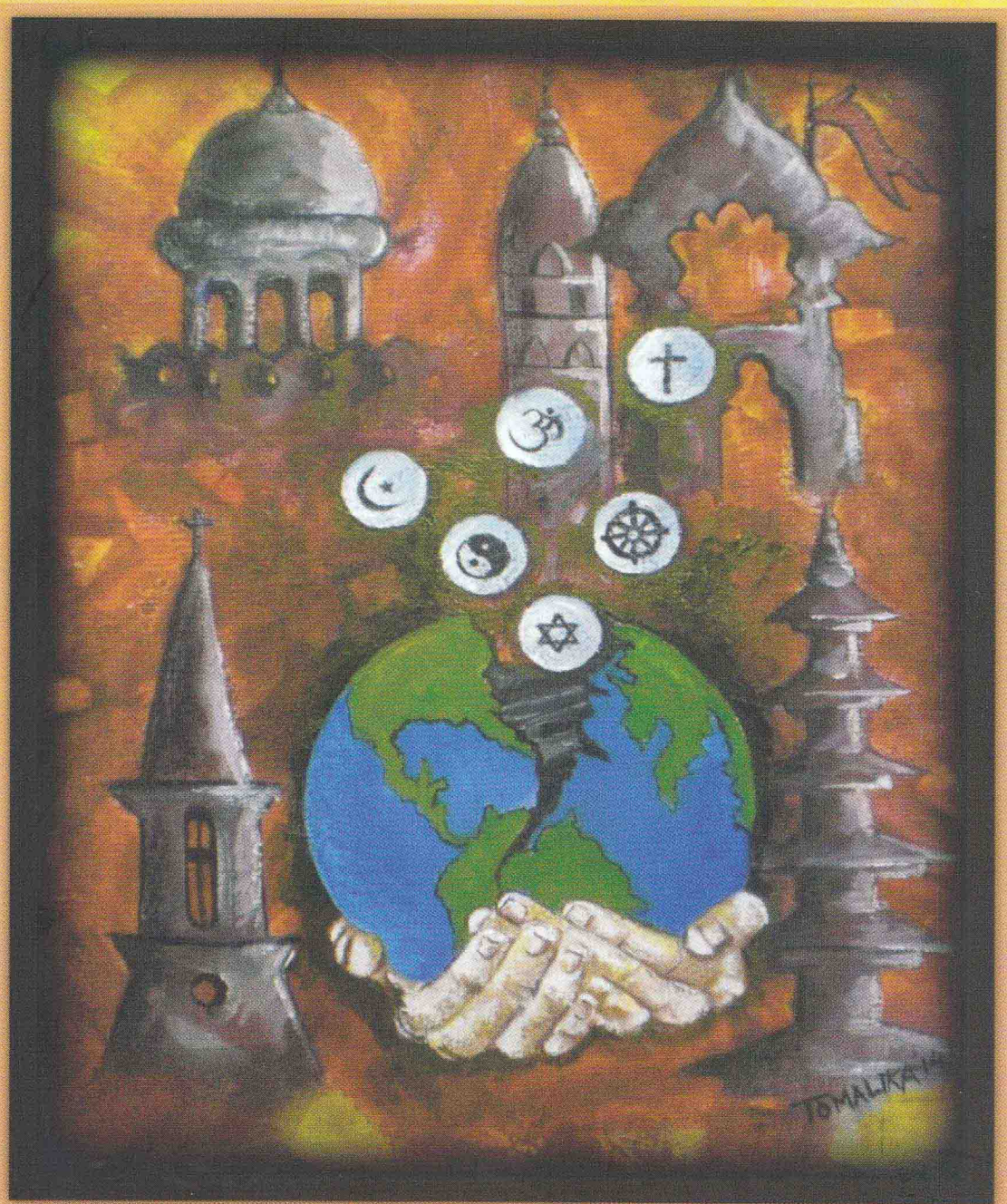


# HUMAN RIGHTS & RELIGION



Executive Editors  
Prof. Dr. Mizanur Rahman  
Prof. Dr. Md. Rahmat Ullah



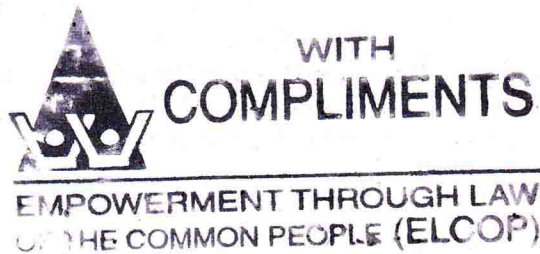
ELCOP Yearbook of Human Rights 2014

# Human Rights and Religion

Executive Editors

**Prof. Dr. Mizanur Rahman**

**Prof. Dr. Md. Rahmat Ullah**



**Published by**

Empowerment Through Law Of the Common People (ELCOP)

Electronic copy available at: <https://ssrn.com/abstract=2523030>



*Professor Dr. Mixanur Rahman*

LLM (Hons), MCL (Cum Laude)

PGD (Distinction), Dip. In Journalism, DICL, Ph.D.

