

THE LEGALITY OF A STATE RELIGION IN A SECULAR NATION

INTRODUCTION

In June of 1988, the Bangladesh Parliament passed the eighth amendment to its Constitution.¹ The Constitution (Eighth Amendment) Act, 1988 specified amendments to various articles of the Constitution.² Section 2, in particular, set forth the insertion of Article 2A, declaring Islam the official religion of the previously secular State.³ Several groups promptly launched protests subsequent to the bill's passing.⁴ One group in particular, calling itself the Committee for Resistance against Autocracy and Communalism,⁵ filed a writ petition contesting the amendment's lawfulness.⁶ Nearly three decades later, amidst troubling extremist activity in the country,⁷ the twenty-eight-year-old petition finally went before the Bangladesh High Court⁸ on March 28, 2016.⁹ Without reaching the merits, the Court summarily dismissed the case for lack of standing.¹⁰ Political

1. See Amena A. Mohsin, *Religion, Politics and Security: The Case of Bangladesh*, in RELIGIOUS RADICALISM AND SECURITY IN SOUTH ASIA 476 (Satu P. Limaye et al. eds., 2004). There have been sixteen amendments to the Bangladesh Constitution. See Ashutosh Sarkar & Shakhawat Liton, *Bangladesh High Court Scraps 16th Amendment to Constitution*, DAILY STAR (May 6, 2016, 3:08 AM), <http://www.thedailystar.net/frontpage/hc-scraps-16th-amendment-1219480>. Five of the sixteen amendments were "scrapped" and one partly scrapped. *Id.*

2. See The Constitution (Eighth Amendment) Act, 1988 (Act XXX of 1988).

3. *Id.* § 2. Article 2A reads: "The state religion of the Republic is Islam, but other religions may be practised [sic] in peace and harmony in the Republic." *Id.*

4. See Sultana Kamal, *Move Towards State Sponsored Islamisation in Bangladesh*, WOMEN LIVING UNDER MUSLIM LAWS DOSSIER 5-6, 1989, at 12.

5. See Dave Bergman, *Bangladesh Court Upholds Islam as Religion of the State*, AL JAZEERA (Mar. 28, 2016), <http://www.aljazeera.com/news/2016/03/bangladesh-court-upholds-islam-religion-state-160328112919301.html>.

6. See *Islam Remains Bangladesh's State Religion as High Court Scraps Petition*, BDNEWS24 (Mar. 28, 2016, 3:47 PM), <http://bdnews24.com/bangladesh/2016/03/28/islam-remains-bangladeshs-state-religion-as-high-court-scraps-petition>. The Committee for Resistance against Autocracy and Communalism was not the only group at that time to challenge the insertion of Article 2A. See Kamal, *supra* note 4. Women's rights activist group Naripokkho and attorney Shakti Das Goswami also filed writ petitions disputing the Eighth Amendment Act's enactment. Ridwanul Hoque, *Constitutional Challenge to the State Religion Status of Islam in Bangladesh: Back to Square One?*, I-CONNECT (May 27, 2016), <http://www.iconnectblog.com/2016/05/islam-in-bangladesh>.

7. See Joshua Hammer, *The Imperiled Bloggers of Bangladesh*, N.Y. TIMES (Dec. 29, 2015), <http://www.nytimes.com/2016/01/03/magazine/the-price-of-secularism-in-bangladesh.html>? (discussing recent extremist attacks against secular bloggers for criticizing Islam).

8. The Supreme Court of Bangladesh is comprised of the High Court Division and the Appellate Division. BANG. CONST., art. 94. See *History of the Supreme Court*, SUPREME COURT OF BANGLADESH, <http://www.supremecourt.gov.bd/web/?page=history.php&menu=11> (last visited Jan. 16, 2017), for a brief history of the Supreme Court of Bangladesh.

9. See *Islam Remains Bangladesh's State Religion as High Court Scraps Petition*, *supra* note 6.

10. *Id.*

groups and people favoring Islam as the state religion hailed the decision as a victory.¹¹ Opposing factions, meanwhile, lamented the preemptive ruling.¹²

This note examines the Court's dismissal and discusses the substance of the petition before ultimately proffering a prediction of how the Court will rule upon the merits of the complaint, should the case proceed on appeal.¹³ As the young nation suffers growing pains during this critical time¹⁴ in its development,¹⁵ the constitutional challenge discussed herein underscores fundamental parts of Bangladesh's identity as well as the judiciary's function to interpret the law despite political and religious disputes.¹⁶

To establish a foundation for the substance of this note, Part I provides a brief history of secularism in the region of Bengal and the events that led to Bangladesh's birth as a secular nation. Part II explains how Islam became the state religion, thereby supplanting the principle of secularism. It then discusses the development of Writ Petition No. 1434 of 1988, which went before the High Court Division in March of 2016, and the Court's dismissal of the case. Part III examines the inconsistency of the High Court's ruling with prior judicial interpretations and addresses the viability of an appeal. It then explores the merits of the writ petition and analyzes the legal arguments of its position.

PART I: SECULARISM IN BANGLADESH

“Bangladesh is a new country with an ancient civilization and culture. As its mighty rivers flow down[,] one can hear, in their murmurs, the music that was heard thousands of years ago. The enchanting beauty of its vast green fields spreading to the distant horizon and its azure

11. See Maher Sattar & Ellen Barry, *In 2 Minutes, Bangladesh Rejects 28-Year-Old Challenge to Islam's Role*, N.Y. TIMES (Mar. 28, 2016), <http://www.nytimes.com/2016/03/29/world/asia/Bangladesh-court-islam-state-religion.html?>

12. See William Helbling, *Bangladesh High Court Denies Petition to Remove Islam as State Religion*, JURIST (Mar. 28, 2016, 9:32 AM), <http://www.jurist.org/paperchase/2016/03/bangladesh-high-court-denies-petition-to-remove-islam-as-state-religion.php>.

13. The arguments discussed in Part III address only the issue of section 2 under the Constitution (Eighth Amendment) Act, 1988 but include some necessary references to section 7.

14. See Maher Sattar, *A Revived Challenge to Islam as Bangladesh's State Religion Goes to Court*, N.Y. TIMES (Mar. 25, 2016), http://www.nytimes.com/2016/03/26/world/asia/a-revived-challenge-to-islam-as-bangladeshs-state-religion-goes-to-court.html?_r=0 (discussing the majority party's commitment to secularism amidst rising “anxiety prompted by a series of extremist attacks”).

15. See Jim Fitzpatrick, *Bangladesh: Growing Pains*, NEW STATESMAN (Dec. 1, 2014), <http://www.newstatesman.com/2014/12/bangladesh-growing-pains> (discussing recent trials of accused war criminals, internal corruption and political stability, and the country's impoverished millions).

16. See Hoque, *supra* note 6.

blue sky still reveal the beauty witnessed since the dawn of civilization. The people inhabiting the land are well known for emotion, a strong sense of values, hospitality, friendliness, a capacity to face challenges, endure sufferings, bear losses calmly, meet the demands of the occasion, and retain firm faith in God.”¹⁷

A. PRE-MODERN

The nation of Bangladesh encompasses an area formerly known, and sometimes still referred to, as East Bengal.¹⁸ Bengal, as a region, represents one of history’s early melting pots,¹⁹ and it is a place whose people have long appreciated different beliefs and adopted various aspects of differing cultures.²⁰

Bengali people descended from Indo-Aryans²¹ who settled in the region between three and four thousand years ago.²² While today most Bangladeshi people are Bengalis,²³ indigenous tribes mostly populated pre-modern Bengal until the early Vedic Period²⁴ when the Indo-Aryans began arriving from the northwestern Indian subcontinent.²⁵ As the newcomers settled in the northwest portion of Bengal, their “Brahmanical socio-cultural

17. Abu Sayeed Chowdhury, *The Bangladesh Constitution in American Perspective*, in CONSTITUTIONALISM IN ASIA: ASIAN VIEWS OF THE AMERICAN INFLUENCE 25, 26 (Lawrence Ward Beer ed., 1979).

