THE CONCEPT OF ASSIMILATION AND THE RIGHT TO FREEDOM OF RELIGION

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ABSTRACT

The Right to freedom of religion has been evolved through the historical debates, deliberations and consensus, and reached the status of universally recognized indispensable fundamental right which has the status of Jus Cogens. It is only subjected to very limited restrictions under the international conventions. On the other hand, the concept of assimilation is a process which requires different communities who belonged to different cultural, racial and religious backgrounds to agree voluntarily to relinquish their diverse identities and assimilate into one dominant culture of that state. While the right to freedom of religion is deservedly recognized in several states, it is also subject to certain restrictive tests in several other states. The various theories/tests are being used as the tools to restrict this right in these states. Although, the courts in these states and The European Court of Human Rights sanction some of the arguments presented by these states to restrict this right, these restrictions contradict the requirements imposed on the states under the international law to protect, preserve and promote the same. Hence, this paper will focus on this problem with the view of examining the position of the international law in the context of domestic law contradictions.

Keywords: Assimilation, Religious Freedom, International Conventions, Restrictions, Criticisms.

INTRODUCTION

The word 'Assimilation' in the context of political and social formation, could be described as a process in which distinct, different, dissimilar, disparate and divergent groups are being brought into a common culture and merged them together formally and socially. It is an attempt or a process to homogenize the heterogeneous people into one dominant culture, notion and value and, thereby, tolerating disappearance of the cultures and values of other people. According to H.G. Duncan, the assimilation "is a process, for the most part consciously, by which individuals and groups come to have sentiments and attitudes similar to those held by other persons or groups in regard to a particular value at a given time."[i]

Hence, the process of assimilation demands the understanding, acceptance, consciousness, consensus, agreement and unanimity among the different and disparate groups to sacrifice their respective cultures for the sake of embracing one common dominant culture. If the diverse people do not want to give up their own cultures or forsake their respective identities, then any attempt to dissolve their cultures from practice or demanding them to sacrifice their distinct identities will no doubt, constitute a force assimilation process which is a prima facie infringement of human rights and also an act of disregarding, disrespecting and violation of international law. This is because the forcing of different groups directly or indirectly within the state, who want to uphold and preserve their respective identities and to maintain their religious, cultural or social differences is an injurious attempt, to erode away multi-culturalism or pluralism which is not only a universally accepted norm, but importantly it is much stressed international law in the major international forums. The process of assimilation may be suitable for a homogeneous society where the people belong to one culture, race, language, religion, etc., but it is neither realistic nor practicable for a heterogeneous society where the diversity is indispensably entrenched.

The multiculturalism or pluralism was recognized as a part of the modern political system, especially in the states where the diverse communities live and where the diversity is the hallmark of those states. The pluralism is not only supported by the national, moral, ethnic or liberal ideologies, but it is also a mandatory requirement under the international law which imposes duties on the state to protect, preserve and uphold the rights of all minority groups with the respective states. Several states have directly or indirectly recognized legal and moral position of their respective states in recognizing the multiculturalism. For instance, Canada

enacted The Canadian Multiculturalism Act (1985) which is described as the act for the preservation and enhancement of multiculturalism in Canada.[ii] The section 3 (1) a, of the Act recognizes and promotes the understanding that multiculturalism reflects the cultural and racial diversity of Canadian society and acknowledges the freedom of all members of Canadian society to preserve, enhance and share their cultural heritage, and the section 3(1) b, explicitly states that multiculturalism is a fundamental characteristic of the Canadian heritage and identity and that it provides an invaluable resource in the shaping of Canada's future(Canadian Multiculturalism Act (1985).[iii]

WHO ARE THE MINORITIES?

The Article 2 of the Universal Declaration of Human Rights enacts "everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[iv] The art. 27 of the International Covenant on Civil and Political Rights states: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language".[v] The Article 1 of The United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (1992) provides that "States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity," and this article also imposes a duty on the state to adopt appropriate legislative and other measures to achieve those ends.[vi] Its Art 2 states 'Persons belonging to national or ethnic, religious and linguistic minorities (hereinafter referred to as persons belonging to minorities) have the right to enjoy their own culture, to profess and practise their own religion, and to use their own language, in private and in public, freely and without interference or any form of discrimination.[vii]

This UN Declaration also imposes a positive duty on the states requiring them to take measures to ensure that persons belonging to minorities may exercise fully and effectively all their human rights and fundamental freedoms without any discrimination and in full equality before the law.[viii] Hence, according to the United Nations Conventions and Declarations, the minorities

who could establish that they either belonging to national or ethnic or cultural, religious or linguistic groups could claim the rights enshrined under the respective international conventions and declarations.