**Chairman, National Human Rights Commission, Bangladesh**

## P r e f a c e

In the contemporary world human rights are all pervading. So much so that international relations in general and foreign policy of many states in particular, today are fashioned by human rights considerations. This has considerable impact on weak and small states. However, this is not the main reason why *Empowerment through Law of the Common People (ELCOP)* engages students of law in human rights discourse. As the name of the organization suggests, ELCOP continues to strive to produce and train a group of lawyers who will dedicate themselves to 'lawyering with the poor' with the ultimate goal of empowerment of the common people. ELCOP calls this new brand of lawyers '*rebellious lawyers*'. *Rebellious lawyers* need not only be adequately equipped with skills of working for and with the poor but also have solid grasp over the latest developments in human rights jurisprudence. This will ensure that their work is never out of context. With this end in view, ELCOP has been dedicating its annual signature event- the Human Rights Summer *School*- to particular themes deemed pertinent and significant. This year's theme is 'Human rights and Religion'.

The question of religion and its relationship with human rights are oft debated issues in human rights discourse. The debate at times takes extreme form in the sense that there are human rights jurists who deny any relationship whatsoever between human rights and religion while there are thinkers and analysts who opine that true human rights are engulfed in religious doctrines and beliefs. Religious practices as evidence of culture and traditions are also put forward as arguments to legitimize the notion of 'cultural relativism'. However, religious extremism in different forms has added a new dimension to understanding the correlation between human rights and religion.

One need not look too far to find examples. Let's take, for example, the dominant religion in Bangladesh, Islam. One author has thus put it: "Today, the same question

haunts the minds of millions of my coreligionists – and millions of others. Is Islam a religion of coercion and repression? Or is it compatible with the idea of liberty – that individuals have full control over their lives and are free to be religious, irreligious, or whatever they wish to be”?

Not all Muslim countries are repressive. Yet every Muslim country still suffers from a deficit of freedom, in varying degrees. Even in the West, some Muslims have proved to be oppressive by reacting violently against those who satirize or even criticize Islam. Given this seemingly rich evidence many people in the West have concluded that Islam as a faith is incompatible with liberty. In the eyes of many Westerners, it is intolerant, suppressive, and even violent religion. Why else, the reasoning goes, would Islamic societies be so unfree?

**An inquisitive mind searches for answers to these questions. Do these criticisms apply only to Islam? Aren't other religions too amenable to these censures?**

**According to a researcher, every religion has a 'core', often a text that is believed to be of some divine origin. Then this core unfolds into history—to be understood, interpreted, and misinterpreted by men. As Islam's divine core, the Qu'ran, entered into human societies, many additional doctrines, rules, practices and attitudes were added to the words of scripture. At certain fateful junctures in Islamic history, some particular interpretations of the Qu'ran prevailed over others – not because they were more valid, but because they were politically or culturally more convenient.**

Thus, the Islam of today carries the weight of fourteen centuries of tradition. Far worse, it even carries the weight of the political crises and traumas endured by Muslims in the past two centuries. The better news is that not only is it possible to reinterpret Islam in newer, fresher ways, there also are signs that these new interpretations are likely to thrive.

Mustafa Akyol, an expert on theology writes: “Could the authoritarian regimes in the Muslim world stem not from Islam but from the deep-seated political cultures and social structures in this part of the world, on which Islam is just a topping? In other words, could authoritarian Muslims be just authoritarians who happen to be Muslim?”

An young and inquisitive mind needs to explore the hidden abundance in mental faculties, unearth the myths around the realities and re-examine the true correlation between human rights and religion, be it Islam or otherwise. The world is inevitably becoming more open, transparent, individualistic, and – obviously- globalized. Whatever is banned will be accessible somehow, only to become more attractive and appealing.

Meanwhile, immutable dictates will only prove the dictator crude, feeble, and tyrannical, thus staining the very image of the religion supposedly being upheld.

Religion emerged to protect the helpless, the poor, the vulnerable and the lost. The same religion cannot be allowed to be used as a weapon to exploit the poor, oppress the helpless, shackle the vulnerable and blind the lost. Religion needs to be re-invented, re-interpreted today as an effective tool for promotion and protection of human rights. That too, is a job for the 'rebellious lawyers'.

Keeping in tune with the tradition, the Yearbook contains articles seemingly having no relationship with religious issues. This, I believe, in no way undermines the inherent quality of the Yearbook designed to introduce the readers with a wider spectrum of human rights and not confining to the narrow theme of the Summer School.

**Professor Dr. Mizanur Rahman**

Chairman

National Human Rights Commission, Bangladesh

And Executive Editor

Dhaka

25 September, 2014



## ACKNOWLEDGEMENTS

The 'ELCOP Year book of Human Rights, 2014' is focusing on: '**Human Rights and Religion**'. It is a publication of scholarly articles specially written for the participants of the 15<sup>th</sup> Human Rights Summer School (HRSS) organized by Empowerment through Law of the Common People (ELCOP). The purpose of this academic effort is to enlighten the participants with different dimensions, contradictions and bridges between the premises of human rights and religion.

The editorial board relentlessly reviewed the articles included in this compendium. We are grateful to **Professor Dr. Abdullah Al Faruque, Professor Zakir Hossain, Dr. Shima Zaman, Mr. Masum Billah, Mr. Shafiqur Rahman Khan, and Mr. Syed Masud Reza** - our fellow colleagues and well wishers of ELCOP. No words of gratitude suffice to truly acknowledge their contribution.

