

# CONSTITUTIONAL CHAOS IN BANGLADESH: A JOURNEY FROM SECULARISM TO ISLAMISM

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## ABSTRACT

Every modern state stands on the separation of state and religion. Bangladesh was born as a secular state with a full guarantee of the right to freedom of religion. Though it started its journey proclaiming itself as a secular state, some political actors in the later course of history pushed the country into an almost Islamic Republic. This paper attempts to figure out what motivated the political actors to begin Islamizing the state by illustrating the chaos that arose from the constitutional modifications in question. It also argues that the basic structure doctrine and the principles of ‘Lemon Test’ turn the laws in Bangladesh, desecularizing the state, unconstitutional. It unearths the religiousness and secularity that our forefathers practiced in their daily lives long before Islam established itself on this land. It further finds the Constitutional Court of Bangladesh as the last resort to have those black laws declared unconstitutional, applying its supreme judicial review power within the current frameworks and limits of the constitution in reference to the landmark decisions of the American, Indian, and Turkish Constitutional Courts.

## INTRODUCTION

While all the modern states in the world have gradually been struggling to push religion into private life and get the shape of a secular state, on the contrary, Bangladesh, though it started its journey as a secular state, gradually turned desecularized, and Islamized, and shaped close to the Islamic Republic. The reasons behind such Islamization may be understood well by the great quote of Michael Bakunin, “*But whenever a chief of State speaks of God, be he William I., the Knouto-Germanic emperor, or Grant, the president of the great republic, be sure that he is getting ready to shear once more his people-flock.*”<sup>i</sup> I organize this paper into three parts. Part I conceptualizes and outlines the constitutional chaos and looks back at where the constitutional chaos and crises started from and how those chaotic situations forced our political and constitutional history reshape. Part II analyzes the historical decay of secularization and Islamization of our state one by one. It takes the Turkish secularization movement and the American separation of church and state movement as role models in reference to some benchmark judgments from both jurisdictions. It also seeks to determine whether religions had any influence on governmental affairs prior to the partition of India in 1947. This Part also interprets the current provisions of our constitution in the light of the basic structure doctrine and the principles of the ‘*Lemon Test*’ and throws the constitutionality challenge to the laws Islamizing the state.

## CONSTITUTIONAL CHAOS

### *i. What Exactly Do I Mean When I Say “Constitutional Chaos”?*

Every constitutional amendment must abide by some set of rules. When political actors violate any one of the rules in amending constitutions, it, as claimed by Yaniv Roznai<sup>ii</sup>, turns into unconstitutional constitutional amendments like The Constitution Forty Second Amendment Act, 1976 of India. Some constitutional modifications go beyond the amending powers, yet gain people's acceptance over time through mutuality, such as Article 9 of the Japanese Constitution of 1947, which Richard Albert dubs “Constitutional Dismemberment”.<sup>iii</sup> Often, political actors bring constitutional amendments by abiding by the letters of the constitutional laws but violating the core spirit of the constitution to achieve their heinous purposes and hold

power longer, which results in huge political crises and anarchy in society and pushes the country into uncertainties that run decades after decades with red question marks which is neither a constitutional “amendment” nor a “dismemberment”. I prefer to call it “Constitutional Chaos” like The Bangladesh Constitution Fourth Amendment Act, 1975, by which the structure of the government was altered into BAKSAL<sup>iv</sup>, The Constitution Fifth Amendment Act, 1979, by which ‘BISMILLAH-AR-RAHMAN-AR-RAHIM’ (in the name of Allah, the Beneficent, the Merciful) was inserted into the preamble of the constitution. Later on, this amendment was declared unconstitutional by the apex court of Bangladesh, but yet this ‘BISMILLAH-AR-RAHMAN-AR-RAHIM’ (in the name of Allah, the Beneficent, the Merciful) remains intact’.