FREEDOM OF RELIGIOUS RIGHTS

The freedom of religion is a distinctive right as it encompasses both individual and collective right (the rights of the religious community). Historically, it was regarded as the one of the first recognized human right,[ix] and accepted as the fundamental right of the man.[x] The right to the religion was a foundation of Human Right ideology as it has the status of jus cogens (a peremptory norm) and customary international law.[xi] It is also part of Jus Gentium (law of nations) and a part of Lingua Franca (universal language) because the language of human rights has become the moral lingua franca.[xii]

The right to freedom of religion has to be read with the right to freedom of thought and conscience as this right is habitually and consistently combined with the freedom of conscience and thought. In this context, the freedom of religion also constitutes a freedom to express one's faith or religion manifestly.

INTERNATIONAL BILL OF RIGHTS

The international community has universally and unanimously agreed to establish several international conventions which impose a duty on the states to protect, preserve and promote the right to freedom of religion along with other human rights. It commenced with the reference made by the Art. 22(5) of the Charter of League of Nations (1920) which provides that… "The Mandatory must be responsible for the administration of the territory under conditions which will guarantee freedom of conscience and religion, subject only to the maintenance of public order and morals…"[xiii] However, though the League of Nations became obsolete because the US did not become a member of it and the eruption of the second world war, the reference to the religious right in the League Charter though in a limited manner is relevant as it also contributed a wider acceptance of this right under the United Nations Charter (1945) where its preamble states "We the peoples of the United Nations determined…to reaffirm faith in fundamental human rights, in the dignity and worth of human person, in equal rights of men

and women and of nations large and small".[xiv] These wordings should be read with the Art.1 (3) of the UN Charter which states "the purpose of the United Nations are…to achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without any distinction as to race, sex, language, or religion."[xv]

However, the universal application of freedom of religion as law making provisions and part of the international treaty law was first recognized in The International Covenant on Civil and Political Rights (ICCPR-1966), where its art. 18 states "Everyone shall have the right to freedom of thought, conscience and religion.[xvi] This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest religion or belief in worship, observance, practice and teaching.," and the art. 18(2) states that "no one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice." However, the art. 20 of the ICCPR has inserted an important provision which imposes a duty on the states to prevent positively any hate campaign against any religious group as this art states "in advocacy of hatred which amounts to incitement to discrimination, hostility or violence must be protected by law." [xvii] Some states give special importance to enforce this provision as this becomes necessary to keep the unity of any state, especially multicultural states where diverse community coexist.

For instance, the Section 16(2) of the South African Constitution (1996), which makes a solitary exception to the freedom of expression (free speech), has enshrined that "the right to freedom of expression does not extend to (a) propaganda for war; (b) incitement of imminent violence; or (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm."[xviii] This provision is further consolidated by Section 10 of the South African Equality Act (2000) provides that no person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds as stated in the Equality Act, against any person, that could reasonably be construed to demonstrate a clear intention to (a) be hurtful; (b) be harmful or to incite harm; (c) promote or propagate hatred".[xix] The South African authority also sought to bring The Prevention and Combating of Hate Crimes and Hate Speech Bill (Hate Speech Bill) to criminalize hate speech. The Kenya is also taking a similar line of preventing measure through legislative measures.[xx]

The Art 2 of The International Covenant of Economic, Social and Cultural Rights (1976) also stresses the state duty to prevent discrimination against any kind of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status", and the art. 5 also imposes a duty on the state parties to enforce the rights under the Covenant without any discrimination."[xxi]

THE MANIFESTATION OF RELIGIOUS RIGHTS

Many local constitutions or the legislations of states recognize the right to freedom of Religion as it is explicitly reflected in the Art. 18 of the ICCPR. This right indispensably includes the right to manifest the religious rights. The question arises what is meant by the word 'manifestation' in this context? Although, the ICCPR does not provide any definition on it, the Art 6 of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on religion or belief (A/Res/36/55) provides some guidelines on it. Its art. 6 states "…the right to freedom of thought, conscience, religion or belief shall include, inter alia , the following freedoms: (a) To worship or assemble in connection with a religion or belief, and to establish and maintain places for these purposes (b) To establish and maintain appropriate charitable or humanitarian institutions; (c) To make, acquire, and use to an adequate extent the necessary articles and materials related to the rites or customs of a religion or belief (d) To write, issue and disseminate relevant publications in these areas(e) To teach a religion or belief in places suitable for these purposes (f) To solicit and receive voluntary financial and other contributions from individuals and institutions (g) To train, appoint, elect or designate by succession appropriate leaders called for by the requirements and standards of any religion or belief(h) To observe days of rest and to celebrate holidays and ceremonies in accordance with the precepts of one's religion or belief, and (i) To establish and maintain communications with individuals and communities in matters of religion or belief at the national and international levels," and the art. 7 states 'the rights and freedoms set forth in the present Declaration shall be accorded in national legislation in such a manner that everyone shall be able to avail himself of such rights and freedoms in practice."[xxii]

