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***RELIGIOUS FREEDOM AND HUMAN RIGHTS IN INDIA:  
CONFLICTS AND RECONCILIATION***

**Abstract:** Traditionally, pluralism has always been a part of India's identity. Even in medieval period there were liberal as well as orthodox rulers. The liberal rulers such as Akbar, Jahangir and Shahjahan ruled with secular and liberal policies while Aurangzeb was orthodox and imposed theocratic practices. Colonial India witnessed western-liberal and secular practices. Communalism too emerged as a part of the "divide and rule policy of the colonial rulers. Independent India adopted a constitution that provides for liberal-democratic values and secular state. However the society is still in the grips of religious and cultural orthodoxy posing challenges to the observation of the universally accepted human rights. The freedom of religion is given to the people as a fundamental right, but many times this freedom is jeopardising the observation of universal human rights and therefore the two kinds of rights are in contradiction with each other. The paper looks into the nature of religious freedom in India and traces how the observation is obstructed in the name of religious freedom.

The regressive practices in the name of religion are not actually a part of religion but they try to draw their legitimacy from religio-cultural sources. The paper also tries to look into the ways and means of reconciling religious freedom and human rights.

**Keywords:** *India, religious freedom, conflict, reconciliation, Muslims, Panchayat system*

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## Introduction

Rights can most simply be defined as claims or entitlements. They define the relationship between an individual and the state. Therefore, citizens are defined as right bearing individuals. The universal acceptance and acknowledgement of human rights makes rights a subject of state membership no more. Though it is difficult to define human rights, one may find that the idea of human rights is bound up with the idea of human dignity. Thus, all these rights which are essential for the maintenance of human dignity may be called human rights.

The UDHR in 1948 is the first legal document laying universal norms on human rights. The Freedom of Religion was given under Article 18 of the UDHR.<sup>1</sup> The Freedom of Religion was accepted as a fundamental right by many countries, including India. Indian Constitution accepted most of the civil, political, social and economic rights mentioned in the UDHR and listed as fundamental rights.

The preamble of the Constitution of India declares India as a secular, democratic, socialist state adhering to the values of equality and human dignity<sup>2</sup>. India did not adhere to any religion in spite of the fact that majority follows Hindu religion or the fact that India was surrounded by theocratic states like Islamic Pakistan on both the sides (east and west) and Hindu Nepal in the north and Buddhist Sri Lanka in the south. The framers of the Constitution of India were very clear on the issue of maintaining religious pluralism. Though the original constitution did not mention the term 'secular' anywhere, however, India has no state religion. India respects all religions and gives equal freedom to all religions. The framers of the Constitution visualised a multi-cultural state with religious pluralism in terms of not only the freedom of religion as a fundamental right but also as a peaceful mutual co-existence of all religions, which definitely amounted to something more than mere tolerance.

India has always been a multi-cultural and multi-religious state. India's heritage has always been plural and multi-cultural, where many faiths and belief systems flourished. Tribalism and a number of sects within the Hindu religion have always co-existed. Besides the Hindu religion, many other religious traditions emerged and existed: like Buddhism, Bhakti and Sufi tradition as well as Islam and Christianity. Islam, which is the second largest religion in India with 14.4% of the country's population, first came to India with Arab traders as early as 7<sup>th</sup> century AD in south India. It was established in north India in the 12<sup>th</sup> century with Turkic

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<sup>1</sup> "The Universal Declaration of Human Rights," accessed July 10, 2013, [www.un.org/en/documents/udhr/index](http://www.un.org/en/documents/udhr/index).

<sup>2</sup> Durga Das Basu, *Shorter Constitution of India*, 2 Vols. (Wadhwa Nagpur: LexisNexis Butterworths, 2008).

invasions and since then became part of India's culture and heritage.<sup>3</sup> Mughal rulers largely followed a policy of non-interference in the personal/internal matters of other religious communities. Even a Mughal emperor made a new religion called Deen-i-ilahi that was more like a code of moral/ethical conduct.<sup>4</sup> He criticised female infanticide and dowry as the religious-cultural practices amongst Hindus and polygamy amongst Muslims.