18. See CRAIG BAXTER, BANGLADESH: FROM A NATION TO A STATE 61 (1997).

19. See *id.* at 12 (describing the supposition that Mongoloid tribes first settled regions of Bangladesh followed by Dravidians from northern India and then Indo-Aryan migrants); see also *id.* at 5 (stating that Dravidian and Mongoloid features “remain in the mixed Bengali population”).

20. See Dr. Sanjay K. Bhardwaj, *Contesting Identities in Bangladesh: A Study of Secular and Religious Frontiers* 6 (Asia Res. Ctr., Working Paper No. 36, 2010) (describing the people’s “longstanding tolerance” of various religious and spiritual influences in the region).

21. “‘Indo-Aryan’ is the name generally adopted for those Aryans who entered India and settled there in prehistoric times, and for their descendants.” *Indo-Aryan Languages*, XIV THE ENCYCLOPAEDIA BRITANNICA: A DICTIONARY OF ARTS, SCIENCES, LITERATURE AND GENERAL INFORMATION 487 (11th ed. 1910).

22. See BAXTER, *supra* note 18, at 5 (“The vast majority of the people of Bangladesh are Bengalis, a branch of Indo-Aryans who migrated into the eastern reaches of India . . . during the second millennium before Christ.”).

23. See *id.*

24. The Vedic period, or Vedic Age, refers to the span of years between circa 1500 B.C. to 500 B.C., during which the Vedas were written. INDIA: A COUNTRY STUDY 121 (James Heitzman & Robert L. Worden eds., 5th ed. 1996) (The Vedas are “ancient hymns composed and recited . . . as early as 1500 B.C.”); see also DAVID M. KNIPE, ENCYCLOPEDIA OF INDIA 254-55 (Stanley Wolpert ed., 2006) (The Vedas are “India’s most ancient textual authority.”).

25. Bhardwaj, *supra* note 20, at 5.

beliefs”²⁶ and “strong social hierarchies”²⁷ as well as “collections of Sanskrit literature . . . and additional knowledge of agriculture”²⁸ served to exert both cultural and economic influence over the area’s indigenous population.²⁹

In 1204 A.D., Mohammad Bakhtiyar’s³⁰ conquest of Bengal “marked the onset of a new phase of identity formation in Bengal”³¹ whereby Islamic values increasingly spread among people in the east delta.³² Both the Brahmanical-based Hindu culture and Islamic culture promoted organization of family and farming systems, making Brahmins³³ and Mullahs³⁴ “instrumental in teaching new methods of agriculture.”³⁵

Because of a well-established tolerance among the region’s people, Bengali society and culture developed an emphasis on religious inclusion.³⁶ Thus, both religious identities permeated the society, creating a Bengali culture of “co-existence between old and new religious practices.”³⁷

B. BRITISH RULE

Despite the history of religious tolerance in the region,³⁸ British meddling helped fuel the rise of communal violence among Bengalis.³⁹ Though European trade in Bengal began with the Portuguese in the

26. *Id.* Brahmanism is an ancient Indian religion that preceded the emergence of Hinduism, and that scholars consider “either as a historical stage in Hinduism’s evolution or as a distinct religious tradition.” *Brahmanism*, ENCYCLOPEDIA BRITANNICA (Sept. 9, 2015), <https://www.britannica.com/topic/Brahmanism>.

27. Bhardwaj, *supra* note 20, at 5.

28. *Id.*

29. *See id.*

30. Ikhtiyaruddin Mohammad Bakhtiyar Khalji, was a leader in the Army of the Delhi Sultanate and brought Bengal under its control. CRAIG BAXTER & SYEDUR RAHMAN, HISTORICAL DICTIONARY OF BANGLADESH 129 (The Scarecrow Press, Inc. 3d ed. 2003). The Delhi Sultanate was the “principal Muslim sultanate in north India from the 13th to the 16th century.” *Delhi Sultanate*, ENCYCLOPAEDIA BRITANNICA (Feb. 6, 2009), <https://www.britannica.com/place/Delhi-sultanate>.

31. Bhardwaj, *supra* note 20, at 6.

32. *Id.*

33. Brahman here refers to “a Hindu of the highest caste traditionally assigned to the priesthood.” *Brahman*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/Brahman> (last visited Feb. 10, 2017).

34. Mullah refers to “an educated Muslim trained in religious law and doctrine and usually holding an official post.” *Mullah*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/mullah> (last visited Feb. 10, 2017).

35. Bhardwaj, *supra* note 20, at 6.

36. *See id.*

37. *Id.* at 6-7.

38. *See id.* at 6; *see also, e.g.*, BAXTER, *supra* note 18, at 19-20 (describing the Husain Shahi Dynasty as “a truly Bengali regime” in which Bengali “Muslims and Hindus alike played important roles in the government” even though land was still mostly controlled by Hindus).

39. *See* Bhardwaj, *supra* note 20, at 9.

sixteenth century, the British East India Company significantly expanded its interests in the region over the next two hundred years.⁴⁰ By the early eighteenth century, the Company enjoyed lucrative economic privileges⁴¹ and had become the region's foremost commercial outfit.⁴²

The British employed a divide and conquer strategy which routinely put Hindus and Muslims at odds.⁴³ Communal violence became frequent during this era, and following two substantial military victories, the British East India Company had achieved decisive rule over Bengal by 1764.⁴⁴ During the following century, the British government replaced the Company and established the Crown's control of Bengal.⁴⁵ Meanwhile, India had already begun its ninety-year struggle for independence from the British Monarchy.⁴⁶

Over the course of several decades in the early twentieth century, the British acknowledged the Indian independence movement and attempted to establish a native government that would be subordinate to the British Empire.⁴⁷ Bengali people joined the pursuit of independence under British

40. BAXTER, *supra* note 18, at 23-26.

41. See RAM GOPAL, HOW THE BRITISH OCCUPIED BENGAL 34-35 (1963) (discussing Mughal Emperor Farrukh-siyar's order exempting the Company from customs throughout the Mughal Empire).

42. Henry F. Goodnow, *Bangladesh*, in CONSTITUTIONALISM IN ASIA: ASIAN VIEWS OF THE AMERICAN INFLUENCE 21 (Lawrence Ward Beer ed., 1979).

43. See Bhardwaj, *supra* note 20, at 10 n.11.

44. Goodnow, *supra* note 42, at 21.

45. *Id.* The company's role in relation to the "original trading mission was gradually eroded" while the British government increased its management of the company's concerns. BAXTER, *supra* note 18, at 31. The Crown, through the Charter Act of 1813, asserted its sovereignty in India over the company's territorial property, and, with the Charter Act of 1833, terminated the company's trade monopoly entirely. *Id.* Queen Victoria, on November 1, 1858, issued a proclamation declaring India thereafter to be "governed by and in the name of the British Monarch through a Secretary of State." *Freedom Struggle*, KNOW INDIA, <http://knowindia.gov.in/culture-and-heritage/freedom-struggle/end-of-the-east-india-company.php> (last visited Jan. 16, 2017).

46. The Indian Mutiny of 1857, later regarded as the "First War of Indian Independence," began on May 10, 1857. *Freedom Struggle: Indian Freedom Struggle of 1857*, KNOW INDIA, <http://knowindia.gov.in/culture-and-heritage/freedom-struggle.php> (last visited Sept. 30, 2017). "India became free at the stroke of midnight, on August 14, 1947." *Freedom Struggle: Quit India Movement*, KNOW INDIA, <http://knowindia.gov.in/culture-and-heritage/freedom-struggle/quit-india-movement.php> (last visited Oct. 8, 2017).

