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RESEARCH ARTICLE

Between a republican and a *Bengalee* state: Confronting exclusionary constitutionalism in Bangladesh

M A Sayeed[1] and Lima Aktar[2]

[1]School of Law, University of New England, Armidale, NSW, Australia
[2]Faculty of Law, Jahangirnagar University, Dhaka, Bangladesh
Corresponding author: M A Sayeed; Email: msayeed3@une.edu.au

Abstract

The constitutional design of Bangladesh is characterized by an ambivalent choice: it aspires to establish a republican yet a *Bengalee* state by putting itself in the conflicting terrain within the *demos–ethnos* binary. This article aims to examine the implication of this problematic choice along all three axes of the constitution's elemental parts: its identity, rights and structure. While the identity element of the Bangladesh Constitution embodies the ethno-nationalist vision of the *Bengalee* state that transforms *demos* into *ethnos*, its rights and structural aspects reflect its republican promise to transform *ethnos* into *demos*. Contemporary scholarship seeks to confront the exclusionary dimension of the ethno-nationalistic choice in Bangladesh but ends up accepting *ethnos* as a politically superior value. Such an approach brings us to the politics of difference and, with that, undermines the integrationist potential of the republican constitution. In response, this article defends the republican promise of the Bangladesh Constitution while arguing that what we need in Bangladesh is the 'de-ethnicization' of the republic, one that can be achieved by transforming *ethnos* into *demos* and not the other way around.

Keywords: Bangladesh; *Bengalee* state; Chittagong Hill Tracts; de-ethnicization; *demos*; *ethnos*; exclusionary constitutionalism

I. Introduction

In *The Inclusion of the Other,* German philosopher Jürgen Habermas argues for maintaining a distinction between the two figurations of peoplehood: *ethnos* and *demos.*[1] Habermas's defense of this distinction is directed against the idea of ethnonationalism

[1]Jürgen Habermas, *The Inclusion of the Others: Studies in Political Theory* (Ciaran Cronin and Pablo De Greif (eds) (Cambridge, MA: MIT Press, 1998). For the purpose of this article, we will retain the original Greek terms *ethnos* and *demos*, both of which designate an aggregate of individuals. See, for people as *ethnos* and *demos*, Alessandro Ferrara, 'On the Paradox of Deliberative Democracy', in F Michelman and Alessandro Ferrar (eds), *Legitimation by Constitution: A Dialogue on Political Liberalism* (Oxford: Oxford University Press, 2022) 44–45.

that collapses the distinction between an *ethnos,* a pre-political community of 'shared descent organized around kinship ties' and a nation constituted as a state.[2] This collapse suggests that 'the *demos* of citizens must be rooted in the *ethnos* of nationals (*volksgenossen*) if it is to stabilize itself a political association of free and equal legal consociates'. For Habermas, there is no a priori reason why a constitutional democracy should rest itself on this logic. Instead, he believes that the republican concept of citizenship may better serve the purpose of constitutional integration. In other words, the progressive extension of citizenship to the whole population provides the state not only with a new source of legitimation but also with a new level of abstract, legally mediated social integration.[3]

From a Habermasian perspective, a republican constitution founded on the voluntary association of the *demos* is therefore more appropriate than the ethno-nationalist or even the liberal-communitarian conception of the nation and democracy.[4] This is because it allows us to disrupt any convergence – symbolic or historical – between republicanism and nationalism that existed, for Habermas, only as a transitional and historical constellation. As he argues, 'republicanism is neither conceptually nor practically dependent on nationality, and the twentieth century, in particular, has provided grotesque examples of the dangers of emphasizing the relationship between *ethnos* and *demos*'.[5] In this article, we wish to argue that the constitutional architecture of Bangladesh is caught up in the same danger that Habermas finds in the collapse between republicanism and ethnonationalism. This is evident in Bangladesh's ambivalent choice in that it aspires to establish a republican yet a *Bengalee* state, thus placing itself in the conflicting terrain of the *demos–ethnos* binary.[6]

The purpose of this article is therefore to examine the implication of this problematic choice along all three axes of the constitution's elemental parts: its identity, rights and structure. In order to do so, we draw on and situate our findings in three different families of constitutional strategies – assimilation, accommodation, and integration – all of which find their place in the constitutional design of Bangladesh.[7]

First, we identify that the original Constitution of Bangladesh adopted the ethno-based *Bengalee* identity for all, regardless of ethnic difference and diversity.[8] This ethno-

[2]Habermas (n 1) 132.

[3]Ibid 111.

[4]This article builds on the idea that republicanism and liberalism stand as two distinct traditions. There is a complex and long-standing debate around the possibility of 'liberal-republican hybrid' on the one hand and their mutual incompatibility on the other. See, for example, Michael J Sandel, 'Liberalism and Republicanism: Friends or Foes? A Reply to Richard Dagger' (1999) 61(2) *The Review of Politics* 209; David Craig, Republicanism versus Liberalism: Towards a Pre-history (2023) 33(1) *Intellectual History Review* 101; Alan Patten, 'The Republican Critique of Liberalism' (1996) 26(1) *British Journal of Political Science* 25.

[5]Habermas (n 1) xxii.

[6]The Constitution of Bangladesh begins with the performative expression 'We, the People', which signifies the *demos*-centric construction of the republic. Further, article 1 of the Constitution declares that 'Bangladesh is a unitary, independent, sovereign Republic to be known as the People's Republic of Bangladesh'. See the *Constitution of the People's Republic of Bangladesh* 1972.

[7]For a detailed discussion of three approaches of constitutionalism, see John McGarry, Brendan O'Leary and Richard Simeon, 'Integration or Accommodation? The Enduring Debate in Conflict Regulation', in Sujit Choudhury (ed.), *Constitutional Design for Divided Societies: Integration or Accommodation* (Oxford: Oxford University Press, 2008).

[8]According to the Bangladesh Population and Housing Census 2011, the vast majority of the people – 98 per cent – are ethnically *Bengalee* and other 2 per cent are from other minor ethnic non-*Bengalee* groups living in Bangladesh. In 2022, new statistics were gathered, but are yet to be released. See Bangladesh Population and Housing Census 2011, vols 1, 2 and 3, prepared by Bangladesh Bureau of Statistics, Statistics and Informatics Division, and Ministry of Planning.

nationalistic paradigm of identity formulation falls prey to being categorized as 'assimilative constitutionalism.'[9] In assimilative strategy, unity is achieved through a coercive 'acculturation' that 'involves one community adopting the culture of another and being absorbed into it'.[10] In that sense, assimilative strategy is only a form of exclusionary constitutionalism. Second, while ethnicizing constitutional identity, which aims to transform *ethnos* into *demos*, the Constitution adopted the *demos*-centric arrangements for other elemental parts: the *architecture of rights and electoral and representative structure of the state*. This is because it provides for a republican architecture of rights and a unitary governance structure based on territorial constituency rather than ethnic representation. This arrangement of individual rights and de-ethnicized representative structure fits into the 'integrationist' approach to constitutionalism,[11] which promotes a common public identity without demanding ethnocultural uniformity or assimilation.[12] From this perspective, the integrationist approach comes closer to the promise of the abstract and legally mediated form of civic integration defended by Habermas.

Finally, in the subsequent constitutional arrangements, there has been an oscillation between these two approaches. During the first military regime,[13] the Constitution was amended (the Fifth Amendment) to redefine the constitutional identity by replacing the ethno-centric *Bengalee* nationalism with Bangladeshi nationalism, a *demos*-centric construction of territorial nationalism.[14] However, the recent Fifteenth Amendment[15] has reinstalled, in the name of restoring the original constitution, the previous arrangement of ethno-centric identity of the people, and with that returned to the assimilationists framework. Interestingly, the same amendment has brought a change in relation to its rights arrangement by inserting a new provision for cultural rights of the ethnic groups.[16] Between the time of the Fifth and the Fifteenth Amendments, the government also signed the Peace Accord to grant certain forms of regional autonomy to the Chittagong Hill Tracts (CHT) people, thus initiating a structural change towards ethnic accommoda-

[9]For instance, McGarry, O'Leary and Simeon (n 7) 42 state that, 'Assimilationists seek the erosion of private cultural and other sorts of difference among citizens as well as the creation of a common public identity, through either fusion or acculturation. Fusion involves two or more communities mixing to form something new (A + B = C). Acculturation involves one community adopting the culture of another and being absorbed into it (A + B = A). Assimilation, therefore, erodes both the public and private differences between and among groups.'

[10]McGarry, O'Leary and Simeon (n 7) 42.

[11]'Integrationists believe political instability and conflict result from group-based partisanship in political institutions … To avoid the ethnically partisan state, integrationists counsel against the ethnicization of political parties or civic associations.' McGarry, O'Leary and Simeon (n 7) 45–46; Seymour Martin Lipset, *Political Man: The Social Bases of Politics* (London: Heinemann, 1983) 12–13.

[12]Sujit Choudhury (ed.), *Constitutional Design for Divided Societies: Integration or Accommodation* (Oxford: Oxford University Press, 2008) 27.

[13]The August 1975 coup paved the way for the emergence of the military rule in Bangladesh. The first regime ruled by the military leader continued from 1975 to 1981. During this regime, some changes were made to the constitution by issuing martial law proclamations. The Fifth Amendment Act was passed by the Jatiya Sangsad on 6 April 1979 to validate all the changes to the constitution. See, Constitution (Fifth Amendment) Act 1979 (Act I of 1979)

[14]This amendment has provided that the *citizens* of Bangladesh shall be known as Bangladeshi while the people will be considered as *Bengalees* as a nation, regardless of their ethnic differences. The Constitution of Bangladesh, article 6(2) states that, 'The people of Bangladesh shall be known as *Bangalees* as a nation and the citizens of Bangladesh shall be known as Bangladeshies.'

[15]Constitution (Fifteenth Amendment) Act 2011 (Act XIV of 2011).

[16]Constitution of Bangladesh, article 23A.

tion.[17] With these changes, the Constitution seems to adopt an 'accommodationist' strategy,[18] which requires the recognition of ethnic difference and 'adjustment to the special interests and needs of groups'.[19]

Such accommodationist demands were first raised by Manabendra Narayan Larma, an influential ethnic leader who represented the CHT people at the Constituent Assembly of Bangladesh. Larma demanded that the constitution be designed around ethnic difference and his proposal was more comprehensive, as he argued not only for the recognition of ethnic identity but also for the inclusion of enforceable group rights and a separate legislative council for the CHT people.[20] However, this demand has not been addressed in the Constitution, although the Peace Accord and the Fifteenth Amendment have already initiated some accommodationist strategy. This brings us the accommodationists' critique that, despite its recent move to plurality-consciousness, the Constitution is not sufficiently inclusive.[21] There is also a more forceful argument that the Constitution, with the changes made by the Fifteenth Amendment, has maintained the relations of domination through assimilation of minority identity into the dominant culture.[22] From this perspective, critics argue for reform along accommodationist strategy while formally opposing coercive assimilation by the majority.