RIGHT TO FREEDOM OF RELIGION IN LEADING JURISDICTIONS

Two clauses in the First Amendment to the United States Constitution (1789) guarantee freedom of religion, where it provides "Congress shall make no law for establishing any religion, or for imposing any religious observance or for prohibiting the free exercise of any religion or prohibiting free exercise of thereof… The First Amendment which is also known as the "Establishment Clause" not only prohibits the state from establishing any official religion, but also prohibits the state favouring any religion over another.[xxiii] The section 116 of the Commonwealth of Australian Constitution Act (1900) provides "The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth."[xxiv] The art. 25 of the Indian Constitution states "Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion (1949)."[xxv] The Art 25 should be read with the Equality clause contained in Art. 14 and non-discrimination clause contained in Art 15(1) which states that the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, and place of birth or any of them."[xxvi] The art. 25 guarantees to every person the freedom of conscience and the free profession, practice and propagation of religion subject to public order, morality and health," and furthermore, Art 26 permits that all denominations can manage their own affairs in matters of religion, Art 26(a) permits establishing and maintaining institutions for religious and charitable purposes, Art 26(b) permits managing a community's own affairs in matters of religion, and 26(c) allows any religious denomination to own and acquire movable and immovable property."[xxvii] This provision for further consolidated by the section 30 which states "All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice." For this purpose, the state shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language" (30(2). According to the Indian Constitutional Law expert Dr. Chaudhari R.G., the art 30 which provides above referred right is absolute and unrestricted.[xxviii]

The Indian Supreme Court precisely explained the meaning of manifestation of a religion in several decided cases, though word manifestation was not referred in several decisions. For

instance, in ***Shirur v. Mutt***, the Indian SC held that, "Article 25 secures to every person, subject to the restrictions to be noted presently, a freedom not only to entertain such religious belief, as might be approved by his judgment and conscience, but also to exhibit is belief in such outward acts as he thought proper and to propagate or disseminate his ideas for the edification of others."[xxix] The SC further stated that a religion may not only lay down a code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion and these forms and observances might extend to matters of food and dress."[xxx]

In the US, the free exercise of one's religious rights is regarded "fundamental constitutional right" under the Equal Protection Clause.[xxxi]The free exercise of religion has been basically defined as the right to believe and profess whatever religious doctrine one desires.[xxxii] Further, in 1993 the Federal Religious Freedom Restoration Act (RFRA) was enacted which was a bipartisan legislation,[xxxiii] and in 2000, the Religious Land Use and Institutionalized Persons Act (2000) (RLUIPA) was enacted to protect individuals, houses of worship, and other religious institutions from discrimination in zoning and landmarking law. [xxxiv]The RFRA was directly cited ***in Simratpal Singh v. Ashton B. Carter***, where the Army Captain Simratpal Singh filed a suit against the Army for the right to keep his beard according to his faith while on duty. The US District Court, Columbia found that the Army act of subjecting the Capitan Singh to a discriminatory test solely because he engages in religious exercise is a quintessential substantial burden on his religious exercise of wearing a beard or/and turban."[xxxv]

In ***Sherbert v. Verner***,[xxxvi] a member of the Seventh - day Adventist Church, was discharged by her South Carolina employer because she refused to work on Saturday, the Sabbath day of her faith. She claimed unemployment compensation benefit but it was denied to her under the South Carolina Unemployed Compensation Act, which disqualifies to make claim if he/she refuses to take a job offered without a good cause. It was held that the provision of the South Carolina statute (Unemployed Compensation Act) which denies her claim for unemployment violates her right to free exercise of her religion, in violation of the First Amendment, made applicable by the Fourteenth Amendment.[xxxvii] In ***Wisconsin v. Yoder***, some members of the conservative Amish Mennonite Church was convicted for violating Wisconsin's compulsory school attendance law which requires a child's school attendance until age 16. The evidence indicates that the Amish community believe that the high school attendance was contrary to

their religion and their way of life and they would endanger their own salvation and that of the children by complying by the law. They provide informal vocational education to the children after they graduated from the eighth grade. The US Supreme Court held that the state's interest in universal education is not totally free from a balancing process when it intrudes other fundamental rights like a right to freedom of religion which is protected under the free exercise clause of the First Amendment and the traditional interest of parents with respect to the religious upbringing of their children. The USSC acknowledged the parents' contention that the compulsory formal education will gravely endanger if not destroy the free exercise of their religious belief.[xxxviii]