Judaism was one of the first foreign religions to arrive in India. Jews, though a minority in India, lived without any instances of anti-Semitism from the local majority population.<sup>5</sup> Christianity, which is India's third largest religion, was introduced in India by Thomas the Apostle who visited Kerala in 52 AD. Although the origin of Christianity in India remains unclear, there is a general consensus that Christianity was rooted in India by the 6<sup>th</sup> century AD.<sup>6</sup>

British rule did lot of harm to the otherwise existing religious pluralism and multiculturalism of the country. They followed a policy of "divide and rule" and resorted to communal politics that ultimately culminated into the creation of a separate nation for Muslims. Though Pakistan was created, a large number of Muslims decided to remain in India and accepted it as their motherland land. Respecting the religious diversity of the country, the framers of the Constitution opted for a secular state rather than a theocratic Hindu state. Constitution has provided for a liberal-democratic state but the society is entrenched in the medieval institutions and practices that are posing challenge to the observation of human rights. Indian constitution provides for the Freedom of religion as a fundamental right that, to a large extent, defines the nature of Indian secularism. Freedom of religion in India has been dealt with both directly and indirectly, by the constitution. Indirectly, the freedom of religion is provided by Articles 15 and 16.

The two Articles deal with the right to equality and non-discrimination and thus make the state uncommitted to any particular religion/religious belief. Articles 25, 26, 27 and 28 deal directly with the freedom of religion, both individual and collective. The Freedom of religion is guaranteed to an individual as a concern for his "liberty" and "well being". The individual is placed before and above the religion and along with the principles of equality and tolerance This is also the reason, perhaps, because of which the weight of restrictions loaded upon this

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<sup>3</sup> Abdul Gafoor Abdul Majeed Noorani, *The Muslims of India: A Documentary Record* (Oxford University Press, 2003).

<sup>4</sup> "Dīn-i Ilāhī," accessed July 12, 2013, <http://www.britannica.com/EBchecked/topic/163768/Din-i-Ilahi>.

<sup>5</sup> "History of the Jews in India," accessed July 12, 2013, [http://en.wikipedia.org/wiki/History\\_of\\_the\\_Jews\\_in\\_India](http://en.wikipedia.org/wiki/History_of_the_Jews_in_India).

<sup>6</sup> "Christianity in India," accessed July 12, 2013, [http://en.wikipedia.org/wiki/Christianity\\_in\\_India](http://en.wikipedia.org/wiki/Christianity_in_India).

freedom and particularly Article 25 is the heaviest. Public order, morality, health, and other provisions of part III are some restrictions on the freedom of religion. Our constitution makers did not use the term “secular” deliberately as the term has definite connotation that does not fit in the Indian context. India took a very liberal view of secularism as against the western concept. *The liberty, equality, and dignity of the individual underlie the constitutional philosophy of Indian secularism.*<sup>7</sup> India has no state/official religion but there is no separation of state and religion. Therefore, no ban on the political parties to use religion for political expediency. However political parties have used it negatively. Indian secularism, thus, implies:

- mutual coexistence of all religions,
- respect for all religions,
- religious freedom to all people (citizens or non-citizens)

The Constitution makers were sober thinkers. They laid the foundation of a liberal democratic state in the years to come. The nature of freedom of religion is clearly mentioned through various Articles enumerated in the constitution and includes both the personal and the social dimension of it. The nature of religious freedom under the constitution is positive and constructive. It is not absolute but it comes with reasonable restrictions to make it realistic and useful.

