

**Compatibility of the state Religion Clause within a Pro-Secular
Constitutional Framework:**
An Analysis in the Context of Bangladesh

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ABSTRACT

In 1972, when the first Constitution of Bangladesh was adopted, it embraced a pro-secular constitutional framework by embracing secularism, pro-secular linguistic *Bangalee* nationalism and liberal democracy into the governing principles. The constitution also prohibited all forms of religion-based politics and refused to provide any special constitutional recognition to any religion, despite the fact that Bangladesh is a predominantly Muslim country. The reason the drafters of the constitution made this decision is because they wanted to avoid reanimating the history of violence that was caused by the use of religion in politics and the state's formal recognition of religion before Bangladesh became an independent country. However, despite the efforts towards secularism in the original Constitution, later amendments reinstated Islam as the state religion. Further, by way of the 15th Amendment of the Constitution in 2011, the state introduced the coexistence of secularism and Islam as the state religion.

Against this backdrop, this thesis analyzes the compatibility of the state religion clause with the pro-secular constitutional framework of Bangladesh. The thesis explores whether the state religion clause is a viable option for a multi-religious country, exploring whether it prevents the effective application of secularism and encourages religious extremism. To that end, this thesis pursues two principal questions: firstly, whether the state religion clause u/a 2A, in its present form, is compatible with the pro-secular constitutional framework of Bangladesh; and secondly, whether constitutional reform may accommodate state religion in the pro-secular constitutional framework while decreasing the risk of communal discontent and violence.

In connection with these questions, this thesis primarily argues that the state religion clause in the Constitution of Bangladesh, which declares Islam as the state religion, is incompatible with the pro-secular constitutional framework of Bangladesh. Further, this thesis argues that coexistence cannot be accommodated within the current constitutional framework of Bangladesh. That said, the thesis also argues that the constitution might be able to recognize religions by making careful amendments to the present constitutional structure, where these amendments harness the positivity of the religion in the society without disturbing the secular constitutional mandates and/or instigating communal discontent and violence.

Résumés

En l'an 1972, lorsque la première constitution du Bangladesh a été adoptée, elle embrassait un cadre constitutionnel laïc (en faisant de la laïcité, du nationalisme laïc, de la langue Bangalee, et la démocratie libérale les principes le régissant) et interdit toutes les formes de la politique basée sur la religion et a renoncé à fournir toute reconnaissance spéciale à la religion. En dépit d'être un grand pays à majorité musulmane, la raison pour laquelle l'assemblée constituante a eu recours à une telle approche stricte pour le Bangladesh était parce qu'ils voulaient éviter de répéter l'histoire de la violence communautaire causée par l'utilisation et la reconnaissance de la religion dans la politique nationale comme cela est arrivé avant l'indépendance du Bangladesh. Toutefois, les changements politiques ultérieurs réintégrées le religion, en particulier l'Islam comme le religion d'Etat dans la constitution. En 2011, ils ont passé le 15e amendement de la Constitution qui a introduit la coexistence de la laïcité et religion d'Etat.

Dans ce contexte, la présente thèse analyse la compatibilité de cette coexistence constitutionnelle (entre laïcité et religion d'Etat) au Bangladesh. La thèse explore si cette infusion est précaire dans un pays aux religions multiples qui peuvent entraver la mise en œuvre effective de la laïcité et de prévenir l'extrémisme religieux. Pour trouver des réponses à ces questions, cette thèse a poursuivi attentivement deux questions principales : premièrement, si la clause de religion d'Etat selon l'article 2A, dans sa forme actuelle, est compatible avec le cadre constitutionnel laïque du Bangladesh ; et, deuxièmement, si une éventuelle réforme constitutionnelle peut accueillir cette coexistence conflictuelle en désamorçant le mécontentement communal croissante et la violence religieuse au Bangladesh.

Par rapport à ces questions, cette thèse soutient principalement que la clause de religion d'Etat dans la constitution du Bangladesh, qui déclare que l'Islam comme religion d'Etat, est incompatible avec le cadre constitutionnel pro-laïcité du Bangladesh; et, par conséquent, est ni possible ni compatible dans le cadre constitutionnel actuel.

Cela dit, la thèse fait aussi valoir qu'il est encore possible de reconnaître officiellement la/les religion(s) en apportant des réformes spécifiques et des changements dans la structure constitutionnelle actuelle. Ces réformes seront en mesure d'exploiter la positivité de la religion dans une société qui valorise profondément le religion, sans perturber les mandats de constitution laïque qui promeuvent la libéralisme, la démocratie et la dignité humaine.

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LIST OF ABBREVIATIONS

AD	Anno Domini
AIML	All India Muslim League
AL	Awami League
BBS	Bangladesh Bureau of Statistics
BLD	Bangladesh Legal Decisions
BNP	Bangladesh Nationalist Party
DLR	Dhaka Law Reports
ECHR	European Convention on Human Rights
ELCOP	Empowerment through Law of the Common People
EU	European Union
INC	Indian National Congress
Op-Eds	Opposite the Editorial Page
PPP	Pakistan People's Party
UK	The United Kingdom
USA	The United States of America

CHAPTER ONE

INTRODUCTORY CHAPTER

Setting the Context

One day, *Durga Chatterjee*, a 15-year-old Hindu¹ girl, realized that her perfect world was not as perfect as she imagined. It all began when *Durga*'s family migrated to Dhaka. She was excited to meet new people and to make new friends at her new school. On her first day at school, she decided to take an extra lunch box to share food with her new friends. Finally, at the lunch hour, she got her chance to introduce herself. She offered to share her food, but to her surprise, all the children except one, Nandita Das, declined her offer. Durga was perplexed. Why did all the other girls refuse to share with her? She could see they shared food with other students. Had she done something wrong? When she asked Nandita what had happened, Nandita replied that all the Muslim girls think that they should not eat food from Hindus because they are Muslims. That day, Durga came home with many questions. She shared her experience with her father, Aditya Chatterjee, and asked him why, despite being born in the same country, Muslims girls thought Hindus were so different.

Mr. Chatterjee, a lawyer, knew that the Constitution, the supreme law of Bangladesh, declares that every person is equal, and no one shall be discriminated against because of religion. He knew that the Constitution states that Bangladesh is a secular country, and that no religion is superior to another. However, Mr. Chatterjee also knew that the Constitution did not represent the reality of his country. He could not explain to his daughter that not only Muslims, but also the state and the constitution, do in fact differentiate between religions. Further, he knows that, despite talking about the constitution's equal regard for all religions, the constitution also opens with a verse from the Quran.² He also could not say that the constitution, while aspiring to secularism, also declares Islam as the state religion. He could not say that in Bangladesh people are arrested and killed only for criticizing Islam³, that temples and idols are vandalized,⁴ and that people are killed because they

¹ Hindu community is the second largest religious community in Bangladesh and the largest religious minority in Bangladesh, see BBS, *Population Census Report 1991* (Dhaka, Bangladesh: Bangladesh Bureau of Statistics, 1991), BBS, *Literacy Assessment Survey 2011* (Dhaka, Bangladesh: Bangladesh Bureau of Statistics 2011).

² The Preamble of the Constitution of the People's Republic of Bangladesh starts with "bismillah-ar-rahman-ar-rahim" which is a verse from sura An-Naml (27:30) of the Holy Quran, see Ali, *The Holy Qur'ān: text, translation and commentary*, ed (Brentwood, MD: Amana Corp., 1983).

³ See "Bloggers Killed since 2013", *the Daily Star (of Bangladesh)* (11 November 2015) 1. online: <paper.thedailystar.net/index.php?opt=view&page=1&date=2015-11-01>; Joseph Allchin, "Bloggers and 'hate speech' in Bangladesh", *Dhaka Tribune (of Bangladesh)* (April 16, 2013),

belong to minority communities.⁵ Mr. Chatterjee knew Durga would realize the truth one day, but at least for now, he would let her believe the myth that the constitution of Bangladesh ensures equality and secularism.

This story is not just a story of a little girl and her father, but a story found in almost every minority household of Bangladesh. It reflects the reality of life for religious minorities of Bangladesh; and shows in practical terms how the constitution of Bangladesh has, over time, failed to protect them from vulnerability. Durga's story compelled me to contemplate how and why the once ideal secular constitution became a religious/secular hybrid by adopting both state religion and secularism. It led me to ask whether this reality is right for the constitution and, more importantly, whether is it appropriate for the Constitution of Bangladesh?⁶

A. Introduction to the Thesis Problem

Bangladesh, a country with one of the largest Muslim populations in the world, is also a pluralistic society with numerous people of diverse religious and ethnic origins. It is also one of the earliest Muslim countries (Turkey being the first) to adopt secularism as a fundamental principle of the state in the national constitution. In fact, unlike Turkey, the first constitution of Bangladesh began with a totally secular mandate: in that it prohibited all forms of religion-based politics and renounced any special recognition to any religion. The founders of the Nation's constitution resorted to such a strict approach because the members of the constituent assembly⁷ did not want to reanimate the violent history of communalism, which was caused by religion-based politics and the state's political recognition of religion.

online:<www.dhakatribune.com/statecraft/2013/apr/16/bloggers-and-%E2%80%98hate-speech%E2%80%99-bangladesh>.

⁴ As per Bangladesh Hindu Buddhist Christian Unity Council, "at least 262 incidents of human rights violation on religious minorities, affecting at least 1,562 individuals, families, and organizations, took place in Bangladesh in 2015, see "262 attacks on religious minorities in 2015", *the New Age (of Bangladesh)* (5 March 2016), online: <newagebd.net/208727/262-attacks-on-religious-minorities-in-2015/>.

⁵ "Machete Killings Since March 2016", *the Daily Star (of Bangladesh)* (20 June 2016) 1. online: <epaper.thedailystar.net/index.php?opt=view&page=1&date=2016-06-20>.

⁶ The story and statement in this paragraph reflect the inspiration of the author to pursue the present thesis.

⁷ The members of the Constituent Assembly were the elected representatives who were given responsibilities to adopt a new constitution for Bangladesh in 1972. From this perspective, they are the founding fathers of the Constitution of Bangladesh.

In this thesis, the expressions ‘recognition of religion’, ‘preferential treatment of religion’, and ‘political recognition of religion’ are repeatedly used. These expressions should not be confused with recognition to religion as in ensuring freedom of religion or any form of recognition which is purely symbolic in nature. Rather, it is a finding of this thesis that the form of recognition to religion which is found to be problematic is the one which has political implications or that envisages that particular religions are special or superior in nature or that obliges the state to favor a particular religion above others. As such, readers should keep in mind that this thesis does not claim that all forms of recognition to religion are detrimental to secularism.

The historiography of Bangladesh (1947-71) shows that the West Pakistani⁸ rulers used a constitutional mechanism to impose Islam upon the public sphere and then used public affairs to construct a theocratic state. This resulted in a denial of the (pro-secular) cultural-linguistic identity of East Pakistan (Now Bangladesh), leading to the secession of East Pakistan and the creation of Bangladesh in 1971. Following this experience, the founders of the original constitution of Bangladesh (adopted in 1972) embraced secularism as a governing principle to secure the cultural-linguistic identity and religious harmony of the nation. However, subsequent politically motivated amendments reinstated religion, specifically Islam, in the constitution and the 15th Amendment of the Constitution (in 2011)⁹ introduced the coexistence of secularism and Islam as the state religion.

Since 2011, this coexistence has been one of the biggest issues within the political arena, academia, civil society, religious groups and among the general population of Bangladesh, leading to the question: can the state religion clause under Art 2A of the Constitution be compatible with the pro-secular constitutional framework of Bangladesh?¹⁰ And further, what are the implications of this coexistence of secularism and the state religion?

⁸ Before Bangladesh becomes an independent country, it was a province of Pakistan (known as the East Pakistan). The West Pakistan was another province of Pakistan. Although, Pakistan had comprised both provinces but the people from the West Pakistan had an absolute monopoly over the governance of Pakistan, see, chapter two of this thesis, *below*, for details on this issue.

⁹ The amendment was enforced by the *Constitution (Fifteen Amendment) Act*, 2011 (Act No. XIV of 2011).

¹⁰ For the purpose of this thesis pro-secular constitutional framework of Bangladesh comprises principles of secularism (u/a 12 of the Constitution), *Bangalee* nationalism (u/a 9 of the Constitution), liberal democracy (u/a 11 of the constitution).

B. Research Questions and Finding the Answer

This thesis, inspired by ongoing discourse on religion and politics, enquires into these issues, and analyzes the compatibility of the constitutional coexistence of secularism (and other secular mandates) and the state religion clause. The thesis explores whether the peaceful coexistence of secularism and a state religion is possible in a multi-religious country, or whether it works to oppose the application of secularism and enable religious extremism. To that end, this thesis pursues two specific questions: firstly, whether the state religion clause u/a 2A, in its present form, is compatible with secularism and other constituent elements of the constitution that form the pro-secular constitutional framework of Bangladesh; and secondly, whether constitutional reform is possible to properly accommodate state religion within the pro-secular constitutional framework while simultaneously de-escalating communal discontent and violence.

Readers should keep in mind that, although the research question indicates that this thesis will assess the compatibility of the state religion clause with the pro-secular constitutional framework of Bangladesh, the main focus of this thesis will in fact be to assess whether or not the state religion clause is compatible with secularism as enumerated in the constitution. This is because the principle of secularism in the constitution is the main component of the pro-secular constitutional framework, and nationalism and liberal democracy are complementary to secularism. That said, chapter three of this thesis will briefly test the compatibility of the state religion clause with these other elements (namely, nationalism and liberal democracy).

Based on the foregoing analysis, the answer to the first research question is answered in the negative, i.e. the state religion clause u/a 2A with its existing construction stands in direct conflict to the principle of secularism and other fundamental principles of the constitution of Bangladesh. The answer to the first research question logically leads to the answer to the second research question being decided partially in the affirmative and partially in the negative. While this thesis finds that the coexistence of state religion and secularism cannot be accommodated within the secular constitutional framework of Bangladesh, it then goes further to find that it is in fact possible to recognize religion (and specific religions) differently and appropriately by making necessary reforms and amendments in the present constitutional structure. The argument is made that these reforms would harness the positivity of religion in the society without disturbing secular constitutional mandates or instigate communal discontent and violence.

This thesis reaches these conclusions through analysis of the two research questions set out above. These research questions are explored in three main chapters. Chapter two explores the key historical events of the pre and post-Bangladesh eras, to illustrate the impact of the political use of religion in legal and administrative policies. Drawing from historical narratives (from 1900-2011), the chapter shows how colonial rule, political parties and military rulers used religion and religious identity in public affairs, the constitution and politics, which eventually caused grave social disorder (characterised by communal dissent, communal violence, the partition of territory, secession and mass killings). In light of these outcomes this chapter indicates that, since the preferential treatment of religion has repeatedly given rise to negative consequences, it is highly probable that declaring Islam as the state religion under the state religion clause is not advisable in the context of the secular constitutional framework and likewise, will work against, rather than encouraging, religious harmony.

Following on from the argument set out in chapter two, chapter three explicitly addresses the compatibility of the state religion clause with secularism and other secular components of the constitution. It does this by analyzing the relevant provisions of the constitution. This analysis demonstrates that the state religion clause is incompatible with secularism, as it contradicts the principles of secularism set out in the Constitution. The chapter shows how the specification of a state religion also contradicts other fundamental constituent elements of the constitution, namely liberal democracy and *Bangalee* nationalism. The chapter also counters justifications for keeping the state religion clause by highlighting the major discrepancies of those arguments. Finally, in order to show that the incompatibility of a state religion is not entirely *sui generis* to Bangladesh, it explores the principles of political secularism and different models of secularism to show that even under an explicit accommodationist model of secularism, the current promotion of religion/religions in Bangladesh is unacceptable. The chapter concludes that the present state religion clause is not compatible with the secular constitutional structure of Bangladesh. However, the chapter does not claim that religion could not be recognized in alternative ways. As such, this chapter leaves room for scrutinizing the viability of the application of alternative theories and frameworks to accommodate religion in the Constitution.

Pursuing the possibility of having an alternative approach to accommodate religion in the Constitution, chapter four explores the frameworks preferred in UK and Sweden, which are

examples of joining the policies of an established state religion with secular policy. In exploring these models, the chapter shows that Bangladesh could adopt certain aspects of the legal and administrative policies of the UK and Sweden to strengthen the secular features of the Constitution while still keeping religion in the constitution. However, the total adaptation of the policy of these states (i.e. the coexistence of state religion and secularism) is not viable because of the extensive contextual, legal and historical differences that exist between Bangladesh and these two countries. The chapter then suggests four alternative solutions, which include approaches like the application of the multicultural model or a neo-secularism approach to provide recognition to religion while preserving the sanctity of the secular structure. The chapter indicates that if religion is accommodated in alternative ways, then that will not only prevent the repetition of the history of religious violence but may also contribute to strengthening and enforcing secular mandates as well as ensures religious harmony in Bangladesh.

C. Research Methodology and Research Strategies

This thesis has adopted a mixed research method, which primarily includes interdisciplinary and doctrinal research methods. The interdisciplinary method is relevant because it helps to examine constitutional problems that intersect with multiple disciplines (such as law, religion, history, and political science). Then, this thesis applies the doctrinal method to analyze the core constitutional provisions (in particular, the provisions related to the state religion clause, the principle of secularism, and other fundamental provisions related to it) to determine whether the state religion clause is compatible with the overall constitutional structure of Bangladesh. Although the thesis does not pursue any comparative analysis *per se*, it occasionally refers to the models of secularism adopted by different countries (e.g. the USA, the UK, Sweden, India, France, and Turkey) to illustrate and explain particular concepts and frame a reform proposal. In terms of collecting data, this thesis relies on both primary and secondary sources. The primary sources are constitutions, legislations, case laws, and administrative decisions. Secondary sources include books, journals, newspaper reports and theoretical writings on secularism, law, religion, society and constitution.

D. Limitations of this Thesis

The thesis does have some limitations. First, as a Master's level thesis, its scope is such that it excludes empirical data that might indicate the response of different stakeholders on the issue of coexistence of secularism and the state religion. That said, with the existing analysis and methodologies, it is expected that this thesis has made a strong case against the compatibility of the state religion clause with secularism in the case of the Bangladesh constitution.

Second, the thesis is limited by the lack of substantial literature on the relevant academic area in Bangladesh. Moreover, the Supreme Court of Bangladesh has not yet provided any guidelines or decisions in cases where the constitutionality of coexistence between secularism and religion was challenged. This lack of relevant literature posed a challenge for the presentation of the arguments put in this thesis, which require a greater understanding of the nature and scope of secularism in the context of Bangladesh.

E. Importance of the Thesis

The thesis should be significant for any academic research and study relating to secularism, state-religion relation, and the study of religion within constitutions, thus transcending its primary focus on Bangladesh. Further, it is hoped that this study will be academically relevant in Bangladesh as it provides an overarching analysis of the situation in Bangladesh, of how historical, socio-political and legal perspectives show that the state religion is not compatible with secularism and other secular components of the constitution. This analysis will be an addition to existing literature on this issue as there is no previous account that enquires into the possible incompatibility of the coexistence of secularism and the recognition of religion.¹¹ Lastly, this thesis, by proposing means to reconcile this constitutional impasse, will provide a resource to state actors as seeking possible reforms in these provisions.

¹¹ The literature that explicitly focused on supporting the coexistence are also extremely scarce. In fact, only one academic article in a Bangladeshi journal (authored by Billah, *infra* note 122), some national blogs, and newspaper Op-Ed addressed the issue.

CHAPTER TWO

THE INTRODUCTION OF RELIGION TO POLITICS AND THE CONSTITUTIONAL FRAMEWORK AND THE AFTERMATH: AN OVERVIEW OF THE HISTORY OF PRE AND POST BANGLADESH ERAS

Introduction

The period between the late 19th to mid-20th centuries was the turning point in the Indian subcontinent¹² as this was the time when the people of the Undivided India¹³ started to revolt against the British; demanding equal rights and equal participation in the governance of India. Historical narratives demonstrate that these uprisings had eventually paved the way to decolonization and the creation of two independent states, India and Pakistan. This freedom, however, came at a great price. This period is remembered as a time of widespread communal violence leading to, perhaps for the first time, perpetual animosity between Hindu and Muslims communities sharing the Indian subcontinent. Historical accounts show that this animosity was triggered when religion was brought into politics by political parties and when the British colonizers opted out the infamous ‘Divide and Rule’ policy by giving preferential treatment to a particular religious groups in different laws (e.g. the *Government of India Act 1919* and *Government of India Act 1935*) and administrative policy (e.g. during the territorial partition of the Bengal province). This religion-based politics eventually led to a chain of continuous and unprecedented events.

Against this backdrop, this chapter, by drawing from historical narratives (from 1900-2011¹⁴), will show that political recognition of a religion(s) or preferential treatment of any religious group has never had a positive impact upon the Indian sub-continent. This chapter will also argue that giving political recognition to a particular religion(s) by the state (e.g. declaring

¹² It includes Indian, Pakistan, and Bangladesh.

¹³ Before the creation of India and Pakistan as a separate in 1947, India was known as the *Akhand Bharat* or the undivided India.