*ii. Where Did We Inherit the Chaos from?*

The partition of India in 1947 was a big rift in a beautiful stainless steel mirror, followed by a long history of blood. The partition threw the people of India into a sea of bloodshed while the people of India before the partition had lived together shoulder to shoulder and hand in hand for centuries. “*The people of India had not accepted the partition. In fact, their heart and soul rebelled against the very idea*”.<sup>vi</sup> In the post-partition era, the chaotic constitutional and political history of Pakistan demonstrated that it endured more dire ramifications of the partition than India. The Constituent Assembly of India, within three years, just after it had begun to work, adopted one of the most successful and largest as well as secular constitutions in the world.<sup>vii</sup> Pakistan, on June 3, 1947, formed its Constituent Assembly; nearly seven months after India formed its Constituent Assembly.<sup>viii</sup> But some staggering events forced Pakistan to rewrite its dreamy destiny. The assassination of Prime Minister Liaquat Ali Khan<sup>ix</sup> and the sudden death of Jinnah,<sup>x</sup> the first Governor-General of Pakistan, pushed the Constituent Assembly into an ocean of uncertainties. The games of power politics, bureaucratic influence, and military intervention put Pakistan into chaotic situations that fueled a delay in adopting a successful constitution for the newly born state.

Finally, when the Constituent Assembly was about to adopt the constitution, all of a sudden, on October 24, 1954, the Governor-General of Pakistan, claiming the original power under Article 19 of the Government of India Act, 1935, dissolved the Constituent Assembly.<sup>xi</sup> Constitutional chaos began here, which drew a miserable fate for Pakistan. Tamizuddin Khan, the president of the Constituent Assembly, challenged the authority of the dissolution of the Constituent Assembly under Article 223A of the Government of India Act, 1935, (this Article

was brought through an amendment by the Constituent Assembly of Pakistan) before the Sind Chief Court. The government of Pakistan as a respondent argued that as no assent was taken from the Governor-General for the amendment, hence, Article 223A does not exist and it has to be deemed that it never was enacted; therefore, the authority of dissolution of the Constituent Assembly still lies in the hands of the Governor-General. The court, after hearing the parties, declared that assent on behalf of the Governor-General for enacting any law is not required (the Constituent Assembly of India never sought any such assent from the Governor-General for passing any law). Henceforth, the dissolution of the Constituent Assembly by the Governor-General is unlawful and illegal.<sup>xii</sup> Upon preferring an appeal by the government of Pakistan, the Federal Court overturned the decision of the Sind Chief Court. In the appeal, Chief Justice Munir opined that, as the assent was not taken in amending Article 223A, the Sind Chief Court has no jurisdiction to entertain this writ petition, and, thereby, the Governor-General has absolute power to dissolve the Constituent Assembly. Cornelius J, a dissenter judge of the appellate judgment, opined that obtaining assent from the Governor-General for passing any law or amending the same is not necessary as the Governor-General is not part of the Constituent Assembly.<sup>xiii</sup>

Nearly two decades after, in 1972, the Pakistan Supreme Court declared the Tamizuddin Khan-judgment erroneous. In the meantime, Pakistan ran out of time to take back what it had lost.<sup>xiv</sup> As per the finding of the Tamizuddin Khan case, a stalemate took place in the history of Pakistan. As a result, tens of hundreds of acts were turned unlawful and invalid, as all of them lacked the due assent of the Governor-General. The very clever Governor-General of Pakistan passed an Ordinance and gave them retrospective effect and accordingly validated the assent-lacked laws, except for Article 223A of the Government of India Act, 1935.<sup>xv</sup> But very unfortunately, the Federal Court of Pakistan declared this power of giving retrospective effect by the Governor General *ultra vires* and unlawful.<sup>xvi</sup>