The majority in India is not aware of the exact nature of the freedom of religion as guaranteed to them, nor are they familiar with the reasonable restrictions on the freedom of religion as enshrined in the Constitution. It is an important factor in social relations as well as an important determinant of public space/life. There is no wall of separation between public and the private and therefore religion is one of the pivots around which personal, social and political life and institutions are organized. It determines the inter-community as well as the intra-community relationship and regrettably religion, as an institution, has been more a force jeopardising or obstructing the implementation of human rights in India. Pandit Nehru, the first Prime Minister of India, had hoped that with the spread of education and development the role and influence of religion in public life will diminish on its own. Unfortunately that did not happen as the vote bank politics resulted in the communal politics and politicisation of religion.

India has witnessed a large number of violent communal clashes between different religious groups that resulted in large scale violations of the right to life, liberty and property. The state was a mute spectator to the ethnic cleansing of Hindus in Kashmir and of Muslims in Gujarat in 2001. The virus of communalism

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<sup>7</sup> Gahrana Kanan, *Right to Freedom of religion* (New Delhi: South Asian Publishers Pvt. Ltd., 1992).

is spreading to the areas where there was no previous history of communal disharmony like Kashmir, Punjab, Karnataka, Orissa, etc. This is a consequence of communal politics which is also responsible for the assertion of religious identity in public by the people who earlier never believed in the public display of their religious belief.

Due to the communalisation of the politics, the society is getting communally polarised. This is further aggravating the already existing divisions in the society due to the casteism, patriarchy and feudalism.

As mentioned earlier, despite the constitutional endorsement of the cultural and religious pluralism, the socio-cultural practices of different religions pose problems which are due to the medieval traits of casteism, feudalism and patriarchy. The issue of religious freedom in India is a complicated one. Theoretically India is a secular state but society is culturally and religiously plural. However it is also mired with medieval institutions such as the casteism and the patriarchy. Therefore it offers ample opportunities to the political parties to play communal cards for political gains. Similarly, various caste groups, religious groups, and social groups bargain for favours from the political class. In the process the human rights standards become the sacrificial goat. The continuance of the Khap Panchayat system, Fatwas and the issue of Uniform Civil Code obstruct the implementation of human rights in the name of cultural and religious freedom.

### **I. The Existence of Khap/Non State Legal Systems**

The Indian social fabric was organised around the village unit, as civilization shifted from nomadic to settled agricultural practices. Throughout the last few millennia, the society of the Indian subcontinent was organised in various forms, such as tribal, village, monarchical, or republican. The mode of governance was that of a council of five, which was called a Panchayat. In the old times, society was organised into clans under a Panchayat system. A clan was based on one large gotra (clan), or a number of closely related gotra. Decisions were arrived at by consensus under the aegis of a Council of five elected members (Panchayat). In times of danger, outside invasion etc, the whole clan rallied under the banner of the Panchayat. A leader would be chosen by the assembly. A number of villages grouped themselves into a Guhaand. A number of Guhaands formed a 'Khap' (covering an area equal to a tehsil or a district) and a number of Khaps formed a "Sarva Khap" each for Haryana and Malwa regions. At what level should a panchayat gather depended upon the magnitude of the problem and the territory involved.

One of the terms used to denote the republic was the 'Khap'. Others were Pal, Janapada, and Ganasangha etc. The Khap consisted of a unit of 84 villages. The individual villages were governed by an elected council, which was known as

the Panchayat. A unit of seven villages was called a Thamba and 12 Thambas would form the unit of 84 villages. We also find Khaps of 12 and 24 villages. Their elected leaders would determine which units would be represented at the Khap level. These Khaps are found to be spread all the way from Northwest India towns to Madhya Pradesh, Malva, Rajasthan, Sindh, Multan, Punjab, Haryana, and modern Uttar Pradesh.<sup>8</sup>

The Sarv Khap (or All Khap) Panchayat (Council) represented all the Khaps. The individual Khaps would elect leaders who would send delegates, who would represent the Khaps at the Sarv Khap level. It was a political organisation, composed of all the clans, communities, and castes in the region<sup>9</sup>

The Khap Panchayat which is a union of a few villages mainly in north India, though it exists in similar forms in the rest of the country, has lately, emerged as quasi-judicial body that pronounces harsh punishments based on age old customs and tradition, often bordering or regressing measures to modern problems.<sup>10</sup> The Khaps have jurisdiction over the Hindu community.