We are specially thankful to **Professor Dr. Mizanur Rahman**, Chairman, National Human Rights Commission (NHRC) and Advisor, ELCOP for his untiring support and inspiration for human rights research, education and campaigning in Bangladesh.

**Mr. A.S.M. Sayem Ali Pathan**, Coordinator HRSS and advocate Supreme Court of Bangladesh took huge trouble in coordinating among the authors, press, volunteers and the Executive Director. He was always on the run to ensure that the time frame is genuinely maintained.

**Mr. Bayazid Hossain and Mr. Mohammad Golam Sarwar**, Faculty of Bangladesh Open University and Eastern University respectively went through the manuscript, did the tedious job of proof reading and diligently assured uniformity of the articles. They made the task much easier for the editorial board. We thank both of them.

**Tomalika Rahmat Ullah**, M.Sc. student of Genetic Engineering Department of Dhaka University designed the cover page. ELCOP is indeed pleased to have such a friend.

**Mr. H. M. Jalal Uddin Chowdhury** of Anindya Computer and Printers extended full cooperation to get the book published in time while maintaining quality and standard.

Our student volunteers for 15<sup>th</sup> HRSS, **Shumi, Borno, Rahul, Joydev, Shimul** worked whole heartedly to organize the HRSS. **Mr. Nazibul Islam Russel**, Program Manager of ELCOP had taken huge trouble in coordinating various official functions. **Md. Osman**

Gani, our office Assistant always sincerely worked for the sake of ELCOP and HRSS. We are really grateful to all of them.

The publication of this Yearbook has been made possible through the generous financial support of the *United Nations high commissioner for Refugees (UNHCR)*, *Manusher Jonno Foundation (MJF)*, *National Human Rights Commission (NHRC)* and many others. Without their help it would not have been possible to organize the 15<sup>th</sup> HRSS. We are indebted to all of them.

We are indebted to every person whose names do not appear here but have been supportive to our endeavour in all possible means.

Despite unceasing efforts the Yearbook may contain a few typographic or textual errors. All such failures are burden of the Executive Editors alone.

**Prof. Dr. Md. Rahmat Ullah**  
Executive Editor and  
Executive Director, HRSS

20 September, 2014

# Contents

Preface  
Acknowledgements  
About the Human Rights Summer School

## Articles

Universalism versus Cultural Relativism in Human Rights Discourse: An Introduction	Dr. Abdullah Al Faruque	1
Poverty Alleviation and Realization of Socio-Economic Rights: Islamic Perspective	Prof. Md. Zakir Hossain	9
Can 'Secularism' and 'State Religion' Go Together?	S M Masum Billah	32
Freedom of Religion in Bangladesh: Constitutional and Human Rights Perspective	Abul Hasanat	52
Humanistic Interpretation of Islamic Law to Eliminate Discrimination	Anisur Rahman Mohammad Golam Sarwar	68
Freedom of Religion and Human Rights: South Asia Perspective	Mohammad Rubaiyat Rahman	80
The Protection of the Children in the Islamic Context: Challenges of Implementation of the Convention on the Rights of the Child by Muslim States	Shafiqur Rahman Khan	91
National Commission for Minorities – Towards a Protection Regime	Tapos Kumar Das	107
Embracing Human Rights in the WTO: Reality or Rhetoric?	Dr. Shima Zaman	125
Rohingya Outcry and Balancing Test: Obligations of Bangladesh under International Instruments and Constitutional Framework	Nahid Rabbi A. B. M. Imdadul Haque Khan	138
Dams and Development: Revisiting Kaptai Hydro-Project in Bangladesh	Dr. Mahfuzul Haque	162



# Freedom of Religion and Human Rights: South Asia Perspective

*Mohammad Rubaiyat Rahman\**

## Introduction

Religion is an all-encompassing normative system, providing a complete value system for all aspects of life.<sup>1</sup> It influences important aspects of human life through marriage, divorce, birth, death and family status. Since religion is part of one's personal identity, the religious communities and organizations should themselves be required to respect rights of individuals.

Emile Durkheim deems religion as simply one aspect of a more general question of classification. Religion became the dominant interest of Durkheim's sociology towards the end of his intellectual development.<sup>2</sup> According to him, religion involved the classification of phenomena into the sacred and profane things that are set aside and forbidden.<sup>3</sup> In comparison, Max Weber was interested in the study of religions in all of their complexity and diversity in the comparative study of human civilizations. He contends that a satisfactory definition of religion could only be attempted as the conclusion to scholarly research.<sup>4</sup> Religions, which pre-date the state as source of power, was considered to be on the wane with the emergence of modernity, but in today's world the conflicts surrounding religion, state, human rights, individuals and collectives, and national and international law are as prominent as ever.<sup>5</sup> The study of religious freedom and human rights has particular importance. The idea and the morality of religions differ from the idea and ideology of human rights in their sources and in the bases of their authority; in the forms in which their respective moral codes are given expression.<sup>6</sup>

Traditionally, human rights law has addressed the public realm, the abuse of citizen's rights by the state. To advance religious freedom, however, it must go beyond obstacles formed by state or religious groups and address abuse of individual rights.<sup>7</sup> Human

---

\* LL.M. student at Tulane University Law School, U.S.A. E-mail: [rubaiyat007@gmail.com](mailto:rubaiyat007@gmail.com)