THE STATE PLAYS A POSITIVE ROLE

In several cases, the US Justice Department had played a positive role to realize this right or to prevent denying this right. In ***Eyvine Hearn and Nashala Hearn v. Muskogee Public School District,*** an 11-year-old Nashala Hearn, a sixth-grade student school was suspended twice from attending school because she was wearing a headscarf while in the school. She sued the Muskogee, Oklahoma, Public School District for ordering her to remove her head scarf, or hijab as she claimed her right to manifest her religion which is protected under the First Amendment to the US constitution and Equal protection clause under the fourteenth amendment to the US constitution. The US Justice Department intervened to support Nashala's right to wear a head scarf in a public school.[xxxix]

The key issue before the court, is whether a school district can bar a Muslim student from wearing a religious headscarf, known as a hijab, under the district's dress code. The court said this case involved a question and inquiry on a matter of equal protection, free exercise of religion, and free speech. They rejected the 'neutrality' argument presented by the defendant (the school authority), and stated that the school dress code policy which prohibits hijab as applied to Nashala, violates her free speech and free exercise rights under the "hybrid rights" principle. When a free exercise claim is coupled with some other constitutional claim, such as free speech, strict scrutiny is triggered. The court further found that Nashala's "hybrid right" of religious exercise coupled with religious expression has been violated by the school's act of prohibiting wearing of hijab and punishing Nashala for wearing it, and the policy has been

enforced against Nashala on a discriminatory basis because of her particular religious faith, and this is not religion-neutral because what was enforced against Nashala is not supported by any compelling justification, and is in any event, not narrowly tailored to achieve the school's goals, it violates Nashala's Free Exercise Clause rights, and therefore infringes her fundamental right of religion in violation of the Equal Protection Clause."[xl]

Two significant dynamics of this case are (1) the state played an intervenor role to support the victim of the human right violation, and thereby played a positive role to prevent violation and protect right, and (2) The court equated the right to manifest one's religion with the freedom to express that right under the "hybrid rights" principle.

Similarly, the US Supreme Court in ***Equal Employment Opportunity Commission, Petitioner v. Abercrombie & Fitch Stores, Inc***, held that denying a job for a Muslim woman only because she was wearing a head scarf was a violation of Title VII of the Civil Rights Act of 1964 78 Stat. 253, as amended, which prohibits discrimination against any individual on grounds of race, colour, religion, sex, or national origin. In this case, Respondent (Abercrombie) refused to hire Samantha Elauf because the headscarf that she wore pursuant to her religious obligations conflicted with Abercrombie's employee dress policy. Justice Scalia while delivering the opinion of the SC clearly stated that the Title VII of the Civil Rights Act of 1964 prohibits a prospective employer from refusing to hire an applicant in order to avoid accommodating a religious practice that it could accommodate without undue hardship."[xli] The significance aspect of this ruling was that the position taken by the US SC that the victim under this act does not need to show that the employer had actual knowledge of the victim's need for an accommodation (a wearing head scarf in this case), but only need to show that the applicant's need for an accommodation was a motivating factor in the employer's decision.[xlii]

Similar to Nashala case, in this case too, The Equal Employment Opportunity Commission (EEOC) which was the created by the state to protect the rights of all communities irrespective of their diversities and differences played an active role to restore the right of the victim of the right. This also indicative of the positive realization of human rights especially the religious right in this case.

In Canada, the acceptance of multiculturalism is a prevalent view during the recent history, though there were small level of opposition against granting manifestation of religious rights in the public places like schools and in government services like security or police. However,

every time when contention arises as to the question of these rights, it is always those who support the rights under the multiculturalism prevail. The Canadian authorities especially the Canadian Superior Courts, specifically the Supreme Court habitually upholds the values, norms and law enshrined in the Canadian Constitution and relevant laws.