In recent times, the Khap system has attracted criticism for its medieval value system which is based on feudalistic and patriarchal notions and contrary to the modern human rights standards. Traditionally the Khap is a geographical entity and a Gotra Khap is an institutional practice, each with a particular caste or community to resolve disputes regarding marriage, family disputes, inheritance, etc in the light of religious-cultural practices and traditions. Nowadays Khaps have turned into a symbol of resistance to change and stand for regressive practices. They are even demanding an amendment to the Hindu Marriage Act of 1955 that legalises inter caste marriage and divorce otherwise not permissible by the Hindu religion.

What do they do:

- they are against inter-caste marriages and inter-religious marriages;
- they are against marriage in the same gotra or clan;
- they are supportive of the caste hierarchy in the conduct of social relations and also of the practice of untouchability;

<sup>8</sup> Bal Kishan Dabas, *The Political and Social History of the Jats* (New Delhi: Sanjay Prakashan, 2001).

<sup>9</sup> M. C. Pradhan, "The Jats of Northern India. Their Traditional Political System - II," *The Economic Weekly*, December 18, 1965, accessed July 12, 2013, [http://www.epw.in/system/files/pdf/1965\\_17/51/the\\_jats\\_of\\_northern\\_indiatheir\\_traditional\\_political\\_systemii.pdf](http://www.epw.in/system/files/pdf/1965_17/51/the_jats_of_northern_indiatheir_traditional_political_systemii.pdf).

<sup>10</sup> "What is KhapPanchayat," *India Today*, October 11, 2012, accessed July 12, 2013, <http://indiatoday.intoday.in/story/what-is-khap-panchayat/1/224274.html>.

- they are highly anti women rights from denying freedom to choose their partners to dress code. They are against wearing jeans as jeans attract inappropriate male attention;

- they do not allow women to carry mobiles as it will facilitate “love affairs”;

- they are strongly in favour of lowering the age of marriage for girls. They should be married as soon as they attain puberty as this would lead to a decline in the rape cases;

- they are in favour of even child marriage and whosoever speaks against it would be declared an outcast;

- however they have stood up for some good things also. They have raised their voices against Dowry a centuries-old religious custom in India, against female foeticide, again a centuries-old religious-cultural practice still prevalent in India – now with a more sophisticated technology of sex determination.

The Khaps function in inhuman, illegal and arbitrary manner. They encourage “honour killings” in the matters of inter caste marriages and marriage within the same “gotra”. They ex-communicate those who do not follow their diktats; many times even the whole family of the girl or the boy who marry against the will of the community will have to leave the village or face death sentence. They also force the couple to commit suicide, many times.

Women’s Organisation AIDWA has made allegations, in some cases where the Khaps allegedly initiated threats of murder and violence to couples who married outside the circle.<sup>11</sup>

The Supreme Court has declared ‘Khap Panchayats’ illegal, which often decree or encourage honour killings or other institutionalised atrocities against boys and girls of different castes or religions who wish to get married or have married.<sup>12</sup> “This is wholly illegal and has to be ruthlessly stamped out. There is nothing to be honourable in honour killing or other atrocities and, in fact, it is nothing but barbaric and shameful murder. Other atrocities with respect of the personal lives of people committed by brutal, feudal-minded persons deserve harsh punishment. Only this way can we stamp out such acts of barbarism and feudal mentality. Moreover, these acts take the law into their own hands and amount to kangaroo courts, which are wholly illegal,”<sup>13</sup> said a bench of justices Markandey Katju and Gyan Sudha Misra. In his report to the Supreme Court, Raju Ramachandran, Senior Advocate appointed by the court to assist it in PILs against

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<sup>11</sup>T.K. Rjalakshmi, “Caste Terror,” *Frontline*, Vol. 2, Issue 25 (December 4-17, 2004), accessed July 12, 2013, <http://Hinduonnet.com/fline/fl2125>.