While we share similar concerns about assimilationism to those raised by the accommodationists, we differ in terms of solution. In this article, we defend republican-integration against both assimilationist and accommodationist strategy.[23] Its main targets are the accommodationists' response to the failure of the current constitutional model. As we argue, the accommodationist approach seeks to confront ethno-nationalism but ends

[17]The Chittagong Hill Tracks Peace Accord of 1997 was a political peace agreement signed between the Government of Bangladesh and the United People's Party of the Chittagong Hill Tracts (the political organisation that controlled the militia in CHT region) on 2 December 1997. This peace accord was adopted as a sign of peace that would address the demand for distinctive structural autonomy to the CHT people. See for detailed background stories on this Peace Accord, Bushra Hasina Chowdhury, *Building Lasting Peace: Issues of the Implementation of the Chittagong Hill Tracts Accord* Urbana-Champaign, IL: Program in Arms Control, Disarmament, and International Security (ACDIS), University of Illinois at Urbana-Champaign, 2002); Amena Mohsin, 'Chittagong Hill Tracts Peace Accord, 1997', in Sirajul Islam, Ahmed A Jamal (eds), *Banglapedia: National Encyclopedia of Bangladesh* (Dhaka: Asiatic Society of Bangladesh, 2012); Mizanur Rahman Shelley, *The Chittagong Hill Tracts of Bangladesh: The Untold Story* (Dakhar: Centre for Development Research, Bangladesh, 1992); M Rashiduzzaman, 'Bangladesh's Chittagong Hill Tracts Peace Accord: Institutional Features and Strategic Concerns' (1998) 38(7) *Asian Survey* 653.

[18]For the purpose of this article, we use the accommodationist approach interchangeably with communitarianism and multiculturalism.

[19]McGarry, O'Leary and Simeon (n 7) 52.

[20]See Manabendra Narayan Larma's speech in The Bangladesh Constituent Assembly Debates 1972, 2(13) 536. Borhan U Khan and MM Rahman, *Protection of Minorities: Regimes, Norms and Issues in South Asia* (Newcastle upon Tyne: Cambridge Scholars Publishing, 2012) esp. Ch 5.3, 72–83.

[21]See, for example, Ridwanul Hoque, 'Inclusive Constitutionalism and the Indigenous People of the Chittagong Hill Tracts in Bangladesh' in Mahendra Pal Singh (ed.), *The Indian Yearbook of Comparative Law* (Oxford: Oxford University Press, 2016).

[22]See, for example, Mohammad Shahabuddin, *Minorities and the Making of Postcolonial States in International Law* (Cambridge: Cambridge University Press, 2021).

[23]Republican integration may be viewed as a specific variety of communitarianism. Like communitarianism, republicanism values *citizenship*, or membership in a *political* community, but such community is 'distinct from other kinds of community based on pre-political commonality, of, for example, race, religion or culture'. For such distinction between republican and communitarian, see Iseult Honohan, *Civic Republicanism* (London: Routledge, 2002) 8.

up accepting *ethnos* not only as a morally superior value but also as a site of political mobilization. This article responds to these problems while arguing that a truly inclusive constitution in Bangladesh would entail the reversal of such logic. That is, it should involve the de-ethnicization of the Constitution by maintaining neutrality to ethnic difference, which resonates with the republican promise of transforming *ethnos* into *demos*. This defence for the republican-integrationist strategy is grounded on the following justifications.

The first justification is contextual. The integrationist approach claims that it functions better when the societies are not deeply polarized and 'when there is already extensive heterogeneity, hybridity, and mixing'.[24] Demographically, Bangladesh has only 2 per cent of people identified as ethnic minorities as opposed to the originated majority. The ethnic minorities composed of as many as eleven communities live predominately in the hilly region of Bangladesh (known as Chittagong Hill Tracts), but some part of these communities also inhabit in the plain land.[25] Moreover, with increasing *Bengalee* migration to the CHT region,[26] a demographic shift has taken place, resulting in mixing and hybridity. The implication of this shift is that the multiple ethnic groups living in CHT cannot 'realistically' aspire and maintain 'either territorial autonomy or consociation'.[27] However, the question may remain whether Bangladesh is still deeply divided along ethnic lines, despite the relatively small size of its ethnic minorities and the demographic mixing in the CHT region. It is important here to emphasize that a society may be ethnically diverse yet not deeply divided. As Benjamin Reilly suggests, for a society to be ethnically divided, its ethnic community must have politically salient cleavages around which interests are organized for political purposes or political mobilization.[28] Such political mobilization occurs, at an empirical level, through ethnically characterized electoral politics, where political parties respond by organizing themselves on the basis of ethnicity and ethnic individuals cast votes only for their own ethnic political party.[29] In Bangladesh, ethnic divisions display no such political salience in the polity's party system.[30] This indicates that Bangladesh is not

[24]McGarry, O'Leary and Simeon (n 7) 85.

[25]See 'Indigenous Peoples in Bangladesh', <https://www.iwgia.org/en/bangladesh.html#:~:text=The%20government%20of%20Bangladesh%20does,the%20Bengali%20population%20are%20mentioned>. However, this demographic configuration of minority people can still be said to constitute the national minority in Kymlicka's term. For the distinction between national minority and multicultural citizenship, see Will Kymlicka, *Multicultural Citizenship* (Oxford: Oxford University Press, 1995)

[26]Amena Mohsin, *The Chittagong Hill Tracts, Bangladesh: On the Difficult Road to Peace* (New York: International Peace Academy, 2003).

[27]McGarry, O'Leary and Simeon (n 7) 85: 'Integration may also be successful with minorities that are small in number and interspersed among others and well-disposed to the strategy.'

[28]Benjamin Reilly, *Democracy in Divided Societies: Electoral Engineering for Conflict Management* (Cambridge: Cambridge University Press, 2001) 4.

[29]Ibid; Benjamin Reilly and Andrew Reynolds, *Electoral Systems and Conflict in Divided Societies: Papers on International Conflict 2* (Washington, DC: National Academies Press, 1999) 3. Donald L Horowitz, *A Democratic South Africa: Constitutional Engineering in a Divided Society?* (Cambridge: Cambridge University Press, 2000). For more detailed definition of divided society, see A Rabushka and K Shepsle, *Politics in Plural Societies: A Theory of Democratic Instability* (Columbus, OH: Merrill, 1972).

[30]The ethnic political party has never been a catalyst for political mobilization (such as voting, power mapping or sharing) here. One empirical account of it is that so far only two regional political parties have been formed, which had not influenced that expressly – at least in the national election sphere. More interestingly, the ethnic politicians who have so far competed and won almost all did so from under the

deeply divided, at least along an ethnic axis, although a fairly deep division can be found to exist along ideological lines (between Islamists and secularists) or on religious lines (between Muslims and Hindus). Given that such ideological or religious division is beyond the scope of this article, we accept that problem of ethnic exclusion in Bangladesh can be addressed by an integrationist approach that functions better in an ethnically diverse yet not divided society.

The second justification comes from the transformative promise of republican-integration. The republican-integrationist approach shares the goal of unity with blindness to ethnic difference without denying the social existence of ethnic diversity. In this way, it differs significantly from the assimilationists approach, which eliminates difference by *establishing* one ethnic identity. In contrast, the integrationist approach achieves unity by *disestablishing* all the ethnic identities, including the majority's own. This de-ethnicization expands 'we-ness', which then underpins the *demos*-centric, trans-ethnic solidarity within the framework of republican citizenship. At this point, someone may legitimately ask how this promise of republican-integration is to be translated in political terms. To address this concern, we wish to clarify that our aim is not to offer an empirical account of the transformation from *ethnos* to *demos* and the ways in which such transformation could make a qualitative difference in the current socio-political milieu. Instead, our prescription is founded on the proposition that constitutions can transform the polity by reducing the gap between the norms and social facts. Therefore, a careful and purposive constitutional design can result in changes in political behavior and practice.[31] Moreover, as we show in this article, the republican promise of the Bangladesh Constitution prescribes the removal of cultural and socio-economic obstacles. Such prescription will help us to understand the ways in which the Constitution can deal with the difference-sensitive claims in the real world while maintaining a *demos*-centric, difference-blind normative foundation.

The remainder of this article is developed in the following way. Part II offers a critic of the assimilationists promise as reflected in its adoption of *Bengalee* nationalism. It argues that the Constitution has not just declared *Bengalee* nationalism as a rhetorical value, but also sets it as a catalytic force for transforming *demos* into *ethnos*. Parts III and IV respond to the accommodationists' arguments for constitutional reform by way of defending an integrationist approach that meets the republican promise of the Bangladesh Constitution. In Part III, we argue that the recent constitutional amendment has had the effect of shifting to an ethno-centric arrangement from the difference-blind approach of rights provided in the original Constitution. Part IV shows how political contestation over the issue of ethnicity has led to the problematic plan for structural reform that masquerades as a solution. It argues that the ethno-centric reform of representative structure will produce *minorities within the minority,* thereby bringing us to circular logic of exclusion. The article concludes with a demand for reform along the republican promise of difference-blindness.

banner of mainstream political parties. See <http://www.parliament.gov.bd/index.php/en/mps/role-of-mps>.

[31] In this respect, we endorse the view of those scholars who argued that careful and purposive institutional design is a *necessary precondition* to promote stable democracy in divided societies. See, for example, the argument of Horowitz (n 29). See also Adam Przeworski, 'Democracy as the Contingent Outcome of Conflicts', in Jon Elster and Rune Slagstad (eds), *Constitutionalism and Democracy* (Cambridge: Cambridge University Press, 1988) 304.

II. '*Bengalee* and democratic state': Exclusion by assimilation?

Joseph Raz once criticized the juxtaposition of Jewish and democratic state as 'morally indecent'.[32] The constitutional characterization of Bangladesh as a '*Bengalee*' yet a democratic state invokes an analogy with such criticism of the Jewish state advanced by Raz. In this section, however, we argue that the idea of *Bengalee* state is more problematic than what Joseph Raz called 'morally indecent'. We develop this argument by showing that the current constitutional arrangement entails coercive assimilation through the exclusion of the ethnic 'other'. In doing so, we first examine the moral relevance of *Bengalee* state, then move to show how it comes to be the site of assimilative politics. To begin with, the project of assimilative politics has been fortified by the constitutionalization of four political ideals – nationalism, democracy, secularism and socialism (NDSS) – with a definition of nationalism in article 9 that enforced the superiority of *Bengalee* identity.[33] The enumeration of these ideals was a much-debated issue from the very moment of drafting the original Constitution. The debates were folded around the reconcilability of two sets of ideals that came in pairs: 'democracy–socialism' and 'socialism–nationalism'. In the Constituent Assembly, it was raised that 'democracy' cannot be reconciled with the ideal of socialism.[34] The other line of critique came to address the problematic relationship between 'nationalism and socialism'. For example, Serajul Islam Chowdhury has criticized the mixing of nationalism with socialism while identifying the danger that it 'could result in the production of what has come to be known as Nazism'.[35] Chowdhury goes further to identify the exclusionary dynamics of *Bengalee* nationalism while criticizing it in the following constitutional terms:

> in their enthusiasm they were oblivious of two ground realities. Firstly, that there were non-Bengali small nationalities living within the territory of Bangladesh, and secondly, that in the modern world a state with a single nationality is not a viable proposition. There is, however, an unconscious display of nationalist chauvinism in the idea advanced in the constitution to the effect that all citizens of the state would be called *Bengalis*.[36]

This criticism reminds us of Joseph Raz's 'moral thesis' against the idea of a 'Jewish and democratic state'.[37] In Raz's view, any ethnic or national values to be attached to the state are true but only signify 'false values of national self-aggrandizement and chauvinism'.[38]

[32]Joseph Raz (comments: Jewish and Democratic State) 'The State of Israel', in Michael Walzer, Menachem Lorberbaum and Noam J Zohar (eds), *The Jewish Political Tradition: Volume 1– Authority* (New Haven, CT: Yale University Press).

[33]Constitution of Bangladesh, article 9 states that, 'The unity and solidarity of the *Bengalee* 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 *Bengalee* nationalism.'

[34]See The Bangladesh Constituent Assembly Debate (1972).

[35]Serajul Islam Chowdhury, 'Beyond Nationalism, Within Aspirations and Achievements', *The Daily Star*, 26 March 2014.

[36]Ibid.