In Balvir Singh Multani and Balvir Singh Multani v. Commission Scolaire Marguerite-Bourgeoys and Attorney General of Quebec, an eleven-year Sikh school boy wears a kirpan (is a religious object that resembles a dagger made of metal) during his school attendance. In 2001, G accidentally dropped the kirpan he was wearing under his clothes in the yard of the school, which made the governing board of the school to ban the wearing of a kirpan on the ground that it violates art. 5 of the school's Code de vie (code of conduct), which prohibited the carrying of weapons. The parents of the student sought from the Court of Appeal a motion declaratory judgment to the effect that the council of commissioners' decision was of no force or effect which was granted by the Superior court. However, the Court of Appeal reinstated the decision to ban by the council of commissioners

Nevertheless, when the case was referred to the Canadian Supreme Court, it stated that "the scope of the Canadian Charter is broad. Section 52 of the Constitution Act, 1982 guarantees the supremacy of the Constitution of Canada. This incomparable tool can be used to invalidate laws that infringe fundamental rights and are not justified by societal goals of fundamental importance" [xliii] The SC held that the decision of the Court of Appeal should be set aside and the decision of the council of commissioners should be declared to be null."[xliv]

In ***Baltej Singh Dhillon*** case, where a follower of Sikhism joined the Canadian RCMP in 1988 but he was faced with dilemma whether to continue with his job by wearing the official uniform which means giving up his religions symbol turban or fight for his religious right. However, there was an internal debate among the Canadian society whether to give up common uniform requirement to satisfy the religious right of wearing turban. Despite the federal government in 1990 removed the ban preventing Sikhs, there was opposition to this decision. However, 1996 three former RCMP officers challenged in the Canadian Supreme Court against the right for Sikhs to wear turbans while on duty. The Supreme Court dismissed an appeal and validated the decision of the Federal government's non-discriminative stand taken on this question.[xlv]

THE UK POSITION

Before the Human Rights Act was passed in 1988, there was no law which permits discrimination on grounds of race, religion or colour. However, the Race Relations Act (1976) was passed to prevent discrimination on racial grounds and relations between people of different racial groups.[xlvi] Although, the Act was phrased with the word 'Race', it is applicable in the situation where the religious right of any individual belonging to any racial group is violated. In ***Mandella v. Dowell Lee***, an orthodox Sikh student who attended a private school wore long hair under a turban. The headmaster of this school refused to admits this student unless he removed the turban and cut his hair. The father of the student sued the School on the ground of racial discrimination under the Race Relations Act (1976). When this case reached the House of Lords, the main question before the House is whether Sikh community is a racial group under the definition of the Race Relations Act (1976)? The House held affirmative by declaring that the Sikhs remain a group of persons forming a community recognizable by ethnic origins within the meaning of the 1976 Act. The House rejected the headmaster's argument that the wearing of a turban is a manifestation of the boy's ethnic origins which could accentuate religious and social distinctions in the school which is a multiracial school based on the Christian faith, and held that that the act of headmaster of the school preventing the Sikh student from attending the school unless removes his turban and cut his hair constitutes a discriminative act under the Act as it could not be justifiable under the Act because the rules had no purpose other than to prohibit a display of religious symbol of an ethnic origin.[xlvii]

However, after the UK pass the Human Rights Act (1998) the freedom of religion was inserted in the section 9 of the Act where it states "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching practice and observance"[xlviii]

GERMAN BASIC LAW

The Articles 4(1) and 4(2) of German Constitution (Basic Law) is very significant as it explicitly recognized the freedom of religion as an inviolable right. The art.4 states 'Freedom of faith and of conscience, and freedom of creed, religious or ideological are inviolable, and the Art 4(2) the undisturbed practice of religion is guaranteed." The landmark decision which

reflects the meaning of the arts. 4(1) and 4(2) on the question of manifestation of one's faith was taken for determination in decision of **The German Federal Constitutional Court,** where two Muslim teachers in the state schools were asked to remove their headscarves. One was given a warning to remove and other was sacked for wearing it. Both brought action against the school authority in the labour courts which were unsuccessful. However, when the case was finally brought before the German Federal Constitutional Court, it was argued by the school authority that they acted according to the law enacted in 2015 by the State Legislative Chamber of North Rhine-Westphalia which prohibits the teachers from publicly express views of a political, religious, ideological or similar nature which are likely to endanger, or interfere with, the neutrality of the Land with regard to pupils and parents, or to endanger or disturb the political, religious and ideological peace at school. However, the Court held that the prohibition on teachers expressing their religious beliefs through their outward appearance is a serious violation of their freedom to profess their faith under the German Basic Law (article 4(1), (2). The Court said that though the school has the right to preserve peace and neutrality, its measure for the same must be a response to an actual threat which the school failed to establish. The Court further stated that wearing headscarves by the teachers does not pose any threat or interference with the pupils' own freedom provided that it did not seek to promote their faith or influence pupils."[xlix]