¹⁴ The reader should keep in mind that the some of the historical events (from 1900-1971) discussed in this chapter predated independent Bangladesh, but as the territory that constitutes present Bangladesh was part of India before 1947 and Pakistan before 1971, these historical accounts are very much part of the history of Bangladesh.

Islam as the state religion in the constitution) is not conducive for the secular constitutional framework and does not maintain religious harmony.

The chapter divides its discussion into three parts: *part I* explores the historical events (1900-1947) to show how religious harmony between different religious communities was dismantled because colonizers and political parties used religion to gain political advantage, which in turn created perpetual animosity between Hindu and Muslims and finally caused the division of India. Following that, *part II* discusses how the West Pakistani rulers' attempt to build an Islamic state through constitutional means by denying the secular linguistic identity of the East Pakistani (now Bangladesh), triggered the liberation war in 1971, eventually leading to the liberation of Bangladesh. Finally, *part III* focuses on the Bangladesh era and shows how the introduction of pro-religious policies weakened the pro-secular constitution framework designed and implemented in the first Constitution. This part also shows how the pro-secular constitutional framework was gradually Islamized, making Bangladesh an insecure place for religious minorities.

The objective of this chapter is to present a contextual analysis as well as setting the context for later chapters of this thesis. Although this chapter will not directly address the issue of the compatibility of the state religion clause with secularism in the Constitution of Bangladesh, it will clarify why recognition of religion in the constitution is particularly harmful to Bangladesh by going through each historical turning point before the parliament juxtaposed secularism and the state religion in the constitution in 2011.

PART I: FROM RELIGIOUS HARMONY TO ANIMOSITY BETWEEN MUSLIM AND HINDU COMMUNITIES OF THE UNDIVIDED INDIA

The current socio-political factors and events¹⁵ that are related to religion and secularism in Bangladesh cannot be fully comprehended without first exploring the pre-liberation history of Bangladesh in connection with the numerous roles of religion (e.g. shaping public life and political trajectory, influencing legal and policy framework and principal catalyst of communal

¹⁵ The following factors and events influenced hundred years of history, namely: the detrimental effect of religion in public life, the bitter relationship between two predominant religious communities, i.e. Hindus and Muslims, the catalyst behind the systematic religious violence and the reason for adopting secularism (in Muslim majority country) as a fundamental principle in the original constitution of Bangladesh (in 1972).

animosity between Hindus and Muslims). To that end, the following discussion will explore the key historical events of the pre-Bangladesh era.

A. The Era of Religious Harmony (8th Century to 18th Century AD)

It is difficult to pinpoint the exact point of departure; nevertheless, religion became a significant catalyst in South Asia when the Arab Muslim traders entered South India in the 8th Century.¹⁶ Although these traders were not part of any missionary group, they did play some role in converting people of different faiths (mostly Hindus) to Islam. Nevertheless, the degree of conversion was not noticeable enough to trigger the wrath of the Hindu Kings.¹⁷ In fact, history shows that, even with the issue of proselytization, the people of both communities (i.e. Hindus and Muslims) were living side by side in tranquility.¹⁸ Later, during the time of Muslim rule in India, the most of the Muslim rulers were tolerant and forced proselytizing of the people of Hindu communities was not a common phenomenon.¹⁹ However, some historians argue that there was a record of mass conversion of lower caste Hindu to Muslims²⁰, but most of the conversions were a self-defense strategy initiated by the people of the lower Hindu caste to escape oppression by higher castes.²¹

The reason most of these rulers opted for tolerance and persuasion, in contrast to forcing conversion was that they realized that any policy against the common people or their religions would cause massive discontent and would threaten their reign. For instance, during the time of Empire Akbar, the Hindus controlled some of the key administrative positions of the regime and many Hindu kings continued their reign under his command. Therefore, religious differences did not constrain peaceful cohabitation. There were not any significant historical records of

¹⁶ Ram Gopal, *Indian Muslims: A Political History (1858-1947)* (Bombay, India: Asia Publishing House, 1959) at 1.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ See generally, *ibid* at 5—12.

²⁰ See Kenneth J Saunders, *a pageant of Asia; a study of three civilizations*, ed, (London: Oxford University Press, H. Milford, 1934) at 162; see also Roland E Miller, *Mappila Muslims of Kerala: a study in Islamic trend* (Orient Longman, 1992) at 93.

²¹ See Abdul Halim, *Legal System of Bangladesh* (Dhaka, Bangladesh: CCB Foundation) [Halim, *Legal System*].

communal discontent or violence during the reign of Hindu and Muslim rulers.²² Therefore, communal animosity was not presented before the British made India its colony in 1863.²³

The reason that the British colonial period was considered to be the point of departure for communal animosity is that centuries of religious harmony were undermined and religious identity became more important than the common interest. The historical sources depict how communal elements were used by the British administration to discourage unity amongst the natives of the territory.

While it is difficult to pinpoint the exact events that made the British realize the advantage of communal elements, the use of communal sentiment was found to be a great tool for the British during the Sepoy Mutiny in 1857 (known as *Sepoy Bidraha* in Bengali). Historical records show that the reason for the mutiny was based on an allegation against the British that the ammunition for a new rifle that used paper cartridges that came ‘pre-greased’ required soldiers to bite the cartridge open to release the powder,²⁴ which was made of tallow derived from beef and pork, prohibited by dietary law for Hindus and Muslims.²⁵ This allegation angered both the Hindus and Muslims soldier of the British army and they revolted to overthrow the British. Although both Hindus and Muslims participated in the mutiny, the motive for doing so was to protect their religion from one another. This event was pivotal for the British administration, as the later discussion will show that the British started using the communal element to validate their policies and create division between religious communities (especially Hindus and Muslims).

B. Harmony Dismantled- Negative Impacts of Use of Religion in Politics and Public Affairs (From 1905 to 1947)

One of the first instances of the British applying the use of communal elements, as triggered by the 1857 Mutiny was when the administration faced widespread opposition from Indians (Hindu and Muslim) against its decision to re-demarcate the province of Bengal (popularly known as the partition of Bengal). The following discussion will discuss events

²² Ahmed Sarif, *Sampradayekatar O Samayer Nana Katha (The Discourse on Communalism and Time)* (Dhaka, Bangladesh: Agamee Prakashani, 2015) at 10 [translated by the author].

²³ *Ibid* at 23.

²⁴ Daniel R Headrick, *The Tools of Empire: Technology and European Imperialism in the Nineteenth Century* (Oxford University Press, 1981) at 88.

²⁵ *Ibid*.

related to partition and explain how this event marked the beginning of the infiltration of communal policies in public affairs and politics.

a. Partition of Territory of Bengal in 1905 Based on Religious Proportionality and Its Effects

From the British perspective, the partition of Bengal territory was a policy decision of administrative convenience,²⁶ but it had political implications as well. The political reason behind the partition became apparent in 1903, when Lieutenant Governor AHL Fraser advised Governor General Lord Curzon that Dacca and Mymensingh districts should be separated from Bengal, because they were "the hotbed of the purely Bengali movement, unfriendly if not seditious in character, and dominating the whole tone of Bengali administration".²⁷ In response to that recommendation, Lord Curzon decided to divide Bengal. His original scheme for partition was published in the Gazette of India on December 12, 1903.²⁸ However, this decision aroused massive discontent from Hindu and Muslim community of Bengal on different grounds.²⁹

Hindus and Muslims alike rejected Lord Curzon's initiative, and he had to face hundreds of protest meetings where both communities participated.³⁰ Curzon anticipated that the scheme would meet with opposition, particularly from the Hindus of Bengal.³¹ Therefore, to subdue the uprising and dismantle communal unity, Curzon decided to promote the Muslim community, who were minorities in the undivided Bengal. The reason was that, since 1763, the Muslims had

²⁶ According to the British government, the principal motive for the partition was that of administrative convenience. Bengal, with a population of seventy-eight million and an area of 189,000 square miles (Bihar, Chota Nagpur, and Orissa being included in it) was too large a province to be efficiently administered, see, Anil Baran Ray, "Communal Attitudes to British Policy: The Case of the Partition of Bengal 1905" (1977) 6:5 *Social Scientist* 34 at 34.

²⁷ *Ibid.*

²⁸ *Ibid* at 35.

²⁹ The following are some of the main grounds: (i) suspicion of divide and rule strategy; (ii) the Hindu leader (mostly were also landlords) from Eastern Bengal feared that their authority over the province would be prejudiced; (iii) the Hindu leader from western part fear that the significance of Calcutta (then capital of India) as political and economic center point will be diminished; (iv) the Muslims of the Eastern part of Bengal feared that the government wanted to turn them into Assamese (people of Assam); (v) Hindu Intellectual saw this as an attack against their pride, sentiment and self-esteem and attempt to dismantle inseparable cultural and linguistic bond, see Ray, *supra* note 28 at 36, 39, M R A Baig, "The Partition of Bengal and Its Aftermath" (1969) 30:2 *Indian J of Political Science* 103 at 111, A K Biswas, "Paradox of Anti-Partition Agitation and Swadeshi Movement in Bengal (1905)" (1995) 23: 4/6 *Social Scientist* 38 at 39.

³⁰ Gopal, *supra* note 16 at 91.

³¹ Ray, *supra* note 26 at 35.

been a backward community with little influence in administration and politics. It was therefore advantageous for Curzon to use communal elements to incite them against the Hindu leaders, who occupied the major positions in mainstream politics. Consequently, Curzon decided to change the balance of interests favoring Hindus and constructed the partition in a manner that appeared to be beneficial to the Muslims of Bengal.³² However, the Hindus vehemently opposed this later scheme. The Hindu leaders were also willing to bargain the annulment of the partition at the expense of Muslim interests. The anti-partition movement thus gradually became more and more pro-religious and less of a national movement. This strategic use of religious/communal elements became more frequent over time, eventually creating a rift between the Hindus and Muslims of undivided India.

In a nutshell, this section showed how centuries of religious harmony began to crumble when the religious element was introduced to state affairs. This also indicates that people from different religious communities lived in harmony and peace as long as their religion was undisturbed.

The following section will further this discussion by showing how religion was used in political movements and legal policy to forge perpetual division and animosity between Hindus and Muslims of the undivided India, and would lead to the creation of a separate India and Pakistan on the basis of religion.

C. Negative Implications of the Use of Religion in Political Movements and Legal Instruments (From 1905 to 1947)

While the British can be held primarily responsible for igniting the communal flame, it would be wrong to claim that the British played ‘the only role’ in creating a division between the communities. The leaders of Muslims and Hindu communities played an even greater role in exploiting the emotions of the masses. It can be seen by a scrutiny of anti-British movements between 1905-1947 which reveals that leaders of both communities used the communal element to gain popular support. For instance, the popular nationalist Movement known as the *Swadeshi* movement, which aimed at the partition of Bengal, was one of the earliest examples in which communal harmony broke down because of the introduction of religious elements by the Hindu

³² Gopal, *supra* note 16 at 91.

leaders. The boycott was initiated by a resolution that people of Bengal will abstain from purchasing British manufactured goods, their education, and employment as a means to create economic pressure on the Government.³³ However, this national movement became pro-religious in the hand of the leaders of the *Swadeshi* movement, who were mostly Hindu leaders based in Calcutta, and because the most prominent supporters were members of the Indian National Congress (INC), (the most dominant political party with majority Hindu members).

This shift in attitudes and its impact on Muslims has been well depicted by Surendranath Banerjee, a Hindu leader of the anti-partition movement who wrote in his autobiography: “Swadeshi had evoked the fervour of a religious movement. It has become part of our Dharma. Naturally, the Muslims could not be expected to subscribe to something which had become a part of the Hindu Dharma [...] the Swadeshi vow to a Hindu audience in the presence of the god of their worship. Such incidents and the use of Hindu symbols to identify nationalism could not but be offensive to the Muslims”.³⁴

The *Swadeshi* movement, despite starting as a united and secular movement, eventually turned into a religiously motivated one. This shows that Hindu leaders sacrificed their Muslim comrades for the sake of achieving their objectives against the British and to introduce a religious element to motivate their movement knowing that this would force the Muslims out of any possible future movement. This communal attitude of the Hindu leaders changed the future of political trajectory, as Muslims came to realize that Hindu leaders could not protect their interests.

This suspicion and distrust between the communities gave rise to a fear of Hindu dominance over Muslims. Therefore, Muslim leaders thought of establishing their separate political identity (against INC that apparently became a pro-Hindu platform) to ensure the benefits of the Muslim community. The following sections will highlight how this political transition caused social disorder and disintegration in the undivided India.

³³ See generally A. K. Biswas, “Paradox of Anti-Partition Agitation and Swadeshi Movement in Bengal (1905)” (1995) 23: 4/6 Social Scientist 38.

³⁴ Ray, *supra* note 26 at 44.

a. Creation of the Separate Political Entity Based on Religious Identity and Its Impact

The All-India Muslim League (AIML) was formed in 1906 by the covert influence of the British administration and under the auspicious of Nawab³⁵ of Dacca (now Dhaka: the capital of Bangladesh) to support the partition movement, adopting the same communal approach as the Hindu leaders.³⁶ This unlikely union with the colonial powers was no coincidence; rather it was a result of a compromise reached through the Simla Pact in 1906, where the Muslims leaders were assured by the British that they would get preferential treatment and benefits. One such benefit was separate reserved seats in the provincial legislative assembly for the Muslims, irrespective of the proportion of the Muslims in the general population.³⁷ Later, the Indian Council Act of 1909 also provided provisions for a separate electorate based on religious identity in the (Imperial Legislative) Council.³⁸ However, the Hindus leaders of INC opposed this special preference because it was seen as the starting point of the transformation of India into 'Muslim India'. Therefore, Hindu leaders increased the level of anti-partition movement, and this resistance was overwhelming for the British. As such, despite efforts to this end, the Muslim League failed to retain partition, and the partition of Bengal was annulled in 1911. However, the decision turned out to ultimately be beneficial for the British as it allowed it on the one hand to formally end the possibility of harmony between these communities (Hindu and Muslim) by showing that Muslims could never properly establish their interests under Hindu domain and, on the other hand, to remain neutral and faultless in the eyes of both religious parties.

In sum, the partition of Bengal was one of the first instances of the use of religion in politics or public policy. It caused a serious anomaly in society as it manipulated the psyche of the people, causing serious social disorder and disintegration of harmony. The following discussion will address another dimension to cases where the use of religion has caused the above negative consequences.

³⁵ During the time of British India, the title of "Nawab" was a personal distinction awarded by the British government to persons and families who either ruled a princely state or had done various services to the Government of the British India. This system is identical to a British peerage.

³⁶ Ray, *supra* note 26 at 44.

³⁷ See K C Chaudhry, *Role of Religion in Indian Politics (1900-1925)* (Delhi, India: Sundeep Prakashan, 1978) at 167.

³⁸ *Ibid* at 179.

b. Preferential Treatment on Religious Grounds through Constitutional Documents and resulting Negativity (From 1919 to 1947)

In addition to the use of religion in administrative policy and political movements, religion became a catalyst for the formation of legal frameworks. For instance, the *Government of India Acts* of 1919 and 1935 (the Acts) (considered to be the most important constitutional documents enacted by the British Government as the process of initiating democratization in India)³⁹ proposed special preferential representation of the Muslim and Sikh communities through the provision of separate electorates for these minorities. However, this preferential treatment was discouraged in the Mont-Ford Report based on which the Act of 1919 was passed. As per that report, “the communal electorate was opposed to the teaching of history and perpetuated class divisions and stereotyped existing relations”.⁴⁰

The Act of 1919 was welcomed by the Muslim leaders and rejected by the INC. The INC doubted that the scheme would ensure their claim for home rule. The separate electorate system was also criticized as being impractical, although it was initially supported by the INC in the Lucknow Pact.⁴¹ Since the INC was a political force not to be ignored, the Act of 1919 was not enforced. Eventually, a new *Government of India Act* was propounded in 1935, which accommodated INC political objectives. This later Act introduced substantial measures of representative government through provincial autonomy (e.g. for the first time, law and order became subject to home rule instead of the British government).⁴² The Act also kept the mechanism of the controversial separate electorates, though not in terms of AIML, which demanded 50 percent representation, and under this Act, the first election was conducted in 1937.

The Act was a major step towards the democratization of India, but it did not bring the results that its drafters expected. Rather, the new Act paved the way for INC dominance. This was because, by having a separate electorate for the Muslims, their representation was isolated within the Muslim community. It therefore reduced the Muslim community’s chance to become

³⁹ Ian Talbot & Gurharpal Singh, *The Partition of India* (New York, USA: Cambridge University Press, 2009) at 32.

⁴⁰ Chaudhry, *supra* note 37 at 218.

⁴¹ See for details *Ibid* at 210.

⁴² Talbot, *supra* note 39 at 32.

a parallel political power in India (to Hindus). Furthermore, the newly formed Congress Government failed to fulfil their election manifesto which focused on the economic and social concern of the masses as opposed to communal issues.⁴³ The reason for this failure was the effect of post-election activities of INC that made the Muslims suspicious about Congress' strategies when the INC offered a share in governing power to the Muslim League in the UP in exchange for renouncing their pro-Islamic political ideology.⁴⁴ The AIML leaders considered this to be a forced assimilation of their interest within the domain of Congress' pro-Hindu interest. It became even more apparent when the new administration started adopting pro-Hindu policies like cow protection (sacred to the Hindus, but permissible food for Muslims) and the promotion of Hindi language and other religious symbolism.⁴⁵

To conclude, it is irrefutable that the use of religious markers, a pro-religious approach in formulating constitutional documents, Congress' communal attitude and the sense of distrust of the Muslim leader on INC strategies, gave the final impetus to the AIML to forward the demand for a separate state, i.e. Pakistan, under the two-nation theory. The following discussion will show how the idea of two nations was originated and how the impossible division of territory was made based on the religious marker.

c. Peculiar Construction of the Idea of Two-Nations based on a Religious Marker

The partition of the undivided India into India and Pakistan in 1947 by the British based on the religious marker can be said to be an unrealistic and overly-simple division. This is because, in making the division, the distinct and complex socio-cultural-political factors that existed at a national and regional level in pre-partitioned India were not properly considered by the British. These socio-cultural-political factors were related to the version of nationalism that had been propagated by the two prevailing political powers – INC and AIML – before partition. It is evident from partition historiography that, while the INC tried to promote a kind of secular based nationalism (though this secularized version was later given a religious color), the AIML propagated a pure communal nationalism based on Muslim identity.⁴⁶ However, the factor that

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ *Ibid* at 32—33.

⁴⁶ See generally Sana Aiyar, "Fazlul Huq, Region and Religion in Bengal: The Forgotten Alternative of 1940-43" (2008) 42:6 *Modern Asian Studies* 1213.

both these parties failed to recognize was that at the regional level, such as the Eastern part of Bengal and Punjab, the constitutive elements of nationalism were not purely religious, but also comprised other unique ethnolinguistic features.⁴⁷

In this context, one may question why the regional leaders from the Eastern part of Bengal concurred with an AIML policy for a separate state for Muslims. The reason was that they chose the best of a bad set of options, i.e. liberation from colonial power while avoiding any possibility of supporting Hindu dominance. This was the strategy used by the AIML, particularly by Muhammad Ali Jinnah (an AIML leader of who became sole spokesperson for the Muslim community during the 1920s), who demanded the separate nation⁴⁸ to emancipate the Muslim community from Hindu dominion.⁴⁹ Therefore, the bone of contention was not strictly religious grounds (e.g. force conversion and/or preventing the observation of religious practice) because there was no apparent threat to the religion. Rather, it was the potential fear of continued dominant-subordinate relations in any future shared state. Therefore, religion was used initially by the British as a dominating mechanism and then later by the Indians themselves as the spiritual foundation of independence. It eventually established a binary ideology between the communities and a contest for separate dominance.⁵⁰

This shows that the partition of India was in fact a political game, rather than a crusade to establish a theocracy. The socio-cultural plurality of this region made it impractical, if not impossible, to form either a purely theocratic state or a purely secular state (like French *laïcité*⁵¹). The post 1947 era of Indian history proves this: one, a successful union of India (which based the policy to establish a secular state with the protection of religious plurality) and two, an unsuccessful Federation of Pakistan which tried to establish a theocratic state by inserting

⁴⁷ Zillur R Khan, "Islam and Bengali Nationalism" (1985) 25:8 Asian Survey 834 at 834.

⁴⁸ This idea of Jinnah later known as the "Two-Nation Theory" based on religious identity, which was applied by the British to divided India in 1947.

⁴⁹ See "Mr. Jinnah's Presidential Address to the Constituent Assembly of Pakistan (August 11, 1947)", online: <www.pakistani.org/pakistan/legislation/constituent_address_11aug1947.html>.

⁵⁰ Satish Saberwal, "The Partition: Communalization, Contestation, and Interaction?" in Kaushik Roy, ed, *Partition of India: Why 47?* (New Delhi, India: Oxford University Press, 2012) 35 at 42.

⁵¹ The French model of secularism which is known as *laïcité* reduces the public influence of religion by prohibiting all forms of religious symbols or dresses that may create differences among citizens, see, Ahmet T Kuru, *Secularism and state Policies Toward Religion: The United States, France, and Turkey* (New York, USA: Cambridge University Press, 2009) at 124.

religion into the constitution and governance policy, thereby disregarding the cultural and regional diversity of the people of West Pakistan (East Bengal became part of Pakistan after 1947). Therefore, the use of religious marker, while providing a good foundation for political agitation toward the claim for a separate state, was not a practical formula for building a future stable social order. This became apparent after the separation of undivided India in 1947.