<sup>12</sup>Rohit Mullick, Neelam Raaj, “Panchayats turn into Kangaroo Courts”, *The Times of India*, September 9, 2007, accessed July 13, 2014, <http://timesofindia.indiatimes.com/home/stoi/deep-focus/Panchayats-turn-into-kangaroo-courts/articleshow/2351247.cms>.

<sup>13</sup> Ibid.

Khap Panchayat has called for the arrest of the “Self Styled” decision makers and proactive action by the police to protect the fundamental rights of the people. It also asked for the recommendations being converted as directions to all states and the union, till a law is enacted by the parliament.<sup>14</sup>

A Dalit girl in Haryana committed suicide after she was gang raped by four youths. Instead of condemning the incident, the Khap said girls should be married off early so that rapes can be avoided. The Khap has had nothing to say about how it would discipline the perpetrators of rapes.

In Uttar Pradesh, Khap Panchayats in western parts of the state have ruled against women carrying or using mobile phones, wearing jeans or other western attire.<sup>15</sup>

The sheer indifference of politicians and vote-bank politics allows the Khap Panchayat’s writ to run amok. Recently, Congress president Sonia Gandhi visited the residence of the Dalit girl in Haryana who committed suicide after being allegedly gang raped. Though Sonia condemned the incident, she didn’t voice a word against the congress-headed state government.

## **II.1 Muslim Community and Fatwas**

Fatwa is basically an Islamic legal opinion which has its roots in the Islamic history. A fatwa, in the Islamic faith, is the technical term for the legal judgment or learned interpretation that a qualified jurist or mufti can give on issues pertaining to the Islamic Law. In Sunni Islamic law any fatwa is non-binding, whereas in Shia Islam it could be considered by an individual as binding, depending on his or her relation to the scholar. The person who issues a fatwa is called a Mufti, i.e. he gives a formal legal opinion on issues. This is not necessarily a formal position since most Muslims argue that anyone trained in Islamic law may give an opinion (fatwa) on its teachings.<sup>16</sup> However, in modern times, starting from Khomeini’s fatwa against Salman Rushdie, this has become an institution synonymous with creating chaos in the society. Recently, very controversial fatwas related to Muslim women came to limelight in India, and brought dilemmas in the Indian society. This is also highly mythical in the society that fatwa is binding in nature and every Muslim is obliged to follow this. However, being a mere legal opinion, fatwa is not binding at all. It is only Mufti, not even Imam, who alone, can issue fatwa only in response to the query referred to them. It is up to the Mustafti i.e. one who

<sup>14</sup> J. Venkatesan, “Stamp out khappanchayats: court,” *The Hindu*, April 20, 2011, accessed July, 14, 2013, <http://www.thehindu.com/news/national/stamp-out-khap-panchayats-court/article1710337.ece>.

<sup>15</sup> “NDTV- News Home-Khap Panchayat” (for details on various kinds of Khap decisions), accessed July 12, 2013, <http://www.ndtv.com/topic/Khap-Panchayat>.

<sup>16</sup> “Fatwa,” accessed July 12, 2013, <http://en.wikipedia.org/wiki/Fatwa>.

questions, whether to accept the fatwa or not and if he/she is not satisfied with that opinion then he can refer the matter to some other Mufti. These fatwas mostly reflect misogynist tendencies as they are issued by the male clergy. The Quran has given various rights to women in the patriarchal society and uplifted not only their social status but equipped them with several important rights, for example, the right to choose their partner in marriage, the right to divorce, and maintenance rights during and after marriage etc. But despite this, Muslim women more often do not get their rights in practice. Muslim clergy denies their rights and enforces duties on them in reverse manner of the Quran. They often issue Fatwa on women to take back the rights that the Quran has granted them.