In doing this wolf-like tactic, the Governor-General of Pakistan fell into a deep ditch that he dug for his political enemies. In an effort to put an end to the political and constitutional standoff, the Governor-General sought advice from the Federal Court of Pakistan. The court imported the doctrine of necessity stemmed from the maxim “*salus populi est suprema lex*” which connotes that “public welfare is the highest law” and this maxim was improperly and

very purposefully used to validate and keep the Governor-General of Pakistan on the throne.  
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East Pakistan, now Bangladesh, the largest province in terms of population in Pakistan, was the epicenter of many uprisings. The people and political leaders of East Pakistan had already come to know that West Pakistan would never accept the leadership of the East while they had to sacrifice their lives to speak their mother tongue under the strings of bullets triggered by the West Pakistani cops.<sup>xviii</sup>

Pakistan, in 1956, almost a decade after the formation of the Constituent Assembly, adopted its Constitution, declaring itself an Islamic Republic State<sup>xix</sup> and holding Islam as the state's patronage religion, which played, afterward, a crucial role in disseminating communal disharmony, social injustice, inequality, and riots amongst minority and majority classes. Mohammad Ali Jinnah, Pakistan's founder, sought partition on religious grounds, but in mind and attitude, he was more secular than religious. In a speech, he admitted, just after the partition, that he wanted a secular Pakistan.<sup>xx</sup> But the leaders of the bureaucratic and defense community did not understand Jinnah's insights, and hence, used Islam as an effective tool for grabbing state power.

But the fate of Pakistan, on October 07, 1958, was betrayed again to this mistakenly born country when General Muhammad Ayub Khan, the Commander in Chief of the Pakistan Army, took over the state power and abrogated the constitution as well as imposed martial law across the country.<sup>xxi</sup> In 1956, Dosso, a resident of a tribe in Pakistan, was found convicted for murder by Loya Jirga, a decisive body of a tribal community in Pakistan, under Section 11 of FCR 1901, a British-born law that was believed to be black. Dosso challenged the authority of Loya Jirga and the constitutionality of FCR 1901 before the Federal Court of Lahore. After the hearing, the court declared FCR 1901 null and void, and unconstitutional. The government of Pakistan preferred an appeal before the Supreme Court of Pakistan. When, in 1959, this appeal case was taken up for hearing before the Supreme Court, Pakistan was already under martial law and its constitution was suspended. If the decision of the Lahore court in the *Dosso* case had been upheld by the Supreme Court, the martial law would have been a question of validity and the constitution would have been restored. During these national crises, Chief Justice Munir played the role of a mysterious man and favored and validated the military regime by improperly using the doctrine of legal positivism, a legal theory pioneered by Hans Kelsen.<sup>xxii</sup>

Thus, Pakistani military gripped the crafts of abusing the judiciary for keeping their regimes upheld.

The military tyranny, unbelievable oppression, class struggles, unreasonable inequality, economic disparity, large-scale unemployment, and stepmother-like attitude towards East Pakistan, resulted in the mass uprising in East Pakistan in 1969. The military regime had no other alternative but to impose war upon the armed-less East Pakistan people on March 26, 1971. After a nine-month-long guerrilla and front war, East Pakistan was liberated and named Bangladesh. Sheikh Mujibur Rahman, an unparalleled and uncompromised leader who led the liberation war in 1971, learned from the mistakes of his Pakistani political friends and enemies and was very aware of not repeating the same mistakes in his newly born country. Hence, he arranged to form a Constituent Assembly that, within a very short time, on November 4, 1972, adopted a successful constitution. But the troubled souls of Pakistan never left the dead bodies. Instead, they kept casting the shadows of curses all over the constitutional history of Bangladesh.

## **THE STATE RELIGION: A PIOUS FRAUD**

Socrates, an ancient philosopher, was put to death by the Athenian people because he did not believe in God.<sup>xxiii</sup> Around three centuries after Socrates, Jesus Christ, the prophet of Christianity, was put to death by the Roman emperor, because he believed in God.<sup>xxiv</sup> These two tragic deaths in human history have called the faith-based concept of justice into question. Even on the verge of the 21st century, when someone has to die in Myanmar because he is Muslim<sup>xxv</sup> and at the same time, another one has to die in France because he just drew a caricature of the prophet Mohamed<sup>xxvi</sup>, these heinous events demonstrate that justice as we know it does not yet exist.