The following discussion will explore the separation of India and show how the idea of building two separate nations for Hindu and Muslims proved to be an impractical one.

d. Partition of India and Pakistan in 1947 Based on a Complex Religious Marker

The decolonization of India was inevitable given the massive pro-independence movement initiated by the INC and claims of a separate state from the AIML. However, the key issue for the British was how India would become independent. The British and Gandhi initiated some efforts to avoid the partition of India. However, by mid-1940, communal politics had become so predominant that all possibilities of integration were effectively excluded. Therefore, the creation of two religiously-based nations was the only real option left before to the British. As per this formula, Cyril Radcliffe⁵² divided the territory into the territories of India and Pakistan, where India got the lion's share of the territory because Hindus were the major inhabitants of undivided India and Pakistan got two discrete territories (West Pakistan and East Bengal, later know as East Pakistan), which were separated from each other by about 1500 km and India between them.⁵³ Therefore, Jinnah's political strategy was founded on the aspiration of the emancipation of Muslims from Hindu domain remained unrealized and the "minority syndrome" became even more concentrated and acute.⁵⁴ Moreover, the partition could not resolve these problems because, when border lines were drawn between two states, the formula was purely scientific, not taking into account the regional, ethnic, linguistic, cultural, social

⁵² Cyril Radcliffe was a UK lawyer with impeccable service record who was the Chairman of Boundary Commission. He was entrusted with the extreme task of drawing a boundary between into a territory that had been integrated for thousands of year in only five weeks (from July 8-August 17, 1947).

⁵³ Willem Van Schendel, *A History of Bangladesh* (New York, USA: Cambridge University Press, 2009) at 107.

⁵⁴ Jaswant Singh, *Jinnah: India-Partition-Independence* (New Delhi, India: Rupa & Co., 2009) at 489.

diversity. This failure eventually gave rise to more insatiability and violence in the independent India and Pakistan.⁵⁵

Pakistan arguably faced even more of a challenge than India because the whole idea of Pakistan was misconceived. The reason is that, when Choudhary Rahmat Ali⁵⁶ first proposed a separate homeland for the Muslims, the idea of Pakistan had not yet been coined. In other words, what Jinnah (as spokesperson for the Muslim community and the AIML) was offering was emancipation from the Hindu domain, because Hindus and Muslims were irreconcilably opposed to a monolithic religious community and there was no possible way to coexist peacefully. Thus, religion once again was used to attract the Muslims, though the motive of Jinnah was not to establish an Islamic state.⁵⁷ For this reason, when the AIML's representatives gathered in Lahore in 1940 for their annual session, the resolution (the Lahore Resolution)⁵⁸ proposed the autonomous establishment of sovereign 'states' in the North-East and North-West, where Muslims were the majority.⁵⁹ However, as Talbot and Singh observe, the vagueness of the scheme gave Jinnah room for maneuvering towards resolution and subsequently the term 'state' was introduced to the idea of a 'Muslim state'.⁶⁰ This was how the idea of Pakistan was conceived. This dramatic shift was political and utilitarian because within the scheme of 'separate states', the AIML and Jinnah would not become the sole dominant powers. Therefore, it was necessary to propound the 'Two-Nation Theory', which proposed a separate country for Muslims alongside Hindus. However, Jinnah's scheme failed to be executed because of the mix of people of different religions in all provinces of undivided India.⁶¹ Pakistan therefore turned out to be a separate but 'not a single' state. There were socio-cultural differences in the regions that became the two wings of Pakistan in 1947. These differences subsequently created

⁵⁵ The scenario of post-partition social disorder e.g. massive exodus, communal riot, forced deportation, expropriating property have in detail discussed in literature related to the partition of India and Pakistan, as such, this thesis within its limited scope will not repeat this discussion in depth.

⁵⁶ He is the "Founder of Pakistan National Movement," in which the word "Pakistan" appears to have been used for the first time in a document, See G Allana, *Pakistan Movement Historical Documents* (Karachi, Pakistan Department of International Relations: 1969) at 103—110.

⁵⁷ See, *supra* note 49.

⁵⁸ See "Presidential address by Muhammad Ali Jinnah to the Muslim League Lahore, 1940", online: <www.columbia.edu/itc/mealac/pritchett/00islamlinks/txt_jinnah_lahore_1940.html>.

⁵⁹ Talbot, *supra* note 39 at 33.

⁶⁰ *Ibid* at 33.

⁶¹ See "Move to Partition Punjab AND Bengal: Text of Mr. Jinnah's Statement", online: <www.nationalarchives.gov.uk/wp-content/uploads/2014/03/fo371-635331.jpg>.

differences of opinion between provinces, especially affecting the Eastern Province, which later seceded from Pakistan in 1971 to become Bangladesh.

The following part will explore the key reason for this conflict and eventual secession. In this connection, it will show how the forced imposition of Islam in public affairs by denying the secular identity of the East Pakistan (now Bangladesh) had played a vital role in the secession of 1971 and the creation of Bangladesh.

PART II: THE CREATION OF PAKISTAN BASED ON RELIGION AND THE AFTERMATH (From 1947-1971)

A. The Journey of ‘Moth-Eaten’⁶² and Conflict Trodden Pakistan

After the creation of Pakistan, “Jinnah got the land but failed to create a state; and failed so decisively in crafting a nation”.⁶³ The reason is that some form of territorial or cultural cohesion was required to forge a national identity. For Pakistan, religion was the only common factor between both territory and culture, which in itself was not strong enough to forge a common bond. A central part of Islam relates to one’s relationship with God⁶⁴, and it does not have a common institutional attachment like the Christian church. The only near equivalent of the Church, the Caliphate, had expired in 1919 with the advent of Kemal Ataturk’s regime. Therefore, other factors, e.g. linguistic, ethnic, sub-national, provincial and ideological, gradually emerged to become constitutive of national identity in Pakistan.⁶⁵ This in turn created the first fissure between pro- Islam-West Pakistan and pro- secular East Pakistan.

a. Conflict between East and West Pakistan: Religious Identity versus Linguistic-Cultural Identity

⁶² The “Moth Eaten” metaphor had become inseparable with Pakistan since the partition of 1947. The origin of this metaphor is unknown, though; it was initially used by the anti-partition advocates who strongly believed the idea of Pakistan could never be successful due to the inseparable Geo-cultural characteristics of erstwhile-undivided India.

⁶³ Singh, *supra* note 54 at 515.

⁶⁴ H Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law*, 4th ed (New York, USA: Oxford University Press, 2010) at 191.

⁶⁵ Nighat Said Khan, “The Global Order: Politics and the Women’s Movement in Pakistan in Soofia Mumtaz *et al*, eds, *Pakistan: The Contours of state and Society* (Karachi, Pakistan: Oxford University Press, 2002) 137 at 139.

Through the creation of Pakistan in 1947, Jinnah, having left with some territories and imagined homeland, made a new start regarding his political strategy. In his first address to the constituent assembly of Pakistan as the first Governor General, he showed a clear inclination towards secular governance policy. To quote Jinnah:

If you will work in co-operation forgetting the past, burying the hatchet, you are bound to succeed [...] We should begin to work in that spirit, and in course of time all these angularities of the majority and minority communities, the Hindu community and the Muslim [...] will vanish [...] You are free; you are free to go to your temples, you are free to go to your mosques or to any other place or worship in this state of Pakistan. You may belong to any religion or caste or creed -- that has nothing to do with the business of the state [...] We are starting with this fundamental principle: that we are all citizens, and equal citizens, of one state.⁶⁶

Jinnah realized that state unity could only be ensured if the state remained neutral as to religion, and respected pluralistic identities. Therefore, he argued that it was imperative for the Constituent Assembly of Pakistan to formulate a constitution that would recognize the principle of secularism as a governing principle.

However, Jinnah himself derogated from his path when he denied any official recognition to *Bengali* (the language of the majority of people of East Pakistan) to declare Urdu as the only state language of Pakistan.⁶⁷ The preference for Urdu was its connection with Arabic and Farsi (both languages having rich Islamic literary resources). Hence, this move was seen as the identity of Indian Muslims and their culture.⁶⁸ However, as this decision constituted a direct denial of the linguistic identity of the people of East, it created enormous national tensions. Added to this debate was the fact that Urdu was only used by 3 percent of the total population, thus falling behind dozens of other languages, amongst which Bengali was the first, with 56 percent usage.⁶⁹ Religious implications were again uncritically brought into public discourse by promoting the case for the assumed connection between the Bengali language and Hindu heritage (the religious text of Hinduism is written in the Sanskrit language from which the Bengali language

⁶⁶ “Mr. Jinnah's address to the Constituent Assembly of Pakistan”, online: <www.columbia.edu/itc/mealac/pritchett/00islamlinks/txt_jinnah_assembly_1947.html>.

⁶⁷ Van Schendel, *supra* note 53 at 111.

⁶⁸ Philip Oldenburg, “A Place Insufficiently Imagined”: Language, Belief, and the Pakistan Crisis of 1971” (1985) 44:4 the Journal of Asian Studies 711 at 717.

⁶⁹ Van Schendel, *supra* note 53 at 110.

originated).⁷⁰ Therefore, Bengali was branded as the language of the Hindus and the *Bangalee* Muslims became half-Muslims. This communal attitude was the source of the animosity between East and West Pakistan.

Critiques may question why the West Pakistani government repeated the British mistake of using religion as a public affairs strategy. In this regard, Professor Ali Riaz observed that the language issue became a crucial factor due to its connection with the feudal foreign elements, i.e. Zamindars (landlords) who controlled the economic resources of Pakistan.⁷¹ Urdu was esteemed by those feudal powers as a symbol of aristocracy.⁷² Therefore, it was necessary for West Pakistan to placate the interests of the aristocracy in order to secure their power.

Thus, once again, religion was used not to protect religion itself, but rather was used to protect the interests clearly superficial to Islam. This pro-Islam attitude continued, despite growing discontent in the Eastern Part. The following part will discuss the scheme of the West Pakistani ruler in forcibly building an Islamic state, which aggravated the relation between two provinces.

B. The Efforts to Build a Theocratic Constitution and the Aftermath

The discontent over linguistic identity was not the only factor that compelled East Pakistan towards secession in 1971. The East Pakistanis were subjected to colossal economic deprivation and were neglected by both civil and military administration.⁷³ The double standard in terms of treatment of Pakistanis from the East and West was first a result of racism (since *Bangalees* were still assimilated with Hindus), and second, a tool to protect the interest of AIML leaders who primarily originated from the West. Therefore, the national policies of Pakistan became West-oriented. In the absence of any other commonality, the hegemonic use of Islamic identity appeared to be the best strategy to create the national bond. This is evident from the speech of Jinnah made in Dacca of East Pakistan:

[h]ave you forgotten the lesson that was taught to us thirteen hundred years ago? Who were the original inhabitants of Bengal-not those who are now living. So, what is the use of saying ‘we are

⁷⁰ Oldenburg, *supra* note 68 at 724—725.

⁷¹ Ali Riaz, *Unfolding state: The Transformation of Bangladesh* (Canada: de Sitter Publications, 2005) at 58 [Riaz, *Unfolding state*].

⁷² *Ibid.*

⁷³ Van Schendel, *supra* note 53 at 108.

Bengalis, Sindhis, or Pathans, or Punjabi’. No, we are Muslims. Islam has taught us this, and I think you will agree with me that whatever else you may be and whatever you are, you are Muslim.⁷⁴

Jinnah made it clear that Pakistan would continue with the Islamization by intentionally bringing communal idioms to justify his actions, while neglecting all other factors necessary for cohesion between East and West. Subsequently, West Pakistan targeted the constitution as the means to forge a common Pakistani nationalism, which again was based on Islam. The first such attempt was made in the 1956 Constitution, which had provided for a complete structure for a theocratic state. The significant theocratic features of this constitution were: *firstly*, that Pakistan be recognized as an Islamic Republic; *secondly*, that the constitution be guided by the principles of democracy, freedom, equality, tolerance, and social justice as enunciated by Islam; *thirdly*, that the head of the state had to be a Muslim; and *fourthly*, a repugnancy clause which is related to giving primacy to Sharia law over other laws if the Supreme Court of Pakistan finds a direct conflict with the Holy Quran.⁷⁵

The constitutional provisions for ‘non-Muslims’ (note: not minorities), transformed non-Muslims to second-class citizens due to dominating theocratic features. Moreover, East Pakistani Muslims became victimized because they were forced to accept this neo-nationalism which was against their cultural diversity and linguistic identity.⁷⁶ It became a source of tension because, although as Muslims they supported Pakistan,⁷⁷ they never vouched for theocracy. This polarized position of the provinces made the situation graver. West Pakistan subsequently made some efforts to break the ice and tried to reconcile the issue related to identity in the constitution. For instance, General Ayyub Khan, who assumed power in Pakistan by a coup d’état on 7 October 1957, tried to legitimize his rule and gain popular support by introducing a new constitution in 1962 which reduced the theocratic features of the earlier constitution. The 1962 Constitution, while based on its predecessor constitution, omitted many references to Islam, including changing the official name into the Republic of Pakistan (omitting ‘Islamic’). However, Ayyub

⁷⁴ Ashok Kapur, *Pakistan in Crisis* (London, UK: Routledge, 2006) at 22.

⁷⁵ Martin Lau, “Islam and the Constitutional Foundations of Pakistan” in Rainer Grote & Tilmann J Röder, eds, *Constitutionalism in Islamic Countries: Between Upheaval and Continuity* (New York, USA: Oxford University Press, 2012) 171 at 192-195.

⁷⁶ Jnanbrata Bhattacharyya, “Aspects of Cultural Policy in Bangladesh” (1983) 18:13 *Economic and Political Weekly* 499 at 501.

⁷⁷ Oldenburg, *supra* note 68 at 712.

had to reverse these constitutional changes because of constant pressure from the Islamist group Jamat-i-Islam who condemned Ayyub for derogating from Islam.⁷⁸ In his efforts to appease the Islamists, Ayyub failed to stabilize political upheavals in both East and West Pakistan. In particular, the Awami League⁷⁹ (AL) under the leadership of Sheikh Mujibur Rahman (Mujib), who by 1969 had become the popular leader in East Pakistan launched a fully-fledged movement for regional autonomy against Ayyub's non-political authoritarianism. Amidst these political upheavals, Ayyub resigned, and power was taken by General Yahya Khan on 25 March 1969.⁸⁰ Yahya tried to stabilize the situation by handing power to political parties through elections. The 1970 national election proved a turning point with AL winning 167 seats of 169 to form a central Government.⁸¹ However, this outcome was not welcomed by the winner in the West, the Pakistan People's Party (PPP) (under the leadership of Zulfikar Ali Bhutto). Under pressure by the PPP, the National Assembly began to frame a new constitution, although this process was indefinitely postponed on 3rd March 1971 by Yahya.⁸² This outcome was the final turning point in the history of undivided Pakistan.

These historical accounts show that the main reason for denying the Eastern part the right to form a government was the West's perception of East Pakistan's culture as an offshoot of Indian Hinduism. The ability of East Pakistan to form the government was thus translated by the West first, as a destruction of the Islamic identity that defined Pakistan and secondly, as a potential threat of assimilation with India. Therefore, it was necessary to suppress this so called 'pro-Hindu nationalism'. The military crackdown on 25 March started the Bangladesh War of Independence, with the Mujib's declaration of Independence on 26 March 1971. The ensuing war resulted in 3 million deaths in 266 days, in one of the worst genocides of the 20th Century, with the war ending on 16 December.⁸³ All these events are evidence of how the idea of

⁷⁸ Lau, *supra* note 75 at 194.

⁷⁹ The Awami League was the leading political parties of the erstwhile East Pakistan who played the pivotal role in protesting the Martial law rule in the Pakistan. In 1970, it secured the landslide majority in the Election but was refused by the Martial Law ruler to form a government. Later when Pakistan's occupation begun in 1971, AL played a major role in organizing and regulating liberation war. At present, AL forms the present government of Bangladesh.

⁸⁰ Lau, *supra* note 75 at 195.

⁸¹ Sirajul Islam, "Election", online: <en.banglapedia.org/index.php?title=Election>.

⁸² See *Constitution of the People's Republic of Bangladesh*, 1972, Schedule V [*Constitution of Bangladesh*].

⁸³ Ministry of Liberation War Affairs of Bangladesh, "Brief History of Liberation War", online: <www.molwa.gov.bd/>.

building a multicultural nation, based on a single religious identity marker, can be doomed from the outset.

The following part enquires into the history of post-1971 independent Bangladesh. It discusses how the Bangladesh constitution embraced a secular policy at the beginning, but with the passage of time leaned towards favoring religion. Eventually, Islam became the state religion, which, standing alongside the secular mandates of the constitution, created a dichotomy, as these concepts are apparently mutually exclusive.

PART III: BANGLADESH ERA: FROM SECULARISM TO ISLAMIC-SECULARISM (1971-2011)

A. Inception of an Era of Secularism and Subsequent Shifts towards Religiosity

The liberation war of 1971 was not fought only for socioeconomic emancipation, but also to protect the secular cultural identity from the West Pakistani ruler. Thus, the country of Bangladesh emerged based on secular-socialist principles. The elected representatives of the 1970 election formed the Constituent Assembly under the leadership of Sheikh Mujibur Rahman to formulate the Constitution of Bangladesh, which was finally adopted on November 4, 1972. The constitution, by acknowledging the pre-independence socioeconomic, cultural and political contexts, declared nationalism, socialism, democracy, and secularism as the fundamental governing principles for Bangladesh. In particular, secularism was adopted because the use of religion in politics had resulted in enormous political upheaval and communal violence. Moreover, it was necessary to bar religion from occupying a political space within Bangladesh, to ensure the solidarity of multi-religious and cultural identities. This cautiousness was reflected numerous times in the speeches of the members of the constituent assembly during the deliberation for adopting the constitution.⁸⁴ Consequently, to ensure this secular constitutional order, under the constitutional mandates, the AL Government banned all pro-religious political

⁸⁴ Abdul Halim, ed, *Gono Parishad Bitorko (the Debate of Constituent Assembly)* (Dhaka, Bangladesh: CCB Foundation, 2015) at 70 [translated by the author] [Halim, *Gono Parishad Bitorko (the Debate of Constituent Assembly)*].

parties.⁸⁵ The political strategy of AL was to gain popular support by establishing an ideological hegemony based on linguistic *Bangalee* nationalism and secularism.

Political analysis shows that, gradually AL started losing popularity for failing to ensure steady economic success, deteriorating law and order, corruption and favoritism.⁸⁶ AL's secular-nationalist ideological hegemony thus needed to be substituted with stronger rhetoric. For this reason, Mujib (then President of Bangladesh), despite being a strenuous supporter of secularism and opposed to the use of religion, started using pro-Islamic statements in his speeches (such as stating that he was proud to be Muslim and that Bangladesh is the second largest Muslim country). Mujib was also recorded to have claimed that secularism, as reflected under Art 12 of the 1972 Constitution of Bangladesh, did not imply absence of religion.⁸⁷ This was the beginning of the infiltration of religion into politics. This is despite the fact that historical records and later-day political analysis notes that Mujib tried to demystify the use of secularism in national and international efforts to secure economic and political cooperation from various pro-American and Middle Eastern countries which refrained from giving recognition to Bangladesh as an independent state, which in turn affected the flow of international aid to and trade of Bangladesh.⁸⁸ Thus, although prior to the assassination of Mujib (on 15 August 1975) the constitution kept its secular character, this event marked the 360-degree shift in the political culture of newly formed Bangladesh from pro-secular to pro-religious.

B. The Beginning of the Islamization of the Constitution (1977-2011)

Following the death of Mujib, Bangladesh witnessed several coup d'états and eventually in 1976 General Ziaur Rahman (Zia) assumed power and declared Martial Law in Bangladesh. This was the turning point towards the formal introduction of religion into politics through the Constitution. To legitimize his usurpation, Zia targeted the Constitution as a means to attract the

⁸⁵ Ali Riaz, *God Willing: The Politics of Islamism in Bangladesh* (USA: Rowman & Littlefield Publishers, Inc., 2004) at 5 [Riaz, *God Willing*].

⁸⁶ Ali Riaz, *Islamic Militancy in Bangladesh: A Complex Web* (New York, USA: Routledge, 2008) at 9 [Riaz, *Islamic Militancy*].

⁸⁷ See Riaz, *God Willing*, *supra* note 85 at 5.

⁸⁸ See generally Kamal Hossain, *Bangladesh: Quest for Freedom and Justice* (Dhaka, Bangladesh: University Press Ltd., 2013).

majority of Muslims of Bangladesh.⁸⁹ In 1977, Zia amended the governing principles of the constitution and made some significant changes: the introduction of *Bangladeshi* nationalism in place of *Bangalee* nationalism to distinguish people of Bangladesh from Indian Bangalees who are mostly Hindus; replacing secularism with absolute trust and faith in Almighty Allah; defining socialism as a means to achieve economic and social justice (analogous to the social justice concept of Islam); and, finally, inserting bismillah-ar-rahman-ar-rahim on the top of the preamble of the constitution.⁹⁰ Later, having formed his political party, the Bangladesh Nationalist Party (BNP), and becoming president by means of a rigged election,⁹¹ Zia removed the ban on the pro-religious, political parties through the 5th amendment to the constitution, which facilitated his alliance with pro-Islamist political parties to ensure his rule. Zia was assassinated in 1981 and succeeded by General Hossain Muhammad Ershad 1982. Ershad followed went one-step further and, for the first time, Bangladesh had a state religion (Islam) by way of the Eighth Constitutional Amendment introduced by Ershad in 1988.