Fatwas reflect the misogynist tendencies operating in the garb of religious pluralism/freedom. Religion is exploited by the patriarchal forces to issue anti-woman commands. It is to say that the foremost victims of all these acts are women, be it with regard to the Hindu or Muslim religion.

## **II.2 The issue of Uniform Civil Code**

The Indian state is committed to the modern values of “equality” and “liberty” to all irrespective of caste, creed, sex and religion. However, India’s reservations regarding the implementation of gender equality in the matters of “personal laws” (a freedom given to various religious groups to have their own personal laws instead of a Uniform Civil Code) despite being a signatory to CEDAW and despite its Constitutional commitment to UCC is enough to show the dominance of religious freedom or else that of fundamentalism in the name of religion over universal human rights values of equality and human dignity.

There are a number of discriminatory provisions and practices that deny women equal rights and a treatment based on human dignity that underlies any definition of human rights. For instance, Polygamy is prohibited in India but is permissible for Muslims on religious grounds. Similarly, unequal property rights, discriminatory maintenance laws are a few examples of how human rights of equality are clearly denied to women in different religious communities in India in the name of the freedom of religion. For a long-long time, even in the Hindu Community, a number of inhuman practices, like Sati and widow exploitation existed, in the name of religion. Personal laws were also discriminatory and did not give equal property/inheritance rights to women but the State in the first decade of being a republic initiated reforms in the personal laws of Hindus despite resistance from right wing Hindu organisations like RSS and Hindu Mahasabha. Religious Freedom was clearly made subordinate to the human rights, to equality and human dignity. India despite being a signatory of CEDAW maintained an exception in the matters of personal laws and that any interference/reformation in these laws in the

light of human rights and human equality could be possible only with the consent of the concerned community.

### **II.3 The reassertion of Muslim identity since 1992**

1992 can well be considered a watershed year in the history of India since independence, where except for the brief period of partition, there has never been an incidence of demolition of the religious structure of a minority community. It was in 1992 that the historical Babri mosque was demolished by the so called Hindutava forces. The demolition puts a question mark on the secular credentials of the Indian state and its inability to protect the fundamental freedom of religion to the minority community. It not only widened the rift between Hindus and Muslims but also resulted in the reassertion of Muslim identity.

#### **Conclusion: Where are we going?**

From the above it becomes amply clear that the universality of human rights is watered down by relative culturalism. In India, religious pluralism is creating obstacles in the observance of the universal human rights values of equality and human dignity. It is important to note that it is not due to the liberal tradition implied in the cultural and religious pluralism but due to the obscurantist fundamentalist forces that are responsible for obstructing the adoption of liberal democratic values underlying the human rights philosophy. Therefore there is an urgent need to rethink the issues involved in the implementation of universal human rights. There is a need to make a balance between the religious freedom and human rights. It calls for re-examination as to how far and what kind of religion rights/freedom is/are permissible within the framework of universal human rights philosophy.

This should evolve an adjustment between human rights and religious rights. It needs to be determined as to how far and what kind of religious rights/freedom is/are permissible under the human rights. Religious freedom and human rights can be reconciled in a pluralist state like India by drafting secular laws related to a number of issues pertaining to the problem of violation of human rights such as anti-communal laws, anti-discrimination laws, rape laws, and domestic violence acts where the laws are universal, and gender, caste and religion neutral. With regard to the uniform civil codes aiming at gender equality, state as well as non-state actors, like civil society, need to take initiative, as sensitizing and educating the masses, particularly the minorities, so that there is demand from within the community for reforming the personal laws as it happened in the case of Christians and Parsees. A pro-human rights environment has to be created for sustaining a healthy culturally and religiously plural society.

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