THE EUROPEAN CONVENTION AND COURT OF JUSTICE

The Art. 9(1) of The European Convention on Human Rights states **"**Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance."[l] The Art.9 (2) contains the usual limitations on freedom of religion which are generally recognized in any International Conventions or any other jurisdiction.

In *Kokkinakis v. Greece,* the European Court of Human Rights (ECHR) stated that 'the freedom of religion is an essential foundation of a democratic society and it further stated that the pluralism is indissociable from a democratic society, which has been dearly won over the centuries, depends on freedom of thought, conscience and religion.[li] In this case, the defendant who was a member of The Jehovah's Witness community was convicted under the Greek law

for engaging in proselytizing activities contrary to the Greek law. The ECHR held that law criminalizing proselytization was excessive punishment and unlawful in terms of Art, 9 of the ECHR." In ***Serif v. Greece,*** the ECHR held that 'the role of authorities is not to eliminate pluralism, but to ensure that the competing groups tolerate each other."[lii]

In ***Ewedia and Others v. the United Kingdom***, the British Airways' uniform code required women to wear a high-necked shirt and a cravat, with no visible jewellery. Ms. Ewadia was wearing of a cross as she believed that it is an important part of the manifestation of her faith. She was penalized by the employer by sending her home without pay. However, later she was offered administrative work without the obligation to wear a uniform. It was held by the ECHR that there was no evidence to indicate that the wearing of cross by Ms. Ewadia had any negative impact on the corporate image of the British Airways."[liii] Consequently, this decision caused the UK courts to interpret the Equality clause of the Human Rights Act (1998) in compliance with this ruling and this decision also compelled the British Airways to amend its uniform policy to permit the wearing of religious symbol (cross in this case) visibly.

In *Lautsi & Ors v Italy*, Ms Lautsi and her two children, complained against the display of a crucifix in the classrooms of the children's State school on the ground that the Italian government had violated arts 2 and 9 of the European Convention on Human Rights. Article 2 protects the right to education, including a parent's right to ensure that their children are educated in conformity with their own convictions. Although the arguments presented by the applicants tacitly reflect the concepts of 'neutrality', margin of appreciation and state secularism, the ECHR held that the displaying crucifix in the classrooms does not violate Arts. 2 and 9 or any other provision of the EU Convention on Human Rights.[liv]

CONTRARY POSITION

However, the ECHR has not been consistent in its stand on protecting religious rights against the unreasonable suppression of right to freedom of religion. Unlike the US or Indian Courts, some of the ECHR decisions on religions right cases were not based on recognition of diversity, pluralism or international law. The ECHR had taken the cover under the certain concepts which are not helpful to protect the victims from the violation of freedom of religion as these concepts are more political and directly or indirectly targeting certain minority groups. They are not aimed at moving towards achieving human right goals or discharging the state positive and

negative duties. The most discernible concepts used by the ECHR to control the exercise of religious rights or deny the religions rights, especially of the minorities, are (1) the margin of appreciation (2) the religious neutrality of the State, and (3) state secularism.

The margin of appreciation was regarded as the main instrument of analysis used by the ECHR to assess the necessary balance between diversity and universality.[lv] This permits the EU states to impose limitations (other than the limitations set out International Conventions) to limit the exercise or manifestation of religious right according to the respective state's decisions. In ***Dahlab v. Switzerland,*** the primary school teacher was not allowed to wear head scarf**.** However, there were no complaints against the teacher from parents of the teacher's pupils. The ECHR held that the interference with the teacher's freedom to manifest her religion (Art. 9(2) was justifiable and proportionate measure.[lvi]

The application of so called 'margin of appreciation' does not recognize either diversity or universality as the diversity requires the recognition of diverse or multi-culturalism and universality requires the recognition of universal values, including International law encompasses in treaty law, law of nations, jus cogens and jus gentium.