<sup>1</sup> Anat Scolnicov, *The Right to Religious Freedom in International Law* (1st, Routledge, Oxford 2011) 1

<sup>2</sup> Bryan S Turner, *Religion and Modern Society* (1st, Cambridge University Press, Cambridge 2011) 3

<sup>3</sup> Ibid.30

<sup>4</sup> Ibid.4

<sup>5</sup> Anat Scolnicov, *The Right to Religious Freedom in International Law* (1st, Routledge, Oxford 2011) 219

<sup>6</sup> Louis Henkin, 'Religion, Religions, and Human Rights' [1998] *The Journal of Religious Ethics* 229, 231

<sup>7</sup> AnatScolnicov, *The Right to Religious Freedom in International Law* (1st, Routledge, Oxford 2011) 221

Rights values have sought secular underpinnings in the concept of human dignity. The human rights idea has valued autonomy and individual freedom, sometimes above order and community.<sup>8</sup> However, religions seem to have overcome (or suppressed) earlier discomfort with the human rights idea. As religions have defined themselves as nearly identical with morality, as ideological differences have thinned and narrowed, human rights have become religiously acceptable, even welcomed. As human rights have become the political idea and ideology of modern times, religions have come to embrace it.<sup>9</sup>

### Curious Nexus of Freedom of Religion and Human Rights

To comprehend the nexus between human rights and religion, it is primary requisite to delve into both concepts on their own terms.<sup>10</sup> It is a central concept of international human rights law that human rights are for all. Everyone everywhere is entitled to equal human dignity and rights as it is expressed in the Universal Declaration of Human Rights.<sup>11</sup>

Human rights norms have grown in international law out of long standing religious and cultural traditions. They have *traditionally* provided a forum as well as focus for subtle and sophisticated philosophical, theological, and political reflections on the common good and our lives.<sup>12</sup> Freedom of religion is a seeming contradiction in terms. Freedom is the absence of constraint; religion is a self-imposed constraint on freedom. Freedom of religion is thus a unique branch of human right. The right to freedom of religion is a core right that was entrenched in international law before many other human rights. During his speech to the US Congress, President Roosevelt mentioned it in his famous 'Four Freedom' (freedom of speech and expression; freedom of every person to worship God in his own way; freedom from want; and freedom from fear).<sup>13</sup> Ninian Smart, a Scottish writer and pioneer in the field of secular religious studies, begins his classic work on

---

<sup>8</sup> Louis Henkin, 'Religion, Religions, and Human Rights' [1998] *The Journal of Religious Ethics* 229, 235

<sup>9</sup> *Ibid.* 229, 236

<sup>10</sup> Clemens N Nathan, *The Changing Face of Religion and Human Rights* (1st, MartinusNijhoff Publishers, Leiden 2009) 25

<sup>11</sup> Kevin Boyle, 'Freedom of Religion in International Law' in JavaidRehman and Susan C. Breau (eds), *Religion, Human Rights and International Law* (1st, MartinusNijhoff, Leiden 2007)

<sup>12</sup> John Witte, Jr. and M. Christian Green, 'Religious Freedom, Democracy and International Human Rights' [2009] *Emory International Law Review* 583, 590

<sup>13</sup> Christine Chinkin, 'Women's Human Rights and Religion' in JavaidRehman and Susan C. Breau (eds), *Religion, Human Rights and International Law* (1st, MartinusNijhoff, Leiden 2007)



religious experience ('The World's Religion') with the claim that 'to understand human history and human life it is necessary to understand religion'.<sup>14</sup>

The role of religion in the international public sphere has become a focal point of attention for scholars of international relations. Huntington, in his two influential articles, 'The Clash of Civilizations?' and 'The West: Unique, not Universal', argued that world politics are entering a new phase in which fundamental conflicts will not be between nation-states, or even ideological or political rivals, but between civilizations and these are differentiated from each other by their history, language, culture, tradition, and, most importantly, religion.<sup>15</sup>

Human rights not only protect religions, but also have come to serve religious ethics in respects and contexts where religion itself has sometimes proved insufficient. Human rights are, at least, a supplemental 'theology' for pluralistic, urban, secular societies; where, religions can accept if not adopt the human rights idea as an affirmation of their own values, and can devote themselves to the larger, deeper areas beyond the common denominator of human rights.

Louis Henkin, a legal scholar who pioneered the study of human rights law, aptly illustrates the nexus:

'... in the world we have and are shaping, the idea of human rights is an essential idea, and religions should support it fully, in every way, everywhere.'<sup>16</sup>

### **Freedom of Religion in the Regime of Human Rights**

The emergence of a legal principle of religious freedom parallels the emergence of international law itself.<sup>17</sup> The Peace of Westphalia Treaties in 1648 concluded the 'Thirty Years War' by setting up a regime of states with different Protestant faiths, obliging them to respect the diverging religious beliefs of individuals subject to their jurisdiction.<sup>18</sup> During preceding centuries, the international version of religious freedom evolved as constitutionally protected right in various national legal systems with focus on the treatment of religious minorities.<sup>19</sup> The historical development of the right to 'freedom of religion' and its incorporation in international legal documents reflect a move from

---

<sup>14</sup> Clemens N Nathan, *The Changing Face of Religion and Human Rights* (1st, MartinusNijhoff Publishers, Leiden 2009) 44

<sup>15</sup> AnatScolnicov, *The Right to Religious Freedom in International Law* (1st, Routledge, Oxford 2011) 226

<sup>16</sup> Louis Henkin, 'Religion, Religions, and Human Rights' [1998] *The Journal of Religious Ethics* 229, 239  
<sup>17</sup> *Supra* note 15.