The slaughters of thousands of Protestant Christians by Catholic Christians in the middle ages and the official death penalty of Mansur Al Hallaj, a mystic, and Islamic Sufi, by the orthodox Muslim rulers in the 10th century caused the people to start to deviate from the faith. In the enlightenment era, religions appeared almost anti-humanist. Scientism proved that religions are no longer necessary to lead human lives. Paganism, polytheism, and monotheism were driving forces for the world's empires, but the Treaty of Westphalia,<sup>xxvii</sup> The Peace of

Augsburg<sup>xxviii</sup>, The enlightenment, the French Revolution, and finally, the American movement for separation of church and state, pushed the religions into private life from the state affairs. Thus, the more we stepped into the modern age, the more religions were privatized. In this part, I discuss how Bangladesh started its journey as a secular modern state and, in the course of history, how our political leaders made this state de-secularized and shaped it close to the Islamic Republic to achieve their heinous purposes of being on the throne forever. All that the political players did in Islamizing the state was toy with the deep passions of ordinary Muslims, and then use those impulses to maintain state authority and suppress mass protests. From now on, I'll refer to the political leaders' entire Islamization process in Bangladesh as "Pious Fraud."<sup>xxix</sup>

*i. The American Long Movement for Separation of Church and State:*

On December 15, 1791, the U.S. Congress added the first amendment to its constitution, preventing the government from making laws respecting the establishment of religion. In 1802, Thomas Jefferson, one of the founding fathers of America and its 3rd president, as well as one of the disciples of John Locke, an influential political philosopher of the Enlightenment era, quoted the First Amendment and interpreted that, "*act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between Church & State.*"<sup>xxx</sup> A constitutional debate on "Does the First Amendment clause mean separation of church and state as Jefferson claimed?" out-broke across America. In the long run, this debate turned from bad to worse, and agitation ripened.<sup>xxxi</sup> After nearly two centuries of breathtaking movements for the separation of church and state and pushing religion into private spheres, in 1947, in the *Everson v. Board of Education* case, Justice Hugo Black of the U.S. Supreme Court recognized Jefferson's interpretation of the First Amendment, that later on, turned into jurisprudence.<sup>xxxii</sup> Thereafter, in 1971, the U.S. Supreme Court, in *Lemon v. Kurtzman*<sup>xxxiii</sup> case, in ensuring a secular modern state and keeping religion into private life, issued three principles that must be contained into every piece of legislation passed by the Congress- "*First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'*" In common law countries, this principles are popularly known as '*Lemon Test*' and every law must be passed this test when it is signed into

an Act. I will examine at the end of this paper if the laws Islamizing and de-secularizing our state pass the American “*Lemon Test*.”

*ii. The Turkish Revolution for the Separation of State and Mosque:*

Turkey, an Anatolian country that ruled over nearly half the world during the Ottoman Empire, became the Republic on October 29, 1923, after a four-year-long war of liberation led by the great leader Mustafa Kemal Ataturk.<sup>xxxiv</sup> On April 29, 1924, Turkey adopted its first elaborate constitution, replacing the sharia laws with secular laws and ensuring equality for all citizens irrespective of race, sex, and religion. Intuitively, Ataturk intuited that, for a modern state, Turkey must have to evolve from an Islamic state into a secular democratic state, which will protect individual rights through the rule of law. To implement that, in 1928, Islam as a state religion was removed from the constitution; in 1937, a year before he died, secularism as a fundamental state principle was inserted in the constitution. In the subsequent constitutional amendments, women’s right to public office and the casting of votes were guaranteed.<sup>xxxv</sup> Ataturk’s goal was to relegate Islam to the private domain as a source of moral and ethical behavior and teachings, and accordingly, he established the Directorate of Religious Affairs (Diyamet) within the Turkish government to separate the Turkish state from the mosque.<sup>xxxvi</sup>