[37]Ruth Gavison, however, provides a defence for the idea of 'Jewish and democratic state'. She forcefully argues about the reconcilability between the liberal democracy and the Jewish nationalism while claiming that Israel is both 'proudly Jewish and strongly democratic'. See Ruth Gavison, 'The Jew's Right to Statehood: A Defense' (2003) 5763 *AZURE* 74.

[38]Raz (n 32) 510.

Raz argues that such Jewishness of the state gives a 'false consciousness' to the people who are non-Jews, but the citizens of that Jewish state.[39] Hence, democracy cannot be retained by one state simultaneously while declaring its identity as a Jewish state alongside being a so-called neutral state. For him, the principle of democracy, being a true signifier of universal value, does not necessarily require the state to customize or localize that universalism into its own (state in concern) language. In other words, there is no need to declare or identify a particular state with an ideal to be a democratic and moral state, even if it is for the sake of any symbolic meaning.[40] It can simply act on being the moral state – otherwise, it cannot be a home for other people who do not belong to that particular symbolic ideal.[41] This leads Raz to claim that morally decent countries need not declare their nationalism to show their character and traditions to the whole world.[42] Such argument advanced by Raz reveals that 'the Jewish and democratic elements are morally odd, or at least in tension with each other.'[43]

From this perspective of Raz's moral thesis, it may appear that the vision of being a '*Bengalee* state is morally odd with the idea of democratic state'. But we will argue that the implication of establishing a *Bengalee* state is somewhat more sinister than the case of privileging Jewish nationalism in the context of Israel. This is because the Constitution of Bangladesh does not just privilege *Bengalee* nationalism over other nations, as in the case of Jewish nationalism; rather, it also provides for coercive acculturation of other ethnic communities by denying the possibility of other identities.[44] The original Constitution institutes this logic of acculturation by declaring that '*citizens* of Bangladesh shall be known as *Bengalees*'.[45] That means it imposes '*Bengalee* nationalism' for all of its citizens irrespective of the distinctive ethnic and cultural background of many other communities.

Interestingly, there was a strong resistance to such constitutional arrangement at the moment of constitution-making. In the Constituent Assembly, Larma, the lone representative of the CHT people, raised his concern against the constitutionalization of *Bengalee* nationalism in the following words:

> You cannot impose your national identity on others. I am a Chakma, not a Bengali. I am a citizen of Bangladesh-Bangladeshi. You are also Bangladeshi, but your national identity is Bengali … They [tribals] can never be Bengali.'[46]

In response, Sajeda Chowdhury, the female member of the Constitution Drafting Committee, argued that the inclusion of tribes as *Bangalees* placed the hill people in a more dignified position as it recognized them as a nation rather than sub-nation.[47] The argument advanced by Chowdhury echoes the position of Sheikh Mujibur Rahman, the

[39]Ibid 513.

[40]Ibid.

[41]Ibid 511.

[42]Ibid.

[43]Mizen Masri, *The Dynamics of Exclusionary Constitutionalism: Israel as a Jewish and Democratic State* (Oxford: Hart, 2017) 4.

[44]Jewish nationalism prioritizes people from a Jewish background over non-Jewish Muslim community members living in Israel. However, through *Bengalee* nationalism, the constitution forcefully obliged non-*Bengalee* ethnic people to become outright *Bengalee*.

[45]Constitution of Bangladesh, article 6.

[46]The Bangladesh Constituent Assembly Debates 1972; L. Yasmin, 'The Tyranny of the Majority in Bangladesh: The Case of the Chittagong Hill Tracts' (2014) 20 *Nationalism and Ethnic Politics* 116.

[47]The Bangladesh Constituent Assembly Debates 1972

country's founding leader, who expressed that the non-*Bengali* ethnic communities should assume the *Bengali* identity by shunning their own.[48] Such abrupt denial of ethnic identity is thought to be founded on the concept of 'assimilative constitutionalism'.[49] It performs an inherently exclusionary function in the name of acculturation that amounts to the negation of the existence of other ethnic communities.[50]

This situation assumes a more complex character with the recent enactment of the Fifteenth Amendment,[51] which has replaced the word 'citizen' (as used in the original Constitution) with the word 'people', and stipulated that 'the *people* of Bangladesh shall be known as *Bangalees* as a nation'.[52] This replacement of 'citizen' by the 'people' reinforced the ethno-nationalist promise of conceiving Bangladesh as the '*Bengalee* state'. This conflation of *people* as *Bengalees* is nothing but a forcible transformation of *demos* into *ethnos*. Seen from this perspective, the concept of the *Bengalee* state finds its striking correspondence with one of Haiti's earliest constitutions of the Black state, where all Haitian citizens were legally defined as Black, regardless of skin colour or prior racial categorization. By securing Haitian citizenship, a person became Black in the eye of the constitution of Haiti;[53] in a similar way, a non-*Bengalee* citizen of Bangladesh becomes a *Bengalee* in the eye of the Bangladesh Constitution.

While intensifying its assimilationist strategy by the Fifteenth Amendment, the Constitution has, however, provided for the 'soft recognition' of the existence of communities other than *Bengalees*. This comes in the form of non-justiciable cultural rights provided under the newly inserted article 23A, which aims to protect and develop the cultural tradition of 'the tribes, minor races, ethnic sects, and communities'.[54] In Part III, we will return to article 23A in order to examine its implications for the republican architecture of rights. For now, we wish to engage with the scholarly response to the issue of recognition of ethnic diversity as mentioned above.

One criticism that seems most dominant across disciplines is that the Constitution of Bangladesh is defective in terms of addressing ethnic diversity.[55] For example, Ridwanul Hoque, coming from the perspective of inclusive constitutionalism, argues that the

[48]Hoque (n 21) 224; see also Raja Tridiv Roy, *The Departed Melody* (Islamabad: PPA Publications, 2003) 330–31. Interestingly, during the debate one of the women-members put a counter-question to such demand of ethnic recognition that 'today they [the ethnic groups in Bangladesh] are too independent. Is not it more prestigious to be recognized as a nation than as an indigenous? See The Bangladesh Constituent Assembly 1972 ([Mrs Sajeda Chowdhury, 25 October 1972].

[49]Hoque (n 21) 224.

[50]Margaret Davies situates such exclusionary feature in the image of unified sovereignty. She argues that a constitution subscribing to the idea of modern sovereignty is inherently exclusionary, as it 'involves a setting apart of one nation and one legal order from neighbouring jurisdictions, and it therefore excludes, and forms identities, nations, and social order through exclusion.' See Margaret Davies, 'Exclusion and the Constitution' (2000) 25(2) *Australian Journal of Legal Philosophy* 297.

[51]Constitution (Fifteenth Amendment) Act 2011 (Act XIV of 2011).

[52]Constitution of Bangladesh, article 6. See n 14 for details.

[53]See Karen Salt, *The Unfinished Revolution Haiti, Black Sovereignty and Power in the Nineteenth-Century Atlantic World* (Liverpool: Liverpool University Press, 2019) 13; Julia Gaffield, 'Complexities of Imagining Haiti: A Study of National Constitutions, 1801–1807' (2007) 41(1) *Journal of Social* History 81; Julia Gaffield, 'Meet Haiti's founding Father, Whose Black Revolution was Too Radical for Thomas Jefferson', The Conversation, 30 August 2018, <https://theconversation.com/meet-haitis-founding-father-whose-black-revolution-was-too-radical-for-thomas-jefferson-101963>.

[54]Constitution of Bangladesh, article 23A.

[55]See, for example, Raja Devasish Roy, 'Challenges for Juridical Pluralism and Customary Laws of Indigenous Peoples: The Case of the Chittagong Hill Tracts Bangladesh' (2004) 21(1) *Arizona Journal of*

non-recognition of indigenous peoples in the original Constitution is a 'genetic defect'[56] or a 'grave mistake'.[57] This echoes the recent acknowledgement from the chairman of the Constitution Drafting Committee that the 'sense of fulfilment' for *Bengalee* nationalism has led to the constitutional exclusion of the other ethnic communities living in Bangladesh.[58] Hoque, however, appreciates the recent change made by the Fifteenth Amendment as a positive move from non-recognition to an explicit 'attempt of inclusion'.[59] For a truly fuller recognition of the ethnic peoples, he argues that Bangladesh needs to 'shift clearly to an accommodationist approach to these peoples' distinct identity'.[60]

In contrast, Mohammad Shahabuddin sees the recent amendment as the reinforcement of the dominance and hegemony of *Bengalee* nationalism through which the hill people of the CHT have become 'constitutional outcasts'.[61] He argues that, 'While this provision finally acknowledges the existence of communities other than *Bengalees*, it nonetheless underscores that unique cultures of these communities fall outside the "national culture" (defined in line with *Bengalee* nationalism).'[62] This argument stems from the fact that, under the current Constitution, the ethnic communities are termed and classified as 'tribes', 'minor races' and 'ethnic sects', not as 'indigenous', 'aboriginal' or '*adivasi*', as they demanded or deserved.[63]

The responses advanced by Hoque and Shahabuddin seem to fall into the accommodationist camp, as they insist on the recognition of 'multiple public (constitutional) identities' to secure the coexistence of different communities within the same state.[64] In this sense, they seek to resolve the problem of ethnic exclusion through emphasizing *ethnos* itself. So, we would suggest, in the name of accommodation, they endorse the

International and Comparative Law 113; Muhammad Shahbuddin, 'The Myth of Colonial Protection of Indigenous Peoples: The Case of Chittagong Hill Tracts Under British Rule' (2018) 25 *International Journal On Minority and Group Rights* 210; Farhat Jahan, *Indigenous Identity Disputes in Democratic Bangladesh* (Southern Paper Series, 2015, CLACSO); Raja Devasish Roy, *Traditional Customary Laws and Indigenous People in Asia* (Minority Rights Group International, 2005); Rajkumari Chandra Kalindi Roy, *Land Rights of the Indigenous Peoples of the Chittagong Hill Tracts, Bangladesh* (IWGIA Document No. 99, Copenhagen, 2000); Faustina Pereira 'The Chittagong Hill Tracts Peace Accord and the Long Road to Peace: A Case Study', in Joshua Castellino and Niamh Walsh (eds), *International Law and Indigenous Rights* (Leiden: Nijhoff, 2005); Jennifer L Solotaroff, Aphichoke Kotikula, Tara Lonnberg, Snigdha Ali and Ferdous Jahan, *Voices to Choices: Bangladesh's Journey in Women's Economic Empowerment* (New York: World Bank, 2019); Mahmudul H Sumon, *Ethnicity and Adivasi Identity in Bangladesh* (London: Routledge, 2022); Elisabeth King and Cyrus Samii, Diversity, *Violence, and Recognition: How Recognizing Ethnic Identity Promotes Peace* (Oxford: Oxford University Press, 2020); Livia Holden, *Legal Pluralism and Governance in South Asia and Diasporas* (London: Routledge, 2016).

[56]Hoque (n 21) 235.

[57]Ibid.

[58]Kamal Hossain, *Bangladesh: Quest for Freedom and Justice* (Dhaka: University Press, 2013), Ch. 9.

[59]He claims 'the recent arrangement, however deficient it might be, can be seen as an expression of plurality-consciousness from the top policymakers'. Hoque (n 21) 228.

[60]Hoque (n 21) 235, 228, 218.

[61]Shahabuddin (n 22) 189.

[62]Ibid 189.

[63]He claims that the denial of the status of an indigenous people results in downgrading these groups legal status and the hill people of the CHT in Bangladesh is a pertinent example of such consequence. Shahabuddin (n 22) 237. See for similar argument, Shahjahan Mondol, 'Recognition of Indigenous People,' *The Daily Star*, 27 August 2014, <https://www.thedailystar.net/recognition-of-indigenous-people-38812>.