<sup>18</sup> Malcom Evans, *Religious Liberty and International Law in Europe* (1st, Cambridge University Press, Cambridge 1997)

<sup>19</sup> Allen D. Hertzke, *The Future of Religious Freedom* (1st, OUP, Oxford 2013) 32

protection of groups to recognition of the rights of the individual.<sup>20</sup> While the current protection of religious freedom under international law is based on individual rights, a growing trend will be seen, reflected in proposed international documents and some regional documents towards recognition of group rights.<sup>21</sup>

The era of modern protection of freedom of religion started after the First World War. The 1919 Minorities Treaty committed Poland to conform non-discrimination of religious minorities, equal funding for educational, religious and charitable causes of minorities, and specifically Jewish education as well as an undertaking not to disadvantage Jews. The Council of the League of Nations had monitored the Minorities Treaty.<sup>22</sup> However, the historical failure of the Minority Treaties in protection of minority group played an important role in the shift towards protection of individual rights. The Treaty was failed in enforcement, and, ultimately, it had been used by Hitler as pretext for the invasion of Poland, and start of the Second World War. The approach to the protection of human rights in the international arena changed from minority protection approach to a conception of universal individual rights as manifested in the early documents of the United Nations.<sup>23</sup>

After the scourge of the Second World War, freedom of religion and conscience has veered into one of the foundational rights in the system of international human rights instruments. Beginning with Article 18 of the 1948 Universal Declaration of Human Rights<sup>24</sup>, religious freedom also is provided for in the International Covenant on Civil and Political Rights<sup>25</sup>, the Helsinki Accords<sup>26</sup>, the European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>27</sup>, and the U.N. Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or

---

<sup>20</sup> AnatScolnicov, *The Right to Religious Freedom in International Law* (1st, Routledge, Oxford 2011) 9

<sup>21</sup> *Ibid.* 9

<sup>22</sup> *Ibid.* 10

<sup>23</sup> J. Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent* (1st, University of Pennsylvania Press, Philadelphia 1999) 27

<sup>24</sup> G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948)

<sup>25</sup> U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* on Mar. 23, 1976.

<sup>26</sup> The Helsinki Accord (Adopted on 1 August 1975) Conference on Security and Cooperation in Europe (CSCE) 14 ILM 1292

<sup>27</sup> Convention for the Protection of Human Rights and Fundamental Freedoms [1950] CETS no. 194 <[http://www.echr.coe.int/Documents/convention\\_ENg.pdf](http://www.echr.coe.int/Documents/convention_ENg.pdf)>



Belief.<sup>28</sup> In 1986, the UN Commission on Human Rights formed the Office of the Special Rapporteur on Freedom of Religion or Belief.<sup>29</sup>

The Universal Declaration of Human Rights, adopted on 10 December 1948, mentions in Article 18 that everyone has the right to freedom of thought, conscience and religion and freedom to manifest his or her religion or belief in teaching, practice, worship and observance. Similar essence is evident in article 27 of the International Covenant on Civil and Political Rights (ICCPR).<sup>30</sup>

According to Louis Henkin, a legal scholar who pioneered the study of human rights law, 'The Universal Declaration is not anti-religious; rather it is a magnificent articulation of our common morality, and an essential support for religion, for religions, for humankind, in the troubled hopeful world at the new millennium'.<sup>31</sup>

The International Covenant on Economic, Social and Cultural Rights<sup>32</sup> (ICESCR) mandates that all the rights which are included in that Covenant must be exercised without discrimination on certain grounds, including religion. In addition to that, article 27 of the ICCPR enumerates that the right of persons belonging to ethnic, religious or linguistic minorities, to enjoy their culture, process and practice their religion and use their language.

The Human Rights Committee is the independent expert organ assigned to monitor states' compliance with the International Covenant on Civil and Political Rights.<sup>33</sup> The Human Rights Committee stated that this is an individual right, but may give rise to duty of State towards a minority to protect its identity. This is clearly different from a group-based right of religious freedom.<sup>34</sup> The UN Human Rights Committee (in its General Comment to Article 18 of the UDHR) has not considered the establishment of religion of itself as an infringement of religious freedom.<sup>35</sup>

<sup>28</sup> Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (Adopted on 25 November 1981) UNGA A/RES/36/55

<sup>29</sup> Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (Adopted on 14 December 2007) Human Rights Council Resolution 6/37.