In Turkey, after Ataturk’s regime, dozens of Islam-based political parties arose whose main agenda was to push the Turkish clock back to the Ottoman Empire and establish the Islamic Republic of Turkey. Fethullah Gulen, the leader of Turkey’s humanitarian religious movement whose ideas are commonly referred to as Gulenism around the world, was accused of overturning the secular regime by instilling Islamism in the Turkish people. He fled Turkey for the U.S. in 1998, just after; the Ankara State Security Court brought charges against him.<sup>xxxvii</sup> In 1998, Recep Tayyip Erdogan, the current president of Turkey, was imprisoned for nine months by a Turkish criminal court and his Islam-based political party, “The Welfare Party,” was declared unconstitutional by the Turkish Constitutional Court for holding Islamic extreme ideology threatening to secularism, a fundamental principle of the Turkish Constitution, 1982.<sup>xxxviii</sup> Between 1998 and 1999, the Turkish Constitutional Court examined and tried four cases and found every political party violated Article II (Secularism) of the Constitution, 1982.<sup>xxxix</sup> The Turkish Constitutional Court banned 20 political parties in 1982 in an attempt to keep secularism upheld in the Republic.<sup>xl</sup> The Turkish military took over state power four times since its journey as the Republic through coups *d’etat*, only to push the country back to



its secular nature.<sup>xli</sup> In Bangladesh, as we will see in the discussion below, the military took over the state power twice to de-secularize and Islamize our secular country. The Supreme Court of Bangladesh, a constitutionally assigned guardian of the constitution, remained silent to save their backs and sometimes supported the de-secularization and Islamization by employing and introducing some new legal doctrines in its jurisprudence.

*iii. Bangladesh: The Birth of a Secular State:*

Discrimination, inequalities, and communal riots based on or stemming from religion and the Islamization of the state during the Pakistan period raised serious concerns among East Pakistani leaders. They saw the dire ramifications of the Islamization of the Pakistan state. And when their turn came, our forefathers incorporated all the characteristics of a modern secular state into our constitution. The preamble of our 1972's Constitution reads as under-

*“Pledging that the high ideals of nationalism, socialism, democracy and **secularism**, which inspired our heroic people to dedicate themselves to, and our brave martyrs to sacrifice their lives in, the national liberation struggle, shall be the fundamental principles of the Constitution”*

The series of communal riots between Hindus and Muslims before and after the partition of India inspired our war heroes to sacrifice their lives in the dream of establishing a modern secular state where all people from all religions or sects would be treated equally and no religion would be patronaged by the state. Secularism is the fundamental principle of state policy (Article 8), and in conformity with this principle, Article 12 runs as follows-

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

Thus, Bangladesh started its journey as a secular state where religion was kept apart from state affairs while religious rights were ensured to be practiced in peace and undefiled under the enforcement of Article 41 of the Constitution.

iv. *The Constitutional Journey of Bangladesh from Secularism to State Religion:*

In August 1975, our history took a dangerous turn and the dreams of our war heroes and freedom fighters went pale. In 1977, “secularism” was replaced by “Absolute Trust and Faith in Almighty Allah” and “BISMILLAH-AR-RAHMAN-AR-RAHIM” (in the name of Allah, the Beneficent, the Merciful) was inserted at the top of the preamble. Article 25 (2), “The State shall endeavor to consolidate, preserve, and strengthen fraternal relations among Muslim countries based on Islamic solidarity” was introduced in the constitution, and Article 38 of the Constitution, which prohibits the formation of religion-based political parties or associations, was revoked therefrom by the martial law proclamation order being no.01 of 1977, imposed by General Ziaur Rahman, the Chief Martial Law Administrator and President of Bangladesh, which he validated through the Constitution Fifth Amendment Act, 1979. Immediately after this disaster in the constitution, we would see General Ziaur Rahman forming a political party, namely the Bangladesh Nationalist Party, participating in the national election, and being the president of Bangladesh who hijacks the religious feelings and support of the ignorant people of Bangladesh. The frauds by our political leaders and armies with ignorant people’s religious feelings began here. In an effort to grab state power, General Ziaur Rahman grew up in the Pakistan Army and saw the Pakistani generals closely abusing religion. By crafting those arts of using religion to abuse ignorant people’s deep religious feelings, General Ziaur Rahman fulfilled his high ambitions in Bangladesh when his turn was on. But the questions resonate—Did the mass people of Bangladesh ever get any benefit from this de-secularization and Islamization of the state? Did this de-secularization and Islamization of the state ever affect the normal lives of the mass of people?