[64]McGarry, O'Leary and Simeon (n 7) 52.

identity-based politics, or what Charles Tylor calls the 'politics of recognition'.[65] One obvious implication of such politics of difference is that it involves 'the positive validation of ethno-cultural difference'.[66] This is why the effectiveness of such strategy is questioned by both the liberal and republican thinkers. For example, David Miller, who is considered a liberal nationalist,[67] identifies the danger of identity politics and argues that it can be counter-productive (self-defeating) in many ways.[68] According to him, the advocate of difference would destroy the conditions under which disparate groups in a culturally plural society can coexist with a common goal of social justice. In this sense, identity politics is 'potentially damaging to the interests of the groups it is meant to serve'.[69] This led him to defend 'republican citizenship', which, according to him, 'is better able to respond to cultural diversity than *these other versions*'. It can do so, he argues, 'by virtue of its ability to draw groups who initially have very different priorities into public debate, and to find *compromise solutions* to political issues that members of each group can accept'.[70] In other words, republican citizenship can resolve the problem of ethnic exclusion in a better way than the strategies suggested by the accommodationist (multiculturalist) camp. For Miller, this defence of republican citizenship is, however, linked closely with the defence of nationality because republican virtues 'are likely to be cultivated only within national borders'.[71]

At stake in Miller's account is that it speaks of a 'moderate nationalism' that is different from race-based or ethnicity-based form of nationalism.[72] It allows the formation of an autonomous self-constituting political nation based on a territorial rather than ethnically determined figuration of peoplehood.[73] As we suggest, this idea of territory-based nationalism is consistent with the republican idea of equal citizenship that combines ethnic neutrality with civic solidarity.[74] For the purpose of this article, we may call it

[65]See Charles Taylor, 'The Politics of Recognition', in Amy Gutmann (ed.), *Multiculturalism and Examining the Politics of Recognition* (Princeton, NJ: Princeton University Press, 1992).

[66]Cécile Laborde, *Critical Republicanism* (Oxford: Oxford University Press, 2015) 230

[67]Miller considers himself a liberal nationalist. For his defence of liberal nationalism, see David Miller, 'The Coherence of Liberal Nationalism', in Gina Gustavsson, and David Miller (eds), *Liberal Nationalism and Its Critics: Normative and Empirical Questions* (Oxford: Oxford University Press, 2019). Despite this, there is also powerful evidence that his nationalism was more republican than liberal. For example, Bojan Ratkovic argues that Miller's theory forms the foundations of republican nationalism, a unique strand of nationalist theory that is distinct from liberal nationalism. See Bojan, Ratkovic, 'Republican Nationalism: Nations, Cultures, and Politics' (2016), <https://ir.lib.uwo.ca/etd/3700>.

[68]See, in general, David Miller, *On Nationality* (Oxford: Oxford University Press, 1995); David Miller, *Citizenship and National Identity* (Cambridge: Polity Press, 2000); David Miller, *National Responsibility and Global Justice* (Oxford: Oxford University Press, 2007).

[69]Miller, *Citizenship and National Identity* (n 68).

[70]Ibid 3. [Emphasis added].

[71]Ibid 5.

[72]Helder De Schutter and Ronald Tinnevelt, 'Is Liberal Nationalism Incompatible With Global Democracy?' (2009) 40(1) *Metaphilosophy* 109.

[73]The use of 'nation' in the context of French republic was based on the concept of *demos*, which makes it the opposite of ethnic origin. See Yolande Jansen, *Secularism, Assimilation and the Crisis of Multiculturalism: French Modernist Legacies* (Amsterdam: Amsterdam University Press, 2013) 205.

[74]Miller's idea of republican citizenship comes closer to the Habermasian vision of civic citizenship, although Habermas advances his idea in relation to post-national identity while Miller seeks confines the nationality connection within the national borders. What is common in their approach is that they seek to transform the nationality connection from 'substantive consensus on values' to the 'procedural consensus on legitimacy'.

'republican nationalism' as distinct from liberal nationalism.[75] Our purpose here, however, is not to define or defend Miller as a republican theorist, but rather to draw on the fact that the marriage between republicanism and nationalism represents a defensible alternative to ethno-nationalism.[76] One advantage of republican nationalism is that it allows a *demos*-centric integration without assimilation. We will discuss shortly that such *demos*-centric integration in turn involves 'disestablishment' and non-domination, which marks its distinction with liberal neutrality.[77]

Having identified its *demos*-centric implications, we wish to suggest that Bangladesh should adopt republican nationalism to replace its ethno-nationalist model of assimilation. It is important to mention here that republican nationalism is not a new idea for Bangladesh. A model of republican nationhood was adopted by the constitutional Fifth Amendment, which was recently invalidated by the Supreme Court.[78] By this amendment, the Constitution introduced the concept of 'Bangladeshi nationalism'. It changed article 6 of the Constitution by providing that the citizens of Bangladesh shall be known as *Bangladeshis* instead of *Bengalee.* While untying the peoplehood with ethnicity, the same amendment did, however, replace secularism with a firm belief in the Islamic faith, forming the part of fundamental principles of state policy. This kind of idealization reduced the inclusionary promise of Bangladeshi nationalism, and leads the critic to dub it an 'Islamic-nationalist' political project.[79] However, such criticism seems to undermine the distinction between constitutional identity defined by article 6 and the fundamental principles articulated in Part II of the Constitution, given that article 6 has greater normative force than the Part II principles, which are non-justiciable in nature.[80] As we suggest, with the adoption of Islam as a fundamental principle, the Constitution simply engendered the same problem of what Raz refers to as a 'morally indecent' state in

[75]Iseult Honohan's idea of 'civic republicanism' perhaps provides a useful explanation of this difference. She defines republicanism as a middle ground between the extremes in the liberalism–communitarianism divide. He claims that republicanism has a richer salience of political community than libertarian spectrum of liberalism, but is less homogenizing and exclusive than liberal nationalism and other forms of communitarianism. Honohan (n 23) 2-5

[76]It may, however, be useful to note that, even if Miller is considered a liberal nationalist, he was against the logic of assimilation in which 'minority groups should be forced to abandon their native cultures in order to assimilate to a single national culture'. In contrast, he shows how republican nationality offers a procedural check against assimilation and argues that a deliberative system of political representation can prevent the imposition of oppressive norms. Miller, *Citizenship and National Identity* (n 68) 76.

[77]For example, Martha Nussbaum defends 'nonestablishment' of religion by appeal to liberal neutrality. Martha Nussbaum, *Liberty of Conscience: In Defense of America's Tradition of Religious Equality* (New York: Basic Books, 2008).

[78]For instances, the original Constitution provided for Bengali nationalism, but the term changed from *Bengalee* to Bangladeshi during the military regime, which was later given constitutional validation by the Fifth Amendment. This position was later changed and the original Bengali nationalism in the constitution was restored by the Fifteenth Amendment. See also Constitution (Fifth Amendment) Act 1979 (Act I of 1979).

[79]Shahabuddin (n 22) 188.

[80]Part II (articles 8–25) of the Constitution of Bangladesh specified some principles, such as: nationalism, socialism, democracy, human rights, economic, social and cultural rights. But these principles are mere interpretative aid to the government, and cannot be judicially enforceable. They are not considered as 'law' This was reasserted in the case of *Kudrat- E-Elahi Panir and Others v. Bangladesh (1992*), where Justice Mustafa Kamal held that to equate 'principles' [embodied in Part II] with 'laws' is to go against the Law of the Constitution itself' 44 DLR (AD) 1992, 320. From this point of view, article 6 has greater normative force than article 8, which prescribes the Islamic ideal to be a fundamental principle.

reference to Israel. Yet such problem of value endorsement should not deter us from appreciating how the Fifth Amendment de-ethnicized the identity of the constitutional subjects. That is, it stripped constitutional identity of any ethnic ingredients, and in this way transformed *ethnos* into *demos*.[81] Looked at from this perspective, Bangladeshi nationalism introduced by the Fifth Amendment was a better choice because it resulted in a 'fair compromise' to the issue of ethnic identity. This is because, it did not recognize non-*Bengalee* identity, but nor did it declare the supremacy of *Bengalee* ethnicity. This neutrality to ethnic difference corresponds to the republican promise, which involves 'trans-ethnic solidarity' through the idea of equal citizenship.[82]

There are at least two aspects that would allow us to distinguish the republican dimension of Bangladeshi nationalism from the idea of a 'homogenic national state'.[83] First, while 'national state' seems insensitive to diversity and seeks to *establish* homogeneity through assimilation, Bangladeshi nationalism remained indifferent to ethnic diversity, and symbolized integration without assimilation. Second, 'national state' involves the strategy of domination as it grounds national solidarity on the common or shared culture or heritage, which is already always characterized by the predominant historical narrative of nationality. In contrast, Bangladeshi nationalism *disestablished* the logic of ethno-nationalist assimilation, and with that reflects the policy of non-domination that lies at the heart of republican integration.

At this point, we should elaborate the relationship between 'disestablishment' and republican integration. To do so, it seems useful to reflect on the debate concerning the use of *laïcité* (the principle of secularism) because it involves the issue of republican impartiality and is seen as a yardstick forms of republican integration.[84] One possible advantage of this is that it will help us respond to the charge raised by the radical advocate of difference (such as Iris Marion Young), who argues that republicanism involves the imposition of oppressive norms in the name of impartiality.[85]

The principle of *laïcité* was developed as a legacy of the struggle by the French republic to institutionalize the separation of the Catholic Church and the state.[86] The 1905 republican law separating the church and state articulates the principle of *laïcité* in a twofold way: first, it guarantees the free exercise of religions; and second, it declares that 'it

[81]However, this implication is often undermined by those who could not acknowledge the difference between article 6, which provides a juridical formulation of identity, and article 8, under which Islamization of values remains as a weakly contra-judicative principle. Shahabuddin (n 22).

[82]For a powerful account on the relationship between neutrality and republican idea of solidarity, see Laborde (n 66).

[83]For an account of national state for this context, Mohammad Shahabuddin, 'The Ideology of the Postcolonial State in Indian Constituent Assembly Debates (1946–50)' (2022) 32(1) *Dhaka University Law Journal* 266.

[84]Stéphanie Hennette Vauchez, 'Is French *laïcité* Still Liberal? The Republican Project Under Pressure (2004–15) (2017) 17(2) *Human Rights Law Review* 285.

[85]For example, Marion Young argues that republicans are committed to an ideal of impartiality, which enforced homogeneity by acting to the disadvantage of those groups in society she identifies as oppressed, including women and ethnic minorities. See, IM Young, *Justice and the Politics of Difference* (Princeton, NJ: Princeton University Press, 1990). From the perspective of republican nationality, David Miller responds to such charge made by Young by arguing that 'she equates the ideal of national unity with the logic of assimilation'. Miller, *Citizenship and National Identity* (n 68) 76. See also for a critique of Young on this issue, N Fraser, 'Recognition or Redistribution: A Critical Reading of Iris Young's *Justice and the Politics of Difference*' (1995) 3 *Journal of Political Philosophy* 166.

[86]See Jansen (n 73) 204.

[state] neither recognizes nor subsidizes any religion'.[87] In its original juridical formulation, *laïcité* requires the neutrality of the state and public authorities, which means no more than the application of this neutrality to religious affairs.[88] The implication of this principle is that it neither promotes nor combats particular religious practice, and it permits every individual to have or not to have any religion. In this respect, it was different from a principle that aims at competition between religious affiliations and citizenship but was similar to establish a 'civic religion'.[89] There is, therefore, a point in questioning the difference-blindness of *laïcité* regime, insofar as it demonstrates its 'moral supremacy' over all religions.[90] Moreover, from a historical perspective, it also invokes the charge of privileging European cultural majorities while rendering this privilege invisible.[91] Such criticisms, however, become stronger with the recent use of the *laïcité* principle as a republican justification for the ban of *hijab* for Muslims in France. It substantiated the claim that republican difference-blindness can be used to discriminate against those religious minorities whose religious practice is more visible than that of others.[92] Therefore, it shows that the *laïcité* principle has undergone a radical shift from its original republican articulation in the 1905 law.