<sup>30</sup> Adopted 16 December 1966, 999 UNTS 171

<sup>31</sup> Louis Henkin, 'Religion, Religions, and Human Rights' [1998] *The Journal of Religious Ethics* 229, 234

<sup>32</sup> Adopted 16 December 1966, 999 UNTS 3

<sup>33</sup> Martin Scheinin, 'The Human Rights Committee and Freedom of Religion or Belief' in Tore Lindholm et al (eds), *Facilitating Freedom of Religion or Belief* (1st, Springer, New York 2004) 190

<sup>34</sup> General Comment 23 (CCPR/C/21/Rev. 1/Add, 5) para. 6.2

<sup>35</sup> AnatScolnicov, *The Right to Religious Freedom in International Law* (1st, Routledge, Oxford 2011) 68

The 1981 UN Declaration on the Elimination of All Forms of Intolerance and Discrimination<sup>36</sup> is based on Religion and Belief. It is the most elaborate international instrument on religious rights and freedoms to present date.<sup>37</sup> However, the 1981 Declaration is silent on the subject of what is a permissible status of religion in the state.<sup>38</sup> The Declaration elaborates the religious liberty provisions that the ICCPR adumbrated. The Declaration also sets forth a lengthy, illustrative catalogue of freedoms that emphasizes more concretely the guarantees of ICCPR. It is pertinent to mention here that although the 1981 Declaration cannot be brought under formal sources of law within the categories of Article 38 (1) of the Statute of the International Court of Justice, the resolution is very significant for the development of customary international law.

Although CEDAW itself does not have any express provision dealing with discrimination of women on religious grounds; the Convention has several pertinent articles dealing with the elimination of practices based on the inferiority of gender (article 5), right to vote and hold public office (article 7), access to health care including family planning (article 12), equality before the law (article 15), and prohibition on discrimination in marriage (article 16). The General Comment 28 to the ICCPR, which is adopted by the Human Rights Committee in 2000 as an updated General Comment on Article 3 (equality between men and women) addresses the human rights concerns of equality between the genders, including those raised by the right to freedom of religion.<sup>39</sup>

The 1992 Minorities Declaration<sup>40</sup> recognizes the right to self-determination of groups within pluralistic societies. The Declaration recognizes 'the promotion and protection of the rights' of religious, cultural, and linguistic minorities as an integral part of the development of society as a whole and within a democratic framework based on the rule of law.<sup>41</sup>

### **Freedom of Religion in South Asia**

There is an important relation between the stance of the state towards religion and the degree of religious freedom in the state.<sup>42</sup> The status of religion in the state, the degree of state involvement with religion and regulation of religion, are relevant not only to the

<sup>36</sup> G.A. res. 36/55, 36 U.N. GAOR Supp. (No. 51) at 171, U.N. Doc. A/36/684 (1981).

<sup>37</sup> UNGA Res. 36/55 adopted 25 November 1981

<sup>38</sup> AnatScolnicov, *The Right to Religious Freedom in International Law* (1st, Routledge, Oxford 2011) 68

<sup>39</sup> Ibid. 128

<sup>40</sup> Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (Adopted 18 December 1992) UNGA A/RES/47/135

<sup>41</sup> John Witte, Jr. and M. Christian Green, 'Religious Freedom, Democracy and International Human Rights' [2009] *Emory International Law Review* 583, 592

<sup>42</sup> AnatScolnicov, *The Right to Religious Freedom in International Law* (1st, Routledge, Oxford 2011) 67



degree of religious freedom, but also to its interpretation. In South Asia, religion is deemed as pivotal marker of identity and tool of political mobilization. It is evident that the world's most populous region has been vying to find balance between absence of religion in politics and use of politics to tilt edge social power and political party.<sup>43</sup>

In Afghanistan, the dominant religion has been Islam. The 2004 constitution of Afghanistan proclaims that 'followers of other religions are free to exercise their faith and perform their religious rites within the limits of the provisions of law'. Article 2 of the constitution of Afghanistan explicitly states that followers of religions other than Islam are 'free to exercise their faith and perform their religious rites within the limits of the provisions of the law'.<sup>44</sup> A stark feature of Afghanistan Constitution is that the provision of Article 7 includes a mandate to abide by the Universal Declaration of Human Rights and obliges the state to 'create a prosperous and progressive society based on social justice, protection of human dignity, protection of human rights, realization of democracy, and to ensure national unity and equality among all ethnic groups and tribes'. However, non-Muslim minority groups, particularly Christian, Hindu, and Sikh groups, are rigged with discrimination and persecution. It is frequent for minority groups to encounter problems obtaining land for cremation and historically have faced discrimination when seeking government jobs, as well as harassment during major religious celebrations. Therefore, effective enforcement of the 2004 constitution is still a daunting challenge due to its potentially contradictory commitments, and the lack of a tradition of judicial review.<sup>45</sup>

In accordance with Constitutional provisions of articles 2A and 8, Bangladesh is a secular nation.<sup>46</sup> The state mechanism provides protection for all religious sections. Yet religious tension does exist. After its independence in 1971, Bangladesh was established as a secular state. However, in 1988, the eighth amendment to the constitution declared Islam as the state religion. The concept of freedom of religion is further stipulated in Article 41 of the Constitution of Bangladesh, which enumerates that every citizen has the right to profess, practice or propagate any religion. In February 2010, the Appellate Division of the Supreme Court ruled<sup>47</sup> that the elements of the Fifth Amendment to the constitution

<sup>43</sup> Ali Riaz, 'Three Arguments about the Religion Politics Nexus' in Ali Riaz (eds), *Religion and Politics in South Asia* (1st, Routledge, 2010).