47. Sayeed Chowdhury, *supra* note 17, at 26 ("The first British step according some recognition to the struggle for independence was the Government of India Act (1919), which declared that its aim was to establish 'a responsible government as an integral part of the British Empire.'"). "This . . . failed to satisfy the growing aspirations of the sub-continent." *Id.* The British Parliament later enacted the Government of India Act (1935) which "provided the foundation on which all constitutional exercises were made in the sub-continent." *Id.*

rule and “acquired considerable political consciousness”⁴⁸ as they “became fully aware of their legitimate rights and privileges.”⁴⁹

Following the Second World War, the British government was eager to relinquish power to the sub-continent and in 1947 enacted the Indian Independence Act.⁵⁰ On August 15, 1947, the British abdicated control of the Indian subcontinent,⁵¹ leaving the former British India carved along religious lines.⁵² Pakistan, including a divided Bengal,⁵³ would be occupied by a majority of Muslims,⁵⁴ while India remained home to a majority of Hindus.⁵⁵ Pakistan comprised West Pakistan and East Pakistan (now Bangladesh).⁵⁶

C. POST-PARTITION (1947)

Soon after Partition, several issues alienated East Pakistan from West Pakistan.⁵⁷ There was an obvious “cultural divide between Bengali Muslims and West Pakistani Muslims,”⁵⁸ and language was a driving factor.⁵⁹ It was not long before linguistic differences resulted in violence.⁶⁰

There was demand in West Pakistan to establish “Urdu as the national language of Pakistan.”⁶¹ Pakistan’s Governor-General Muhammad Ali Jinnah supported this demand.⁶² Bengali speaking East Pakistanis, however, who outnumbered the Urdu-speaking West Pakistanis, “could not accept that their language was not to be given equal status.”⁶³ On February

48. *Id.*

49. *Id.*

50. *Id.* at 27. The Indian Independence Act 1947 provided for the establishment of India and Pakistan as two independent “Dominions.” Indian Independence Act, 1947, 10 & 11 Geo. 6, c. 30, § 1.

51. See BAXTER, *supra* note 18, at 57.

52. “As the political parties by then had agreed to partition the sub-continent, Britain handed over its responsibilities to two independent dominions, India and Pakistan, amidst universal friendliness for Britain, without bitterness, without rancour.” Sayeed Chowdhury, *supra* note 17, at 27.

53. BAXTER, *supra* note 18, at 56-57 (“It was decided that [Bengal] would be partitioned.”).

54. See William Dalrymple, *The Great Divide: The Violent Legacy of Indian Partition*, NEW YORKER (June 29, 2015), <http://www.newyorker.com/magazine/2015/06/29/the-great-divide-books-dalrymple>; see also *Freedom Struggle: Quit India Movement*, *supra* note 46 (“[T]he Muslim League . . . pressed for the separate state of Pakistan.”).

55. See Dalrymple, *supra* note 54.

56. See Sayeed Chowdhury, *supra* note 17, at 27. “The two wings of Pakistan were separated by more than twelve hundred miles.” *Id.*

57. BAXTER, *supra* note 18, at 62.

58. *Id.*

59. *Id.* at 8.

60. *Id.* at 62.

61. *Id.*

62. *Id.* at 62.

63. *Id.*

21, 1952, a demonstration involving students ended in open conflict after demonstrators and police clashed,⁶⁴ resulting in police opening fire on the protesters and killing several students.⁶⁵

The tragedy swayed the language debate in Pakistan's Constituent Assembly.⁶⁶ In September 1954, the Assembly reached the decision that "'Urdu and Bengali and such other languages as may be declared' would be 'the official languages of the Republic.'"⁶⁷

Pakistan's government was, for the most part, controlled by "[m]ilitary officers and retired civil servants,"⁶⁸ but East Pakistanis were determined to gain power through the democratic process.⁶⁹ The first ever general election was scheduled in Pakistan in 1970.⁷⁰ The Awami League, an East Pakistan Bengali political party led by Sheikh Mujibur Rahman, participated in the election.⁷¹ Despite victories confined to East Pakistan, the Awami League managed to win the majority of National Assembly seats.⁷² Accordingly, Mujibur Rahman, as leader of the majority, would be "the logical of head of government."⁷³ West Pakistani leaders, however, found Mujibur

64. *See id.* at 63. "Students and others marched through the streets demanding equal status for Bengali." *Id.*; *see also* Bashir Al Helal, *Language Movement*, BANGLAPEDIA (March 1, 2015, 11:06 AM), http://en.banglapedia.org/index.php?title=Language_Movement ("Since 1952, [February 21] has been observed every year to commemorate the martyrs of the Language Movement."). In further recognition of the Language Movement, the General Conference of the United Nations Educational, Scientific and Cultural Organization in November of 1999 proclaimed February 21 to be International Language Day. *See id.*; *International Mother Language Day: 21 February*, UNITED NATIONS, <http://www.un.org/en/events/motherlanguageday/> (last visited Jan. 16, 2017).

65. BAXTER, *supra* note 18, at 63.

66. *See id.*

67. *Id.*

68. Goodnow, *supra* note 42; *see* BAXTER, *supra* note 18, at 64-65 (describing how "'Punjabi Mussalmans' . . . comprised almost all of the Pakistani army" and that "East Bengal had almost no [trained administrative] personnel").

69. Abul Kasem Fazlul Haq and Husain Shaheed Suhrawardy, east Bengali politicians, "in the early 1950s led their disparate parties to victory," sweeping the mostly West Pakistani Muslim League from office. BAXTER, *supra* note 18, at 72; *see* BAXTER & RAHMAN, *supra* note 30, at 97 (describing Fazlul Haq as "the leading Bengali Muslim political figure in the pre-independence period"); *see also* Huseyn Shaheed Suhrawardy, PAKISTAN HERALD, <http://www.pakistanherald.com/profile/huseyn-shaheed-suhrawardy-1187> (last visited Jan. 16, 2017, 10:23 PM) (describing Suhrawardy as "a politician from Bengal").

70. Goodnow, *supra* note 42.

71. Sheikh Mujibur Rahman was the "[f]ather of the nation and first president of Bangladesh." Harun-or-Rashid, *Rahman, Bangabandhu Sheikh Mujibur*, BANGLAPEDIA (Dec. 10, 2015, 3:17 PM), http://en.banglapedia.org/index.php?title=Rahman_Bangabandhu_Sheikh_Mujibur. The East Pakistan Awami Muslim League in 1953 elected Sheikh Mujib general secretary. *Id.* He continued to serve in that post until 1966 when the party elected him. *Id.* In an effort to sound more secular, the party in 1955 omitted, at Mujib's urging, the word "Muslim" from its name. *Id.* Mujibur Rahman's initiative in this matter reflected the "secularist attitude to politics that he developed after 1947." *Id.*

72. Goodnow, *supra* note 42, at 22.

73. *Id.*

Rahman unacceptable because his campaign had emphasized East Pakistani autonomy,⁷⁴ espousing secularism⁷⁵ and Bengali language and culture.⁷⁶

The new National Assembly, which included the recently elected members of the Awami League, failed to convene.⁷⁷ In fact, “strikes and riots in East Pakistan” resulted from the inability to reach any sort of compromise.⁷⁸

D. LIBERATION

Political negotiations failed, and Pakistan, on March 25, 1971, “used [its] military might . . . to crack down on those . . . described as rebels in East Pakistan.”⁷⁹ The Pakistani government arrested Mujibur Rahman, and the Pakistani military proceeded to kill many Bengalis.⁸⁰ Still, many managed to escape and “carry on the ensuing civil war.”⁸¹ India provided aid to the East Bengali rebels⁸² and later directly intervened in late November 1971,⁸³ bringing about the end of the war on December 16, 1971 when “Dhaka fell to the invading Indians.”⁸⁴ Bangladesh was at last free.⁸⁵

PART II: POST LIBERATION

With India’s constitution to serve as a model, drafting Bangladesh’s constitution proved to be a straightforward task.⁸⁶ The document was adopted on November 4, 1972.⁸⁷ Of special importance here is that the Bangladesh Constitution preserved principles essential to the nation’s

74. *Id.*

75. *Journey of Bangladesh Awami League 1949-2016*, BANGLADESH AWAMI LEAGUE, <https://publication.albd.org/Journey-of-Awami-League-1949-2016/#p=2> (last visited Feb. 22, 2018) (describing secularism as one of Awami League’s “founding and operating principles”).

76. See Whitney Smith, *Flag of Bangladesh*, ENCYCLOPAEDIA BRITANNICA (Feb. 2, 2001), <https://www.britannica.com/topic/flag-of-Bangladesh#ref712621> (stating that “[f]rom its founding in 1949, the Awami League was the expression of Bengali nationalism in the territory then known as East Pakistan”).