Hussain Muhammad Ershad, another Martial Law Administrator and the legacy of former Martial Law Administrator Ziaur Rahman made Islam the state religion by the Constitution Eight Amendment Act, 1988. In this regard, Mr. Ershad was one step ahead of Ziaur Rahman. He not only made Islam the state religion but also provided state patronage to Islam. It is said that Mr. Ershad used to perform his every Friday prayer at those mosques that had large numbers of Mussollis (followers) only to make the common people understand that he was a pious ruler and that Islam would never be harmed till it was kept in his hands by the people. In his personal life, he had lots of sex scandals, and he never seemed to be a pious person as he

claimed or pretended to be. This old wolf destroyed the leftovers of democracy and secularism after his predecessor, General Ziaur Rahman.

The Constitution Eighth Amendment Act, 1988, providing for the setting up of permanent benches of the High Court Division in different parts of Bangladesh and making Islam the state religion, was challenged before the High Court Division. In the famous *Anower Hossain* case<sup>xlii</sup>, the Supreme Court of Bangladesh struck down the amendment in part because it dealt with the setting up of permanent benches of the High Court in different divisions of Bangladesh. The people of Bangladesh were surprised by the court's attitude, observing that the judges of the Supreme Court declared the earlier one unconstitutional, reasoning that it was a violation of the doctrine of basic structure and ignoring the latter one, which was an important and defining part of the same amendment of the constitution that indeed violated the basic structure of the constitution. The decision in the *Anower Hossain* case proved that our judges did not have enough wisdom and intuition to sacrifice their class interests over the national and public interests. In the year of making Islam the state religion, the Dictatorship and Communalism Resistance Committee, a voluntary organization, filed a writ petition challenging the very constitutionality of making Islam the state religion. After 30 years, in 2016, the High Court Division rejected the writ petition, grounding that the petitioners lack *locus standi*.<sup>xliii</sup>

In a series of cases during and after martial law regimes, the martial law was considered valid and legal by the Supreme Court of Bangladesh.<sup>xliiv</sup> In 2010, the martial law which was legalized by the Constitution Fifth Amendment Act, 1979, was declared illegal and unconstitutional by the Supreme Court of Bangladesh.<sup>xliv</sup> Here, we find a great match with our predecessor, Pakistan. In 1959, in the *Dosso* case, the Pakistan Supreme Court declared martial law valid. After a decade, in 1972, the same court declared martial law illegal in the *Asma Jilani* case. Did our Supreme Court follow the same path that Pakistan did decades ago? Would it be so much to say that the spirits of Pakistan still cast their shadows upon us?

v. *The Constitution Fifteenth Amendment: A Constitutional Double Standardization:*

The people of Bangladesh suffered a lot at the hands of their military tyrants, and they put an end to those oppressions through several bloody movements and mass uprisings. Leading the

liberation war in 1971 and declaring a secular state in 1972 made the people of Bangladesh believe that the Awami League is their torchlight bearer, and they voted for the Awami League again in the 2008 national election, expecting that this party would again push the country's clock back to its position as before 1975. But Awami League government stepped into the shoes of the military tyrants. In 2011, this government brought the Fifteenth Amendment into the Constitution, keeping secularism in the preamble, Articles 8 and 12; and at the same time, remaining Islam as a state religion in Article 2A of the Constitution. This severe inconsistency reshaped it into a double-standard constitution. People have been deceived and tricked again by a democratic government. Historically, the Awami League is a secular political party that shed blood, sacrificed lives, and struggled for decades to establish secularity and liberty throughout its Pakistan history. But on the verge of the 21st century, why did it compromise with its long-cherished ideology? Holding political power tight, keeping the throne unstable, and pleasing the Islamists made this party hypocrite. Anyways, leaning to Islam by Awami League, in an effort of pleasing the Islamists, caused dire ramifications in the following history of Bangladesh; Holy Artisan militant attacks followed by the large-scale atrocity and slaughters of dozens of non-believers in the recent time by the Islamic extremists.

