michael Karayanni eds., 2007).

191. Press Trust of India, *Bangladesh Will Drop Islam As State Religion 'When Time Comes,' Says Ex Minister: Report*, NDTV (Nov. 14, 2016), <https://www.ndtv.com/world-news/bangladesh-will-drop-islam-as-state-religion-when-time-comes-former-minister-1625060>.

V. CONCLUSION

The discussion above demonstrates that freedom of religion has long been—and remains—an important issue in Bangladesh. The original 1972 Constitution of Bangladesh guaranteed freedom of religion and secularism. Though secularism was subsequently deleted from the Constitution, it was again reinstated through the Fifteenth Amendment in 2011. The current Constitution of Bangladesh contains both secularism and *Bismillah-ar-Rahman-ar-Rahim*, the state religion of Islam. Though this may be interpreted as contradictory, in reality, it is not because the Constitution provides that “the State shall ensure equal status and equal right in the practice of the Hindu, Buddhist, Christian, and other religions.”¹⁹² Furthermore, *Bismillah-ar-Rahman-ar-Rahim* is an example of ceremonial deism. But the government places restrictions on religious freedom through the Penal Code and the Information and Communication Technology (Amendment) Act. In order to protect the equal status and freedom of practice of the minority groups, some restrictions on religious expression (e.g., criticism of another group) are necessary; the government should change these laws.

192. BANGL. CONST., art. 2A (amended 2011).