77. Goodnow, *supra* note 42, at 22.

78. *Id.*

79. BAXTER, *supra* note 18, at 79.

80. *See id.*

81. *Id.*

82. *Id.* The rebels were known in Bengali, or Bangla, as the Mukti Bahini. *Id.* Mukti Bahini translates in English to “liberation army.” See EYAL BENVENISTI, *THE INTERNATIONAL LAW OF OCCUPATION* 189 (2d ed. 2012).

83. BAXTER, *supra* note 18, at 79.

84. *Id.*

85. *Id.*

86. *Id.* at 87.

87. Sayeed Chowdhury, *supra* note 17, at 28.

governance.⁸⁸ Later known as the “tenets of Mujibism (or *Mujibbad*),”⁸⁹ the enshrined principles included four structural⁹⁰ pillars: “nationalism, socialism, secularism, and democracy.”⁹¹ On December 16, 1972, the parliamentary constitution took effect.⁹²

Thereafter, the Constitution underwent several major changes⁹³ before December 28, 1974, when Mujibur Rahman declared a state of emergency⁹⁴ and suspended fundamental rights within the nation.⁹⁵ This was the beginning of the end for Mujibur Rahman. On January 25, 1975,⁹⁶ the Bangladesh Parliament, without regard to the will of the people,⁹⁷ adopted

88. BAXTER, *supra* note 18, at 88.

89. *Id.*

90. See RIDWANUL HOQUE, JUDICIAL ACTIVISM IN BANGLADESH: A GOLDEN MEAN APPROACH 113-114 (2011) (referring to “basic structural pillars” of the Constitution). The doctrine of basic structure “is not a well-settled principle of constitutional law; it is rather a recent trend in and a growing principle of constitutional jurisprudence.” Shahriar Kabir Pulok, *Law of Writs in Bangladesh and Its Interpretation in the Supreme Court of Bangladesh*, LINKEDIN: PULSE (Dec. 13, 2015), <https://www.linkedin.com/pulse/law-writs-bangladesh-its-interpretation-supreme-court-pulok?trk=prof-post>. The concept originated from a decision in the Dacca High Court under Pakistani rule. *Id.* (referring to *Abdul Haque v. Fazlul Quder Chowdhury*, (PLD) 1963 (Dac.) 669 (Pak.)). On appeal, the Pakistan Supreme Court upheld the Dacca court’s decision that found that “franchise and form of government are fundamental features of a Constitution and the power conferred upon the Presidency by the constitution of Pakistan to remove difficulties does not extend to making an alteration in a fundamental feature of the Constitution.” *Id.* (quoting *Fazlul Quder Chowdhury v. Abdul Haque*, (1963) PLD (SC) 486 (Pak.)). The development of the basic structure doctrine took place in conditions under which the executive was essentially able to pass Constitutional amendments via a legislature comprising an “overwhelming majority” under executive command. *Id.* These amendments were allowed to pass “without eliciting any public opinion, without sending the Bill to any select committee and without giving sufficient time to the members of the parliament for deliberation on the Bill for amendment.” *Id.*

91. BAXTER, *supra* note 18, at 88.

92. *Id.* at 84, 87.

93. The Constitution (First Amendment) Act, 1973, passed on July 15, 1973, amended the Bangladesh Constitution’s Article 47 through the addition of a clause allowing for the prosecution and punishment of those accused of various crimes under international law. Emajuddin Ahamed, *Constitutional Amendments*, BANGLAPEDIA (Mar. 19, 2015, 1:55 PM), http://en.banglapedia.org/index.php?title=Constitutional_Amendments. It also added Article 47A which made certain fundamental rights inapplicable in such cases. *Id.* The Constitution (Second Amendment) Act, 1973, passed on September 22, 1973, amended several articles, and, more importantly, added Part IXA which provided for the suspension, in an emergency, of certain fundamental rights of citizens. *Id.* The Constitution (Third Amendment) Act, 1974, enacted on November 28, 1974, simply fixed the boundaries between Bangladesh and India. *Id.*

94. Prime Minister Mujibur Rahman requested the President at the time, Professor Mohammadullah, “to proclaim emergency rule.” Goodnow, *supra* note 42, at 22.

95. See BAXTER, at *supra* note 18, at 84, 91 (describing, at the time, Prime Minister Mujibur Rahman’s “power to order arrests and to limit the independence of the judiciary and the freedom of the press”).

96. Sayeed Chowdhury, *supra* note 17, at 32 n.10.

97. *Id.* at 32.

the fourth amendment to the Bangladesh Constitution.⁹⁸ In doing so, the Parliament essentially denied the Bangladeshi people any assurance of parliamentary representation,⁹⁹ and armed Mujibur Rahman with unprecedented power and authority as President.¹⁰⁰

On August 15, 1975, a coup d'état led by several military officers slayed President Mujibur Rahman and his family.¹⁰¹ Khondakar Mushtaque Ahmed¹⁰² ascended to the Presidency¹⁰³ and on August 20, 1975, assumed the power to put forward martial law regulations that were immune from any court's questioning.¹⁰⁴ The new nation continued to face turmoil, and there were several regime changes in a short span of years.¹⁰⁵ During this time, Major General Ziaur Rahman, a former freedom fighter,¹⁰⁶ rose as a "leading figure."¹⁰⁷

After nomination to the Presidency in 1977, Major General Ziaur Rahman promptly ordered that the Constitution be amended to replace references to secularist Bangladesh with "an expression of absolute faith in Allah."¹⁰⁸ His objective was to water down the official secularism

98. See Ahamed, *supra* note 93. The Constitution (Fourth Amendment) Act, 1975, passed on January 25, 1975, brought about major changes to the Constitution, including the replacement of the parliamentary system with presidential rule and Mujibur Rahman as president. See *id.*

99. See The Constitution (Fourth Amendment) Act, 1975 (Act II of 1975), section 2.

100. See Sayeed Chowdhury, *supra* note 17, at 32 (discussing Mujibur Rahman's empowerment to carry out his functions at will and the submission of all Ministers to his direction, thereby vesting him with more power than the U.S. President but without the checks and balances found in the U.S. democratic system).

101. *Id.* at n.11. Among the murdered were Mujib's wife, sons, nephew, and brother-in-law. BAXTER, *supra* note 18, at 92. His two daughters, abroad at the time, were spared. *Id.* The majors responsible for the coup "represented the grievances of the army." *Id.* By then, Mujibur Rahman's popularity had fallen so low, that "[f]ew in Dhaka appeared . . . to lament" his death. *Id.*

102. Khondakar Mushtaque Ahmed, at the time of Mujibur Rahman's assassination, was a right-wing member of Mujibur Rahman's cabinet, considered "more Islamic and conservative in his view than the mainstream of the Awami League." BAXTER, *supra* note 18, at 89.

103. The majors involved in the coup arrested three of Mujibur Rahman's cabinet members thereby bringing Khondakar Mushtaque Ahmed to the top of the cabinet list. *Id.* at 92. The majors then appointed Mushtaque Ahmed to be president. *Id.*

104. Sayeed Chowdhury, *supra* note 17, at 32 n.11.

105. On November 3, 1975, Brigadier Khalid Musharaf, a former freedom fighter and army officer loyal to Mujibur Rahman, led a coup that lasted several days and ended with his death "in a firefight on November 7." BAXTER, *supra* note 18, at 93. During that time, Mushtaque Ahmed resigned from "the presidency in favor of Chief Justice Abu Sadat Muhammad Sayem." *Id.* President Sayem resigned just a year and a half later for health reasons. *Id.* at 84, 96.