*vi. Secularism in the Pre-Independence Era, 1971:*

The Dravidians, our genetic forefathers, used to worship the giants of nature. It was a sort of polytheism in character. Around 1500 BCE, the Aryans invaded the Dravidians and conquered the landscape. The Dravidians fled their home lands and took shelter in the mountains and jungles. The Aryans totally outlawed and outcast the Dravidians from society. Thus began the Aryans' reign of their new empire. Today's Hinduism is a fusion of Dravidianism and Aryanism.<sup>xlvi</sup> When the Aryans imposed a caste system on society, like Brahmins, Khsatryas, etc., some secular philosophy or religions appeared in the sub-continent. The most well-known secular religions that promoted secularism as an ideology are Charvak, Bhuddism, and Jainism. From ancient India till the British period, secularism was found in the Indian empires.

1. **Emperor Ashoka and Secularism (269-232 B.C.)<sup>xlvii</sup>:** When Ashoka endured some bitter experiences in the Kalinga war, he converted to Buddhism and gave great importance to the ideal of tolerance towards different ideologies and religions. Ashoka's definition of social ethics is based on respect for all religious.<sup>xlviii</sup>

**2. Akbar the Great and Religious Syncretism (1556 A.D. to 1605 A.D):** In 1562, Akbar passed an imperial decree not to convert war prisoners into religions against his will. In 1563, when he lifted the pilgrimage tax, Hindus all over India were highly motivated to construct numerous temples. He financed the translation of Hindu texts into the Persian language, with the goal of building a common ground for unity between the two cultures. In 1564, Akbar abolished the *zazia* tax imposed on the Hindus. Earlier on, only Muslims were treated as citizens. But Akbar gave equal citizenship status to both Hindus and Muslims. His policy didn't admit political differentiation on the basis of religion.<sup>xlix</sup>

**3. The British Regime: Secularization of the Legal System:** The Indian Law Commission, led by Lord Macaulay, played a major role in secularizing the Indian legal system. The whole civil and criminal administration systems were established in the light of the secularism. A few of the secular laws promulgated by the British colonists are: The Indian Penal Code, 1860; The Code of Criminal Procedure, 1898; The Code of Civil Procedure, 1908; The Limitation Act, 1908; The Contract Act, 1872; The Evidence Act, 1872. The Charter Act of 1833 clearly expresses the secular policies of the British Government. Section 87 of the Act declared "that no Indian subject of the Company in India was to be debarred from holding any office under the Company by reason of his religion, place of birth, descent and color".<sup>1</sup> We observed that after the partition of India in 1947, India moved towards a more secularism and it promulgated its personal Hindu laws in the light of the secular modern state. On the contrary, Pakistan went close to becoming an Islamic Republic and peeled off its secular attire.

**vii. The Constitutionality Test for the State Religion:**

Firstly, we saw the *Keshavananda* case in India and the *Answer Hossain* case in Bangladesh, which established the principle that the basic structures of a constitution can never be amendable. Our long history of struggles for secularism made our forefathers adopt a constitution in 1972 containing secularism as one of its fundamental state principles. The history of liberation shows our constitution stood on some basic structures; secularism is the most important one of them. Subsequent amendments making Islam the state religion and

diminishing and fading secularism through the Constitution Eighth Amendment Act, 1988, and Fifteenth Amendment Act, 2011 are a violation of the basic structure doctrine.