While Zia's measures to use Islam can be seen as a strategy to achieve legitimacy for his apparently illegitimate reign, his could not be said to be a remarkable instance of state-centric Islamization process. Nevertheless, Ershad's regime is marked by several initiatives to impose Islam on secular *Bangalee* culture: banning the drawing of Alpona⁹² in the Language Martyr's day observation because of its similarity to Hindu/Indian culture.⁹³

Ershad eventually had to relinquish his position in the face of a massive anti-autocratic movement in the 1990s. However, despite the reinstitution of democracy, Islamic components inserted into the constitution were never removed. In fact, both BNP and AL showed an inclination towards forming alliances with the Islamist political parties.⁹⁴ Moreover, during the martial law periods and subsequent democratic regimes, another factor became increasingly noticeable: heightened violence against religious minorities of Bangladesh. The number of

⁸⁹ See Ali Riaz, "The Politics of Islamization in Bangladesh in Ali Riaz, ed, *Religion and Politics in South Asia* (New York, USA: Routledge, 2010) 45 at 48 [Riaz, "The Politics of Islamization"].

⁹⁰ Riaz, *God Willing*, *supra* note 85 at 20.

⁹¹ Riaz, "The Politics of Islamization", *supra* note 89 at 48.

⁹² Colorful lines and designs drawn on the surface of Language Martyr's Altar.

⁹³ Dina Mahnaz Siddiqi, "Political Culture in Contemporary Bangladesh: Histories, Ruptures and Contradictions" in Ali Riaz & C Christine Fair, eds, *Political Islam in Bangladesh* (New York, USA: Routledge, 2011) 7 at 19.

⁹⁴ Riaz, *God Willing*, *supra* note 85 at 46.

religious minorities dramatically decreased (some argue that they were forced to flee)⁹⁵ and since then their number has hardly ever increased.⁹⁶

It is a question worth pondering why state religion was never removed from the constitution. The following section will discuss that question in detail by showing that the coexistence of state religion and secularism in the same constitution created a complex situation which ended the smooth application of secular constitutional mandates.

a. Advent of Islamic-Secularism through Co-Existence of Secularism and the State Religion Clause

The constitutional accommodation of theocratic features continued until the 15th Constitutional Amendment was passed in 2011 pursuant to a landmark decision⁹⁷ of the Supreme Court of Bangladesh, which declared the 5th Amendment introduced by Zia to be unconstitutional. The 15th Amendment reinstated the original four fundamental principles (nationalism, socialism, democracy and secularism). But it did not remove Islam as the state religion in Art 2A⁹⁸ and “bismillah-ar-rahman-ar-rahim” above the preamble.

While the legislature’s reason for keeping these religious idioms was an effort to recognize religion in symbolic form, if examined carefully one will find a clear inclination towards political compromise. By adopting this peculiar Islamic-secularism, the Government tried to avoid agitation from the Muslims community, while keeping room for political negotiation with Islamist and secular forces.

In sum, Bangladesh started its journey as an independent nation with a calculated move to prevent any element in the constitution from motivating communal politics that might reignite the violent consequences of religious disputes evidenced in 20th century South Asian history. The

⁹⁵ See Atanu Mohapatra & Prakash, “Violence Against Minority Hindus in Bangladesh: An Analysis,” online: <www.vifindia.org/print/2200>.

⁹⁶ In 1974, Hindu minorities’ forms 13.4 percent of the total population, while the Muslims forms 85.4 percent. However, at the end of Martial law regime (1990’s) the number dramatically decreased to 10.5 percent and, in 2011, the number dramatically decreased to 8.5 percent while the number of Muslims population increased to 90 percent, see *supra* note 1.

⁹⁷ *Bangladesh Italian Marble Works Limited v Government of Bangladesh* (2006) 1 BLT (HCD) (the Supreme Court of Bangladesh) [*Bangladesh Italian*].

⁹⁸ The state religion of the Republic is Islam, but the state shall ensure equal status and equal right in the practice of the Hindu, Buddhist, Christian and other religions, see *Constitution of Bangladesh*, *supra* note 82, Art 2A.

fear was that Bangladesh would be exposed to similar situations again by accommodating religion in the constitution as a political element, taking into account ideological motivators (Muslims). This time, however, the mechanism used was not only peculiar but also deceiving, because the mode of religious patronization has been concealed under the shadow of secular principles.

Conclusion

This chapter briefly summarized the political history of Bangladesh and analyzed significant phases of that political history (British colonization, the post-British Pakistan era, and Post-Independence Bangladesh Era until present). The chapter showed how, in each of these periods, religion was used as a means to an end to gain political advantages.

In light of this historical analysis, this chapter provided some clear context for the reader as to how religion is seen and interpreted in Bangladesh in terms of governance structures and politics. Moreover, this analysis is vital for finding the answer to the question of whether or not state religion is compatible with secularism, because history demonstrates that the use of religion for political purposes is never suited to this region. This chapter also showed that, whenever any religion was given any special recognition, or whenever religion was used for political advantage, (even if the motive was good), negative consequences ensued. Without exploring the full record that illustrates the problems with religion in this region, it would have been difficult to justify the arguments that the principal thesis makes: namely that the state religion clause in the present Constitution will disrupt its secular mandates or indirectly instigate divisions or violence in society. As will be shown in the next chapter, this mechanism (the state religion clause) is not conducive to maintaining the pro-secular constitutional framework, religious harmony, social stability and order in Bangladesh.

CHAPTER THREE

TESTING THE COMPATIBILITY OF COEXISTENCE OF STATE RELIGION AND SECULARISM WITHIN THE CONSTITUTION OF BANGLADESH

Introduction

Can secularism and a state religion co-exist in a single Constitution? If one knows the dictionary meaning of these terms, the quick answer to that question will be no. That being said, is this question that simple to answer?

Although much of the existing literature indicates that the public sphere and public policy can be constituted by either religious or secular elements,⁹⁹ the constitution of Bangladesh provides an exception through the 15th constitutional amendment, which established secularism as a fundamental principle of the state policy, while also declaring Islam as the state religion. There are several other countries like the United Kingdom, Sweden, and Germany which are, on the one hand, secular, while on the other have established a church or official religion. But then again, there are examples of the opposite position, such as the USA, where the First Amendment¹⁰⁰ separates the Church and the state but does not exclude religion from the public sphere totally. We also have France and Turkey who totally excluded religion from public life, applying the theory of separation of state and religion.

Therefore, it is evident that different schools of thought offer different ideas about secularism: some of them exclusionary and hostile; others inclusive and accommodating. Considering the elusive nature of secularism, and taking into account the results of the competing literature, the debate on the compatibility of constitutional coexistence of secularism and state religion is at best fluid.

On the face of this fluidity, the research question in this chapter boils down to whether the coexistence of secularism and state religion is necessarily a binary opposite. This time, an

⁹⁹ Bruce Ledewitz, “the New New Secularism and the End of the Law of Separation of Church and state” (2009) 28 Buff Pub Int L J 1 at 26.

¹⁰⁰ “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof”, Constitution of the United States, 1787, First Amendment [*Constitution of the USA*].

affirmative answer to this question would be a mistake, as this thesis argues that such coexistence is variable and will depend on factors like policy and the public sphere.

As such, to test the compatibility in a given case, the Constitution or the legal framework in question has to be tested separately by looking into the internal factors, such as the theoretical foundation behind such coexistence, its consistency with other constituent elements of the constitution, as well as external factors, such as socio-political and cultural elements, popular consensus and historical background.

This chapter starts where the last chapter ends: the historical background. The historical analysis indicates the possibility of preferential or political recognition of religion resulting in negative consequence in the case of a multi-religious country like Bangladesh.

Within this historical context, this chapter analyzes external and internal factors and will argue that the state religion clause is, in its present form, incompatible with the pro-secular constitutional framework of Bangladesh. This is primarily because it contradicts secularism and other fundamental tenets of the Constitution, in light of Bangladesh's past and present reality. It will also show that the scope of the state religion clause is inconsistent with the principles of political secularism.¹⁰¹

The chapter will substantiate these arguments in three parts: in *part I*, it will review and analyze the arguments of the parliament, judiciary, the Government, and the scholars in favor of the existing coexistence and highlight the limitations and discrepancies of these arguments. Secondly, *part II* will test the assumed compatibility through the doctrinal analysis of existing constitutional provisions, and finally *part III* will test compatibility in light of the different models and theories of secularism to show that the coexistence is not only inconsistent in the case of Bangladesh but also goes against basic principles of political secularism.

¹⁰¹ Political theorist Rajeev Bhargava coined the term political secularism. However, the idea of political secularism to be discussed in this chapter is not based on the normative standards of political secularism discussed by Rajeev Bhargava.

PART I: ARGUMENTS IN FAVOR OF THE CONSTITUTIONAL FRAMEWORK CONSTITUTIVE OF THE CO-EXISTENCE OF SECULARISM AND ISLAM AS THE STATE RELIGION

This part of the thesis will explore the rationales for keeping state religion with secularism. It will discuss the strength and weakness of those rationales to determine if they are justified in any way, sufficient to keep the state religion clause in the constitution. This part will complement the later parts of this chapter, which will analyze the relevant constitutional provisions to argue that the state religion clause is inconsistent with secular mandates of the Constitution of Bangladesh. Before embarking on the analysis to test the compatibility of the state religion with secular mandates of the Constitution, it is necessary to see the present structure of the constitution in dispute.

The existing constitutional framework which gives rise to the controversy explored in this thesis starts with a verse from the Quran: bismillah-ar-rahman-ar-rahim. Sura An-Naml (27:30) of the Holy Quran.¹⁰² This verse appears before all except one of Suras of the Holy Quran. In Muslim popular culture, this verse is often used at the beginning of events and speech to show the utmost allegiance and respect to Allah (God). However, later, the Constitution declares in Art 7 that-

All powers in the Republic belong to the people, and their exercise on behalf of the people shall be effected only under, and by the authority of, this Constitution.¹⁰³

The preamble further declares secularism as one of the high ideals of the Constitution and Art 8¹⁰⁴ cemented the aspiration of the preamble by incorporating secularism as a fundamental principle of the state policy. Subsequently, the constitution defines secularism and freedom of religion to provide a guideline for the legislature and policy maker to understand the nature of secularism in Bangladesh. Art 12 of the Constitution collectively defined secularism and freedom of religion as:

¹⁰² See Ali, *supra* note 2.

¹⁰³ *Constitution of Bangladesh*, *supra* note 82, Art 7(1).

¹⁰⁴ “The principles of nationalism, socialism, democracy and secularism, together with the principles derived from those as set out in this Part, shall constitute the fundamental principles of state policy, *Ibid*, Art 8.

The principle of secularism shall be realized by *the elimination* of (a) communalism in all its forms; (b) the granting by the state of political status in favour of any religion; (c) the abuse of religion for political purposes; (d) any discrimination against, or persecution of, persons practicing a particular religion.¹⁰⁵

To complement the provision above, Art 41 of the Constitution stipulated that:

(a) every citizen has the right to profess, practise or propagate any religion; (b) *every religious community or denomination has the right to establish, maintain and manage its religious institutions*. (2) No person attending any educational institution shall be required to receive religious instruction, or to take part in or to attend any religious ceremony or worship, if that instruction, ceremony or worship relates to a religion other than his own.¹⁰⁶

However, the secular model becomes an Islamic-secularism¹⁰⁷ by operation of Art 2A of the Constitution, which 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, Buddhist, Christian and other religions.*¹⁰⁸

Thus, this provision makes Islam ‘the standard’, and other religions get the equal status only when and if they get treatment similar to that of Islam. As a first position, one may argue that the existing framework is inconsistent because it includes apparently contradictory principles: secularism and an official religion. In other words, a state cannot be at the same time both secular and religious. That being said, the concept of secularism cannot be compartmentalized within a singular definitional paradigm¹⁰⁹ Moreover, without understanding the nature of the constitution of Bangladesh, it would be a polemical argument that the existing constitutional framework is contradictory only because secularism and state religion coexist. As such, the following section will first explore the rationales for keeping the state religion with secularism within the constitution.

¹⁰⁵ *Constitution of Bangladesh*, *supra* note 82, Art 12 (emphasis added).

¹⁰⁶ *Ibid*, Art 41 (emphasis added).

¹⁰⁷ This term has been introduced by this thesis to indicate the peculiar nature of secularism of Bangladesh which has embraced both secularism and recognized Islam as the state religion.

¹⁰⁸ *Constitution of Bangladesh*, *supra* note 82, Art 2A (emphasis added).

¹⁰⁹ See Gérard Bouchard & Charles Taylor, *Building the Future: A Time for Reconciliation* (Quebec, Canada: Gouvernement du Québec, 2008) at 133.

A. Arguments in Favor of Juxtaposition of Secularism and the state Religion Clause

The constitutional juxtaposition of the state religion clause and secularism has been adopted by the parliament and declared valid by the Supreme Court of Bangladesh. It is also strongly supported by the (democratic) government, politicians, and scholars as compatible with the overall constitutional framework.

At this point, this thesis scrutinizes whether or not the existing framework is consistent with the arguments provided by these actors and scholars. These arguments favoring constitutional framework are based on the following grounds:

a. The Constitutional Recognition under Art 2A is a Reflection of the ‘Social Reality’ and a Way to Provide Equal Treatment to All Religions in Bangladesh

Shared belief in a transcendental power plays a vital role in shaping a community or society. For this reason, religion and a belief system have a predominant role in constructing a new constitution or amending the old one.¹¹⁰ Although the constitution is the greatest example of positive law that intends to address all worldly matters, such as the establishment of government, parliament, judicial review mechanisms and ensuring citizen’s rights, it also needs the people’s acceptance and obedience to ensure a stable legal and social order. This acceptance could never be achieved should the constitution go against the popular belief system, traditional values, and cultural identity of the society.

Like any other society, the Bangladeshi society has always held religion in high esteem either explicitly or implicitly. Indeed, religion has played a vital role in determining the constitutional structure of Bangladesh. For the constituent assembly in 1972, determining the role of religion was a key factor. Back then, the constituent assembly unanimously agreed to build a constitution based on principles of secularism by acknowledging the past legacy of political instability and bloody communal riots.¹¹¹ However, the model of secularism as adopted did not separate religion from public life as in French *laïcité*; rather it was intended to prevent any form of preferential treatment given to a particular religion and religion-based politics.

¹¹⁰ W Cole Durham Jr, “Religion and the World’s Constitutions” in W Cole Durham Jr *et al*, eds, *Law, Religion, Constitution: Freedom of Religion, Equal Treatment and the Law* (Surrey, England: Ashgate Publishing Limited, 2013) 3 at 15.

¹¹¹ See generally Halim, *Gono Parishad Bitorko (the Debate of Constituent Assembly)*, *supra* note 84.

However, not censuring religion *per se* for the sake of protecting religious freedom later upset the balance, as evidenced by the policies of the first Government of Bangladesh under the leadership of Shiekh Mujib), who gradually propagated leniency towards his (and Bangladesh's) Muslim identity.¹¹²

Three reasons for this change in trajectory can be found in the existing literature: firstly, to retain the political support of the Muslim majority; secondly, utilising the intrinsic values and religious ideals as upheld by the people; and thirdly, considering the sensitivity of the issue of religion in Bangladesh for every government since liberation to maintain a policy of avoiding any form of religious uprising.¹¹³ As such, it is argued that the “outlook and practices of Islamic ideals are blended into the lifestyle” of the people of Bangladesh, in such a way that even conscious and deliberate attempts to relegate Islam to the background can have little effect”.¹¹⁴

This view is reflected in the actions of state actors. For instance, when the Supreme Court of Bangladesh declared the constitutional amendments facilitated by the Martial Law authorities to be unconstitutional, the Cabinet of the Government recommended that the parliament reinstate secularism (banished by Zia) in the Constitution while still “keep[ing] the provision of state religion (adopted by another martial law ruler Ershad) [by] considering the national reality”.¹¹⁵ Subsequently, through the 15th Amendment, the parliament reinstated secularism in the preamble, Art 8 and Art 12, and kept the state religion provision along with addendum: “equal treatment to all other religions”.¹¹⁶

¹¹² Debesh Chandra Sannal, “Dharmanirapekhyta Samporke Bangabandhur Kichu Kotha” in Mahfuza Khanam & Topon Kumar Dey, eds, *Dharmanirapekhyta: Samprodayik Sampritis Mail-Bandan* (Dhaka, Bangladesh: Merit Fair Prokashan, 2015) 52 at 59.

¹¹³ The killing of the Atheist Bloggers for writing against age-old Islam dogma and the Government's reactionary response of criticizing the victims and prosecuting other bloggers for hurting religious sentiment show that the Government wanted to neutralize, if not appease, these fundamentalists and prevent any forms of popular uprising by manifesting its pro-religious position. See, “Bloggers Killed since 2013”, *the Daily Star (of Bangladesh)* (11 November 2015) 1. online: <epaper.thedailystar.net/index.php?opt=view&page=1&date=2015-11-01>.

¹¹⁴ Ahmed Shafiqul Huque & Muhammad Yeahia Akhter, “The Ubiquity of Islam: Religion and Society in Bangladesh” (1987) 60:2 Public Affairs 200 at 225.

¹¹⁵ “Bangladesh moves to retain Islam as state religion”, (21 June 2011), online: *CNS News* <<http://www.cnsnews.com/news/article/bangladesh-moves-retain-islam-state-religion>>.

¹¹⁶ See *Constitution of Bangladesh*, *supra* note 82, Art 8, Art 12, and Art 2A.

It is worth noticing that the Parliament did have the opportunity to remove all forms of religious expression imported by the Martial Law Regime,¹¹⁷ but they chose the easier path of concurring with the religious values of the people of Bangladesh, which had a vital effect on voting politics. Secondly, they had the option to promote the idea that secularism (as enshrined in art12) is not exclusionary to religion, which should have been self-evident.

Moreover, the present provision is said to encompass the essence of the principles of neutrality towards religion by giving equal status to all religions and, consequently, precludes any possibility of preference to any particular religion which was the case before the 15th Amendment.¹¹⁸ In 2015, the Supreme Court recognized these arguments by rejecting a writ petition that challenged the constitutionality of the coexistence of secularism and state religion".¹¹⁹ The Court rejected the petition because the constitution ensures equal rights for people of all religions, including Hindus, Buddhists, and Christians.¹²⁰ Therefore, the Court found that the juxtaposition is compatible because it does not contravene any fundamental requirements of secularism. Moreover, the Court summarily dismissed another writ petition brought by 15 citizens of the Citizens' Committee for Resisting Communalism and Autocracy, for lack of standing.¹²¹ This time, the Court did not find the arguments put to be compelling enough to entertain this petition and again cited the ground of technicalities for non-hearing.

b. The state Religion Clause Reflects Mere Symbolic Recognition and Does not have any Overarching Effect over Principles of Secularism

Apart from the argument of social reality, it is argued that the state religion entails only ceremonial implication and is a mere constitutional courtesy towards the diversity of religion in

¹¹⁷ See chapter two of the thesis *above*, for details on this issue.

¹¹⁸ Before 15th Amendment of the Constitution, there was no provision related to secularism and Islam was given the highest priority over other religions.

¹¹⁹ Rock Ronald Rozario, "Bangladesh court ruling supporting state religion sparks criticism", *UCA News.Com* (8 September 2015), online: <www.ucanews.com/news/bangladesh-court-ruling-supporting-state-religion-sparks-criticism/74224>.

¹²⁰ *Ibid.*

¹²¹ The High Court Division of the Supreme Court of Bangladesh, on March 28, 2016, summarily dismissed a 28-year-old constitutional petition challenging (revived by the aforementioned 15 petitioner) Islam as the state religion because the petitioners lacked standing to litigate without going to any formal hearing, see, Ridwanul Hoque, "Constitutional Challenge to the state Religion Status of Islam in Bangladesh: Back to Square One?" (27 May 2016), Int'l J. Const. L. Blog (blog), online: <www.iconnectblog.com/2016/05/islam-in-bangladesh>.