106. See BAXTER, *supra* note 18, at 86, 93, 94.

107. BAXTER, *supra* note 18, at 84. Major General Ziaur Rahman was President Sayem's nomination, at the time of his resignation, to follow him as President. Goodnow, *supra* note 42, at 22. At the time, Ziaur Rahman held, and continued to hold, posts as "Chief of Army Staff and Chief Martial Law Administrator." *Id.*

108. Goodnow, *supra* note 42, at 22. President's Order No. 1 of 1977 inserted the phrase "[BISMILLAH-AR-RAHMAN-AR-RAHIM] (In the name of Allah, the Beneficent, the Merciful)" above the Preamble of the Constitution. Mohsin, *supra* note 1, at 474. The proclamation also changed

established under Mujibur Rahman's leadership.¹⁰⁹ Ziaur Rahman continued to serve as President until his assassination in 1981.¹¹⁰ While his murder precipitated yet another regime change,¹¹¹ it was Ziaur Rahman's critical modification of the Constitution early on¹¹² that would serve as a preview of more drastic changes soon to come.¹¹³

By 1982, a second military regime had acceded to power under Lieutenant General Hussain Muhammad Ershad.¹¹⁴ Ershad would see three

Article 8, Clause 1 to read “the principles of absolute trust and faith in the Almighty Allah, nationalism, democracy and socialism meaning economic and social justice, together with the principles derived from them . . . shall constitute the fundamental principles of state policy.[.]” *Id.* Prior to the Order, Article 8, Clause 1, which pertains to the “Fundamental Principles of State Policy,” read, “The principles of nationalism, socialism, democracy and secularism, together with the principles derived from them as set out in this Part, shall constitute the fundamental principles of state policy.” *See* BANGL. CONST., art. 8(1), passed by the Constituent Assembly of Bangladesh on Nov. 4, 1972, and authenticated by the Speaker on Dec. 14, 1972 (Dacca: Constituent Assembly of Bangladesh, 1972). The principle of secularism, therefore, had been effectively abandoned. *See* Mohsin, *supra* note 1, at 474.

109. BAXTER, *supra* note 18, at 142. Ziaur Rahman accorded priority to Islam but also tried to persuade non-Muslims that their interests were protected. *Id.* In fact, his concern was such that he invited minority leaders to his residence in order to give them reassurances prior to the Order's announcement. *Id.* He initiated the changes primarily to satisfy Middle Eastern demands, especially those of Saudi Arabia, so that Bangladesh could continue to receive economic aid from those countries. *Id.* Ziaur Rahman may have also been anxious about an increasing “Islamic fundamentalism in Bangladesh.” *Id.* It has also been argued that Ziaur Rahman's proclamation of this Order was motivated for purely political reasons, attempting to garner blind support from religious Bangladeshis who were “politically unconscious”. *See* Rayhanul Islam, *Amendments of Bangladesh Constitution and Their Impacts*, LAW HELP BD (Aug. 24, 2014), <http://lawhelpbd.com/constitution/amendments-bangladesh-constitution-impacts/>.

110. In a plot alleged to have been constructed by Chittagong army commander Major General Muhammad Manzur and carried out in Chittagong, President Ziaur Rahman was assassinated on May 30, 1981. BAXTER, *supra* note 18, at 103. The Bangladesh Parliament passed two additional Constitutional Amendment Acts prior to Ziaur Rahman's death. *See* Ahamed, *supra* note 93. The Constitution (Fifth Amendment) Act, 1979, passed on April 6, 1979, validated beyond question from the courts all modifications to the Constitution made by the Martial Law Authorities between August 15, 1975 and April 9, 1979, dates inclusive. *Id.* The Constitutional (Sixth Amendment) Act, 1981 was passed in July 1981. *See* Islam, *supra* note 109.

111. Upon President Ziaur Rahman's death, Vice President Abdus Sattar became acting president. BAXTER, *supra* note 18, at 104. An election was then held on November 15, 1981 whereby acting President Sattar, by winning 65.5 percent of the votes, “became the duly elected president of the country.” *Id.* Dissatisfied with the role of the military now that the country was under civilian rule, Lieutenant General Hussain Muhammad Ershad, leading a coup, “assumed full powers under martial law”. *Id.* at 105. Ershad discharged Sattar and his vice-president from office, installed Justice Abul Fazal Muhammad Ahsanuddin Chowdhury as president, and declared himself prime minister. *Id.* He also disbanded the Parliament in session as well as the cabinet and “became the chief martial law administrator.” *Id.* It would be four years before a new Parliament was in place, the majority of seats held by the Ershad-aligned Jatiya Party and won through rigged elections. *Id.* at 108, 112.

112. *See supra* note 108 and accompanying text.

113. *See infra* notes 115, 119 and accompanying text.

114. *See infra* note 118.

additional Constitutional amendments passed¹¹⁵ before his resignation on December 6, 1990.¹¹⁶ The second of these is the subject of this discussion.

In an effort to retain the support of the country's Muslim majority and thereby remain in power,¹¹⁷ Ershad enacted, in June of 1988, the Constitution (Eighth Amendment) Act, 1988.¹¹⁸ The Act affirmed Islam as the official state religion while at the same time excising from the Constitution any trace that might have otherwise remained of Bangladesh as a secular nation.¹¹⁹ It is important to note that the Eighth Amendment Act also established six High Court Division judicial benches, located outside of Dhaka, thereby decentralizing the judiciary.¹²⁰

E. WRIT PETITION NO. 1434 OF 1988

Several groups, protesting the Act's purported legality,¹²¹ filed petitions with the Bangladesh Supreme Court that same year.¹²² Among the petitions filed was Writ Petition No. 1434 of 1988, the subject of this discussion, submitted by Advocate Subrata Chowdhury¹²³ on behalf of Swairachar O Sampradaiyikata Protirodh Committee (Committee for Resistance against Autocracy and Communalism).¹²⁴ The committee comprised "the leading

115. The Constitution (Seventh Amendment) Act, 1986, passed on November 10, 1986, essentially legitimized beyond question from the courts all laws made during Ershad's martial law between March 24, 1982 and November 11, 1986, dates inclusive. Ahamed, *supra* note 93. In fact, Ershad had asserted that martial law would remain in effect unless Parliament passed a bill indemnifying "all actions taken during the martial law period when the constitution was suspended." BAXTER, *supra* note 18, at 112. Parliament passed the Constitution (Eighth Amendment) Act on June 7, 1988. Ahamed, *supra* note 93. The Constitution (Ninth Amendment) Act, 1989, passed in July of 1989, enabled direct elections for the Vice President and limited the office of the President to two consecutive five-year terms. *Id.* It also permitted the Vice-President's appointment, upon parliamentary approval, in the case of vacancy. *Id.*

116. See BAXTER, *supra* note 18, at 84.

117. See Islam, *supra* note 109.

118. HIRANMAY KARLEKAR, BANGLADESH: THE NEXT AFGHANISTAN 53 (2005).

119. The Constitution (Eighth Amendment) Act, 1988, passed on June 7, 1988, asserted, among other things, that the state religion would be Islam. Ahamed, *supra* note 93. It also created six permanent benches, outside Dhaka, of the High Court Division of the judiciary. *Id.* While not the same as proclaiming that Bangladesh would be an Islamic state, the Act nonetheless managed to amass "further opposition from those dedicated to the secular state that had been enshrined in the 1972 constitution." BAXTER, *supra* note 18, at 114.

120. See Ahamed, *supra* note 93.

121. See Writ Petition No. 1434/1988, ¶¶ 8-14. (Bangl.).

122. See Hoque, *supra* note 6.

123. See Sattar & Barry, *supra* note 11.

124. See Writ Petition No. 1434/1988 (Bangl.).

intelligentsia of the country from all walks of life”¹²⁵ and a presidium of fifteen concerned citizens,¹²⁶ including several judges and scholars.¹²⁷

Incredibly, the matter became apparently frozen in the courts for more than two decades.¹²⁸ In the intervening years, Parliament passed several

125. *Id.* at ¶ 1.

126. *See* Bergman, *supra* note 5 (quoting Dr. Anisuzzaman, an original executive member of the Committee responsible for the petition, as he describes the Committee’s motivation for filing the writ petition); *see also* Kamran Reza Chowdhury, *High Court Backs Islam as State Religion of Bangladesh*, BENAR NEWS (Mar. 28, 2016), <http://www.benarnews.org/english/news/bengali/state-religion-03282016141344.html> (quoting executive Committee member Dr. Serajul Islam Chowdhury’s description of the Committee’s motivation). Other executive members were Justice Kemaluddin Hossain, Begum Sufa Kamal, Justice Debesh Chandra Bhattacharya, Justice K.M. Subhan, Dr. Khan Sarwar Murshed, Mr. Syed Ishtiq Ahmed, Kabir Chowdhury, Mr. Kalim Sharafi, Dr. Mosharaf Hossain, Major General (Retired) Chitta Ranjan Datta Biruttam, Mr. Badaruddin Umar, Mr. Faiz Ahmed, and Dr. Burhanuddin Khan Jahangir. Writ Petition No. 1434/1988 (Bangl.).