Second, the *Lemon v. Kurtzman* case of the United States Supreme Court established three criteria for any modern secular legislature to pass a law: first, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; and finally, the statute must not foster excessive government entanglement with religion. The Constitution Eight Amendment Act, 1988, and The Constitution Fifteenth Amendment Act, 2011, were passed to make Islam the state religion which officially patronages, advances, and entangles Islam. As such, these two amendments fail the “*Lemon Test*” as evolved in the *Lemon v. Kurtzman* case.

In 2008, in Turkey, we witnessed the Constitutional Court declare a Turkish Constitutional Amendment Act (lifting a ban on wearing headscarves by women in universities) unconstitutional and illegal. The Turkish Constitutional Court reasoned that this amendment violates the sacred principle of secularism in the Turkish Constitution.<sup>ii</sup>

It is the Supreme Court of Bangladesh that can declare the Constitution Eight and Fifteenth Amendment Acts unconstitutional within its current frameworks and limits using its judicial review power for violation of the basic structure doctrine and failure of the “*Lemon Test*”.

## CONCLUSION

Today, some Bangladeshi Bengalis claim that Bangladesh should be ruled by Islamic law. They also believe that making Islam the state religion is the perfect step. But evolutionary and anthropological history proves that we still carry the blood and genes of the Dravidians, some of us being Aryans, and others of mixed nations.<sup>iii</sup> Our forefathers were polytheists. During the Middle Ages, when Muslim rulers invaded India and started reigning over the landscapes, some poor Hindus who were victims of the upper caste-customs of Brahmins were converted into Islam<sup>iiii</sup>. Religions are like mirages that change from century to century. The religious leaders use the feelings of the common people to rule over the empire and control the human spirit.

What our political leaders did regarding secularism and Islamism all through the history is a pious fraud. Because they did not believe what they made the common people believe. The reason behind all they did was to keep their political power untroubled. By doing that, they

polluted the sacred history of the secularism in Bangladesh that pushed the modernity of the state into decay. The laws desecularizing and Islamizing the state are a violation of the constitutional basic structure doctrine which also fails the “*Lemon Test*” as evolved in *Lemon v. Kurtzman* case of the U.S. Supreme Court to be stood enough legal and constitutional.

## ENDNOTES

- <sup>i</sup> MICHAEL BAKUNIN, GOD AND THE STATE, (May 18, 2022, 12:30AM), <https://www.scribd.com/read/271527782/God-and-the-State>.
- <sup>ii</sup> YANIVE ROZNAI, UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENT: THE LIMITS OF AMENDMENT POWERS, 13-15 (1<sup>st</sup> ed., Oxford University Press, 2017)
- <sup>iii</sup> Richard Albert, *Constitutional Amendment and Dismemberment*, 43:1, THE YALE LAW JOURNAL OF INTERNATIONAL LAW, 04, (2018).
- <sup>iv</sup> Bangladesh Krishak Sramik Awami League (BAKSAL) was a political front comprising Bangladesh Awami League, Communist Party of Bangladesh, National Awami Party and Jatiyo League. Following the Fourth Amendment to the Constitution of Bangladesh, enacted on 25 January 1975.
- <sup>v</sup> The constitutional chaos as I defined, are found in many countries’ constitutions all over the world. In Bangladesh, this chaos took place numbers of times that I would discuss in the subsequent papers part by part.
- <sup>vi</sup> MAULANA ABUL KALAM AZAD, INDIA WINS FREEDOM, 227-229 (Complete Version., Orient Longman Private Limited, 1988)
- <sup>vii</sup> *Constitution of India 1950*, CONSTITUTION OF INDIA, (Apr. 28, 2022, 11:07PM), [https://www.constitutionofindia.net/constitution\\_of\\_india](https://www.constitutionofindia.net/constitution_of_india).
- <sup>viii</sup> *First Constituent Assembly of Pakistan (1947-1954)*, HISTORYPAK.COM, (Apr. 28, 2022, 11:07PM), <https://historypak.com/first-constituent-assembly-of-pakistan-1947-1954/>.
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