Bangladesh.¹²² This argument is based on the fact that Art 2A belongs to Part I of the constitution that describes the general features and the profile of Bangladesh: for example, the official name of the Republic, the state language, national emblem and the capital. While these provisions have intrinsic importance for describing the characteristics of the Bangladesh, (e.g. Art 1 describes Bangladesh as a unitary, independent and sovereign Republic), it is argued that they do not prevent parliament from enacting any law in light of the four core fundamental principles of the state.¹²³ Moreover, it is further argued that Art 2A is neither part of the preamble nor part of the fundamental principle of the state policy which is considered to be the ‘guiding star’ of the constitution.¹²⁴ This restrains the state religion from having any overarching effect over the principle of secularism.¹²⁵ Put another way: Islam being the state religion does not restrain Parliament from striking down any law (even a religious law) if it were to conflict with Art 7(2), which declares the supremacy of the constitution of Bangladesh.¹²⁶ In sum, this argument states that the state religion provision only symbolically represents the numerical majority of Muslims in Bangladesh amongst other diverse religious groups.

c. Positive Attitude to Religion Does not take Away Secular Characteristics of the State

The argument next in line to support the state religion clause is that since secularism cannot be unequivocally defined, it has to be understood in the specific context of a particular state. Considering the social structure of Bangladesh, secularism is to be taken as a means to an end¹²⁷ and “anything that is pernicious and exploitative cannot be allowed to remain outside the control of the constitution simply because it is paraded on the garb of religion”.¹²⁸ In other

¹²² S M Masum Billah, “Can Secularism and state Religion Go Together?” (2014) 15 ELCOP YB Human Rights 32 at 44.

¹²³ *Constitution of Bangladesh*, *supra* note 82, Art 8.

¹²⁴ *Anwar Hossain Chowdhury v Bangladesh*, (1989) BLD (Spl.) 1 (Supreme Court of Bangladesh) at para 138.

¹²⁵ Secularism is declared as a high ideal by the preamble and a fundamental principle in Art 8 (which is used to formulate policy of governance and as an aid to interpret any law in case of any ambiguity. See, *Constitution of Bangladesh*, *supra* note 82, Art 8.

¹²⁶ “(2) This Constitution is, as the solemn expression of the will of the people, the supreme law of the Republic, and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void”, *Constitution of Bangladesh*, *supra* note 82, Art 7.

¹²⁷ As per Billah secularism is a means to the end which is not only religious freedom and neutrality but also achieving social justice and establishing a society free from exploitation.

¹²⁸ Billah, *supra* note 122 at 40.

words, just because Bangladesh has had bitter historical experience with religion does not make religion an untouchable phenomenon, hence does not justify banishing religion from the constitution. Moreover, unlike the Western understanding, secularism in Bangladesh is not based on the strict separation of religion and state, but rather on religious neutrality which implies “equal opportunity for all religions to participate in public affairs and benefit from state patronage”.¹²⁹ Therefore, in the context of Bangladesh, incorporation of the state religion clause only represents a positive attitude towards strengthening religious freedom.

B. Limitations of the Arguments in Support of the Existing Constitutional Framework

The arguments forwarded above for the present constitutional juxtaposition are apparently compelling, and one with little or no grounding in the historical and socio-political situation of Bangladesh will consider them to be strong justifications for the existing framework. However, once analyzed in light of the proper historical and socio-political context of Bangladesh, the arguments lose credibility and can be found misleading due to their subjective prior assumptive nature, individualistic interpretations of constitutional law and the social-political reality of Bangladesh. The limitations of the preceding arguments are discussed in the following sections.

a. The Idea of ‘Social Reality’ is Superficial

The argument that recognition of religion acknowledges the reality of socially embedded religious values and beliefs in Bangladesh is based on a presupposed assumption that religions (especially Islam) are the *raison d’etre* of Bangladesh, both past and present. Arguably, this assumption is inherently flawed. Drawing upon the discussions put in chapter two of this thesis, we can see the significance of religion in the community as a matter of everyday life, and any specific/special influence was found mostly within the religious communities. For that, there are no noticeable historical accounts of significant mass movements to establish an Islamic state in the territory that constitutes Bangladesh. Besides, if religion had at all built and reflected the ideology of the people, Bangladesh would not have seceded from Pakistan, a country with Islam at its core. Moreover, the declaration of secularism as a governing principle in Bangladesh was never met with any pro-religious movement. Furthermore, the allurements of establishing Islamic

¹²⁹ Riaz, *God Willing*, *supra* note 85 at 22.

ideologies had been rejected by the masses in the past. For instance, the Martial Law rulers in Bangladesh did apply the strategy of attracting the majority of Muslims by adopting a pro-Islamic attitude, but this did not help them to sustain their undemocratic reign. If the strategy of establishing pro-Islamic Bangladesh was acceptable to the people, then the people would not have revolted against Martial law and demanded democratic government.¹³⁰

From this perspective, the social reality argument is seen to lack historical and socio-political support. Besides, without any empirical evidence in favor of this position, the state's argument to have a state religion clause to fulfill the people's demands is mere conjecture. In sum, the state religion clause is something which was invented, based neither on any traditional grounds nor on social necessity. Rather, it was imported to fulfill a long-term political agenda.

b. The Idea of Symbolic Recognition and Constitutional Courtesy is Misleading

One of the arguments for keeping the state religion clause is that it does not restrain the legislature from enacting any law that goes against the fundamental features of the constitution; hence, it is a mere symbolic recognition of religion, or a constitutional courtesy. This argument attempts to trivialize the significance of the state religion clause. In fact, as a provision within part I of the Constitution, the state religion clause is a part of the basic structure of the Constitution, that is, a provision that cannot be amended by the parliament.¹³¹ As such, even if it does not put an explicit limit on the powers of the legislature, since this clause is not amendable, one can confidently infer that the provision will in fact constitute an implied restraint on the legislature from legislating any law against this provision.

Apart from the concept of constitutional courtesy, manifesting the clause as a symbolic recognition requires scrutiny. It is true that symbolic recognition of religion in public affairs is not an alien concept, but this recognition in other countries is distinct from its status in Bangladesh. The following examples clarify this point: the presence of the name of God in constitutions (such as in Germany) and the national mottos (the national motto of the USA is “In

¹³⁰ Sabbir Ahmed, “Military Rule”, online:-*Banglapedia* <en.banglapedia.org/index.php?title=military_rule>.

¹³¹ “Notwithstanding anything contained in [...] the Constitution...*all articles of Part I* [...] *shall not be amendable by way of insertion, modification, substitution, repeal or by any other means.*”, *Constitution of Bangladesh*, *supra* note 82, Art 7B (emphasis added).

God we Trust”), following religious ceremony in public functions,¹³² displaying religious symbols and state recognition of a particular church (e.g. the UK and Sweden).

To understand why these symbolic recognitions should be seen differently from Bangladesh, it is necessary again to go back to the history of these countries which show strong adherence of symbolic recognition without political turmoil.¹³³ On the contrary, Bangladesh has no known historical antecedent of symbolic recognition of religion (like in the USA). When suddenly viewed from this external perspective, it becomes difficult for Bangladeshi society and concerned political actors (e.g. lawyers, parliamentarians, politicians, activists and voters) to accept that state religion is merely a symbolic notion.

Moreover, the language of the provision requires more than just a symbolic recognition, because by declaring Islam as the state religion, it represents a dual characteristic of the state (secular and religious). Heiner Bielefeldt sheds light on the paradox of this duality:

A secular state and a religious society can harmoniously exist together. But a secular state cannot at the same time be a religious state, i.e. a state proclaiming an official state religion”.¹³⁴

Therefore, construing the state religion clause as a symbolic recognition is misleading, as symbolic recognitions do not significantly change the characteristics of a constitution.

c. The state Religion Clause has an Indirect Overarching Effect on Secularism

Secularism, as a fundamental constitutional principle, has taken seniority over the state religion clause. However, while theoretically secularism is seen to be superior to the state religion, from an applied perspective, secularism is actually subjected to the state religion clause which, as a part of the basic structure of the constitution, is not subject to amendment. This means that the legislature cannot apply a constitutional justification to uphold secularism in preference to state religion. An example of this position is the present of the anti-blasphemy provision under section 57 of the *Information and Communication Technology Act 2006* (the ICT Act). The law provides that:

¹³² Ledewitz, *supra* note 99 at 7, 17.

¹³³ See e.g. *Ibid* at 6.

¹³⁴ Heiner Bielefeldt, “Preliminary findings of Country Visit to Bangladesh by Heiner Bielefeldt, Special Rapporteur on freedom of religion or belief”, online: (9 September 2015), online: *Ain o Salish Kendra ASK A Legal Aid Human Rights Organisation* <www.askbd.org/ask/2015/09/09/preliminary-findings-by-heiner-bielefeldt/>.

If any person deliberately publishes or transmits or causes to be published or transmitted in the website or in any other electronic form any material which is false and obscene and if anyone sees, hears or reads it having regard to all relevant circumstances, its effect is such [...] causes to hurt or may hurt religious belief [...] then this activity will be regarded as an offence.¹³⁵

Although the government describes this provision as anti-hate speech legislation, the objective of such legislation is not to redress the offensive idea but is rather to restrain any possible negative outcomes that may result from such speech.¹³⁶ In this context, a statement that may hurt religious sentiments does not qualify as hate speech unless such speech seeks to marginalize certain groups through vilification and detestation and may make the target group unacceptable and dangerous in the eyes of the majority of people. In this context, a secular constitution should have a mechanism for protecting religious freedom and facilitate a legal framework to prevent hate speech. However, the ICT Act 2006 punishes a person for mere criticism of religion that, under human rights law principles do not amount to hate speech. Thus, the ICT Act 2006 becomes an anti-blasphemy law which is inconsistent with the concept of secularism.¹³⁷

This example shows that, although the constitution of Bangladesh is based on secularism, it actually translates into a clear preference for Islam, as criticism of other religions in Bangladesh never received equivalent state attention. As such, the concept of secularism in Bangladesh is interpreted in a way that is contrary to any other standard model applied around the world.

The following part will take the argument from here, and further it, with analytical examples to demonstrate how the present constitutional framework, with the state religion clause in it, stands in contradiction to pro-secular mandates.

¹³⁵ *Information and Communication Technology Act, 2006*, s 57 (Act No. LIX of 2006).

¹³⁶ Pearl Eliadis, *Speaking Out on Human Rights: Debating Canada's Human Rights System* (McGill-Queen's University Press, 2014) at 231.

¹³⁷ Muhammad Rezaur Rahman, *Influence of Religion Based Social Norms in Materializing Freedom of Expression: An Analysis in the Context of Bangladesh* (Term Paper, McGill Faculty of Law, 2015) [unpublished].

PART II: TESTING THE COMPATIBILITY OF THE CO-EXISTENCE OF SECULARISM AND STATE RELIGION: A THEORETICAL ANALYSIS

The preceding discussion aims to uncover lacunae in the foundations of arguments based on which the parliament and the government have kept the state religion clause in the secular constitutional structure of Bangladesh. That said, one may argue that, even if there are lacunae in those arguments (as there are), the historical accounts that indicate the hidden reality do not mean that coexistence between state religion and the principle of secularism will always end in disaster. Rather, what it means is that the compatibility analyzed by this thesis needs more comprehensive theoretical assessments that are sourced in these historical accounts.

Part II will embark on this assessment in two segments. In *section A*, a doctrinal analysis of the provisions related to secularism and state religion will be carried out to ascertain the inconsistencies between these principles. *Section B* will then assess the consistency of the state religion clause with other constituent elements of the constitution. In light of the assessment, this part will argue that the state religion clause, as it appears in the constitution under Art 2A, is not compatible with the principle of secularism under Art 12 of the Constitution, and thus the present juxtaposition of secularism and state religion is inconsistent with the overall constitutional structure of Bangladesh.

A. Incompatibility of the Present state Religion Clause (u/a 2A) with the Secularism (u/12) of the Constitution

In the absence of extensive empirical research, ascertaining the compatibility of the questioned juxtaposition is superficial and hence non-credible. Therefore, to test the scope of the juxtaposition in a particular constitution and its resilience to state religion, an analysis of the connotations of each term and phrase is paramount. To begin with, the meaning of secularism has been defined u/a 12 of the constitution as:

The principle of secularism shall be realized by *the elimination* of (a) communalism in all its forms; (b) the granting *by the state of political status in favour of any religion*; (c) the *abuse of religion for political purposes*; (d) any discrimination against, or persecution of, persons practicing a particular religion. (emphasis added).

Scrutiny reveals some very important aspects of these principles: firstly, secularism is to be realized by limiting the state from granting political status to any religion and by the elimination of “*any discrimination against, or persecution of, persons practicing a particular religion*”. A plain reading of the text denying political status to any religion indicates the state’s commitment to neutrality (though the provision does mention the term neutrality) regarding any religious issue. The article omits any notion of religious tolerance or explicit recognition of equal status to other religions. Rather, it adopts the classic notion of separation of religion and state, and non-interference of the state in the religious matter in governance and political affairs.

From this perspective, the way Art 2A is constructed comes in direct conflict with the principle of secularism because it declares that *the state religion of the Republic is Islam*. This shows that a special recognition is indeed given to Islam by declaring it as the state religion. Although the provision provides for the equal status of Hindu, Buddhist, Christian and all other religions, this remains anonymous. In this way, even if the constitution directed the elimination of granting of favors to *any* religion and prohibited any form of political status for a religion, this would not reconcile the contradiction between the treatments of different religions.

That being said, the foregoing arguments in favor of the incompatibility may be challenged in four ways *Firstly*, that the concept of neutrality cannot be forcibly construed as passive in the sense that the state cannot take any positive action for religion; *secondly*, by giving equal status to all religions, there is no question of preferential treatment; *thirdly*, that declaring a state religion is not a political recognition of that religion; and *finally*, that the elimination of preferential treatment does not automatically entail separation of the state and religion. The following section will cement the argument that state religion is incompatible with secularism by countering these four possible critiques.

a. Reviewing the Counter Arguments against the Arguments of Incompatibility between the State Religion Clause and Secularism

i) As to the first critique that that the concept of neutrality cannot be forcibly construed as passive, the following can be said. The concept of neutrality related to religion is highly debated, and there is no consensus in the existing literature as to its standard scope. Apart from the dictionary meaning of neutrality (which indicates abstention from choosing between options or

arguments or ideas), the idea of neutrality in religion has at least two mutually exclusive meanings, namely: positive or benevolent neutrality (through which the state, in an attempt to ensure equality, maintains impartiality “specific factor and qualities in decision making” but entirely separates itself from religion), and negative neutrality (through which the state maintains impartiality with the view to reducing any religious affiliation).¹³⁸ In this regard, how Bangladesh will maintain religious neutrality depends on the proper interpretation of the present constitutional arrangement. It is apparent that the government interprets religious neutrality as per Art 12 as benevolent neutrality which allows religious affiliation of the state so long as the decisions are impartial and non-prejudicial to other religious communities. Therefore, giving equal status to all religions is the proof of state neutrality. However, prominent secularists like Professor Anisuzzaman and Sirajul Islam¹³⁹ argue that secularism, as reflected in Art 12, should be interpreted in its simplest sense: that the *state shall not* provide *any* political recognition to *any religion*.¹⁴⁰ From their perspective, the simplest meaning of secularism is non-affiliation of the state with *any* religion.¹⁴¹ Anisuzzaman further argues that, if the founding fathers of the constitution wanted to provide equal status to all religions, then the language of Art 12 would have been quite different, so as to make such an idea compatible.¹⁴² As such, it is misleading to interpret the concept of neutrality under Art 12 as allowing any form of recognition to religion, albeit collectively.

ii) The second critique, which questions the incompatibility, by arguing that Art 2A denies preferential treatment to any particular religion, also has its limitations. Once again, this thesis reiterates the argument that providing equal status to all religions does not amend the

¹³⁸ See Rafael Palomino, “Religion and Neutrality: Myth, Principle, and Meaning” (2011) BYUL Rev 657 at 664, 679; Robert Audi, “Natural Reason, Natural Rights, and Governmental Neutrality Toward Religion” (2009) 4 Religion & Human Rights 157 at 172.

¹³⁹ These two professors are considered as a paramount authority in the study of secularism from Bangladesh’s context, politico-Islamic history of Bangladesh. They have authored many books and articles where they explained the scope of secularism and the implications of the state religion in the constitution. Some of these writings are cited in this thesis, see, the bibliography of this thesis.

¹⁴⁰ Anisuzzaman, “Dharmanirapekhyta Prosongay” in Mahfuza Khanam & Topon Kumar Dey, eds, *Dharmanirapekhyta: Samprodayik Sampritis Mail-Bandan* (Dhaka, Bangladesh: Merit Fair Prokashan, 2015) 13 at 16—17.

¹⁴¹ Sirajul Islam Chowdhury, “Rastro Hobbe Dharmanirapekho Somaj Hobe Ehojagotik” in Mahfuza Khanam & Topon Kumar Dey, eds, *Dharmanirapekhyta: Samprodayik Sampritis Mail-Bandan* (Dhaka, Bangladesh: Merit Fair Prokashan, 2015) 19 at 21.

¹⁴² Anisuzzaman, *supra* note 140 at 17.

contradiction between Art 12(a) and Art 2A. Nevertheless, it is worthwhile to look at the analysis of the syntax, wording, and punctuation that make up the provision. This investigation reveals that Art 2A has failed to provide equal status to all religion in its true sense.

The provision starts by stating that the state religion is Islam then there is a ‘comma’ and ‘but’ followed by the state shall ensure equal status and equal right in practice; then the three (main) religions are mentioned i.e. the Hindu, Buddhist, Christian followed by ‘and other religions’. The linguistic formation indicates that Islam is *the* state religion, and all other religions have inferior status, since ‘but’ as a negative conjunction indicates the disjunction between Islam and other denominations. The verb ‘shall ensure’ indicates a positive obligation on the state to avoid the predominance that may be created by the Islam as the state religion. Specific mention of other three main minority religions tends to indicate the second line of hierarchy through numerical percentage, as the Hinduism is the second largest religion in Bangladesh followed by Christianity. This grammatical arrangement of the article enables the state to pick and choose how to treat religions.

Had this provision intended to recognize religious pluralism, it would have clearly recognized all religions either by mentioning each one (which would be a dubious process given the diverse religious denominations followed not only by indigenous people but also Muslims, Hindus, and Christians)¹⁴³ or by keeping it general. Omitting to offer protection to non-believers or agnostics has, in recent times, become a provocative question. Specifically mentioning atheism or agnosticism is not a common practice in constitutional law, however the murder of atheists in Bangladesh demonstrates the need for a resilient form of religious pluralism or non-political recognition in Bangladesh. Thus, it is plausible to argue that religious pluralism is not present in Art 12, and hence Art 2A is inconsistent by providing preferential treatment to Islam.

iii) To understand the third critique arguing that Art 2A does not imply a political recognition of religion, it is important to ascertain the purpose of Art 2A. The article intends to provide a symbolic recognition to religions. However, unlike other concerned countries with constitutional recognition of state religion, the role of religion in Bangladesh, especially in public life, public discourse, and the public forum has never been symbolic historically or politically.

¹⁴³ The chronology of the Art 2A is Islam (represented by 90 percent Muslim), Hindu (8.5 percent), Buddhist (0.7 percent), and Christian (0.1 percent) and rest belong to other religion.

An interesting example is a custom of the national television channel of Bangladesh (known as the Bangladesh Television) to broadcast the recital from Quran and other religious texts every day before starting transmission. It is evident that, apart from the four religions mentioned in the Art 2A, there is no practice of recitation of other religious scriptures. Had such recital been symbolic, then there would have been no reason to recite The Quran everyday. One can here see a clear pattern of preferential practice to put Islam in a revered position.

As such, in the presence of clear provisions to protect religious freedom and in the absence of any such historical practice in favor of symbolic recognition of religion in the constitution, it is difficult to refute the political nature and implication of the state religion clause.

iv) The following response can be given to the final point of critique, being that the constitution implies a separation of religion and state, but there is no explicit indication regarding such separation. While this argument has its merit, it is also true that Art 12 talks about the elimination of *abuse of religion for political purposes*, a goal which cannot be achieved unless the state maintains some form of separation from religion. In other words, if the state, instead of maintaining distance from religion, starts promoting all religions, then there will be a question of priority among the religions. For example, if the state decided to fund an Islamic institution, then the people from other religions might question the state's motive which would in turn lead to a political movement based on religion. Therefore, if the state wants to ensure the first two principles of secularism under Art 12, then it has to maintain some forms of distance if not strict separation from religions.¹⁴⁴

In sum, the above discussion shows that there is a clear inconsistency between the state religion clause u/a 2A and the provision of secularism u/a 12. From this point, the thesis, in the following section will further its assessment of the compatibility of the state religion clause by looking into other components of the constitution which, together with secularism, form the pro-secular constitutional framework.

¹⁴⁴ The strict separation sometimes requires the state to ignore some of the social functionality of the religion like religious festival or ceremonies. In the context of Bangladesh, while it is better to avoid promoting religion but since it is liberal towards religious freedom, thus the state shall have to ensure that its action is not hindering the observation of these festivals or ceremonies.

B. Contradictions between the state Religion Clause and the Fundamental Principles of the State Policy of the Bangladesh Constitution

The preamble of the constitution of Bangladesh enunciates “nationalism, socialism, democracy and secularism” as four high ideals. Art 8 follows suit by incorporating these high ideals as the core fundamental principles and affirms that:

these principles shall [...] be applied by the state in the making of laws, shall be a guide to the interpretation of the constitution and of the other laws of Bangladesh, and shall form the basis of the work of the state and of its citizen.¹⁴⁵

Although these principles are not judicially enforceable,¹⁴⁶ it is apparent that they form the foundation of the constitution. As such, the constitutionality of any law shall be determined in light of these principles. Hence, to test the consistency of the state religion clause, recourse must be had to these principles. In addition to the earlier discussions on secularism, this part will argue that state religion is also contradictory to the core principles of *Bangalee* nationalism and liberal democracy.

a. The Point of Contradiction between the State Religion Clause and *Bangalee* Nationalism

An understanding of nationalism is vital to comprehend the emergence of Bangladesh as a nation state in 1971. Nationalism played a pivotal role in the liberation war against Pakistan in 1971. *Bangalee* nationalism defined its people, their identity and the unique characteristics which separate Bangladesh from both Pakistan and India (the Indian *Bangalees*). Along with the economic and political subjugation by the West Pakistan regime, the refusal to recognize the distinct culture and language of East Pakistan, with the superimposition of Islamic identity, contributed to Bangladesh’s secession.¹⁴⁷

A reader not familiar with the geopolitical antecedents of South Asia might wonder why the recognition of regional identity was refused in the first place. The refusal of the unique

¹⁴⁵ *Constitution of Bangladesh*, *supra* note 82, Art 8.