<sup>44</sup> Freedom of Thought 2013: A Global Report on the Rights, Legal Status, and Discrimination Against Humanists, Atheists, and the Non-religious' (Freedom of Thought Report 2013) <<http://freethoughtreport.com/about-the-report/>> accessed 31 July 14

<sup>45</sup> Bureau of Democracy, Human Rights and Labor, 'Afghanistan' (US Department of State 2010) <<http://www.state.gov/j/drl/rls/irf/2010/148786.htm>> accessed 2 Sept 14

<sup>46</sup> Susan S Wadley, *South Asia in the World* (1st, M.E. Sharpe, 2013) 90

<sup>47</sup> Writ Petition of 6016 of 2000

were unconstitutional. The ruling paved the return of secularism to the constitution and nominally banned religious political parties.<sup>48</sup>

Freedom of religion is a salient feature of the Constitution of India.<sup>49</sup> However, each state of India has distanced itself from the religion.<sup>50</sup> The word 'secular' had been inducted into the wording of the preamble of the Constitution of India. Under Article 25 of the Constitution, all persons are equally entitled to freedom of conscience and the right to freely profess, practice, and propagate religion subject to public order, morality, and health. Article 26 provides every religious denomination a fundamental right to manage its own affairs in matters of religion. Article 29 gives the absolute and unqualified right to minorities to protect the respective language, script and culture.<sup>51</sup> Under the 1992 National Commission for Minorities Act, five religious communities--Muslims, Sikhs, Christians, Parsis, and Buddhists--were considered minority communities. On January 20, 2014, the Government of India awarded the 'national minority' status to the Jain community in India, as per wordings of Section 2(c) of the mentioned Act.<sup>52</sup> Nevertheless, incidents of communal attacks on religious minorities and their property is common in India.

Pakistan emerged as an independent Muslim state on the world map on 14 August 1947. Religion played a vital role in its creation. The analysis of the religious provisions of three different constitutions of Pakistan demonstrates the degree of importance attached to religion in its constitutional system. In the 1956 Constitution, Islam was not made the state religion; nevertheless, Pakistan was declared an Islamic Republic. Teaching of the Koran was made compulsory. The head of state was to be a Muslim. Article 197 empowered the President to set up 'an organization for Islamic research and instruction in advanced studies to assist in the reconstruction of Muslim society on truly Islamic bases'.<sup>53</sup> In the 1973 Constitution of Pakistan, Islam is declared as the state religion (article 2). The President as well as the Prime Minister of the country must be Muslim. Article 29 states that no law shall be made that are repugnant to the Koran and article 227

<sup>48</sup> Bureau of Democracy, Human Rights and Labor, 'Bangladesh' (US Department of State 2010) <<http://www.state.gov/j/drl/rls/irf/2010/148789.htm>> accessed 2 Sept 14

<sup>49</sup> Bureau of Democracy, Human Rights and Labor, 'India' (US Department of State 2010) <<http://www.state.gov/j/drl/rls/irf/2010/148792.htm>> accessed 2 Sept 14

<sup>50</sup> Gerald J Larson, *Religion and Personal Law in Secular India* (1st, Indian University Press, 2001) 24

<sup>51</sup> Ibid. 25

<sup>52</sup> 'Jains Granted Minority Status' (The Hindu 2014) <<http://www.thehindu.com/news/national/jains-granted-minority-status/article5598368.ece>> accessed 2 Sept 14

<sup>53</sup> Niaz A Shah, *Women, the Koran and the International Human Rights Law* (1st, MartinusNijhoff Publishers, Leiden 2006) 95



requisites that all existing laws shall be brought in conformity with the injunctions of Islam.

It is a common practice in Pakistan that Religious parties opposing any amendments to the constitution affecting its Islamic clauses. In 2010 the 18th Amendment of the constitution was passed without amending constitutional clauses affecting minorities. The punishment for contravening the country's blasphemy laws is death penalty. However, in any incident where minority group claims its religious feelings are insulted, the blasphemy laws are rarely enforced, and any case is rarely brought to the legal system.<sup>54</sup> The existence of effective politico-religious factions is common reality in Pakistan. Another political reality is that power invariably remained in the hands of non-Islamic parties despite the fact that religious groups remained a formidable force and did exert pressure mainly through street demonstrations. Military juntas have always dislodged popularly elected governments, leading to the alienation of mainstream political parties. The option for military rulers was to win over the support of religious-political factions. So the religious outfits were made part of the military administration and their demands were heeded leading to the introduction of their brand of an Islamic system in the country. This provided some political and popular support to the military regimes.<sup>55</sup> Fundamentalist groups became a part of various military juntas and their interpretation of Islam informed the process of legislation. The friendship of military and fundamentalists give birth to several laws based on their interpretation of Islam. According to the opinion of Niaz A Shah, it seems that the ultimate aim was the politics of Islam, not the introduction of real Islam. Playing the politics of religion has served the purposes of its proponents but has seriously undermined women's human rights.<sup>56</sup>

In Nepal, proselytizing (i.e. conversion to other religion) is illegal and punishable by fines, imprisonment, or, for foreigners, expulsion. The government enforced the immigration laws that provide for expelling any foreign workers found proselytizing. However, Personal conversion is allowed. Nevertheless, such ban on proselytism limited the expression of minority religious belief.<sup>57</sup>

---

<sup>54</sup> Bureau of Democracy, Human Rights and Labor, 'Pakistan' (US Department of State 2010) <<http://www.state.gov/j/drl/rls/irf/2010/148800.htm>> accessed 2 Sept 14