127. *See* Writ Petition No. 1434/1988 (Bangl.).

128. *See* Ashif Islam Shaon, *HC Rejects Writ on State Religion*, DHAKA TRIBUNE (Mar. 28, 2016, 7:26 PM), <http://www.dhakatribune.com/bangladesh/2016/03/28/hc-rejects-writ-on-state-religion-2/> (discussing the petition’s “long course of legal battle”); *see also* Sattar & Barry, *supra* note 11 (reporting that the petition “had wended its way through the court system for 28 years”).

more amendments,¹²⁹ one of which had some bearing on the issue at hand¹³⁰ and that had a direct role in the petition's revival.¹³¹ In all, twenty-three years passed before Advocate Chowdhury filed a supplemental plea, breathing life back into the original cause.¹³² After an additional prayer on

129. The Constitution (Tenth Amendment) Act, 1990, enacted on June 12, 1990, provided an exclusive ten-year reservation of thirty Parliamentary seats for women members of Parliament. Ahamed, *supra* note 93. The Constitution (Eleventh Amendment) Act, 1991, passed on August 6, 1991, recognized as legal the appointment and swearing in as Vice President of Chief Justice Shahabuddin Ahmed. *Id.* It likewise confirmed Ershad's resignation from the Presidency as well as ratified Vice President Ahmed's actions as acting President from the time of Ershad's resignation on December 6, 1990 until October 9, 1991, when the duly elected new President Abdur Rahman Biswas took over the Presidential office. *Id.* The Eleventh Amendment Act also provided for Vice President Ahmed's return to his position as Chief Justice of Bangladesh. *Id.* Perhaps more importantly, the Act marked an historical occasion where "[f]or the first time in Bangladeshi history, a multiparty committee was formed to reach a compromise" between opposing political parties—the majority BNP party and the minority Awami League—actually worked together to reach a compromise in passing it. BAXTER, *supra* note 18, at 122. The Constitution (Twelfth Amendment) Act, 1991, passed on September 18, 1991, has been referred to as "the most important landmark in the history of constitutional development in Bangladesh[.]" Ahamed, *supra* note 93. The Act restored Bangladesh's parliamentary form of government, as opposed to presidential, whereby the Prime Minister became the executive head and the President, to be elected by members of Parliament, the constitutional head of state. This system, under the act, provided Parliament with assumption of responsibility over the Prime Minister's cabinet, abolished the Vice-Presidential office, and provided a stable base for democracy in the country by guaranteeing the peoples' representation at the local government level. *Id.* The Constitution (Thirteenth Amendment) Act, 1996, passed on March 26, 1996, allowed a Caretaker Government, or interim government, with no party affiliations, to assist the Election Commission to hold peaceful, fair, and impartial Parliamentary elections. *Id.* Under the Act, the Caretaker Government fell under the responsibility of the President and was to be dissolved upon the Prime Minister's entrance into office after the election of the new Parliament. *Id.* The Constitution (Fourteenth Amendment) Act, 2004, passed on May 16, 2004, expanded the number of Parliamentary seats reserved for women from thirty to forty-five and raised from sixty-five years to sixty-seven years the age of retirement for Supreme Court Judges. *Id.* The Act also provided for portraits to be displayed of the President and Prime Minister in both of their offices and for the Prime Minister's portrait to be displayed in "all government, semi-government and autonomous offices," and diplomatic missions abroad became compulsory. *Id.* The Constitution (Fifteenth Amendment) Act, 2011, passed on June 25, 2011, in addition to restoring ideals and principles previously removed from the Constitution, augmented the number of Parliamentary seats reserved for women by five additional seats, bringing the total to fifty. *Id.* The Act also officially recognized Sheikh Mujibur Rahman "as the Father of the Nation" and outlawed the acquisition of governmental power "through extra-constitutional means." *Id.*

130. The Fifteenth Amendment Act restored "secularism and freedom of religion, incorporating nationalism, socialism, democracy and secularism as the fundamental principles." *Id.*; see Constitution (Fifteenth Amendment) Act (Act XIV of 2011), 2011, §§ 8, 11.

131. See Sattar, *supra* note 14 (discussing the court's recommendation in 2011 to revive the petition following the reinstatement of "Article 12 of the Constitution which lays out 'the ideal of secularism' and dates to 1972").

132. See Bergman, *supra* note 5; see also *Bangladesh Court Rejects Petition Challenging Islam as State Religion*, DAILY STAR (Sept. 8, 2015, 12:19 AM), <http://www.thedailystar.net/frontpage/hc-rejects-petition-state-religion-139621>. The supplemental plea updated the original by omitting from the petitioners those who had by then "left from the world" and adjusting the respondents to reflect changes in the government since the time of the original petition's submission. See Writ Petition No. 1434/1988, Supplementary Affidavit on Behalf of Petitioners. It also iterated, among other things, that several judicial decisions in other cases challenging various Constitutional amendments supported the petition's

behalf of the petitioners,¹³³ the petition was finally scheduled to be heard before the High Court Division on March 28, 2016—twenty-eight years after its original filing.¹³⁴ The three-member bench¹³⁵ dismissed the case within two minutes,¹³⁶ stating that the petitioning committee was without locus standi.¹³⁷

PART III: ANALYSIS

The High Court's ruling is inconsistent with past judicial decisions in the area of locus standi because prior interpretations have broadened the scope of the doctrine.¹³⁸ Previous Bangladesh Supreme Court decisions have steadily expanded locus standi to reach beyond "any person aggrieved".¹³⁹ To file a petition, a person need not suffer such grievance personally; any group or person may petition the Court for relief in the public or societal

cause. *See id.* The High Court Division of the Supreme Court of Bangladesh on June 8, 2011 issued a Rule Nisi, requiring respondents to show cause as to why the Court should not declare unconstitutional section 2 of the Eighth Amendment Act, which purported to make Islam the official state religion. *See In re Hossain (HCD)* (June 8, 2011) (order issuing Rule Nisi). The High Court on December 1, 2011 issued a Supplementary Rule Nisi seeking cause from respondents as to why the Court should not also hold unlawful section 4 of the Fifteenth Amendment Act, which likewise re-affirmed Islam as the state religion. *See In re Swairachar O Sampradaiyikata Protirodh Committee* (Dec. 1, 2011) (order issuing Supplementary Rule Nisi).

133. *See* Sneha Shankar, *Bangladesh Court Upholds Islam As State's Religion, Rejecting Plea*, INTERNATIONAL BUSINESS TIMES (Mar. 28, 2016, 7:34 AM), <http://www.ibtimes.com/bangladesh-court-upholds-islam-states-religion-rejecting-plea-2344091> ("This February, Chief Justice Surendra Kumar Sinha created a three-member bench to hear the 1988 petition after a prayer was submitted on behalf of the petitioners.").

134. *See* Kamran Reza Chowdhury, *Bangladesh: High Court to Hear Petition on Islam's Official Status*, BENAR NEWS (Mar. 16, 2016), <http://www.benarnews.org/english/news/bengali/islam-constitution-03162016173809.html> (incorrectly reporting the hearing date as March 27, 2016); *see* Agence-France-Presse, *Bangladesh Court Rejects Scrapping Islam as State Religion*, RAPPLER (Mar. 28, 2016, 7:10 PM), <http://www.rappler.com/world/regions/south-central-asia/127354-bangladesh-islam-state-religion-court-ruling> (correctly reporting the hearing day and date as Monday, March 28, 2016).

135. *See* Bergman, *supra* note 5.

136. *See* Sattar & Barry, *supra* note 11.