¹⁴⁶ *Ibid.*

¹⁴⁷ Sanjay K Bhardwaj, “Contesting Identities in Bangladesh: A Study of Secular and Religious Frontiers” Asia Research Centre Working Paper No 36 at 14.

identity of East Pakistan was driven by the prejudice that Bengali language and culture were an offshoot of Indian Hindu culture and hence were anti-Islamic.¹⁴⁸ However, for the people of East Pakistan, being *Bangalee* “was not a mere illusion or frivolous idiosyncrasy, but has a definite character which separated them from other races in Pakistan”.¹⁴⁹ Moreover, most of the population was not prepared for losing their identity in favour of an imposed Islamic national identity. As a result, *Bangalee* nationalism became a vital force to unify the people of the East against the Pakistanis since 1948 and more strongly since the Language Movement of 1952. In the post-independence era, *Bangalee* nationalism as a fundamental constitutional principle has gained more prominence. Art 9 of the constitution of 1972 and the present constitution¹⁵⁰ defines Bengalee nationalism as:

the unity and solidarity of the Bangalee nation, which, deriving its identity from its language and culture, attained sovereign and independent Bangladesh through a united and determined struggle in the war of independence, shall be the basis of *Bangalee* nationalism.¹⁵¹

Two main features of this nationalism are language and the war of independence in 1971 which reflects movements against religious hegemony (especially hegemony through Islam). These developments show that people of Bangladesh as a nation shall be united based on their shared language and culture, rather than religion. This makes *Bangalee* nationalism more culture-centric than religious. As such, incorporation of any provision that ensures special recognition to religion makes it inconsistent with *Bangalee* nationalism.

There can be questions from an historical perspective that a language and culture based nationalism does not have to automatically conflict with religion, especially when religion (both Islam and Hinduism) formed an integral part of *Bangalee* life. *Bangali* [*Bangalee*] *Mussalman* has been a popular term for a long time in the territory that became Bangladesh, having socio-

¹⁴⁸ See chapter two of this thesis, *above*, for details on the topic.

¹⁴⁹ *Khondker Delwar Hossain v Bangladesh Italian Marble Works and Others* (2010) 62 DLR (AD) 298 (Supreme Court of Bangladesh) at 117 [*Khandker*].

¹⁵⁰ This article was omitted together with secularism by the constitutional Fifth Amendment in 1979. However, both of these articles were reinstated in 2011 by Fifteenth Amendment after the Fifth Amendment was declared unconstitutional by the Supreme Court of Bangladesh, see *Khandker*, *supra* note 149.

¹⁵¹ *Constitution of Bangladesh*, *supra* note 82, Art 9.

cultural and religious significance.¹⁵² However, post-1971 history shows that many quarters equated *Bangalee* identity with anti-Islamic identity. Ziaur Rahman replaced *Bangalee* nationalism with Bangladeshi nationalism to distinguish people of Bangladesh from Indian *Bangalees*.¹⁵³ However, drawing a distinction between Bangladesh and India was not Zia's only motive. Rather, Bangladeshi nationalism was necessary for his Islamization scheme: he also omitted secularism from the constitution and introduced a new provision, which introduced 'absolute trust and faith in Almighty Allah' as a fundamental principle of the constitution.¹⁵⁴ These simultaneous changes indicate that *Bangalee* nationalism could have been complementary to secularism, but was not compatible with the superiority of God as perceived in (orthodox) Islam. From this perspective, recognizing Islam as the state religion means facilitating an identity conundrum, i.e. whether the people of Bangladesh are first Muslim, and then *Bangalee*, or Bangladeshis who are Muslims. In this struggle between nationalism and religious identity, the vision of unity and solidarity forged by secular elements were compromised. Hence, finally, pro-secular nationalism in the Constitution became meaningless.

b. The State Religion Clause is Incompatible with Liberal Democracy under the Constitution of Bangladesh

Democracy, another basic tenet, found in Art 11 of the constitution is based on the liberal democracy model.¹⁵⁵ To ensure the basic pillars of liberal democracy, any elements that facilitate majority domination have to be eradicated. From the liberal democratic perspective, promoting religion is one of the ways to prejudice individual freedom and equal representation. Hence, it is necessary to separate religion from the state. This indicates that a constitutional provision for a liberal democratic system must maintain neutrality towards religion; a task in which secularism plays a vital role. Although the Constitution of Bangladesh incorporates secularism to facilitate

¹⁵² Ahmed Chhafa, *Prabandha Samagra* [An Anthology], vol 1 (Dhaka, Bangladesh: Howlader Prokashoni, 2014) at 40 [translated by the author].

¹⁵³ See generally Marcus Franda, "Ziaur Rahman and Bangladeshi Nationalism" (1981) 16:10/12 *Economic & Political Weekly* 357.

¹⁵⁴ *Khandker*, *supra* note 149 at 107.

¹⁵⁵ It stipulates that the "Republic shall be a democracy in which fundamental human rights and freedom and respect for the dignity and worth of the human person shall be guaranteed and in which effective participation by the people through their elected representatives in administration at all levels shall be ensured.", see, *Constitution of Bangladesh*, *supra* note 82, Art 11.

the effectiveness of democracy, the concurrent presence of state religion makes both democracy and secularism dysfunctional.

However, in contrast, it is argued that promoting religion is not contradictory to liberal democracy and construing liberal democracy as secular *per se* is misleading.¹⁵⁶ In this regard, Will Kymlicka argues that, “liberal neutrality actually allows the state to promote a particular religion on the same terms that it does a particular language- namely, as long as it is done for some neutral reason, such as social harmony or communication”.¹⁵⁷ Such arguments offer liberal democracy scope to promote or accommodate religion for ensuring social harmony. In this context, the question again boils down to Bangladeshi reality: has the recognition of state religion ever succeeded in securing social harmony in Bangladesh? In a country with 90 percent Muslim population, a separate recognition of Islam is not a necessity, but rather a hegemonic tool. This recognition has, over the years, facilitated the existence of oxymoronic complexes: democracy and theocracy now compete for primacy in a ‘secular’ Bangladesh. Therefore, the provision of a state religion is also contradictory to the constitutional principle of democracy.

To conclude, *part II* has shown the reasons the state religion clause in its present form is incompatible with the principles of secularism, nationalism, and democracy. The discussion makes it clear that, as long as the state religion clause remains in the constitution, the effectiveness of other basic principles that forms the pro-secular constitutional framework will be compromised.

In the following section, this thesis will show that the incompatibility of the state religion is not entirely *sui generis* to Bangladesh. It will explore the principles of political secularism and different models of secularism. This section will be the final argument that will establish the incompatibility of the state religion clause by showing that, even under explicitly accommodating models of secularism, the recognition of religion(s) as is done in Bangladesh cannot be accommodated.

¹⁵⁶ Veit Bader, “Secularism, Public Reason or Moderately Agnostic Democracy?” in Geoffrey Brahm Levey & Tariq Modood, eds, *Secularism, Religion and Multicultural Citizenship* (New York, USA: Cambridge University Press, 2009) 110 at 111.

¹⁵⁷ Geoffrey Brahm Levey, “Secularism and Religion in a Multicultural Age” in Geoffrey Brahm Levey & Tariq Modood, eds, *Secularism, Religion and Multicultural Citizenship* (New York, USA: Cambridge University Press, 2009) 1 at 6.

PART III: COMPATIBILITY OF STATE RELIGION WITH THE EXISTING THEORIES AND MODELS OF SECULARISM

The existing literature on the concept of secularism has not been aligned in a single normative paradigm. The concept is ever expanding and exceedingly dynamic and thus it is difficult to construct a single definition. For that reason, a scholar like Charles Taylor has observed that “it is not entirely clear what is meant by secularism”.¹⁵⁸ However, the reason behind this complexity is not that the concept is confusing; rather that it expands its components in a different manner in different contexts and disciplines. Therefore, each attempt to explain the state-religion relationship concerning secularism faces a counter question asking what is the notion of secularism that is being referred to. For this reason, it is first necessary to explore the current understandings of secularism and then follow up by ascertaining the proper definition that can be applied in Bangladesh’s case. This will in turn help to construct the theoretical framework to be used for assessing the compatibility of state religion in a secular constitution.

Three major disciplines of the social sciences: philosophy, sociology, and political science, all have interpreted secularism in different ways. These interpretations constitute dominant explanations of the phenomenon.¹⁵⁹ Nader Hashemi explains it in following way:

Philosophically, it can be described as rejection of the transcendental and metaphysical in favor of the existential and empirical; sociologically, the term entails the gradual decline of religion’s influence on public life and social institutions; and politically, it is seen as the separation between private and public spheres, represented by the separation of state and religion.¹⁶⁰

For the present case, the two basic features of secularism in the constitution of Bangladesh relate to the elimination of abuse of religion for political purposes. As such, secularism, as enshrined in the constitution, can be considered to be a political philosophy that delineates the relationship between religion and the state.¹⁶¹ As such, secularism from the

¹⁵⁸ Nader Hashemi, *Islam, Secularism, and Liberal Democracy: Toward a Democratic Theory for Muslim Societies* (New York, USA: Oxford University Press, 2009) at 105.

¹⁵⁹ Ali Riaz, “The Future of Secularism”, online: <kathakata.com/archives/1755>.

¹⁶⁰ Hashemi, *supra* note 158 at 106.

¹⁶¹ The reason, the secularism in Bangladesh is to be considered as a political philosophy because the objective of secularism is to find the best way to govern complex, religiously pluralistic society, see Jacques Berlinerblau, *how to be Secular: A Call to Arms for Religious Freedom* (New York, USA: Houghton Mifflin Harcourt, 2012) at 5.

political science perspective (which focuses on the state-religion relationship) is the appropriate approach for the following discussion. This definition will inform the discussion as to whether a state religion can be accommodated within the purview of political secularism. For this chapter, secularism in a political sense shall be termed as ‘political secularism’.

A. The Key Principle of Political Secularism and its Purview

Over the years, different formulas of secularism have been propounded which include: ‘the separation of Church and state’, ‘state neutrality towards religions’ or ‘the removal of religion from public space’ to draw the line between religion and state.¹⁶² As mentioned above, in the absence of an unequivocal framework for secularism, these ideas each “contain part of the truth”,¹⁶³ and collectively provide key principles which construe the complex definition of secularism. According to Maclure and Taylor, secularism entails two prevalent principles which are equality of respect (recognizing equal moral value or dignity of all citizens) and freedom of conscience.¹⁶⁴ These two principles can be achieved by applying two operative modes: by ensuring the neutrality of the state towards religion, and separation of church and state (or, as the case may be, a separation of state and religion).¹⁶⁵ Although these operative modes may be different, they are interrelated in the sense that the state cannot ensure neutrality without some operative separation between religion and state. That being said, the threshold of separation might vary in different countries. While some countries separate the two by excluding religion from the public sphere altogether, others, instead of pushing it to the private sphere, maintain an equal distance from anything that could be defined as religion. Ahmet T. Kuru termed the restrictive model of secularism as assertive secularism, while the flexible one as passive secularism.¹⁶⁶

Irrespective of their differences, these different models of secularism depend on how far a state will allow religion in the public sphere. For instance, France with its model of secularism (*laïcité*) reduces the public influences of religion by prohibiting all forms of religious symbols or

¹⁶² Bouchard, *supra* note 109 at 135.

¹⁶³ *Ibid.*

¹⁶⁴ Jocelyn Maclure & Charles Taylor, *Secularism and Freedom of Conscience* (Massachusetts, USA: Harvard University Press, 2011) at 20.

¹⁶⁵ *Ibid.*

¹⁶⁶ Kuru, *supra* note 51 at 11.

dress that may indicate difference among citizens.¹⁶⁷ On the other hand, countries like the USA, by the First Amendment of the Constitution, maintain a different degree of separation between church and state, which is realized not by excluding religion from of the public sphere. Again, Indian secularism, which is slightly different from the French and the US models, is based on a principled distance between religion and state (instead of separation). This model provides that “religion may intervene in the affairs of the state if such intervention promotes freedom, equality or any other value integral to secularism”.¹⁶⁸ This implies that state can interact with religion so long as the state is not promoting a religion and the religious institutions are not interfering with state actions. Rajeev Bhargava termed this version of secularism as ‘contextual secularism’, where the state and religion need not be mutually exclusive, but where religious and political institutions shall maintain non-sectarian separation.¹⁶⁹

a. Can Political Secularism Accommodate a state Religion Clause Like in Bangladesh?

The abovementioned discussion makes it apparent that the degree of separation between state and religion may vary according to the context and socio-political differences. However, under political secularism, the state has to ensure distance or neutrality from religion to ensure the basic principles of secularism. For that reason, political secularism may allow public visibility of religion or even the state’s interaction with religion, but that interaction is to protect freedom of thought, conscience and religion, and not to promote a faith system. This leads to the inference that the state religion clause under the constitution of Bangladesh is beyond the purview of accommodating state religion under political secularism which is thought to be the foundation of Art 12.

Conclusion

This chapter began by asking whether secularism and state religion could coexist in a constitution. In exploring this issue, the chapter looked into the constitutional paradox of

¹⁶⁷ *Ibid* at 124.

¹⁶⁸ Rajeev Bhargava, “Political Secularism: why it is needed and what can be learnt from its Indian version” in Geoffrey Brahm Levey & Tariq Modood, eds, *Secularism, Religion and Multicultural Citizenship* (New York, USA: Cambridge University Press, 2009) 82 at 104.

¹⁶⁹ Rajeev Bhargava, “What is Secularism for?” in Rajeev Bhargava, ed, *Secularism and its Critics* (Delhi, India: Oxford University Press, 1998) 486 at 536.

Bangladesh, created in the year 2011. The chapter analyzed how compatibility between secularism and a state religion in the constitution is impossible because it stands in direct contradiction with secularism, liberal democracy, and nationalism: three basic constituent principles of the constitution of Bangladesh.

The chapter further substantiated the argument of incompatibility by exploring the principles of political secularism and reviewing different models of secularism to show that, even under an explicitly accommodating model of secularism (like in the USA or India), no model allows the promotion of religion/religions by the state as is done in Bangladesh.

Finally, the chapter also reviewed the arguments of state actors and scholars favoring the maintenance of the state religion clause in the constitution and argued that there are discrepancies in these arguments based on the integration of the state religion clause into the secular constitutional structure of Bangladesh. With these discrepancies, the claim of state actors and scholars as to the compatibility of said coexistence become vulnerable.

However, what remains to be explored is how the contrary examples of such coexistence functions in other countries, for example the UK, Sweden and Denmark.¹⁷⁰ There also are other alternative theories to consider, such as Rawl's overlapping consensus,¹⁷¹ Wilson's relational dialogism,¹⁷² Ledewitz's idea of secularism¹⁷³ and the principle of multiculturalism, which offer alternative interpretations of the state-religion relationship. This discussion leads to serious consideration of the premise that there might, after all, be a way to reconcile the conundrum or accommodate religion in different ways.

This is where the next chapter begins: with an exploration of alternative theories and a consideration of their potential implementation into the frameworks in Bangladesh. In the next chapter, the thesis will test these alternate formulae to construct a concluding answer.

¹⁷⁰ See generally Stuart Mews, *Religion in Politics*, ed, (Essex, UK: Longman Group UK Limited, 1989).

¹⁷¹ See generally Maclure, *supra* note 164.

¹⁷² See generally Erin K Wilson, *After Secularism: Rethinking Religion in Global Politics* (London, UK: Palgrave Macmillan, 2012).

¹⁷³ See generally Ledewitz, *supra* note 99.

CHAPTER FOUR

IN SEARCH FOR A MIDDLE GROUND TO ACCOMMODATE RELIGION IN THE PRO-SECULAR CONSTITUTIONAL FRAMEWORK OF BANGLADESH

Introduction

Despite the incompatibility of the state religion-secularism coexistence, in reality, the Bangladesh government and parliament today remain steadfast about preserving the status-quo. The Supreme Court's "judicial unwillingness"¹⁷⁴ in 2015 to entertain the writ petition challenging the constitutionality of the state religion clause further complicates the issue. Such political and judicial reluctance has transformed the matter from a constitutional one to a political one, considering the large Muslim constituency in Bangladesh. Political positioning has, in fact, facilitated the present government to defend the state religion clause.

While state actors are not ready to take any immediate action; they are subject to a flood of questions raised by actors in civil society, academics and minority communities, as to the rationale for not resolving this constitutional contradiction. It has ultimately become an impediment to good governance, and breaking the stalemate is therefore paramount for smooth constitutional functioning.

Against this backdrop, the core objective of this chapter is to ascertain whether a reform can be made to accommodate religion (in place of the state religion clause) in the constitution while still maintaining its secular structure.¹⁷⁵ This thesis breaks down the arguments on this question in two parts: *part I* of the chapter will assess the viability of constructing a conciliation framework that would explore selected instances of convergence between established religion/church and secularism. *Part II* will suggest, in the alternative, four different means of accommodating religion which could be applied in Bangladesh.

¹⁷⁴ Hoque, *supra* note 121.

¹⁷⁵ These alternative approaches are discussed in part II of the chapter. The readers should keep in mind that these alternative approaches are suggested to defuse the possible negativity of the present state religion clause, and they are not intended to create a paradigm which will have similar implications as the present state religion clause.

PART I: THE VIABILITY OF APPLYING THE MODEL OF THE STATES CONVERGING ESTABLISHED RELIGION/CHURCH AND SECULARISM IN BANGLADESH

Sweden, Bolivia, Costa Rica, Denmark, Finland, Greece, Norway, and the United Kingdom (the UK¹⁷⁶) all have an official religion or established church.¹⁷⁷ They are all also established democracies¹⁷⁸ that maintain a secular policy in the governance of the state. These instances where states have been able to maintain official religion alongside a secular governance policy have been possible due to the historical, ethnographic and demographic circumstances of the state. Relevantly, these countries mostly have a homogeneous population that is greater than the heterogeneous and multi-religious people of those states. These circumstances help form the political culture of countries which foster the objectives of secularism. In these countries, one can find neutrality of the state towards religion, to ensuring the democratic rights of the people, to equality and non-discrimination among its citizens and to freedom of religion. These principles have been developed over a long history of development and political evolution. It is therefore unnecessary in these circumstances to consider whether or not the state promotes or supports a particular religion. If this intricate balance between rights and interests is achieved, then secularism and an official/established religion may coexist in perhaps any country, society or community. As indicated above, there is more than one instance where such balance has been achieved.

¹⁷⁶ Although in the UK the Church of England is one of the official churches, it is considered as the most important among other established churches like Scotland's national church, the Church of Scotland because the British monarch through constitutional means hold the position of the supreme governor of the church. As such, for the purpose of this research, when any reference is made to the UK, the readers should keep in mind that it indicated England and established church in the UK is the Church of England. This is necessary because in addition to England, the UK comprises three other countries (all of them have their separate established/official church), so within this short span of this thesis, it is difficult to discuss all these established churches of the UK.

¹⁷⁷ Although in popular culture the established official religion and established religion/church sometimes used interchangeably, but in some countries, the certain church has been declared constitutionally or through other means as the established religion or church but not as the official church or religion. For example, unlike the UK, (where, the Church of England is one of the official churches, and the Christianity is the official religion), Sweden, whereas the Church of Sweden has been considered as the established church (or as semi-established church), but after the separation of church and state it is not considered as the official church/Christianity is not official religion. In this context, for the purpose of this thesis, the established religion shall not be ipso facto considered as the official religion or state religion unless context implies otherwise.

¹⁷⁸ Jonathan Fox, "Separation of Religion and state in Stable Christian Democracies: Fact or Myth?" (2012) 1 JL, Religion & state 60 at 73.

The UK and Sweden have, in particular, are good examples of how to uphold secularism while maintaining the established Church or official religion. These states are not secular states *per se*, compared to the French approach of *laïcité*, as they did not banish religion from the affairs of state, but rather they struck a balance between secularism and religion. This makes these states an exceptional instance of middle ground where the decision need not be ‘either or’ and one which possibly could have been adopted for Bangladesh.

That being said, before suggesting the introduction of these alternative models to Bangladesh, it is necessary to ascertain how these countries attained that balance. This is necessary, because to apply the frameworks of these countries, the situation and factors of convergence need to be compatible with the situation in Bangladesh. If they do not have common variables, then the successful convergence of secularism and official/established religion will not be enough to resolve Bangladesh’s problem. The following section will therefore explore the catalysts for striking a balance between official religion and secular policies in the UK and Sweden.