What is striking in this bifurcation of *laïcité* regime within the republican promise is that it slightly shifts from 'disestablishment' of religion to the express imposition of 'obligation' at the individual level. The obligation-generating function of the 'new' *laïcité* principle sets out to encourage or discourage a particular practice, such as prohibiting *hijab*. But "disestablishment" would condemn this kind of policy, as Patten has rightly argued that a disestablishmentarian response to cultural diversity 'would condemn policies that consciously set out to encourage or discourage particular forms of cultural life'.[93] Looked at from this perspective, we wish to note that the idea of republican neutrality should not be equated with the new *laïcité* regime that demands uniformity in public and associational life. Rather, it is the 'disestablishing' effect that forms the kernel of republican neutrality, and *laïcité* can be considered a yardstick of republican integration only if it is taken to imply the condition of disestablishment.

This is why many scholars have attempted to distinguish republican *laïcité* from the new regime of civic *laïcité*.[94] In a carefully written work, Cécile Laborde advances a similar argument about *laïcité* as she argues that a truly republican *laïcité* must focus on where

[87]Articles 1 and 2 of the 1905 Law of Separation Between Church and State.

[88]Laborde (n 66) 33.

[89]Offering a rich genealogical account of the term *laïcité,* Sylvie Le Grand concludes that, 'With the emergence of *laïcité* as a term, a transfer of sacrality takes place, a new republican and *laïque* form of the sacred is established, a civic religion *à la française*.' Sylvie Le Grand, 'The Origin of the Concept of *laïcité* in Nineteenth Century France' in Marion Eggert and Lucian Hölscher (eds), *Religion and Secularity* (Leiden: Brill, 2013) 74.

[90]For example, Charles Renouvier argues that *laïque* morality should explicitly aim to 'take minds away from superstitious beliefs'. This leads Maclure and Taylor to argue that Renouvier advocated for *laïcité*'s moral supremacy over all religions. See Jocelyn Maclure and Charles Taylor, *Secularism and Freedom of Conscience* (Cambridge, MA: Harvard University Press, 2011).

[91]Jansen (n 73) 287.

[92]See Vauchez (n 84).

[93]Alan Patten, 'Beyond the Dichotomy of Universalism and Difference: Four Responses to Cultural Diversity', in Sujit Choudhury (ed.), *Constitutional Design for Divided Societies: Integration or Accommodation* (Oxford: Oxford University Press, 2008) 95.

[94]For example, Taylor and Maclure argue to revive the French Republican tradition of laicism as opposed to the civic unity variant. See Maclure and Taylor (n 90).

actual neutrality remains unrealized in order to address the privileges of some religions and conceptions of the good life over others. Interestingly, such understanding involves a positive prescription towards the reform of what she calls "official republicanism". This allows her to offer a distinctively critical vision of republicanism that calls for a strategy of non-domination by way of removing socio-cultural obstacles to minority incorporations. As we suggest, this strategy of non-domination echoes the core idea of republican liberty advanced by Phillip Pettit.[95] Laborde, however, shows how the strategy of non-domination can work through the arrangement of positive rights and disestablishment.

In Part III, we take on and situate Laborde's argument in the context of Bangladesh. For now, we should reassert to the claim that Bangladeshi nationalism was reflective of republican neutrality that seeks to disestablish the predominant historical narrative of *Bengalee* nationality. This was warranted by the 'we-perspective' used in the preamble of the original Constitution.[96] At stake in this 'we-ness' is that it not only requires de-ethnicization of nationality but also a shift of its foundation from 'cultural properties' to 'civil rights'.[97] Before the changes made by the Fifteenth Amendment, the Bangladesh Constitution was almost there. But, as shown above, Bangladesh has returned to the idea that the dominant *Bengalee* majority alone constitutes the people, a construction that transformed *demos* into *ethnos*.[98] Having identified this, we now turn to discuss how this ethno-centric (re)turn has affected other elemental parts of the constitution: rights and structure.

III. Rights-based pluralism and the politics of 'inclusive exclusion'?

As we noted above, the original Constitution has counterbalanced the ethno-nationalist promise of assimilation by adopting a republican-integrationist architecture of rights that prioritizes *demos* over *ethnos*. In this part, we examine how this *demos*-oriented architecture of rights is contested, reasserted and is being directed to an ethno-centric turn. Interestingly, the contestation over the rights issue exists from the founding moment of constitution-making. While debating in the Constituent Assembly, Larma proposed for a right-based accommodation of the non-*Bengalee* ethnic communities. He expressed his discontent against the constitutional non-recognition claiming that the Constitution 'did not reflect the hopes and aspirations of the tribal population'.[99] But when his recognition-demand was rejected by the assembly leaders, he advanced a stronger demand for special group rights. That is, he demanded special constitutional protection of the social, political, economic and religious security of the ethnic communities.[100] No such arrangement was made in the original constitution to protect the rights of the ethnic communities; rather, the Constitution has adopted the individualistic model of rights, with commitment to equality and non-discrimination.[101]

[95]Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford: Oxford University Press, 2000).

[96]The preamble of the Constitution of Bangladesh starts with 'We, the people of Bangladesh, having proclaimed our independence on the 26th day of March, 1971'.

[97]Habermas (n 1) 3.

[98]The Constitution (Fifteenth Amendment) Act XIV of 2011.

[99]Larma's speech (n 20).

[100]Rokeya Chowdhury, 'The Doctrine of Basic Structure in Bangladesh: From "Calf-Path" to *Matryoshka* Dolls' (2014) 14(1&2) *Bangladesh Journal of Law* 43.

[101]Constitution of Bangladesh, article 28 states that, 'the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex or place of birth', and also that, on these grounds, no citizen shall be

On the dawn of long-standing political demand for Indigenous recognition,[102] the government of Bangladesh recently brought a constitutional reform. In 2011, the Constitution was amended to introduce a new provision – article 23A – that obliges the government to protect and develop the unique local culture and tradition of the non-*Bengalee* communities.[103] Therefore, the Constitution now provides for 'cultural rights', but the striking point is that such rights have been included in the form of principles (directive) and not as fundamental rights, as originally demanded by Larma.[104] The implication of this seems profound. This is because, in the context of the Bangladesh Constitution, fundamental rights have stronger justiciability than the fundamental principles (directives) which are 'contra-judicative' in nature.[105] From this perspective, article 23A implies only a 'weak' form of constitutional protection of cultural rights. There is, however, an option to consider whether article 23A constitutes a 'moral tool' that promotes constitutional 'negotiation' among culturally diverse people.

This point was picked up by Tarunabh Khaitan, who sees article 23A as an example of political constitutionalism.[106] While writing for an entirely different purpose (that is, to offer a perfectionist justification for constitutional directives), Khaitan emphasizes the importance of article 23A in terms of promoting 'constitutional polyvocality', which he builds on the Jacobsohnian balance of 'disharmony.[107] According to him, article 23A illustrates constitutional directives' ability to allow 'unresolved contestations over identity to be reflected in the constitutional text, thereby endorsing value pluralism'.[108] Interestingly, such an argument corresponds to the demands of the ethnic communities, which feels a moral or strategic need to continue a political dialogue. For example, Raja Debasish Roy, an influential intellectual figure from the ethnic communities in Bangladesh, argues that without 'even effective negotiations with governments and others, meaningful autonomy will remain as elusive as ever'.[109]

What is striking about such an approach is that it seeks to institute the space of constitutional dialogue within the framework of constitutionalism. We may find a similar argument in the work of James Tully, who emphases constitutional negotiation as a precondition of cultural accommodation. But Tully disagrees that modern constitution

ineligible for or discriminated against in respect of any employment or office in the service of the Republic. In addition, article 27 provides for constitutional guarantees of equality before law and equality of opportunities.

[102]Historically, the ethnic people have argued for their constitutional rights and demanded them from the different governments from time to time. The political parties also used this as a bargaining tool to gain power in politics. Most recently, in its 2009 election manifestation, the Awami League promised its ethnic demands.

[103]Constitution of Bangladesh, article 23A

[104]Chowdhury (n 100) 75.

[105]*Kudrat- E-Elahi Panir and Others v. Bangladesh (1992)*.

[106]Tarunabh Khaitan, 'Constitutional Directives: Morally Committed Political Constitutionalism' (2019) 82(4) *Modern Law Review* 613.

[107]G Jacobsohn, 'Constitutional Identity' in S Choudhry, M Khosla and PB Mehta (eds), *Oxford Handbook of the Indian Constitution* (Oxford: Oxford University Press, 2016).

[108]Tarunabh Khaitan (n 106) 626. He defined constitutional directive more as an 'obligatory telic norms' that is 'deferred to a future date' for its actual realization. (631) He also described these directives as 'weakly contra-judicative' yet the best 'tool to realize a morally-committed conception of political constitutionalism'. (603) For him, the directive speaks of political constitutionalism because they operate only for 'initiating and legitimizing political action.' (632). Tarunabh shows how the right dose of expressive polyvocality, used by the framers, can be able to 'fine-tune the relative weights they [framers] wish to assign to the identification thesis and its antithesis' (625).

[109]Roy (2004) (n 55); Roy (2005) (n 55); Roy (2000) (n 55).

can offer such space. In his exemplary work, *Strange Multiplicity: Constitutionalism in the Age of Diversity*,[110] he argues that modern constitutionalism is inherently *homogenizing*, and is unsuitable for the accommodation of diversity. In order to accommodate diversity, the post-imperial constitutional project must acknowledge and act upon the premise that the constitution is 'not monologue' but rather a 'dialogue' between different groups.[111] In other words, the accommodation of diversity presupposes the 'constitutional negotiation' of diverse groups. As he argues:

> A contemporary constitution can recognise cultural diversity if it is conceived as a form of accommodation of cultural diversity. It should be seen as an activity, an intercultural dialogue in which the culturally diverse sovereign citizens of contemporary societies negotiate agreements on their ways of association over time in accord with the conventions of mutual recognition, consent and continuity.[112]

The polyvocality argument that Khaitan situates in relation to article 23A aligns with Tully's invocation for constitutional dialogue, despite their distinctive approach to modern constitution.[113] Conceiving article 23A as a political formula of negotiating difference, Khaitan sets out to defend ethnic difference as a moral site of political mobilization. Seen in this light, Khaitan's reading of article 23A reflects accommodationist (or multiculturalist) approach, endorsing the logic of identity politics or what Charles Taylor advanced as the politics of difference.[114]

Such logic of difference comes to be more problematic if it is emphasized for the purpose of legal constitutionalism as opposed to political constitutionalism. The advocacy for legal constitutionalism can be found in the account of those who seek to protect ethnic minority under the legally enforceable regime of group-differentiated rights. For example, Shahabuddin argues that the omission of any specific guarantee for minority rights in the Bangladesh Constitution reduces the minority groups to the position of individual citizen, thereby assimilating the minority identity into the dominant culture.[115] He contends that the 'liberalist-individualist' architecture of rights is responsible for this problem because 'the individualist notions of equality and non-discrimination are not merely inadequate for minority protection but are indeed the *modus operandi* of assimilation and the extinction of group identity'.[116]

[110]James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995)

[111]Ibid 183.

[112]Ibid 184.

[113]Tarunabh's idea of value pluralism is consistent, as he argues, with liberal constitutionalism. But Tully's argument shows less faith in the reconcilability between pluralism and modern constitutionalism.