The religious neutrality is a criterion which is being used by the ECHR to determine the proportionality of limitations on religious freedom by recognizing that the state has the right to remain neutral towards religion. The state religious neutrality is a right phrase as it could be used to prevent any discrimination against any particular religious group, especially among the minority because when a state maintains a neutrality it could not favour or promote any particular religion. However, ECHR uses this neutrality concept to deny certain manifestation of religious right by permitting the state to determine whether the given exercise of religious rights is legitimate in the context of that state's perspective. This is a direct denial universalism of rights which emphasizes that the rights are universal and they could not be invalidated or diluted by the states. This also allows the state to intervene or interfere substantially in the free exercise of religious rights and this attitude is diametrically against the US position on religious rights. The US courts adopt '*least restrictive test'* which ensures that the state does not interfere or intervene in the free exercise of religious right, unless it is inevitably necessary to do so for the greater benefit of the people. Such interference must be minimal and should be adopted only as the last resort.

State secularism implies that the state has the policy of non-religious and that state is not a religious state. This does not mean that the state should discard religions or discourage people from exercising their religious right. The best example to cite is the Indian secularism which does not permit the state to favour any particular religion, but it embraces all the religions practice by the Indians and provide equal support and protection for all of them. It implies further that there will be no denial of religious rights as the secularism is the boundary for the state to protect religious rights of all people equally without any discrimination, and this also necessitates a different treatment according to the diversity of the religious belief. The first prime minister of independent India, Jawaharlal Nehru said in his famous Aligarh Muslim University Convocation address in 1948 "whatever confusion the present may contain, in the future, India will be a land, as in the past, of many faiths equally honoured and respected, within a tolerant, creative nationalism, not a narrow nationalism living in its own shell." [lvii]However, the secularism as understood by the ECHR provides the right to state to determine whether to approve certain religious manifestation or to prohibit them on the ground of secularism. In ***Leyla Sahin v. Turkey,*** Sahin, a fifth-year student of the faculty of medicine of the University of Istanbul was asked to remove her head scarf based on the circular issued by the Vice Chancellor of the University which directed the students with beards and students wearing headscarves would be refused to enroll on the course or to admit him/her to lectures or to write examinations. Sahin complained to the ECHR that prohibition of wearing of scarf in the university is an unjustified interference her right to education, within the meaning of Art. 2 of the Protocol No.1 to the Convention and also violation of Arts. 9 and 14 of the Convention. She also argued that through prohibition of wearing a head scarf, she was forced to select between her right to education and right to religion, for both of which she is entitled. The ECHR held that the restriction of religious freedoms in the form of religious dress was proportionate to the aim of promoting democracy through the maintenance of secularism." (Emphasis Added-underlined and bolded).[lviii]

The above ruling of the ECHR clearly indicates that the court had adopted 'the maintenance of secularism" in terms of the Turkish law as the decisive criterion to determine whether the right to free exercise of religion or the right to education of a Turkish citizen is violated or not. This is obviously contradicted the very purpose of right clauses contained all international and regional human rights conventions which requires the state to play both negative and positive role to preserve and protect the rights of the people. As noted above, either in the US or India

'secularism or state neutrality' is not a decisive criterion to determine the rights of the people. The courts in these states continue to interpret secularism or state neutrality' as the vanguard to protect the rights of the people, especially those of the minorities, or to buttress their argument that the state should not interfere or intervene in the free exercise of religious rights because the state is neutral in its approach to religions without taking any sides to a particular religion but to protect the free exercise of religious rights of all communities without any interference or discrimination by the state or its agents.

The right to freedom of religion is a fundamental human right which global community wants to protect and preserve because this right emerged from the historical evolution of recognizing the human beings right to choose his faith and practice according to his conscience. In the modern era, especially after the birth of the UN, the international communities reached exclusive and undiluted consensus that every community should respect each other's right to exercise their respective religion. Since it is apparent that the right regime has to be operated within the modern state system, the international community agreed to create law making treaties to impose duties on the member states to protect, enforce, enhance and preserve the freedom of religious rights along with other rights enshrined in these conventions.

The states are required under these international or regional conventions to take positive and progressive measures to enforce these rights including the right to freedom of religion. However, these conventions also laid down certain exceptions under which the state could restrict the manifestation of religion for prescribed reasons. However, these reasons are very exceptional and should be used only when there is no alternative to handle emergency situations or should be used as the last resort. The Art. 18 (3) of the ICCPR provides that 'freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others."[lix] For instance, section 1 of the Canadian Charter of Rights and Freedoms (1982) guarantees the rights and freedoms set out in it only subject to such reasonable limits prescribed by laws as can be demonstrably justified in a free and democratic society[lx] (***the doctrine of minimum impairment).***

These limitations are very reasonable as no religious practice could harm others or allow it to harm other people who are entitled to the same rights. The attitude of the courts in many jurisdictions to the right to freedom of religion are very liberal and they have taken these limitations as exceptional which are only applicable if such situation arises or when no

alternative is possible unless the limitations are imposed under the one or more than one of these grounds.