<sup>55</sup> Niaz A Shah, *Women, the Koran and the International Human Rights Law* (1st, Martinus Nijhoff Publishers, Leiden 2006) 104

<sup>56</sup> Ibid.106

<sup>57</sup> Bureau of Democracy, Human Rights and Labor, 'Nepal' (US Department of State 2010) <<http://www.state.gov/j/drl/rls/irf/2010/148798.htm>> accessed 2 Sept 14

In countries of South Asia, complicated sets of laws are used to govern personal law of different religious denominations. A codification of the various personal laws began during colonial rule, and continued after independence. In India, the personal law is the law of the individual's religious community, and it is applied in the secular courts. In Bangladesh, like its neighboring countries, personal law is the religious law of the individual's religious community. As in India, it is applied in the secular court system, in the Family Courts.<sup>58</sup> In Sri Lanka, family law is communal, religious or customary. However, there is a separate jurisdiction only for the Muslim minority religious courts. The substantive law is the religious law, but the religious courts are subject to the general court system. However, judgments of the religious court can be ultimately appealed to the (secular) Supreme Court of Sri Lanka.

The protection of women's freedom of religion and belief is a paradigm test case of the conflict between religious freedom as a community right and the rights of individuals in that community.<sup>59</sup> The legal regime of South Asian countries is explicitly subliminal regarding the issue. Moreover, deficit of protection of such right avails women little influence over the rules of the community in which they live.

## Conclusion

The construction of the right of 'freedom of religion' must be dealt with elements of constraint as well as freedom. Therefore, the interpretation and protection of religious freedom as a human right is more complicated than that of other forms of human rights.<sup>60</sup> Discrimination in tandem with intolerance, in matters of religion or belief, is still a feature of violation of human rights in the present world. Freedom of religion is also closely linked with a region's social as well as political stability.

Significance of peace and stability of the region is vital not only to eight South Asian States but also to world economy, security and political stability. South Asia, where religion plays vital role in the state governance, has been rigged with menacing religious extremism. In South Asia, freedom of thought, conscience, religion and belief is far from being universally enjoyed. Religious persecution of minority faiths, forcible conversion, desecration of religious sites, the proscribing of beliefs and pervasive discrimination, killings and torture, are common occurrences in the region. Abuse of religious freedom hints absence of good governance, rule of law in tandem with derogation of human rights. There is recognition of freedom of religion, explicitly or impliedly, in the text of South Asian States' Constitution. Ironically, this indispensable freedom is always under thicket of appalling violence in every corner of the region.

<sup>58</sup> AnatScolnicov, *The Right to Religious Freedom in International Law* (1st, Routledge, Oxford 2011) 131

<sup>59</sup> Ibid.126

<sup>60</sup> Ibid.1



The countries of South Asia should view their religious diversity as regional strength, and demonstrate to the rest of the world how to balance religious identity and nationality with a view to gilt-edge human rights. To champion human dignity and freedom of religion, a regional human rights mechanism enables various advantages.<sup>61</sup> Countries of the same region often share common cultural traditions and political history, which are well observed in South Asia. Thus, governments of the region may find it easier to reach consensus on the content of rights and to endow a regional court with meaningful enforcement powers.<sup>62</sup> It provides strong incentive to promote and protect human rights within the region.

According to the wordings of the Paris Principles<sup>63</sup>, national human rights institutions should privilege independence from grappling bulwarks of state mechanism, and should have vested with broad human rights mandate and resource to perform its functions. However, the National Human Rights Commissions of South Asia region has been facing stumbling challenges from state mechanisms and civil society in ensuring freedom of religion. Legal obstacles, deficit of proper executive power are creating bulwarks against the function of those institutions. In a workshop on June 2014, organized by a civil society forum under the rubric of 'Building Consensus for a South Asia Human Rights Mechanism', regional initiative for South Asia Human Rights Mechanism has been convened through the 'Lahore Declaration'.<sup>64</sup> The pivotal focuses of the workshop have been to sort out various lacunas in order to assure human rights for common people in South Asia, and also to outline the avenues that can be deemed to be promising in the future. The 'Lahore Declaration' emphasizes the rationale and need for a regional human rights mechanism for South Asia to promote and protect the pluralistic nature of the region. The Declaration also notes that such regional mechanism would provide broader adherence of States and address common human rights issues including rights of minorities and protection of women and children from violence. Such regional mechanism, consisting of National human rights commissions of South Asian countries, would be apt not only to ensure and safeguard freedom of religion but also to address effectively the issue of right to religious freedom to ensure human dignity. There needs coherent mechanism in South Asia to put into place that ensures human rights of freedom of religion that is guaranteed for all.

---

<sup>61</sup> Carole J. Petersen, 'Bridging the Gap?: The Role of Regional and National Human Rights Institutions in the Asia Pacific' [2011] *Asia Pacific Law and Policy Journal* 174

<sup>62</sup> Carole J. Petersen, 'Bridging the Gap?: The Role of Regional and National Human Rights Institutions in the Asia Pacific' [2011] *Asia Pacific Law and Policy Journal* 174, 184

<sup>63</sup> G.A Res. 48/134, U.N Doc. A/RES/48/134 (1993)

<sup>64</sup> 'Calling for a Regional Human Rights Mechanism in South Asia' (Forum-Asia 2014) <<http://www.forum-asia.org/?p=17335>> accessed 2 Sept 14