



CONSTITUTIONAL LAW

Secularism and state religion in the Bangladesh Constitution

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NAFIZ AHMED

One of the most unique features of the Bangladeshi Constitution is that it pledges to conserve secularism (Article 12) while also declaring Islam as its state religion (Article 2A). The promise of secularism was present in the original Constitution. The state religion was added later through an amendment. Secularism was removed from the Constitution but was later restored through another amendment. Currently, both secularism and state religion co-exist in the Bangladeshi Constitution. If their meanings are taken literally, the existence of secularism and a constitutionally recognised state religion seem mutually exclusive, as there is an intrinsic conflict between the two. However, in a recent judgment (decided in 2016), the High Court Division of the Supreme Court of Bangladesh held that secularism and state religion can co-exist without contradicting each other. This short essay examines how the recently published judgment changed the meaning of secularism and state religion in Bangladesh.

Through the *Anwar Hossain Chowdhury and others v Bangladesh* case, the Supreme Court of Bangladesh incorporated the doctrine of basic structure into the constitutional law jurisprudence of Bangladesh. According to the basic structure doctrine, the Constitution of Bangladesh cannot be amended in a way that destroys the basic structure of the Constitution. A provision or principle connected to the constitutional identity of Bangladesh Constitution is part of its basic structure. Secularism was one of the primary motivators of the emergence of independence Bangladesh and the adoption of its autochthonous Constitution. The readers of the Bangladesh Constitution would generally agree to call it a secular constitution. Thus, secularism is undoubtedly connected with the constitutional identity of Bangladesh. The Supreme Court of Bangladesh had made similar remarks in *Bangladesh v Advocate Asaduzzaman Siddiqui and Ors*.

Through the Writ Petition No. 1434 of 1988, *Swairachar O Sampradaiyikata Protirodh Committee, along with prominent public intellectuals of that time, challenged the constitutionality of the insertion of a state religion in the Constitution. The writ was finally heard in 2016. However, the hearing only lasted for 10/12 minutes, as noted by*

Justice Ashraf Kamal in the full text of the judgment. The writ was dismissed because the first petitioner did not have *locus standi* (the right to sue), as per the Court. The full text of the judgment became available to the public in 2024. Quite interestingly, the full text of the judgment discusses the substantive issues of the petition, although only the issue of *locus standi* was argued before the Court. In the full text of the judgment, the Court held that the inclusion of state religion does not affect the basic structure of the Constitution and does not violate the constitutionally guaranteed freedom of religion. It also held that the inclusion of state religion "does not offend the concept of secularism, as provided for in the Constitution."

Secularism has been given different meanings in different jurisdictions. Three meanings of secularism are worth mentioning. Firstly, it may mean that the state has a negative obligation not to endorse the practice of any religion (the idea associated with the Constitution of the United States of America). This version of secularism prohibits the state from conflating religion with public life. Secondly, secularism may mean that the state must regulate religion (the idea associated with the French Revolution). This version of secularism requires the state to prohibit the people from bringing religious practices and symbolisms into the public sphere (e.g., banning hijabs and abayas in public schools). The second version of secularism requires the state to govern and restrict, if necessary, religious practices through laws. Thirdly, secularism may mean that the state has a positive obligation to take measures to ensure that all religions can be practiced freely. This may be done by funding the establishment of places of worship, providing state-funded security in places of mass religious gatherings, and so on.

Justice Naima Haider, writing for the majority in *Swairachar O Sampradaiyikata Protirodh Committee vs Bangladesh*, observed that the third meaning of secularism is its true meaning in the context of the Bangladeshi Constitution. She noted that Article 2A "places an obligation upon the State to ensure equal status and equal right in the practice of the Hindu, Buddhist, Christian and other religion." (Emphasis added) Justice Haider also observed that "Article 12 as drafted... would impose an obligation upon the

State to ensure [that] religious authorities of any particular religion cannot dominate over the State..." Thus, according to Justice Haider, although Article 2A recognises Islam as the state religion, it creates a positive obligation on the state to ensure the religious rights of the minorities.

While interpreting Article 2A, Justice Haider held that the constitutional recognition of Islam as the state religion does not create any legal obligation on the state. She noted that the recognition of a state religion may be of two types: 'recognition with establishment' and 'recognition without establishment'. A recognition is 'with establishment' where state religion may be enforced by placing religious laws in the legal hierarchy or giving special privileges to that religion's followers (such as becoming President or Monarch). Justice Haider wrote, "...recognition with establishment will occur when the State maintains a formal connection with any specific religion which is 'established' in the sense of being supported, funded by the State". According to Justice Haider, the recognition of state religion in Bangladesh is recognition without establishment. Thus, according to the Court, the recognition of state religion has no legal consequence. Justice Haider notes, "[t]he conferment of status of 'State Religion' on its own does not tantamount to an action on the part of State to grant political status in favour of Islam. Article 2A must be read as a whole and once read, it becomes obvious that the insertion of the concept of Islam being the state religion does not, on its own, affect the constitutional rights of others having different religious beliefs."

The above-discussed case begs a few questions. For instance, one might ask if all petitioners must have *locus standi* for a writ petition to be maintainable. One might also ask how a clearly justiciable constitutional provision can be without legal consequences. The Court also did not address how the recognition (even without establishment) of a religion as the state religion may affect the believers of other religions. Nevertheless, the judgment provides us with a new understanding of secularism in Bangladesh and the consequences (or lack thereof) of recognising Islam as the state religion.