137. *See* Bergman, *supra* note 5. Locus standi refers to "a right to appear in a court or before any body on a given question" or, in other words, "a right to be heard." *See Locus Standi*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/locus%20standi> (last visited Feb. 10, 2017). In Bangladesh constitutional law, it is "the ability of a party to demonstrate to the court sufficient connection to and harm from the law or action challenged." *See Locus Standi*, CHANCERY LAW CHRONICLES (Apr. 30, 2011, 5:35 AM), <http://www.clebd.org/lawdictionary/173.html>. Whether or not a party seeking redress from the Court for a public wrong or injury has a personal interest in the matter, such party must have "sufficient interest" in the cause. *Id.* (citing Latifur Rahman, J. in *Dr. Mohiuddin Farooque vs. Bangladesh*, 17 BLD (AD) 1 (1997)).

138. *See* Pulok, *supra* note 90 (citing *Dr. Mohiuddin Farooque v. Bangladesh*, 49 DLR (AD) 1 (1997)).

139. *Id.*

interest.¹⁴⁰ Relief sought by an individual or group on behalf of the general public is known as public interest litigation, and this concept—that the Supreme Court is accessible to someone notwithstanding the absence of a personal interest—has transformed "the traditional doctrine of locus standi."¹⁴¹

In other words, any violation or infringement of a public interest against society's objectives endows a petitioner with the requisite standing to seek relief from the Court.¹⁴² Considering this low threshold for establishing a public interest claim, it seems unlikely that the petitioners were without the necessary standing to bring the challenge. The Committee for Resistance against Autocracy and Communalism filed Writ Petition No. 1434 of 1988 as "representatives of all [s]ections" of Bangladesh society and sought redress of grievances in connection with the deprivation of "the people of their democratic rights" resulting from the enactment of an unconstitutional act by an unlawful Parliament.¹⁴³ The petition on its face thus appears to make a valid showing of standing under the law. The High Court's avoidance of the petition's merits signals its unwillingness to address a matter that holds severe political ramifications for the country.¹⁴⁴ This reluctance is consistent with the view that judicial review of constitutional amendments is inherently suspicious because of embedded political questions that are better settled through political discourse.¹⁴⁵

Despite the High Court's decision, the Committee for Resistance against Autocracy and Communalism still has a chance to prevail.¹⁴⁶ Fortunately for the petitioners, the Supreme Court of Bangladesh comprises more than merely the High Court Division.¹⁴⁷ The Appellate Court Division is the utmost tribunal to which the petitioners may appeal.¹⁴⁸

Should the Committee decide to pursue their case at the appellate level, for the appeal to lie, either the High Court Division must certify that the

140. *Id.*

141. *Id.*

142. CHANCERY LAW, *supra* note 137.

143. Writ Petition No. 1434/1988, ¶ 1 (Bangl.).

144. *See* Sattar & Barry, *supra* note 11 (mentioning how the "country's largest Islamic political party" called for a nationwide strike and "Sunni Muslim groups" staged demonstrations in protest of the hearing); *see also* Bergman, *supra* note 5 (reporting that even posturing a stance that favored the challenged amendment "could have been fraught with political dangers").

145. *See* Pulok, *supra* note 90.

146. *See* Reza Chowdhury, *High Court Backs Islam as State Religion of Bangladesh*, *supra* note 126 (stating the availability of the Appellate Division for redress of High Court verdicts and the petitioners' intention to discuss the matter before deciding on whether or not to proceed).

147. BAXTER, *supra* note 18, at 129 (discussing the division of the Supreme Court into two benches). The High Court is primarily an appellate court from the district courts. *Id.*

148. *Id.*

case entails a substantial issue of Constitutional interpretation, or, certification notwithstanding, the Appellate Division must grant the appeal.¹⁴⁹ If an appeal is indeed sustained, the Appellate Division may either affirm or overrule the High Court decision. In the event the Court affirms, the petitioners may well be forced to abandon their claim once and for all.¹⁵⁰ If the Court, however, overrules the decision of the court below, the claim would likely be remanded to the High Court Division for hearing on the merits;¹⁵¹ the petitioners would finally be permitted to present their case.

A. THE PETITIONERS' ARGUMENT AND ITS MERITS

The petition has merit and deserves the Judiciary's examination because it raises several constitutional questions.¹⁵² The pleading first identifies the petitioners as representatives of all sections of society, aggrieved by sections 2 and 7 of the Eighth Amendment Act,¹⁵³ and reveals their purpose: to resist Ershad's military dictatorship.¹⁵⁴ It then provides a procedural history regarding the passing of the Eighth Amendment Act.¹⁵⁵ Thereafter, the petition proceeds to attack the lawfulness of not only sections 2 and 7 of the Eighth Amendment Act, but also the Eighth Amendment Act and the

149. See BANGL. CONST., art. 103. Article 103 of the Constitution of the People's Republic of Bangladesh, entitled Jurisdiction of the Appellate Division, reads in relevant part:

"(1) The Appellate Division shall have jurisdiction to hear and determine appeals from judgments, decrees, orders or sentences of the High Court Division.

(2) An appeal to the Appellate Division from a judgment, decree, order or sentence of the High Court Division shall lie as of right where the High Court Division –

(a) certifies that the case involves a substantial question of law as to the interpretation of this Constitution;

...

(3) An appeal to the Appellate Division from a judgment, decree, order or sentence of the High Court Division in a case to which clause (2) does not apply shall lie only if the Appellate Division grants leave to appeal."

Id.

150. Upon application, the Appellate Division may review its own judgment. See The Limitation Act, 1908 (Act No. IX of 1908) 1st sched., art. 173; see also BANGL. CONST., art. 105.

151. Appellate courts in Bangladesh have authority to take evidence and make final dispositions. See The Code of Civil Procedure, 1908 (Act No. V of 1988) § 107.

152. See Writ Petition No. 1434/1988 (Bangl.).

153. Section 2 established Islam as the official state religion by means of insertion of Article 2A. See Constitution (Eighth Amendment) Act, 1988 (Act XXX of 1988) section 2. Article 2A as stated in the Act reads: "The state religion of the Republic is Islam, but other religions may be practised in peace and harmony in the Republic." *Id.* Section 7 effectively decentralized the High Court Division by creating six permanent benches in various districts throughout the country. *Id.* at § 7.

154. See Writ Petition No. 1434/1988, ¶ 1 (Bangl.).

155. See *id.* at ¶¶ 3-7.

Seventh Amendment Act themselves on grounds which include a lack of parliamentary jurisdiction, procedural error, conflict with unmodified articles, and violations of the Constitution.¹⁵⁶

With respect to section 2 of the Eighth Amendment Act, the petitioners' argument focuses on the basic structure of the Constitution itself. They argue that the insertion of Article 2A, declaring Islam as the state religion, irreconcilably violates the character and structure of the nation and the Constitution in that it excludes officially and politically, and in direct conflict with the structural Constitutional pillars of secularism and nationalism, the non-Muslim religions of Bangladesh, and that such insertion continues to offend the basic structure such that the article is ultra vires and without legal effect.¹⁵⁷ Accepting the premise that structural Constitutional pillars are unamendable,¹⁵⁸ the fundamental ideals of secularism and nationalism are, and since their adoption in 1972 have been, immune from legislative modification.

The petitioners likewise argue that the amendment of Article 100 under section 7¹⁵⁹ of the Eighth Amendment Act violates the basic structure of the Constitution. This issue is especially relevant because the Supreme Court has since declared the amended Article 100 unconstitutional because it impermissibly modified the "basic structure of the Constitution."¹⁶⁰ The Court's treatment of the issue in that case offers tremendous support for the petitioners' argument regarding Article 2A.

In *Anwar Hossain Chowdhury and others vs. Government of Bangladesh*, the Supreme Court's Appellate Division struck down Article 100 of the Constitution as amended under section 7 of the Eighth Amendment Act, holding by a three to one majority that the basic structural pillars of the Constitution are unamendable, that the judiciary is a basic structural pillar of the Constitution, and that Article 100, as amended under section 7 of the Eighth Amendment Act, destroyed the body of the judiciary and was therefore ultra vires.¹⁶¹ The Court's ruling also shielded the

156. *See id.*

157. *See* Writ Petition No. 1434/1988, ¶ 8 (Bangl.).