[114]For instance, see other multiculturalists such as Kymlicka (n 25) and W Norman, 'Return of the Citizen: A Survey of Recent Work on Citizenship Theory' (1994) 104(2) Ethics 352 for more multiculturalist arguments, where he argued for three types of rights: special representation rights (for disadvantaged groups); multicultural rights (for immigrant and religious groups); and self-government rights (for national minorities).

[115]See Shahabuddin (n 22) 71, 196, where he argues in favour of groups or collective rights to mitigate the current ethnic crisis by mentioning the group rights as 'an effective response to ethnic conflicts that requires that group rights be accommodated in one form or the other'.

[116]Shahabuddin (n 22) 72.

Following this argument, Shahabuddin identifies how this assimilative project was reinforced by the court's adherence to the individualist principle of equality and non-discrimination as enshrined in the Constitution of Bangladesh.[117] The case of *Mohammad Badiuzzaman v. Bangladesh and Others*[118] has been used as an example in this regard. In that case, the CHT Regional Council Act of 1998 was challenged on the ground that such a special arrangement violated fundamental rights to equality and non-discrimination.[119] The court upheld the framework of equal rights against the idea of special group rights while indicating the need for political settlement towards progressive and innovative constitutional reform. This signifies, for Shahabuddin, the court's failure to offer 'legal approval' to measures necessary for peacebuilding in the CHT region.[120] In response, Shahabuddin argues for a difference-sensitive arrangement of rights which 'requires that group rights be accommodated in one form or the other'.[121] Patten provides a useful account of such rights-arrangement responsive to differentiated citizenship:

> a politics of difference extends to all citizens a basic package of standard liberal rights, plus a set of difference- sensitive policies designed to reach out to members of cultural minorities and provide acknowledgement, accommodation, and assistance to their ways of life. *The difference model* does not abandon the idea of individuals as autonomous seekers of their own conceptions of the good, but it adds to this view of individuals the idea that they are also bearers of a cultural identity that they do not share with all other citizens.[122]

If this 'difference model' is what Shahabuddin has in mind, then his critique of a liberal-individualist framework of equal rights provides no good reason to believe that his position was anti-liberal.[123] This is because such an account of differentiated-rights has successfully been generated by the liberal-multiculturalists, advocating for reconstructing the liberal concept of rights[124] and, more radically, the idea of equality itself, as we will see

[117]See Constitution of Bangladesh articles 27, 28 and 29, which in general stated the equality and non-discrimination principles especially article 28(1) which stated that the state shall not discriminate against any citizen on grounds only of religion, race, caste, sex or place of birth.

[118]Writ Petition No. 2669 (2000) before the High Court Division of the Supreme Court of Bangladesh. See also Writ Petition No. 6451 (2007), which challenged the legality of the CHT Peace Accord itself.

[119]It stipulated the violation of the Act on the following grounds: (i) a non-tribal person shall not be able to contest the election of a District Council; (ii) a person who is not a permanent resident of a district cannot be a voter; (iii) preference will be given to tribal people in the Police Service; and (iv) no land in the CHT will be transferred without prior permission from the Council under section 6 (Uo) of the impugned Acts, 1998, section 11 of the impugned Acts, 1998, section 15 (Kha) of Rangamati and Khagrachari Hill District Acts, 1998 and Section 27 of the Bandarban Hill District Acts, 1998, the new section 64 of the impugned Acts respectively. See *Mohammad Badiuzzaman v. Bangladesh and Others*, para. 17.

[120]He criticized such an approach of court by saying that 'the court failed to offer legal approval to measures that parties to the Accord accepted as crucial elements of peacebuilding in the region'. See Shahabuddin (n 22)195.

[121]Shahabuddin (n 22)196.

[122]Patten (n 93) 101. [Emphasis added].

[123]Interestingly, Shahabuddin earlier also disagreed with Kymlicka's view that group rights can be organized under the framework of liberalism. See Mohammad Shahabuddin, 'Liberal Understanding, Shortcoming, and Controversy apropos Group Rights: Do We Need a Different Paradigm?' (2007) 16(1) *Yokohama Law Review* 155.

[124]Among other accommodationists, Kymlicka and Raz also want these kinds of arrangements of right. See Joseph Raz, Multiculturalism (2002) 11(3) *Ratio Juris* 193; Kymlicka (n 25).

shortly. So, the problem here is simply not that Shahabuddin's account of differentiated rights offers no greater protection than does the liberal-individualistic framework of rights. Rather, the major problem of his argument lies in the following aspects: first, he fails to recognize the republican promise of Bangladesh Constitution and the ways in which such promise characterised its arrangement of rights;[125] and second, and most importantly, he subscribes to the danger posed by multiculturalism, which can be described by taking note of the following argument from Habermas:

> in the case of multiculturalism, discrimination takes place within the framework of a broadly legitimate constitutional state and takes the more subtle form of domination by a majority culture that has merged with the general political culture. However, against Charles Taylor's communitarian proposal, I argue that a 'politics of recognition,' which is supposed to ensure the equal right of different subcultures and forms of life to coexist *within a single republican polity*, must reject collective rights and survival guarantees.[126]

Habermas's response to the multiculturalist argument stems from his republican justification for equal citizenship, which entails the concept of equal rights. Therefore, it raises the legitimate question of whether such an idea of equality denies difference.[127] Such debate around equality and difference forms a recurring theme across feminism, race theory and, more generally, discrimination theory.[128] For the purposes of this article, it seems useful to respond briefly to some charges made, especially by the accommodationist critics of equality. Critics coming from the difference theorists mainly attack the idea of formal equality in which 'equality is equated with sameness'.[129] For example, Cristine Littletone charges that such sameness-based vision of equality is an exercise of power by and for a white male elite.[130] Marion Young, while advocating for group-differentiated rights, advances her argument on the ground that equal citizenship

[125]There are some important differences between the republican and liberal conceptions of rights. See, for example, Miller, *Citizenship and National Identity* (n 68) 59–60. One such distinction comes from institutional perspective: liberals make the judiciary as the supreme arbiters of constitutional rights, while in the republican model, the arrangement of rights depends on the constitutional politics grounded in public policy and deliberate discussion. This distinction should be read in light of 'difference-blindness' as it may be found in liberalism – particularly in the non-communitarian spectrum of it – but it stands on the idea of disestablishment, which makes it different from the non-interventionist logic of liberal rights.

[126]Habermas (n 1) xxxvii. [Emphasis added].

[127]Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. William Rehg (Cambridge, MA: MIT Press, 1996) 118–31.

[128]See John Capps, 'Pragmatism, Feminism, and the Sameness-Difference Debate' (1996) 32(1) *Transactions of the Charles S. Peirce Society* 65; Joan Chalmers Williams, 'Dissolving the Sameness/Difference Debate: A Post-modern Path Beyond Essentialism in Feminist and Critical Race Theory' (1991) *Duke Law Journal* 296; Sonia Liff and Judy Wajcman, '"Sameness" and "Difference" Revisited: Which Way Forward for Equal Opportunity Initiatives?' (1996) 33(1) *Journal of Management Studies* 79.

[129]Ratna Kapur, 'Gender Equality', in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), T*he Oxford Handbook of the Indian Constitution* (Oxford: Oxford University Press, 2016); Ratna Kapur, 'Un-Veiling Equality: Disciplining the "Other" Woman Through Human Rights Discourse', in Anver M Emon, Mark Ellis and Benjamin Glahn (eds), *Islamic Law and International Human Rights Law* (Oxford: Oxford University Press, 2012).

[130]Cristine Littletone, 'Restructuring Sexual Equality', in Katharine T Bartlett and Rosanne Kennedy (eds), *Feminist Legal Theory* (London: Routledge, 1991).

institutes sameness: 'citizenship for everyone, and everyone *the same qua citizen*'.[131] If equality is conceived of sameness, for her it adds two different meanings to the universal idea of citizenship: first, it empathizes generality rather than difference (what citizens have in common as opposed to how they differ); and second, it entails universal application of law and rules that are blind to group and individual difference.[132] Citizenship as generality tends to enforce homogeneity while universality as equal treatment promotes oppression and disadvantages.

The implications of these claims have been profound, for they instigate reform proposals from both the liberal and non-liberal theorists. Some liberal theorists advocate restructuring the individualistic framework of rights, while the difference theorists translate their demand into the idea of 'true equality', which is grounded not in sameness but rather in difference.[133] For example, Sheila Foster offers a powerful account of such 'true equality' with respect to difference which sets that 'the goal of diversity should be to affirmatively include individuals from systematically excluded and disadvantage groups'.[134] In other words, true equality would enable diversity to erase the negative aspect of difference by eradicating institutional processes that translate into perpetual and systematic disadvantages for individuals with difference. In this respect, equality with respect to difference means no more than equality with the option of affirmative action.

This jurisprudence of positive discrimination, we argue, is consistent with the republican promise of equal rights and disestablishment. Habermas recognizes the potential for a gap between norms and facts – between the formal guarantees of equal rights and their actual worth. This tension requires him to set conditions for overcoming the inherent moment of inertia and inequality and, with that, to insure fairness and stability of political dialogue. For him, such conditions can be fulfilled by taking welfare measures for economic and social equality. More crucially for our purposes, Laborde defends the idea of affirmative action as part of what she calls 'critical republicanism'. While counteracting the demand for differential treatment along ethnic and cultural lines, she argues that socio-economic disadvantage, rather than ethnic origin, is far preferable to focus. This is because the removal of socio-economic obstacles will facilitate the integration of ethnic minority, without requiring that they may be preferentially promoted.[135] In this respect, we endorse Laborde's view and wish to add that the logic of removing social obstacles corresponds with the idea of disestablishment that forms the ethical precondition of republican unity.

At stake in such republican understanding of equality is that it indicates a shift in the meaning of 'equality' itself. That is, it draws on its *descriptive meaning* – 'the same' – and operates through its *prescriptive meaning*.[136] The equality in its prescriptive meaning involves the application of rightful rules to appropriate characteristics of the individual

[131]Iris Marion Young, 'Polity and Group Difference: A Critique of the Ideal of Universal Citizenship' (1989) 99(2) *Ethics* 250. [Emphasis added].

[132]Ibid.

[133]Cynthia V Ward, 'On Difference and Equality' (1997) 3(1) *Legal Theory* 65.

[134]Sheila Foster, 'Difference and Equality: A Critical Assessment of the Concept of 'Diversity' (1993) 1 *Wisconsin Law Review* 105.

[135]Laborde (n 66).