A. Converging Secularism and Official or Established Religion or Church: Unearthing the Formulae of the UK and Sweden

In the UK and Sweden, the coexistence of official religion or an established church and secular policy was not achieved overnight. Rather, this convergence has been established gradually. Several factors actively influenced this development. These factors are, among other things, the influence of historical events, the traditional value of the religious institution (the Church), the non-political and symbolic nature of religious recognition, and an adaptation of concurrent secular socio-legal policy. In addition to that, the social and cultural uniqueness of these states with a homogenous population, and homogenous culture/ethnic groups played a vital role in curbing the possibility of rivalry on religious fronts, because the absence of heterogeneity means the absence of competing interests. This makes striking a balance between religion and secularism far easier than it is in a heterogeneous and unbalanced society like in Bangladesh. The following discussion will shed light on the factors/catalysts behind the said convergence.

a. Historical Background and Traditional Implication for Having Established Church or Religion

Historical narratives show that the establishment of religion or state recognition of a particular church was established long before the UK and Sweden adopted a secular policy. Unlike Bangladesh, the reason these countries have maintained an established church or religion instead of an official religion is that it is not necessary to be officially secular if the state can maintain religious neutrality and harmony among different religious communities of society.

For instance, although, the UK is considered as one of the first states to introduce a separation between church and state, this change was made to reduce the influence of the Roman Catholic Church interfering with state matters during the reign of Henry VIII.¹⁷⁹ In the UK, the separation was never considered as an exclusion of religion from the state. Rather it was based on non-interference between the two. The reason was simple: to uphold the supremacy of the English monarchy and hence national sovereignty. This made the entanglement between religion and state possible in the UK. In fact, in the *English Reformation Act 1530* resulted in the establishment of a separate Church of England free from the Vatican influence. This new Church became the official Church of England, and the King became the head of this new Church.¹⁸⁰ From this perspective, the Roman Church was seen as an unwanted interference impeding the sovereign actions of the state by issuing papal orders and the Church of England thus became the means to maintain both spiritual and temporal (read governmental) stability.

Like the UK, the establishment of the official Church of Sweden was an effort to unify the country by reducing the powers and influence of the Catholic Church, by acquiring Church properties to unify the country.¹⁸¹ The rationale behind having an official church was not to promote religion from a spiritual sense but to bring the majoritarian Christians under the umbrella of national unity.¹⁸²

¹⁷⁹ Russell Sandberg, *Law and Religion* (New Work, USA: Cambridge University Press, 2011) at 20, 23.

¹⁸⁰ *Ibid* at 23 —24.

¹⁸¹ Maarit Jänterä-Jareborg, “Religion and the Secular state in Sweden (Interim National Reports issued for the occasion of the XVIII International Congress of Comparative Law)” (Utah, Sweden: The International center for Law and Religion Studies, Brigham Young University) at 671.

¹⁸² See generally *Ibid*.

This shows that the official church in these countries was established with particular (socio-political) objectives in the past which legitimized its acceptability in the society from a governance and policy perspective. Since this recognition symbolized national unity rather than *religious identity*, it had been possible for these states to subsequently maintain officially established religion along with the secular policy.

b. Symbolic and Ornamental Recognition of the Religion

Cases where an established religion obliges the government to patronize it in one way or another, eventually leading to double standards among religions and citizens, happen mostly in countries which have a tendency to use religion as a tool for political domination.¹⁸³ Religion has, by nature, an overwhelming and authoritative effect on society; hence, it is often difficult to ensure that an official religion will not jeopardize other religious entities through state patronization.

For that reason, the only possible way to overcome this uncertainty is if the state can make the case that recognition of an established religion is just merely symbolic or ornamental. If this can be achieved, then there is room for having both secular policies and an official religion.

Although this appears to be a difficult task, the UK and Sweden are able to achieve this balance, albeit gradually by way of significant constitutional reforms, by keeping the established church symbolic. The UK gave Christianity special legal recognition through the Church of England, but it is not an integral part of the state, it is not a recognized part of the Executive department of the state and “differential treatment of the Church of England in comparison with other churches has remained within a manageable scope”.¹⁸⁴ Since the Church of England has a strong entanglement with English society, Church-state unification is adopted merely to

¹⁸³ It is pertinent to mention that official recognition to the Church given by the state will always have some political implications. However, in the present context of the UK and Sweden, giving such status does not lead to domination. As such, political domination referred in this para implies the situation- when religion is used to dominate political fields and people at large. This is evident in different countries of South Asia, e.g. India, Pakistan, and Bangladesh. Here, the reader should differentiate between these two ideas of political authority.

¹⁸⁴ Winfried Brugger, “On the Relationship between Structural Norms and Constitutional Rights in Church-state Relations” in Winfried Brugger & Michael Karayanni, eds, *Religion in the Public Sphere: A Comparative Analysis of German, Israeli, American and International Law* (Germany, Heidelberg: Springer Berlin, 2007) 21 at 22.

“maintain a strong line of tradition, which most members of the community view as part of their specific identity”.¹⁸⁵

Alternatively, in the case of Sweden, the symbolic nature of the established church is even more explicit. This is because though the majority of people follow the Church of Sweden (which is the Evangelical Lutheran former state Church of the country), Church attendance in Sweden is one of the lowest in the world.¹⁸⁶ Moreover from the state’s perspective “the Church became primarily an administrator of a specifically religious social sphere, and as a result, the Church suffered a decline in its social authority”.¹⁸⁷ Hence, in Sweden, religion has been gradually becoming a matter of the private sphere only.¹⁸⁸ The only reason the Church of Sweden is still an established Church (and not official Church) because it is a part of the collective identity of the people of Sweden, and people still follow religious rites for some life events despite the low rate of church attendance.¹⁸⁹

The above discussion shows that both the UK and Sweden have been able to balance their neutrality in the presence of an established religion because these religions have been considered as a symbolic attribute rather than to promote or impose particular religious faith over others. Besides, these societies were gradually constructed as secular and the effect of religion has been reduced. The possibility of the use of religion to gain political advantages has also been eliminated.

c. Adaptation of Secular Legal and Social Policy

As discussed above, the reason these states were able to balance secularism and religion is that they have a strong historical entanglement with the Church as well as non-political/symbolic nature of the recognition. This endeavor has been achieved not only through the state’s good intentions, but also through the adaptation of specific legal and policy reforms which ensure that the establishment of a particular religion does not hinder the state’s neutrality and the religious freedom of other religious minorities. For instance, in Sweden, through special enactment in 1998, a separation of church and state brought all religious communities to an equal

¹⁸⁵ *Ibid* at 25.

¹⁸⁶ Jareborg, *supra* note 181 at 669.

¹⁸⁷ *Ibid* at 672.

¹⁸⁸ *Ibid*.

¹⁸⁹ *Ibid* at 669.

level. Subsequently, the Church of Sweden was declared as a voluntary organization and its status as public administration of Sweden cease to exist.¹⁹⁰ Moreover, the courts were only bound by the secular laws, and although there are religious courts, those only deal with internal religious affairs.¹⁹¹

In the UK, similar legal initiatives have maintained non-interference of religion in state affairs, despite the explicit reference to the Church by the monarchy, Parliament, judiciary and organs of public administration.¹⁹² One of the reasons for justifying such entanglement given by the UK administration is that the Church and Christianity have relevance in the English society. Hence, the primary focus of the administration is to ensure the protection of both the state Church and religious freedom simultaneously. This has been made possible by the domestic decision makers through necessary adjustments to the rules applying to the established Church so that it complies with European Union (EU)¹⁹³ and the ECHR standards.¹⁹⁴ One example is the annulment of the exemption enjoyed by the organized religion relating to prohibition of discrimination on the ground of sex. This addresses the issue of discrimination against women by the state church, which was removed after state intervention making a strong case for gender equality.¹⁹⁵

In a nutshell, it can be deduced that the secret of having both official or an established religion together with secular policies is that different factors have been congruent in the test cases of the UK and Sweden. Therefore, while it is true that these achievements are laudable, that does not mean their framework can be instilled as models in other countries as well. Thus, to adopt these models requires some contextual similarity.

The following section will explore possible contextual similarities or dissimilarities between Bangladesh and these two countries to ascertain whether these frameworks are viable to

¹⁹⁰ *Ibid* at 673.

¹⁹¹ *Ibid* at 683.

¹⁹² See generally Sandberg, *supra* note 179.

¹⁹³ It is pertinent to mention, though; the UK are not obliged to comply with EU standard as in June 2016 through referendum the UK decided to leave the Union.

¹⁹⁴ Sandberg, *supra* note 179 at 67.

¹⁹⁵ *Ibid*.

resolve the conundrum created because of coexistence of the state religion and secularism in Bangladesh.

B. Viability of Applying the Model of the UK and Sweden in Bangladesh

If Bangladesh intended to adopt the policies of the UK and Sweden, then along with the constitutional recognition of Islam (or any other religion for that matter), the secular constitutional objectives must be expressly applied through policy and practice. Further, such adaptation cannot be achieved unless the following crucial factors are accounted for: understanding the violent communal history, the non-political nature of religion and its subsequent political use and introducing laws to ensure practical neutrality. The effects of religious recognition in society need be shared across religions, and that can be achieved only when recognition of a different role for religion is socially acceptable and the likelihood of social instability or violence can be reasonably monitored. The following discussion will scrutinize these questions one by one.

a. Differences in Constitutional Framework related to Secularism and Established Religion

The question of compatibility is very complex in Bangladesh. This thesis draws attention to the crucial fact that the cases examined, the UK and Sweden, differ from Bangladesh in a vital aspect: neither of these states constitutionally incorporated secularism and religion. For example, after the separation of church and state in Sweden, the constitution considered the Church of Sweden as an established church but *not* a state church.¹⁹⁶ The decision not to introduce a state church saved Sweden from a paradox like the one that exists in Bangladesh. Even if the constitutional recognition of an established Church¹⁹⁷ is tantamount to the state's special preference for a religion, the absence of a constitutional provision on secularism means, in fact, there is no coexistence of religion and secularism. This is also true in the UK, where the Church of England is the official Church but there is no state policy on secularism. Therefore, these countries do not have double standards regarding constitutional obligations (i.e. the requirement

¹⁹⁶ Ted Olsen, "Swedish Church state Separate: Official run ends after nearly 500 years", online: <www.christianitytoday.com/ct/2000/januaryweb-only/11.0.html>.

¹⁹⁷ See *Constitution of the Kingdom of Sweden*, chapter 8, Art 6.

to be secular and promote religion at the same time) neither *de jure* nor *de facto*. This allows the policy makers of the UK and Sweden to be flexible in constructing policy. Moreover, it does not oblige them to comply with a practically impossible constitutional duty e.g. to protect a state religion and refrain from giving political recognition to any religion at the same time, which is the case in Bangladesh.¹⁹⁸ Since these models do not constitutionally combine secularism and state religion, they may be appropriate to apply as a governing strategy (perhaps as a blueprint to maintain religious neutrality), but do not provide a solution to resolve the complexity which has arisen because of the coexistence of secularism and the state religion in the constitution of Bangladesh.

b. Different Socio-Historical Context and Distinct Philosophical Understandings regarding the Principles of Secularism and Official Religion

As discussed in the previous chapter, secularism, as enshrined in the constitution in Bangladesh, adheres to the definition of secularism in a political sense. The philosophy of secularism (in the political sense) requires separation between religion and state which can be realized by preventing the promotion of any religion by the state, or prevention of the use of religion in politics. The principles of secularism as enumerated in the Constitution of Bangladesh also explicitly require a realization of the objectives of Art 12, discussed above.¹⁹⁹ This philosophy is different from that of the UK and Sweden, as their secular philosophies are based on the state's neutral connection with religion.

This approach is possible in a society where a particular religion is already socially and legally established and the state then has to ensure the religious autonomy and freedom of other religious minorities as a sign of its neutrality. This strategy is plausible in a country where the religious minorities are mostly immigrants²⁰⁰ and the state is not persuaded to support established religions so long as these minority groups' religious freedom are protected. The reason minority groups cannot pursue the state for disestablishment of established religion is not that they do not want to (although they may not!), but rather because their status as citizens does

¹⁹⁸ See *Constitution of Bangladesh*, *supra* note 82, Art 2A & 12.

¹⁹⁹ *Ibid*, Art 12.

²⁰⁰ Like most of the religious minorities in UK are immigrants.

not place them in a position where they feel discriminated by state policies; and because, as new additions to an old society they do not possess the bargaining chips to demand removal of the majoritarian religion which is traditionally well established in their adopted state.

The practical reality in Bangladesh the opposite of the above, where religious minorities were never immigrants but are native inhabitants. Hence, in terms of national and geographic identity, both majority and minority religious groups stand in an equal position in Bangladesh. Moreover, the idea of recognizing Islam as the state religion was suddenly introduced by the Martial Law Administration in 1982. This made it difficult for minority communities to accept Islam as a state religion and the meaning of the term ‘state religion’ became a confusing matter for many. The only clear result of this policy has been the derogation of other (minority) religions.

For this reason, the problem Bangladesh faces today cannot be resolved by formally recognizing in the constitution that every other religion is equal to Islam. Since any form of preferential recognition to religion opens the possibility of prioritization between groups, leading to communal discontent, the parameter of equality between religions is necessarily different in Bangladesh.²⁰¹ As discussed in earlier chapters, this reality eventually frustrates any attempt of symbolizing the recognition of minority religions, even if this recognition were to be non-political. As such, there needs to be a massive reconstruction of the language of the present state religion provision in the constitution. In the absence of this change, the wholesale adoption of the British or Swedish framework would be pointless.

Despite so much dissimilarity between states, the rationale for discussing foreign models of secularism is simple: the impracticality of the wholesale adaptation of these models by Bangladesh does not discard all possibility of reconciliation or partial adoption of these models. The following section will elaborate on those points.

C. The Extent to which the UK and Swedish Models May Apply to Bangladesh

This section begins by highlighting the specific aspects of the British and Swedish models which could work to address the incompatibility issue of the Bangladesh constitution. These aspects are as follows:

²⁰¹ See chapter two of this thesis, *above*, for details on this topic.

i) Since the main source of the contradiction is the presence of the state religion clause, the term state religion needs to be replaced and a new clause formulated (following the UK's model). This new clause should articulate the traditional value of all religions in public life. However, this constitutional recognition should only be a symbolic one.

ii) Alternatively, Bangladesh may adopt Sweden's approach: where the constitution ensures the separation of religion and state, but at the same time stipulates a certain denomination or established religion. This approach may be viable in Bangladesh, as the legal separation would mean that the state handles the governance sector and the established religion(s) handling the religious life of the people. In this case, the national mosque of Bangladesh might play the role of the national leader on Islamic issues. Alternately, Bangladesh in replacing Islam as the state religion may declare that all the known religions be designated as established religions. However, to make this policy effective, the constitution should incorporate a proviso that the state shall preclude itself from promoting a particular religion only because they have the status of the established religion.

iii) Finally, in order to ensure that the symbolic recognition does not in any way provide preferential state patronization of one religion, Bangladesh needs to introduce separate laws, like those enacted in Sweden, to provide that the state be separated from religious affairs (with certain exceptions which may include monetary support for religious festivals, the allotment of proportional funding for the establishment of religious institutions and tax exemptions). In addition, the government of Bangladesh needs to adopt secular legal and administrative policies as is done in the UK and Sweden. This could be achieved by enacting anti-discrimination laws,²⁰² and by avoiding policies that adopt anti-blasphemy laws. The state should also prevent state branches of power (the executive, legislature and judiciary) from expressing religious bias, favoritism, or disapproval of a religion and, while regulating hate speech, the government should ensure a positive environment for freedom of expression, which should include opinion against religions as protected speech.

²⁰² It is a while since the Law Commission of Bangladesh has drafted a bill Anti-Discrimination Law for the parliament but it has not been adopted as law yet, see, "Dalits push for enactment of law against discrimination", *New Age (of Bangladesh)* (8 February 2016), online: <newagebd.net/201099/dalits-push-for-enactment-of-law-against-discrimination/>.

In conclusion: in finding a solution for Bangladesh, the above recommendations may be taken into consideration. However, these approaches cannot provide a wholesale solution to the problem. As such, the following section (*part II*) will explore other, more constructive solutions which could amicably resolve the issue by accommodating religion while preserving the pro-secular constitutional framework.

PART II: FOUR ALTERNATIVE MEANS TO MAKE RELIGION CONGRUENT WITH SECULARISM IN BANGLADESH

Political secularism requires separation from religion not because it is antagonistic to religion in general terms, but rather as a means to ensure the state's neutrality towards religion, to uphold individual autonomy regarding religion and to safeguard religious freedom for all citizens equally. This means that secularism (in the political sense) does not necessarily deny the social relevance of religion. Rather, legal or administrative policies regarding religion could be implemented by a secular state, provided these are taken within the appropriate social context to protect religious freedom. Such policies, however, must be based on the reasonable consensus of the community, where that community comprises both believers and non-believers. This is a difficult balance to strike in a religiously pluralistic society, especially in one such as Bangladesh. Nevertheless, such difficulties should not be an excuse for leaning towards certain policy (related to religion) that may dissatisfy part of the population.

In Bangladesh, this difficulty is one of the reasons why the law and policy makers avoid legislating in the area of between secularism and state religion. Any decision might be interpreted by the majority Muslim community as the government favoring religious minorities, and vice versa. In this debate, the most vital point tends to be ignored: that enforcing secular policies, including the removal of a state religion from the constitution, does not need to prejudice or undermine constitutionally guaranteed religious freedoms. Unfortunately, this argument is politically unpopular: the popular position is that the removal of the state religion would be equal to blasphemy against Islam. This position has developed into an active fight against secularism, where the true intention of secularism is clouded, and is presented as

apostasy or irreligiousness.²⁰³ There is therefore an urgent need investigate ways to sensitively address the state religion clause issue without causing mass discontent. One may argue that the best way forward for Bangladesh is not to remove the state religion clause but rather to make it compatible with secularism.

This raises the issue of mutual exclusiveness between secularism and state religion. The idea of mutual exclusiveness is often perceived as contrary to the constitutionally mandated prohibitions against the political recognition of religion. As discussed earlier in this thesis, any claim of symbolic recognition of religion in Bangladesh has zero acceptability. That being said, the idea of non-political and symbolic recognition of religion is one option for the inclusion of religion in the constitution. To that end, by showing the common ground shared by religion and secularism, and how these principles and interests can complement one another, an acceptable compromise can be struck.

The following section will develop these base points into four alternative approaches that could be adopted in Bangladesh to accommodate religion in an alternative way which is compatible with the secular constitutional mandates.

A. Four Alternative Means to Accommodate Religion in the Secular Constitution

The following discussion will suggest four alternative means of accommodating religion. Based on this discussion, this part will establish that, through necessary constitutional reforms, the enactment of legislation and administrative policy²⁰⁴ which will resolve the incompatibility issue between secularism and religion, reinforce religion as an important social element, and thus realize the fundamental principles of the constitution and introduce social stability and cohesion in Bangladesh.

²⁰³ As per the principles of secularism enumerated in the constitution, secularism does not mean non-religion or irreligion, see *Constitution of Bangladesh*, *supra* note 82, Art 12.

²⁰⁴ As this thesis focuses on the issue of compatibility related to the constitutional provision related to state religion and secularism, as such, it is expected that the reformation proposal (if any) should be limited to possible constitutional change or amendment and not a wide range of legal and policy reforms. That said, the reason all these measures are indispensable is that they will ensure the functionality of the constitutional changes. In other words, it will not be enough to mention in the Constitution, religion has social relevance or cultural value, traditional implications or religion is conducive to secularism; as long as the government is not taking legal and policy measures to ensure that religion remains non-political and compatible with secularism. In the absence of such, the vested interest group will find their way to use religion, in whatever form they can, to use religion for political purpose which will be proven detrimental to secularism.

a. Applying the Principle of Multiculturalism

Multiculturalism has been adopted in many pluralist societies -i.e. societies with ethnic, religious and/or racial diversity- to ensure that these diverse groups, whether a majority or a minority, get equal treatment from the state. Multiculturalism policy is especially effective in a religiously pluralistic society because it prevents the development of a hierarchy among religious groups by the state giving equal treatment to all religious groups. A multicultural state treats all religions equally and provides assistance equally. This means that, even if Islam is the majoritarian religion and Buddhism is the minority religion, the state shall consider them as equal and assist them equally.²⁰⁵ This policy has been rigorously embraced by different countries such as Canada and the UK, because these countries consider diversity to be the source of national prosperity.²⁰⁶

However, multiculturalism as a policy has been opposed by secularists on the ground that, though multiculturalism strengthens the bond between different religious and ethnic groups, it also weakens overall national unity.²⁰⁷ This is because the different identities of religious groups hamper the established social cohesion, as they prioritize their sectarian religious identity over common national identity. The difference between social cohesion and national social cohesion is that the latter is commonly accepted by all members of society, despite their individual differences. In the context of Bangladesh, linguistic nationalism and secularism are considered to be universal national identity markers. As such, it is possible that multicultural policies could undermine social cohesion in Bangladesh.²⁰⁸ For that reason, secularists usually favor a religiously neutral state as opposed to a multicultural state, since a religiously neutral state completely precludes itself from recognizing or supporting any religion.