158. *See* HOQUE, JUDICIAL ACTIVISM, *supra* note 90, at 114.

159. *See supra* note 153 § 7.

160. Ahamed, *supra* note 93.

161. *Anwar Hossain Chowdhury and others vs. Government of Bangladesh* 41 DLR (AD) 165 (1989).

Preamble from unilateral parliamentary modification¹⁶² and revived Article 100 as it existed prior to the Eighth Amendment Act.¹⁶³

By *Anwar Hossain's* logic,¹⁶⁴ the legality of Article 2A's insertion turns on a two-part analysis: (1) whether the fundamental Constitutional principles of secularism and nationalism, as stated in the original Preamble and original Articles 8(1) and 12,¹⁶⁵ constitute basic structural pillars of the Constitution and, if so, (2) whether Article 2A's insertion operates to amend or otherwise modify those pillars, thereby changing substantially the basic structure of the Constitution.

It is all but absolutely certain that secularism and nationalism, as enumerated in the Constitution, form two of the charter's basic structural pillars. The language of the document itself supports this because the term "fundamental" as used in the phrase "fundamental principles" in the original Preamble,¹⁶⁶ refers to "[f]orming a necessary base or core."¹⁶⁷ References to nationalism and secularism as two of the four pillars under the tenets of Mujibism likewise support this posture.¹⁶⁸

Although it seems equally likely, the question remains whether the basic structure is affected by Article 2A's continued inclusion in the document. Of potential detriment to the petitioners' case is that Parliament, exercising its undisputed lawful authority in passing the Constitution (Fifteenth Amendment) Act, 2011 and thereby restoring the original references to secularism, had the opportunity to remedy this very issue but intentionally omitted to do so. And perhaps even more fatal is that beyond simply forgoing to remove Article 2A, Parliament may arguably have ratified it through its insertion of Article 7B, introduced in section 7 under the Fifteenth Amendment Act and which preserves Article 2A from amendment

162. *Id.* at ¶ 420 (Shahabuddin Ahmed, J., stating that "[i]n view [of this decision], the impugned Amendment will go off the Constitution and the old Article 100 will stand revived along with its provision for holding of Sessions.").

163. *Id.* at ¶ 496 (M.H. Rahman, J., stating that the "Preamble is not only a part of the Constitution; it now stands as an entrenched provision that cannot be amended by the Parliament alone.").

164. Writ Petition No. 1434 of 1988 in its supplementary plea addresses this point without going into detail. See Writ Petition No. 1434/1988, Supplementary Affidavit on Behalf of Petitioners, ¶ 7 (Bangl.) (submitting that Article 2A is invalid because, like amended Article 100, it undermines the Constitution's basic structure).

165. See BANGL. CONST. arts. 8(1), 12, passed by the Constituent Assembly of Bangladesh on Nov. 4, 1972, and authenticated by the Speaker on Dec. 14, 1972 (Dacca: Constituent Assembly of Bangladesh, 1972).

166. See *id.* at pmb1.

167. *Fundamental*, OXFORD DICTIONARIES, <https://en.oxforddictionaries.com/definition/fundamental> (last visited Feb. 12, 2017).

168. BAXTER, *supra* note 18, at 88; Mohammad Gani, *Father of Our Motherland Bangladesh: If Not Mujib!*, MUKTO-MONA (Apr. 4, 2007), https://gold.mukto-mona.com/Articles/Mohammad_Gani/father_of_motherland_BD.html.

“by way of insertion, modification, substitution, repeal or by any other means.”¹⁶⁹ Since the petitioners, however, pray for the article’s removal on grounds that it is ultra vires and ultimately without legal effect,¹⁷⁰ shrewd argument in court may support their intention not to amend but to delete it.

Although the petitioners’ arguments carry sound logic, it is unlikely that a Court will hear this case soon, if ever. Counsel for the petitioners, Advocate Subrata Chowdhury, has, as of the date of this note, yet to file an appeal. And even if the High Court is compelled to hear the case upon remand, it appears likely that the current political climate will only incentivize the judiciary to drag its feet.¹⁷¹ In that case, perhaps delay is a good thing.

CONCLUSION

Bangladesh, as an idea and as a nation, arose upon the pillars of nationalism, socialism, democracy, and secularism.¹⁷² Historically, it is a place of religious harmony where similar traditions, language, and land itself bind Bengalis together.¹⁷³ The Constitution adopted in 1972 echoed this attitude, declaring as fundamental principles the same “high ideals of nationalism, socialism, democracy, and secularism.”¹⁷⁴

Despite more than a decade of illegal legislation under autocratic regimes,¹⁷⁵ born from political turmoil within the young nation, the passage of time has worked to reverse many of the Constitution’s modifications under the various military dictatorships.¹⁷⁶ Among those that continue to endure, however, is Article 2A, enacted in 1988 and affirming Islam as the nation’s official religion.¹⁷⁷ A challenge to Article 2A, in the form of Writ

169. BANGL. CONST., art. 7B.

170. Writ Petition No. 1434/1988 (Bangl.).

171. Recent years have seen an increase in extremist activity in Bangladesh including the targeting of bloggers, secularists, intellectuals and other foreign nationals. Ellen Barry, *Fear and Silence in Bangladesh as Militants Target Intellectuals*, N. Y. TIMES (Nov. 3, 2015), https://www.nytimes.com/2015/11/04/world/asia/bangladesh-terrorism-ansar-al-islam.html?_r=0; Matt Vasilogambros, *The Bloody Fight Over Bangladesh’s Secularism*, ATLANTIC (Apr. 26, 2016), <http://www.theatlantic.com/international/archive/2016/04/bangladesh-secularism/479820/>; Ishaan Tharoor, *American Is Among 20 Dead in Terrorist Attack in Bangladesh*, WASH. POST (July 2, 2016), https://www.washingtonpost.com/news/worldviews/wp/2016/07/01/terror-attack-in-bangladesh-capital-should-surprise-no-one/?utm_term=.fe23e6fe4e66.

172. See BAXTER, *supra* note 18, at 88.

173. See *supra* notes 19-29 and accompanying text.

174. BANGL. CONST., pmbll., passed by the Constituent Assembly of Bangladesh on Nov. 4, 1972, and authenticated by the Speaker on Dec. 14, 1972 (Dacca: Constituent Assembly of Bangladesh, 1972).

175. See *supra* notes 101-120 and accompanying text.

176. See *supra* notes 129-30 and accompanying text.

177. See Ahamed, *supra* note 93.

Petition No. 1434 of 1988, arose and has continued to endure—until recently.¹⁷⁸

Finally hearing the case twenty-eight years after its original filing, the High Court disposed of it in less than two minutes.¹⁷⁹ The petition's merits were never tested before the Court—due likely to the political nature of the issue.¹⁸⁰ The claim, however, which draws upon the doctrine of basic structure,¹⁸¹ is anything but meritless.

An appeal may lie, and if so, the merits may well be heard after all. Favorable case law strongly supports the petition's argument.¹⁸² Lawful parliamentary action and inaction, however, work against it.¹⁸³ Either way, the petitioners' claim has substance, and it deserves it be judged on the merits. The High Court's silence on the issue speaks volumes.

*Eusef Robin Huq**

178. See *supra* notes 121-138 and accompanying text.

179. See Sattar & Barry, *supra* note 11.

180. See Bergman, *supra* note 5.

181. See *supra* notes 90, 156.

182. See *supra* notes 159-162 and accompanying text.

183. See *supra* note 167; see generally Constitution (Fifteenth Amendment) Act, 2011.

* Special thanks to Muhammad Abdullah, without whose unceasing efforts I could not have completed this Note. Thank you also to my aunt Shireen Huq for her availability and assistance, and to Advocate Subrata Chowdhury for cooperating in this endeavor. Thank you especially to my wife Jamie for a brilliant topic and to both her and my daughter Mae for their loving support despite the long hours away from them. And thank you to my colleagues on the *Global Studies Law Review* for their diligent work in finalizing this Note for publication.