[136]See P Weston, *Speaking of Equality: An Analysis of the Rhetorical Force of 'Equality' in Moral and Legal Discourse* (Princeton, NJ: Princeton University Press, 2016); B Paul Komisar and Jerrold R Coombs, 'The Concept of Equality in Education' (1964) 3 *Studies in Philosophy and Education* 223.

being 'adjudged equal'.[137] In other words, prescriptive equality is comparative and relational than absolute.[138] We suggest that the republican idea of equal rights embodies both the descriptive and the prescriptive meaning of equality. In this sense, republican equality differs from Young's understanding of equal citizenship, which builds only on the descriptive meaning of equality. In contrast, republican equality starts with equal status of citizenship but does not end with equal treatment to those with difference – it remains indifferent to ethnic difference but not to socio-economic disadvantages that originate from such difference.[139]

Turning to the arrangement of the Bangladesh Constitution, we can see that it embodies the republican idea of equality as discussed above. The provision of article 28 sets out the principle of equality and non-discrimination along different categories of identity – race, caste, sex, religion and even place of birth. But the same article provides for affirmative action for the advancement of any backward section of citizens.[140] In a similar way, the Constitution allows the making of special provision in favour of any backward section of citizens to ensure adequate representation in the service of the republic.[141] The court of Bangladesh has been faithful to this republican idea of equality, as in the case of *Mohammad Badiuzzaman.* As shown above, Shahabuddin has been critical of *Badiuzzaman,* and of the arrangement of rights in general, despite the fact that the provisions of equality address much of the concerns raised by the difference theorists. He fails to acknowledge that the problem of the Bangladesh Constitution is not its *demos*-centric architecture of rights; rather, it is the *ethnos*-centric construction of nationality that we need to challenge and *disestablish.*

Far from this promise of disestablishment, the present Constitution, with the insertion of article 23A, has tilted its balance towards ethno-centric nationalism. This turn is reflected in the shifting language of the court on the question of ethnic identity and regional autonomy. Before the insertion of article 23A, the court was reluctant to recognize the ethno-centric arrangement of rights, particularly the right to autonomy under the CHT regulation.[142] However, the opposite direction towards the ethno-centric interpretation can be found in a recent case of *Wagachara Tea Estate Ltd. v Muhammad Abu Taher and Others* (2014).[143] In that case, the court has, by reinterpreting the status of ethnic people and their CHTRC,[144] recognized the status of ethnic minorities from 'tribal or ethnic sects' to 'Indigenous people'. Moreover, it accepted, reinforced and recognized the 'special status' of CHT that makes it a 'distinct' region from other parts of Bangladesh as a republic, the point to which we will turn in the next section.

For now, we wish to claim that these arguments offered by the court stem directly from the language of the current Constitution, particularly article 23A. This has legitimized the

[137]See CJB Macmillan, 'Equality and Sameness' (1964) 3(4) *Studies in Philosophy and Education* 320.

[138]See Peter Foster, Roger Gomm and Martyn Hammersley, *Constructing Educational Inequality: A Methodological Assessment* (London: Routledge, 1996).

[139]There may, however, be a contrasting argument that 'difference theorists are necessarily anti-equality'. See Cynthia V Ward, 'On Difference and Equality' (1997) 3(1) *Legal Theory* 65.

[140]Constitution of Bangladesh, article 28.

[141] Constitution of Bangladesh, article 29 (3)(a).

[142]In this series of decisions, notably in the *Badiuzzaman* decision (as discussed in the subsequent section), the court even termed the CHT Regulation a 'dead law' and consequently as 'unconstitutional'.

[143]Civil Appeal No. 147 of 2007 (judgement 2 December 2014).

[144]It is because the ethnic groups in Bangladesh are not recognized as aboriginals or Indigenous, which is why they are constitutionally called ethnic sects. However, for the first time the court addressed them as 'Indigenous people'. See Hoque (n 21) 223.

promise of emphasizing *ethnos* as enforced by the original Constitution. It did not guarantee non-exclusion, but results in a more 'subtle form of domination', often in the form of what can be called 'inclusive exclusion'.

IV. Structural reform for autonomy: the circularity of exclusion?

In the previous part, we have discussed how the architecture of rights is shifting from *demos* to *ethnos*-centric turn. This part examines the structural aspect of the Constitution with a focus on the question of regional autonomy and a special legislative council for the CHT people, a long-standing demand raised by their representative. In doing so, we engage with the two important structural models suggested by the accommodationists: 'consociationalism' and 'centripetalism'.[145] The purpose of this is twofold. First, it shows how the demand of regional autonomy rests on the concept of differentiated citizenship, and therefore reinforces the ethno-nationalistic aspirations rather than the republican promise; second, it will help us prescribe the ways in which the Constitution can better respond to the minority demand for structural reform without compromising its republican promise.

On this point, it will be useful to briefly introduce the ideas of 'consociationalism' and 'centripetalism'. The consociation model is advanced by Arend Lijphart, who advocates the establishment of an 'ethnic federation'.[146] This model argues for a 'cross-community power-sharing executive' by which major elite representative from different communities can jointly work for conflict eradication.[147] However, to achieve consociation, Lijphart prescribes that three important elements need to be present: coalition – complete or concurrent;[148] proportionality in public sectors – legislative, executive and judiciary;[149]

[145]Apart from the two models on which we have chosen to focus, 'communalism' is also considered an accommodationist strategy to respond to the problem of ethic exclusion. For a useful discussion on these models, see Benjamin Reilly, 'Political Engineering: Consociationalism, Centripetalism, and Communalism', in Reilly (n 28). See also McGarry, O'Leary and Simeon (n 7).

[146]The major essays of Lijphart can be found in Arend Lijphart, *Thinking About Democracy: Power Sharing and Majority Rule in Theory and Practice* (London: Routledge, 2007); Arend Lijphart, 'Typologies of Democratic Systems' (1968) 1 *Comparative Political Studies* 3; Arend Lijphart, 'Consociational Democracy' (1969) 21 *World Politics* 207; Arend Lijphart, *Democracy in Plural Societies: A Comparative Exploration* (New Haven, CT: Yale University Press, 1977); Arend Lijphart, 'Consociation and Federation: Conceptual and Empirical Links' (1979) 12 *Canadian Journal of Political Science* 499; Arend Lijphart, *Power-Sharing in South Africa* (University of California Press, 1985); Arend Lijphart, 'The Evolution of Consociational Theory and Constitutional Practices' (2002) 37(11) *Acta Politica* 1965; Arend Lijphart, 'The Wave of Power-Sharing Democracy', in Andrew Reynolds (ed.), *The Architecture of Democracy: Constitutional Design, Conflict Management and Democracy* (Oxford: Oxford University Press, 2002); see generally Arend Lijphart and Carlos H Waisman (eds), *Institutional Design in New Democracies: Eastern Europe and Latin America* (Boulder, CO: Westview Press, 1996).

[147]McGarry, O'Leary and Simeon (n 7) 58

[148]The fundamental point of consociation is to build a common mechanism under which all the ethnic communities will take part in political institutions. However, such political participation does not necessarily mean achieving a complete representation of all groups other than major groups of ethnic representation. In this way, the plurality of consociation is achieved in a divided society.

[149]To be more specific, Lijphart advocated for a list proportional representation system, which he believed would facilitate 'discipline and control' by party leaders by 'making the consociational settlement more stable'. Other wings of this model also advocate for a single transferable vote, which they think will be more equipped with maintaining power-sharing processes in the election. See McGarry, O'Leary and Simeon (n 7) 59–60.

and autonomy or community self-government.[150] This way, consociation guarantees a society that will produce homogenous ethnic constituent units though complete ethnic representation. On the other hand, centripetalism is equivalent to words such as 'convergence', 'centrism' and 'bringing together'. Major proponents of this model are Donald Horowitz[151] and Benjamin Reilly.[152] This model, like consociation, focuses on the institutional accommodation of minorities and how they can contribute towards a more deliberative democracy. However, the centripetal model differs from the consociation model in claiming a unique institutional design to manage democracy in a divided society by *deinstitutionalizing* the existing ethno-centric representation. That institutional design does not opt to 'simply replicate existing ethnic divisions in the legislature and other representative organs';[153] rather, it aims at *depoliticizing* ethnicity 'by putting in place institutional incentives for politicians and their supporters to act towards the accommodation of rival groups'.[154] Along these lines, Horowitz argued for non-ethnic federalism in which powers would devolve from the central to the local authority. Having identified these differences, let us see what model is adopted in Bangladesh and where it is moving.

From the time of drafting the original Constitution, the demand for structural safeguards was pressed by the representative of the CHT people, both within and outside the Constituent Assembly. On 15 February 1972, Larma led a delegation to meet the key architect of independent Bangladesh, Sheikh Mujibur Rahman, and raised a series of demands for structural autonomy that include the establishment of a special legislative body, continuation of the offices of the tribal chiefs, and constitutional entrenchment of the CHT Regulation 1900.[155] It seems that such demands by the ethnic leader for a strong regional council echoed the spirit of the consociation model: to formulate an *ethnic federation* based on the 'rule by the minority over itself in the area of the minority's exclusive concern'.[156] These demands for structural safeguards were rejected on the ground that they were 'parochial'.[157] Consequently, the ethnic aspirations for regional autonomy did not find a place in the Constitution. In contrast, the Constitution has established a *demos*-centric parliament while providing that 'parliament shall consist of

[150]Community self-government is meant by Lijphart as a functional autonomy by which both the governing system and territorial autonomy will be preserved, such as schooling, operation of personal laws, separate public funds for media and others. See Sujit Book, *'Bat Ye'or, The Dhimmi: Jews and Christians Under Islam* (David Maisel, Paul Fenton & David Littman trans.) (Rutherford, NJ: Fairleigh Dickinson University Press, 1985); see generally Benjamin Braude and Bernard Lewis (eds), *Christians and Jews in the Ottoman Empire: The Functioning of a Plural Society: The Arabic Speaking Lands* (Princeton, NJ: Holmes & Meier).

[151]Horowitz (n 29); Donald L Horowitz, *Ethnic Groups in Conflict* (Berkeley, CA: University of California Press, 1985).

[152]Reilly (n 28); Reilly and Reynolds (n 29) 2.

[153]Reilly (n 145) 84–85.

[154]Ibid 84–85.

[155]See *Mohammad Badiuzzaman v. Bangladesh and Others*, para. 10; Shahabuddin (n 22) 187.

[156]Lijphart, *Democracy in Plural Societies* (n 146) 41. It is to be noted that the plan of Larma was merely a proposal and was in its initial stage. If the opportunity arose to form a structural autonomy, then the institutional plans might change significantly. However, the outlines and the logical consequence of such plans suggest that that alleged structural autonomy, if accepted, would be able to culminate to change the institutional characteristics along with the associated elements for a strong consociation.

[157]Quoted in *Mohammad Badiuzzaman v. Bangladesh and Others*, para. 10.

three hundred members to be elected in accordance with law from single *territorial constituency* by direct election'.[158]

One way to make sense of this territorially distributed electoral structure is to view it as showing 'difference-blindness' with regard to ethnic diversities. From this perspective, it was consistent with the republican promise of the Bangladesh Constitution. But this difference-blind aspect of the constitutional structure is overshadowed by the ethno-nationalistic promise of the *Bengalee* state. This is why the constitutional denial of regional autonomy is often seen as part of the chauvinistic project of subsuming the CHT people through forced assimilation to *Bengalee* nationalism.[159] Such understanding is also responsible for the ongoing ethnic conflicts that began in the wake of the constitutional refusal to recognize the regional autonomy of the CHT peoples. The discontent ultimately culminated in the 'macro-nationalist' claim for separate nation-hood to be known as the 'Jumma nation'.[160] By resorting to insurgency, the hill people continued the power-sharing demands, including for regional autonomy. In response to this, a political settlement was reached and the CHT Peace Accord was signed between the CHT region and the government of Bangladesh in 1997.

This Accord provides for the Chittagong Hill Tracts Regional Council (CHTRC), giving certain regional autonomy to the communities living only in CHT regions. It mandates two-thirds ethnic representation and also guarantees an ethnic chairman.[161] This arrangement, in particular the formation of CHTRC, has been appreciated as a 'paradigmatic improvement in the style of indigenous people's participation' and 'a means of tacitly recognizing their separate cultural and political identity'.[162] If we situate the Accord in relation to the models suggested by the accommodationists, we may find it shares the features of both the consociation and centripetal models. On one hand, it provides certain forms of autonomy to a group of territorially concentrated ethnic minorities. However, in terms of representative arrangements, it provides for a cross-ethnic electoral constituency by making it subject to the centralized process of deliberative democracy.[163]

Interestingly, this 'hybrid arrangement' provided by the Accord was challenged in the case of *Mohammad Badiuzzaman* on the ground that the alleged accord violated the basic structure of the Constitution. In this case, the petitioner argued:

[158] Constitution of Bangladesh, article 65(2). [Emphasis added].