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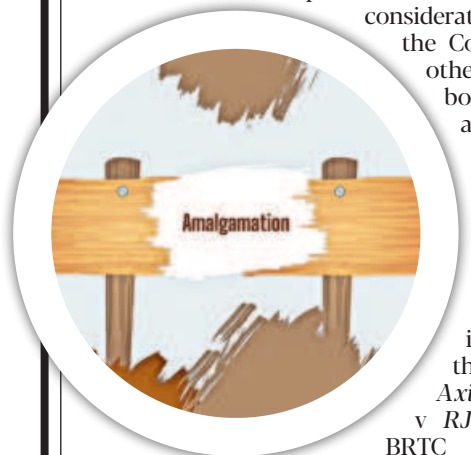
LAW VISION

Role of the Supreme Court in an amalgamation process

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Under the scheme of the Companies Act 1994, sections 228 and 229 require a scheme of amalgamation, be it for merger or acquisition, to get approved by the High Court Division (HCD or Court). Central to an amalgamation process is the application procedure and consideration of application by the HCD, as the HCD is vested with the authority to either approve or reject such an application. The HCD might reject such an application, if it considers that the scheme is in asymmetry with the core of public interest or even when it finds the scheme not to be generally beneficial. In certain cases, the Court may choose not to outrightly reject a scheme and direct the applicant to revise the scheme in line with public interest and other lawful considerations. Further, the Court may direct other regulatory bodies to take appropriate measures to assess the viability of a scheme and its potential impacts.

As an instance, in the case of *Robi Axiata Limited v RJSC 2016* the BRTC was entrusted with the same task and conducted an expert evaluation of the proposed merger as well as a public hearing on the merger and amalgamation as per section 87 of the Bangladesh Telecommunication Act. In this case, the Court considered several key aspects of post-amalgamation effects. While considering the effects of the merger through socio-economic lenses, the Court allowed several intermediaries including some employees of airtel to secure



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justice and protect public interest by applying its inherent jurisdiction. Thereafter, the Court also considered the issue of consumer rights and directed the BTRC to assess the effects of merger on the consumers in terms of charges imposed and access, quality and variety of services available, deter unfair practices of operators to secure and promote healthy competition, ensure market accessibility of new operators etc. In the language of the court, the BTRC conducted a thorough investigation and public hearing to guard against "total chaos in the telecommunication industry of Bangladesh". Indeed, there should be certain yardsticks to assess the socio-economic impact of any amalgamation process, particularly whether the scheme of amalgamation will monopolise the business affecting other corporations in the same business arena. Also, in the case of *Summit Power Limited v Summit Narayananj Power Ltd (2018)*, the Court directed the petitioner to revisit some clauses of the scheme so as to enable them to merge the corporations.

Thus, the HCD plays a catalyst role in an amalgamation process and approves an amalgamation process after a thorough perusal of the application and being satisfied that the amalgamation will not bring any evil for anybody.

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COURT CORRIDOR

Judicial discretion as a potent tool

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When a legal rule is not adequate to reach a conclusion, honorable judges use their discretionary power by seizing assistance from legal principles, which they are entitled to do. Although statutes of our country repeatedly mention judicial discretion, they do not precisely specify its limits. In the *BLAST and Others v Bangladesh & Others (2015) 1 SCOB (AD)* case, it was suggested that courts tend to passively echo statutory punishments. However, the same case also recognised those discretionary powers embedded in Bangladesh's penal provisions allow judges to adapt sentences based on the unique facts of each case. Civil cases in Bangladesh allow judges greater flexibility in handling preliminary issues and determining financial penalties, unlike criminal cases with stricter guidelines. However, one may ask: in the presence of clear and valid legal rule, does judicial discretion still hold any



weight? The very essence of judicial discretion lies in its application when multiple permissible options coexist within the legal framework. While multiple lawful options may exist, discerning the one with the highest

moral weight stands as the core function of judicial discretion.

The perception of discretion may vary among individuals, as it is influenced by personal values, cultural norms, and lived

experiences. It hinges on what one person considers a discreet action that might differ enormously from another's perspectives. Contextual and individual experiences further influence how discretion is applied, making it a nuanced subjective judgment.

Despite conflicting legal provisions, in *Riggs v Palmer*, 115 N.Y. 506 (1889) the court (New York Court of Appeals) considered morality and societal norms using discretionary power. The core legal question in the case revolved around whether William A. Palmer, who murdered his grandfather, could still inherit his estate. The court, ultimately, decided against inheritance, ruling that his unlawful and morally

unacceptable actions forfeited any benefits granted by the will. Judge Robert Earl speaking for the majority, sided with the plaintiffs. The court, guided by timeless principles of law and recognised maxims, determined that granting Elmer any advantage from his criminal act would be fundamentally unjust. Justice demands that no one be allowed to exploit their own wrongdoings, profit from their deceit, or leverage their injustice for personal gain. Acquiring property through criminal means is similarly condemned. When important judgments like this one arise, a disconnect between legal rulings and societal norms poses a serious concern. While strict interpretations safeguard order,

clashes with fundamental morals necessitate judicial flexibility. After all, courts exist within a social fabric that grants them legitimacy, and their decisions should reflect shared social values.

Discretion permits legal actors to interpret and apply laws in a way that aligns with the contemporary perspectives. This adaptability supports maintaining the relevance and legitimacy of the legal system, as it can respond to changing public attitudes and expectations. However, while discretion is a potent tool, it must be utilised within the bounds of established laws and regulations. Meandering beyond these boundaries can undermine the principles of justice and fairness. Therefore, a delicate balance must be struck, permitting discretion without renouncing the overarching framework of legal principles.

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