The alternative way to instill multiculturalism and neutrality would be to determine the scope of these policies through constitutional and legislative reform. In this instance, the state

²⁰⁵ Paul Cliteur, “state and religion against the backdrop of religious radicalism” (2012) 10:1 Intl J Cont L 127 at 132.

²⁰⁶ See the statement of Justin Trudeau’s speech where he emphasized the importance of religious diversity for national prosperity. He made this statement while welcoming the month of fasting for Muslims, see the video, Facebook, “A l’occasion du mois de Ramadan, message de Justin Trudeau” (5 June 2016), online: <www.facebook.com/TunisieNewsOfficiel/videos/vb.343872315642513/1337858042910597/?type=2&theater> at 00h:01m:21s.

²⁰⁷ Cliteur, *supra* note 205 at 143.

²⁰⁸ *Ibid.*

religion clause of Bangladesh does allow for the equal treatment of all religions, but if the state politically recognize any religion, and does not maintain or encourage a hierarchy to develop between religions, it will thus enable multicultural philosophy to thrive. This philosophy will in turn enable the state to treat and assist all religions equally, thereby acknowledging the religiously plural nature of Bangladeshi society.

Therefore, the conundrum created in the constitution of Bangladesh can be resolved by the application of multicultural philosophy, where the present state religion clause u/a 2A will be substituted with a provision that is based on multiculturalism. This change is necessary because, under the multicultural policy, no religion shall be prioritized over other religions. By contrast, although Art 2A, in its present form, provides equal respect to all religions, it declares Islam to be the state religion, thus frustrating the essence of multiculturalism.

i) Applying the Multicultural Model in the Constitution in Place of the Present State Religion Clause

Application of multiculturalism in the constitution in place of the state religion clause will not be a practical solution unless it is supported by appropriate law and policy. In Canada for instance, section 27 of the *Canadian Charter of Rights and Freedoms* provides constitutional recognition of multiculturalism²⁰⁹, which is effected by The *Multiculturalism Act 1988*. This law not only gives effect to the Charter and preserves multiculturalism but also delineates its scope. In this context, Bangladesh should consider adopting a similar kind of law (in addition to the separate clause for multiculturalism discussed above) to ensure that the state does not establish any covert policy of disparity (that is, assisting religious groups based on proportionality) among religions in the name of multicultural policy.

b. Representing Religion as a Means to Achieve ‘Overlapping Consensus’ on Basic Constitutional Principles

An ideal society is the one where citizens are empowered to come up with an ‘overlapping consensus’ on political principles, while accepting that they may have different

²⁰⁹ This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians, *Canadian Charter of Rights and Freedoms*, s 27, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

ideas about what make up the standards of a successful life.²¹⁰ According to Rawls, an overlapping consensus can be achieved where citizens agree upon the same basic laws, determined by reason, and where the consensus is compatible from their different point of view.²¹¹ In the context of Bangladesh, secularism and liberal democracy are among the most basic principles on which the constitution of Bangladesh is based. From the earlier discussion, it has been established that the state religion clause is outside the overlapping consensus, because it is inconsistent with these two basic principles. Therefore, to preserve these two basic principles of the constitution, the state religion clause would need to be removed from the constitution.

However, for citizens to agree upon the necessities of these two basic principles, they should be allowed to formulate their reason subjectively. In other words, the declaration in the constitution that democracy and secularism are basic principles does not make these principles ‘basic’ for all citizens unless they consider them to be so. Where these principles are not accepted as basic, there can be no overlapping consensus established about certain basic principles or laws. As a result, these constitutional principles will be considered to be imposed rather than agreed upon and their realization as basic principles will take time and work. Since the overlapping consensus is a necessary condition for social stability and for the development of an ideal society, people should be open to formulating such a consensus based on their reason. This may include religious reasoning and argument. Religious arguments are necessary because “citizens who, raised in a religious community, anchor all their views on what their preferred religious scripture tells them, and who know no other way to express them, but through religious language and arguments”.²¹² However, religious arguments could be ineffective if people from the religious community feel that their religion has been ignored to promote other constitutional principles, such as secularism and democracy. This is a potential outcome if religion is removed altogether from the Constitution to uphold these basic principles. To avoid this outcome, citizens must be allowed to agree upon the basic principles without having feeling as though they have compromised their religious mandates. An acceptable balance between religious and secular principles can be achieved only if religion remains as an important element of the constitution

²¹⁰ Maclure, *supra* note 164 at 17.

²¹¹ Leif Wenar, “John Rawls”, (25 March 2008), online: *Stanford University* <plato.stanford.edu/entries/rawls/#staovecon>.

²¹² Marcus Agnafors, “On the Secular Requirement A Critical Review of the Demand for Secular States” (2014) 3 *JL, Religion & state* 93 at 117.

and is presented as socially relevant, as well as conducive to secularism and democracy rather than as the tool of favoritism and political exploitation, as is the case under the current state religion clause.

If this balance can be achieved, the people of Bangladesh, regardless of their faith or beliefs, may be ready to accept the significance of the principles of democracy and secularism to Bangladesh society based on their reasoning (be it religious or secular). The presence of religion in the constitution may thus be more beneficial for achieving social consensus than removing it from the Constitution altogether. Therefore, in place of the present state religion clause, an alternative clause based on describing religion as an important social component and element of social harmony may be able to resolve the present constitutional conundrum.

c. Curtailing the Factors of Religion that Instigate Religious Violence

The idea that religion is incompatible with secularism comes from the widely held notion of liberal secularists that religion leads to intolerance.²¹³ This idea has developed from numerous historical events where a “war of religion [was] fought over the personal belief doctrine”.²¹⁴ Due to the apparent connection of religion with irrationality and intolerance, liberal secularists preferred religion to be removed from the public sphere altogether. However, this liberal secularist assumption of religion is “based on a flawed interpretation of historical events and historically inaccurate definition of religion”; because when those wars of religion were fought, religion was understood to be a social and communal element rather than the modern idea of religion, which is more a private and individual matter.²¹⁵ This shows that religion and secularism are not necessarily contradictory, as posited by the secularist.²¹⁶ Moreover, Professor Erin K. Wilson in her relational dialogism theory²¹⁷ argues that “religion is no longer considered purely irrational [...] and neither are contemporary [...] public life considered purely rational [...] this opens up the space for acknowledging the religion’s presence in the modern public

²¹³ Wilson, *supra* note 172 at 103.

²¹⁴ This doctrine is related to the definition of religion which based on personal doctrine and belief. As per this definition, religion is conceived as “a set of privately held doctrines or beliefs, focusing primarily on the individual element and implying irrationality, see *Ibid* at 103

²¹⁵ *Ibid* at 103—104.

²¹⁶ *Ibid*, at 97.

²¹⁷ See Wilson, *supra* note 172, chapter three.

sphere”.²¹⁸ In light of this argument, it can be said that secularist suspicion of the negative implications of religion which would compromise secularism are not entirely justified. In the Bangladesh context, if religion could remain purely rational and non-violent, removing religion from the constitution would be unnecessary, as there would no longer be the threat of a state religion instigating chaos and disorder in society.²¹⁹ As such, one of the possible ways of balancing secularism and religion would be removing the recognition of a state religion (‘declaring one or more religion state religion’) from the religion clause and thereby defusing the negative effects. However, proponents of this argument must keep in mind that this change would take a long time, as contemporary Bangladesh is not ready for such a major change.

d. Adopting a ‘Neo Secularism’ Approach

In addition, the recognition of religion through the constitution could be made compatible with secularism by adopting a neo secularist approach. Ledewitz has termed this neo-secularism as the ‘new new-secularism’, where he introduced a new school of thought on secularism.²²⁰ The people following this new school of thought are new neo-secularists who consider “adopting a nuanced and somewhat accepting attitude regarding religion”.²²¹ This nuanced approach is taken because “a public role for religious language, imagery, and symbols, as well as public subsidies for institutions closely linked to religion [may help,] flourishing mixed national culture of religious believers and nonbelievers”.²²²

From this perspective, religion can be recognized in the constitution, in a way that will ensure the application of a secular ideology, but not at the expense of the traditional values that all the religions of Bangladesh promote. However, in contemporary Bangladesh, it is not yet feasible to embrace this approach as current secularism principles in the constitution neither exclude religion from public sphere nor oblige the state to reduce the influence of religion on public life as, for example, in the French *laïcité*.

²¹⁸ *Ibid* at 99.

²¹⁹ See chapter one and two, *above*, and five of the thesis to get an idea about how political recognition causes violence, social instability, and biasness of the policy maker towards the majoritarian religion.

²²⁰ See generally Ledewitz, *supra* note 99.

²²¹ *Ibid* at 2.

²²² *Ibid*.

i) Applying Neo Secularism Approach in the Constitution

Therefore, the way to embrace this approach is to make necessary additions to the present constitutional provision related to secularism (u/a-12), in order to communicate the intention that the principle of secularism does not prejudice “religious language, imagery, and symbols, religious institutions and most importantly religious freedom”. However, these measures will become counterproductive if religion is not construed as a cultural construct or traditional element, rather than a political element or value, as is the case under the current state religion clause.

B. Steps to Apply an Alternative Means of Accommodation of Religion in the Constitution of Bangladesh

The above discussion shows that there are alternative means by which the constitutional impasse, created because of the coexistence of secularism and state religion, can be resolved. However, to apply these alternatives, either individually or (in the case of some options) together, the following steps are necessary:

Firstly, Art 2A of the constitution, i.e. the state religion clause that declares Islam as the state religion, has to be removed from the constitution.

Secondly, a new provision must be inserted to meet the requirements of any of the three alternative constitutional provisions as out above at headings a, b or c.

Thirdly, reconstruction of the provision of secularism in u/a 12, in light of the neo-secularism model, which will in turn complement the amended Art 2A by explaining that secularism is not agnostic to religion.

Finally, to ensure that the state neither imposes a secular or religious ideal on the people –in addition to the necessary constitutional reform – a separate legal and policy framework must be adopted to ensure that the state remains neutral in terms of governance, while at the same time it does not hamper the religious freedom and individual autonomy of the people of Bangladesh.

Conclusion

The religious and/or communal violence that was instigated by the state’s preferential recognition of a particular religion(s) predates, and continues long after (through systemic

discrimination and violence) the independence of Bangladesh. This social instability and violence were key factors that led to the adoption of secularism as the governing principle of the Bangladesh Constitution, together with nationalism and democracy. Nevertheless, adopting these principles was not enough to preserve the sanctity of this secular structure and it was necessary to preclude the state from giving religion any form of recognition which would frustrate the aims of these principles. Unfortunately, an adaptation of the state religion clause, as has been shown in this chapter, does hinder the secular structure of the constitution, which in turn makes this clause incompatible with the secular constitution of Bangladesh. In this context, it is therefore necessary to remove the present state religion clause from the constitution. However, taking into account the influence of the religion in a pluralistic society like Bangladesh, it is not an easy task to remove religion from the constitution, even if to do so would better society. For that reason, state actors remain committed to keeping the state religion clause, in order to avoid retaliation from religious communities.

This chapter has addressed this concern and explored alternative means to accommodate religion in the constitution (which all require replacing the state religion clause) which, if implemented, would make the constitutional recognition of religion compatible with the secular constitutional framework of Bangladesh. In exploring these possibilities, this chapter has assessed the viability of applying similar frameworks as those applied in the UK and Sweden to Bangladesh, on the basis that these countries are able to reconcile an official or established religion with secular governing policy. However, in assessing these alternative models, it became apparent that the key factors that enabled the UK and Sweden to balance secularism and religion are not present in Bangladesh, which makes it less viable for Bangladesh to import these policies and frameworks. That being said, it is also true that Bangladesh could adopt certain aspects of the legal and administrative policies of the UK and Sweden to strengthen the secular mandates of the Constitution, while still keeping religion in the constitution.

In addition to that, this chapter also suggested four alternative solutions which include the application of the multicultural model and taking a neo-secularism approach to providing recognition of religion while preserving the sanctity of the secular constitutional structure.

The key finding of the chapter was that it is possible to accommodate religion in the secular constitution of Bangladesh. To do so, by applying any one of the alternatives set out above, the present state religion clause would have to be replaced, and concurrent legislative and

administrative policies which would make these constitutional amendments effective and meaningful would have to be adopted.

CHAPTER FIVE: CONCLUDING CHAPTER

A. Final Thoughts and Summing up

The Constitution of Bangladesh declares, “This Constitution is, as the solemn expression of the will of the people, the supreme law of the Republic”.²²³ It indicates that the constitution explicitly controls the trajectory of state action and that state actors will treat the mandates of the Constitution as central and binding. From this perspective, every constitutional change is vital as it may change the very course of the nation. Therefore, close scrutiny of every constitutional amendment is crucial to determine whether or not such change is disruptive to the fundamental structures and spirit of the constitution, and/or society itself. This thesis finds it exceedingly important to scrutinize the 15th Amendment of the Constitution, which juxtaposed secularism and Islam as the state religion. The reasons why this particular amendment is worth investigation are demonstrated through the lessons of history, the socio-political status of religion in Bangladesh society, and the unique societal structure of Bangladesh. Bangladesh, although a predominantly Muslim society, is also multi-religious and multi-ethnic. The status of Islam as the majoritarian religion allows Islam to enjoy a dominant social position. This social dominance was officially confirmed when the state declared Islam as the state religion through constitutional amendments, which also removed secularism from the Constitution of Bangladesh. Although secularism was reinserted in the constitution in 2011, Islam remains the state religion. Statistics show that the more lenient the state had been towards Islamization, the more religious minorities have been imperiled.²²⁴ Constant violence against religious minorities, and state impunity against the perpetrators of such violence, are some of the reasons for the deterioration of the balance between secularism and religion, which is also an offshoot of Islam’s official recognition.²²⁵

In this context, one may question how Islam as the state religion has influenced this situation? The answer is that, since constitutional recognition of Islam as the state religion, the Constitution obliges the state to provide special treatment to Islam and this indirectly compels

²²³ *Constitution of Bangladesh*, *supra* note 82, Art 7.

²²⁴ See for details Abul Barkat, *an Inquiry into Causes and Consequences of Deprivation of Hindu Minorities* (Dhaka, Bangladesh: PRIP Trust 2000); Sambuddha Gupta, “Struggle for Hindu Existence”, online: <hinduexistence.org/2011/03/04/islamic-persecution-upon-disappearing-bangladeshi-hindu-minorities/>; Mohapatra, *supra* note 95.

²²⁵ See Mohapatra, *supra* note 97.

the state to be lenient towards religious violence perpetrated by Muslims and Muslim religious and/or political leaders against non-Muslims. As long as Islam remains the state religion, it will not be possible for the state to enforce its secular constitutional mandates.²²⁶ Without the state's complete dedication to enforce secular mandates, the very purpose of the independence of Bangladesh will fail. Moreover, like Mizanur Rahman, (former chairman of the National Human Rights Commission of Bangladesh) rightly remarked, if the state does not treat religious minorities properly, within next 15 years there will be no religious minorities left in Bangladesh.²²⁷

This constitutional favoritism towards Islam has facilitated the general notion²²⁸ that the only way to minimize the negative impacts (violence and discrimination) is to secularize the state through constitutional mandates. If that cannot be done, then Bangladesh may see the worst examples of constitutional supremacy instead of best practices. Were this to occur, the constitution, instead of protecting freedom of religion, would rather facilitate the extinction of religious minorities of Bangladesh by empowering state actors to do so. As such, this thesis found that it is absolutely necessary to ascertain whether the pro-secular constitutional mandates can be effectively enforceable if the Constitution contains any element like the state religion clause (u/a 2A) of the constitution that contradict this secular structure.

Against this background, this thesis tested the following research questions: *firstly*, whether the state religion clause u/a 2A, in its present form, is compatible with secularism and other elements of the constitution that form the pro-secular constitutional framework of Bangladesh; and *secondly*, whether constitutional reform is possible to accommodate the coexistence of religion and secularism within the constitution, and whether this coexistence would also work to defuse communal discontent and violence.

Following this introduction, contextual analysis was undertaken in chapter two and the thesis focused on very specific analysis in chapter three. Chapter three analyzed the relevant

²²⁶ See chapter three, *above*, for details on this issue.

²²⁷ This statement has been made Mizanur Rahman during an interview with the Daily Star, for details, see “Not so happy with the state: Outgoing Human Rights Commission boss speaks on a wide range of rights violence”, *the Daily Star (of Bangladesh)* (20 June 2016), online: <epaper.thedailystar.net/index.php?opt=view&page=1&date=2016-06-20>.

²²⁸ Among the secularist, politicians, member of civil society, and academics.

provisions of the constitutions of Bangladesh and reviewed the viability of justifications for keeping the state religion clause. This thesis supplemented these arguments by assessing the compatibility of state religion with secularism by exploring the principles of political secularism, and, finally, by analyzing different models of secularism to determine whether any viable model exists to reconcile the Bangladesh paradox. Furthermore, this thesis engaged in more abstract discussion (in chapter four) by looking into models from different countries to find any suitable frameworks that converge established or official religion and secularism to determine if these models could be adapted to enable religion to be accommodated in the constitution of Bangladesh. Finally, the thesis explored other possible alternatives to provide recognition of religion while also preserving the sanctity of the secular structure.

B. Main Points and the Key Findings of this Thesis

In light of the extensive discussion and analysis, the main finding of the thesis is that the state religion clause (u/a 2A), as it stands presently, cannot coexist with the provision of secularism and other elements of the constitution that promote secularism. The thesis also concludes that, while the state religion clause in its current form cannot be made compatible with secularism, potential reforms are available to accommodate religion in alternative ways which would ensure the survival of both the secular characteristics of the constitution and the religious sentiment of pluralistic Bangladeshi society.

In addition to the principal findings of this thesis, the following conclusions are drawn from a wide-ranging review of the discussions, analyses, facts, examples, and findings presented in this thesis. Readers should consider these also:

- From a historical perspective, the political or preferential treatment of religion has repeatedly caused negative consequences. As such, it is not surprising that declaring Islam as the state religion under the state religion clause is not conducive for the secular constitutional framework, nor for religious harmony in Bangladesh.
- The state religion clause is incompatible with the secular constitutional framework, as it contradicts secularism and works against other key constitutional principles: namely, liberal democracy and nationalism.

- The present state religion clause is incompatible not only under the Bangladeshi interpretation of secularism, but also under other more familiar and popular interpretations of political secularism.
- The Bangladesh context is different from other countries (such as the UK and Sweden) in terms of state religion and secular state policy. As such, the total importation of those secularism/religion models are not a viable option for Bangladesh, as the factors that created the constitutional balance in those countries are absent in Bangladesh. That being said, Bangladesh could adopt certain aspects of the legal and administrative policies from the UK and Sweden to strengthen its secular policies.
- It is possible to accommodate religion in the Bangladesh constitution in alternative ways (e.g. through multiculturalism, applying neo-secularism model). These changes could be made through necessary constitutional amendments.
- There is the possibility of applying principles of multiculturalism with secularism in a country which is predominantly Muslim.
- Finally, it would be difficult to assert in the context of Bangladesh that special recognition of a particular religion could be accommodated in any constitution based on some of the existing literature,²²⁹ because that would mean accommodating a religion in a way which allows favoritism within a pro-secular constitution. This outcome would be very difficult and could be unpredictable in the unique socio-political context of Bangladesh.

In conclusion, this thesis, within its short scope, has scrutinized a paradoxical constitutional dilemma and presented the best possible recommendations to defuse that paradox. While this thesis finds a silver lining, it also concludes with a mark of caution that replacing the state religion clause and applying alternative means as suggested in this thesis will be the necessary first step to solving the problem. The second step to resolving the existing dilemma, and to make this constitutional adjustment effective and meaningful, must be the adoption of concurrent legislative and administrative policies.

²²⁹ The existing literature reflects that, since religion is accommodated in some of the secular and liberal democratic countries, hence it can generally be accommodated in a secular constitutional framework.

If only all these measures are properly implemented, then the sacrifice made by the martyrs of the liberation war of 1971 for securing respect for human dignity will truly be meaningful.

C. Looking Forward and Scope for Future Research Endeavors

This thesis has departed from the academic discourse which, to date, has remained mostly within the political arena. At the end of this extensive discussion, some intriguing questions remain, such as: what do the stakeholders and general people think about the state religion clause? And, do people appreciate secularism? This thesis paves the way for extensive empirical research to find answers to these questions.

Moreover, this thesis concludes that the state religion clause disrupts the secular constitutional framework of Bangladesh. This finding raises another matter of interest; which is if the state religion clause is removed altogether and if religion is not accommodated in an alternative way, then what would be the response from the Muslim population? Therefore, further research might be conducted to ascertain whether the removal of Islam could cause retaliation against other religious groups or whether it could create resentment towards the secular policy of the constitution.

In addition to these questions, the thesis lays the groundwork for further comparative research to assess the viability of applying multiculturalism-secularism as a collective approach to achieve social consensus and religious harmony in Islamic societies. This thesis could not explore this point, given time and space limitations.

Finally, this thesis, which started off as a Bangladesh-centric endeavor, has evolved into a work addressed to both national and international readers in the matters of the state, secularism, and religion. However, in the end, it is best to remember that this thesis is one of the numerous efforts of a Bangladeshi to carry on the legacy that our fathers created in 1971.

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