[159] See The Bangladesh Constituent Assembly Debates 1972.

[160] Since the mid-1980s, the hill people have been referred to as the 'Jumma nation'.

[161] Part 3 of this Accord provides that a chairman of the CHTRC will be elected indirectly and other members (of which two-thirds will be ethnic representatives) will be elected directly and proportionately from the communities living there. Since there are officially eleven communities with Chakma being the dominant ethnic community, five persons will be elected from the Chakma tribe, three persons from the Marma tribe, two persons from the Tripura tribe, one person from the Murung and Tanchangya tribes, and one person from the Lusai, Bawm, Pankho, Khumi, Chak and Khiyang tribes.

[162] Hoque (n 21) 231. See also Ahmmed, Md. Matiul Hoque Masud, Md. Faisal and Md. Niaz Morshed, 'The Chittagong Hill Tracts Peace Accord in Bangladesh: An Overview' (2013) 4(4) *Mediterranean Journal of Social Sciences* 123.

[163] However, there are powerful critique advanced by the advocate of difference. See for a critique of deliberative democracy, L Sanders, 'Against Deliberation' (1997) 25 *Political Theory* 347; IM Young, 'Communication and the Other: Beyond Deliberative Democracy', in S Benhabib (ed.), *Democracy and Difference* (Princeton, NJ: Princeton University Press); IM Young, 'Difference as a Resource for Democratic Communication', in James Bohman and William Rehg (eds), *Deliberative Democracy: Essays on Reason and Politics* (Cambridge, MA: MIT Press).

> the cumulative effect of the various clauses of the impugned acts and the creation of the Regional Council is not only that of violating various provisions of the Constitution as mentioned hereinabove, but also of destroying one of the basic structures of the Constitution, namely, the unitary character of the state by supporting to create a territorial unit which eventually may claim the status of a federating unit.[164]

This argument involves the court deciding on the question of structural reform for regional autonomy. Focusing on the regional aspect of the CHTRC, the court accepted the petitioner's view. In its judgment, the court was satisfied that promoting the interests of people living in a particular territory would destroy the very fabric of the unitary republic. Moreover, the court emphasized the constitutional principle of equality and non-discrimination principles, as shown in the previous part. The heavy implication of such reliance is that the court did not aspire to accept any constitutional structure that may potentially threaten the republican nature of Bangladesh as a state. Instead, such an approach of the court endorses the 'difference-blindness' which is consistent with the concept of republican nationalism that we are defending in this article. However, coming from an accommodationist camp, Ridwanul Hoque criticizes such approach of the court:

> In its analysis, the *Badiuzzaman* court failed to appreciate that indigenous self-determination in a unitary State such as Bangladesh can be achieved through *'a range of possibilities of institutional re-ordering* other than the creation of new states,' or without undermining state sovereignty'. The CHTRC and the transfer to the CHT district councils of certain indigenous-specific powers are definitely innovations of the type that is within the fold of a unitary constitutional order.[165]

For Hoque, the CHTRC and the new model of enhanced Indigenous participation through the district councils could alternatively be seen as an innovative institutional reordering. However, according to him, this 'innovative' arrangement should have been approved from the normative perspective of inclusive constitutionalism, ensuring both the recognition and participation-based inclusion of the CHT people. A similar argument is advanced by Mohammad Shahabuddin, who argues that having confined itself to the state's unitary character, 'the court failed to offer legal approval to measures that parties to the Accord accepted as crucial elements of peacebuilding in the region'.[166] His criticism was therefore directed against the structure of the Constitution that 'conceives of Bangladesh as a unitary national state, thereby limiting the scope for accommodating ethnic differences'.[167] From this perspective, the court's disapproval of the consolidation of indigenous self-governance was nothing but the negation of the 'rival approach [that] recognizes the right of tribal people[s] as distinct peoples'.[168]

[164]Writ Petition No. 2669 (2000) before the High Court Division of the Supreme Court of Bangladesh. See Shahabuddin (n 22) 193–94.

[165]Hoque (n 21) 232. [Emphasis added].

[166]Shahabuddin (n 22) 195. He does, however, have a differing position about the Peace Accord. While acknowledging that the Peace Accord offered some regional autonomy, he has criticized it on the ground that it denied any constitutional recognition of the distinct identity of the hill communities. This is because the Accord uses the term 'tribal' (*Upojati* in Bengali, meaning sub-nation).

[167]Shahabuddin (n 22) 137.

[168]Hoque (n 21) 232.

This brings us to the question of whether the approval to the regional council for the CHT people would then promote the politics of difference? If so, could it solve the problem of exclusion along ethnic lines? One interesting way of responding to this question is to view the operation of the regional council as reproducing the ethnic minority within its own framework. For example, the *Bengalee* people living in the CHT region may be viewed as an ethnic minority if seen from a demographic point of view. Even the member of a non-*Bengalee* community may find that they are in a marginalized community if they do not belong to the ethnic sect having majoritarian control in the political, cultural and economic activities of the region.[169] Therefore, regional autonomy would not resolve the problem of exclusion; rather, it would create the circularity of exclusion by producing a 'minority within a minority'. In other words, *Bengalee* people and other ethnic sects would form new minority groups in the face of a new majority, where ethnicity would never be a vanishing point. Interestingly, the idea of the *Jumma* nation has already replicated that same logic and the risk of ethnic exclusion among them that they themselves confront in the name of ethnic difference.[170] In addition, there are other limitations associated with the concept of regional autonomy – that is, it does not include the autonomy of small ethnic communities living on the plain land.[171] Seen in this light, the demand for regional autonomy contradicts its own logic of non-exclusion.

This circularity of exclusion along the ethnic line helps us understand the limits of 'ethnic federalism' as advanced by the advocate of consociation model. The problem with this model is that it validates the use of ethnicity not only as a morally superior value but also as a subject of political mobilization. The implication of this may be counter-productive. It may be detrimental to the condition of Indigenous people, making them more vulnerable than before. An example of this can be found in the case of Malaysian federalism, as explored by Andrew Harding. By carefully analysing the power, structure and intensity of the newly created autonomy (under the tenets of traditional federalism) of Malaysian Indigenous peoples (Sabah and Sarawak), Harding has demonstrated how ethnic federalism in Malaysia brings discontent and division to an ethnically divided society. He concludes that 'their status within the federation (both constitutional and

[169]A careful analysis reveals deeper aspects of the problem and its consequences. First, the electoral system is gerrymandered in such a way that it only absorbs the ethnic elite community in its system and excludes other less-dominant community automatically from being elected in that region. For instance, the past statistics of the elected parliament members' lists for the last eleven parliaments show that most members are elected from the predominant elite-ethnic groups and also from same lineage. Thus, the ethnic political participation and representation from CHT regions fundamentally comes from the elite-pedigree relationship. Therefore, this system automatically has facilitated the partial and total exclusion of the less-predominant ethnic communities and the plain land communities from its ethnic political participation and representation respectively.

[170]This is because one minority group invoking the right to self-determination within a state may produce another minority group, which may in turn invoke the same logic of ethnicity to claim its right to self-determination. This circularity of right to self-determination ultimately constitutes circularity of exclusion.

[171]It is important to note that the CHT peace treaty only mentions eleven ethnic communities living in the CHT region, with Chakma constituting the dominant ethnic group. However, there are other ethnic communities residing in the northern part of Bangladesh – for instance, Sonthals. Although there is no official statement regarding the number of ethnic groups living in Bangladesh, a mainstream Indigenous organization claims about 54 ethnic communities. See <https://www.iwgia.org/en/bangladesh.html#:~:text=The%20government%20of%20Bangladesh%20does,the%20Bengali%20population%20are%20mentioned>.

political), and federal interventions in state politics that have eroded state autonomy'.[172] Thus, the demand for regional autonomy in the form of ethnic federalism is unable to resolve the problems of exclusion by the means of structural reform.

It does not, however, rule out the possibility of non-ethnic federalism advanced by Horowitz. For Horowitz, federalism is not only a means of distributing power among majority and minority peoples, but also an effective way of removing absolute ethnic majority in a particular region.[173] This is why non-ethnic federalism is particularly attractive compared with the more overtly consociational features conventionally proposed.[174] As we suggest, Horowitz's argument about federalism comes closer to the republican form of federalism supported by Habermas. As acknowledged by Habermas, federalization may work as a possible tool to safeguard cultural autonomy by *decentralizing* state power.[175] Unlike ethnic federalism, it does not require the virtue of formally designing state institutions on the basis of ethnic identities. Such a de-ethicized model of federalism is closely linked to the concept of difference-blindness. Insofar as its structural reform is concerned, Bangladesh can therefore adopt this strategy of non-ethnic federalism.[176] This choice is crucial because it will settle what the Constitution ultimately prioritizes: *ethnos* as demanded by the advocates of difference or *demos* as entailed by its vision of becoming a republic.

V. Conclusion

This article argues for de-ethnicizing the Constitution as a response to the problem of ethnic exclusion in Bangladesh. By using the *ethnos–demos* binary as an explanatory framework, we argue that the real problem of the Bangladesh Constitution lies not in its structural elements or in the architecture of rights – both of which are based on the idea of *demos* as opposed to *ethnos*. Instead, it is the ethno-based formulation of identity that sets out its exclusionary paradigm by transforming *demos* into *ethnos*. Therefore, a truly inclusive constitution in Bangladesh would entail reversing such logic. Towards that end, we offer the following suggestion. For the identity part, we call for a complete disavowal of *Bengalee* nationalism and its replacement by the idea of Bangladeshi nationalism; for the rights part, we seek *status quo ante*; and finally, for the structure part, we only need the *status quo* of the original constitutional arrangement or, at best, the adoption of non-ethnic federalism.

[172]Andrew Harding, '"A Measure of Autonomy": Federalism as Protection For Malaysia's Indigenous Peoples' (2018) 46 *Federal Law Review* 570.

[173]McGarry, O'Leary and Simeon (n 7) 55.

[174]Richard H Pildes, 'Ethnic Identity and Democratic Institutions: A Dynamic Perspective', in Sujit Choudhury (ed.), *Constitutional Design for Divided Societies: Integration or Accommodation* (Oxford: Oxford University Press, 2008) 198.

[175]Jürgen Habermas, 'The Struggles for Recognition in the Democratic Constitutional State', in Amy Gutmann (ed.), *Multiculturalism: Examining the Politics of Recognition* (Princeton, NJ: Princeton University Press) 128.

[176]However, we should note that article 7B of the Constitution of Bangladesh entrenched (made unamendable) some of the important fundamental features of the constitution. These unamendable features also include the unitary nature of the state, thus making the possibility of transforming Bangladesh into a federation more difficult. These features were initially identified by the famous case *Anwar Hossain Chowdhury v. Bangladesh* (1989), which would later be constitutionalized by the Fifteenth Amendment of the Constitution.

This *demos*-centric prescription has been defended in this article not only against conservative ethnonationalism but also against the accommodationist (or multiculturalist) approach of constitutionalism. On one hand, it offers a critical foil for the ethnonationalistic paradigm of the *Bengalee* state that amounts to exclusion in the name of assimilation. On the other hand, it distances itself from the accommodationist approach that confronts ethnic assimilation by relying on the politics of difference. Despite sharing similar concerns about assimilation, we do not agree with the accommodationist claim that difference-blindness amounts to forced assimilation and exclusion. Such an understanding is too simple to do justice to the integrationist potential of a difference-blind constitutional arrangement. This is what we take as the point of our departure: we defend the republican promise of difference-blindness. As we believe, it is the vision of the *Bengalee* state – not the republican arrangement of rights and structure – that stands between us and a truly inclusive constitution in Bangladesh.

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