The attitude of the ECHR reflects the position held by some of the European States on the freedom of religious expression which is inconsistent with the international norms and international laws which have been evolved through centuries and reached as the international agreements and conventions which impose duty on the states to protect, promote and preserve this right and make them liable (answerable) for its breach.

ACADEMIC/EXPERTS' CRITICISM

There are several criticisms on the inconsistent rulings of the ECHR on the right to religious freedom. The important criticism came from famous legal academics Ann Mayer and Christian Moe. They both shared that the Court's decisions (Sahin and Refah) at both the Chamber and Grand Chamber levels were flawed because of reliance in an insufficiently nuanced understanding of Islam. Mayer's view that the Refah decision as individuals of rights on the basis of stereotypes, prejudices, and undocumented fears about potential risk they post to national security. Ann Mayer contends that the Court used stereotype understanding of key concepts such as sharia to demonstrate incompatibility of these concepts with human rights and democracy, without taking into account much more reasonable and representative interpretations of these notions in the Muslim world.[lxi] In Refah case, the ECHR justified the banning of Islamic Welfare Party in Turkey on the ground of applying secularism.[lxii]

An eminent academic Jeremy Gunn criticized the decisions of Dahlab as he compared Dahlab decision with Lautsi. In the ECHR allowed crucifixes on the walls of the Italian schools but in Dahlab the court justified the prohibition of wearing headscarf in the school by the school teacher.[lxiii] On the both cases, the main contention is the question of whether it is permissible to manifest religious symbol in the classroom. The court responded positively in Lautsi (it is a religious freedom) and negatively in Dahlab case (it is a not religious freedom).

The conclusion of the Shadow Report made by the International Center for Advocates Against Discrimination (ICAAD) prepared for the United Nations Human Rights Committee on the occasion of its briefing on France, categorically declared that the French authority's act of preventing Muslim girls from wearing a headscarf demonstrates that its policy constitute an

affront to religious freedom and minority rights, and only serve to undermine the goals of pluralism and democracy that they seek to uphold."[lxiv]

The fundamental objective of the human right regime is to enhance the whole regime with the view of creating human rights respected societies across the globe, where everyone is appreciated and his or her honour is respected. The subjugating the right to freedom of religion through political, social and legal mechanisms is not helpful to promote this right, but it negates the very promise made by the states in the international forums to protect and promote this right. The restrictive approach to the right to freedom of religion under the concepts developed by some states (not by the international community) compellingly demands the people belonging to different religious group to give up what they believe and to comply with the models or concepts which these states have developed, and thereby, demanding them (religious groups) to compromise their faith according to these models or concepts.

This is a clear denial and deprivation of not only the right to freedom of religion, but also the right to freedom of expression, conscience and thought as it is a forceful imposition of the philosophies of these states on others' faith. This attitude could not be regarded as the recognition or protection of free exercise rights to freedom of religion. One may argue that the restrictive approach is necessary to bring all communities under the one national identity. However, this argument could not gain legitimacy because the national identity does not mean that everyone should follow what the majority or the state wants to do, but the national identity is the aggregation and integration of all diverse identities and the recognition of them could not be denied under the social contract. An eminent scholar Michael W. McConnell observed that "the purpose of the Religious clauses is to protect the religious lives of the people from unnecessary intrusions of government, whether promoting or hindering religion. It is to foster a regime of religious pluralism, as distinguished from both majoritarianism and secularism."[lxv] The significance of the social contract for the formation of modern civil society is another argument which supports that the right to freedom of religion should not be disproportionately restricted.

The social contract is a contract between the state and its citizens. No modern state could exist or function without the social contract and it is the people who give authority to the state or to its agent (government) to manage their affairs. Under the social contract, the people surrender or delegate certain rights to the state and retained or reserved their fundamental rights to themselves.

Furthermore, under the social contract the rights that are not delegated or retained by the people, the state undertakes to protect them (both individual and collective rights). In modern times, the people do not give authority to states to establish absolute or totalitarian rule, but they wanted states to protect their basic rights as the primary duty of the state. The terms of the social contract (rights/duties of the state and rights/duties of the people) are normally enshrined and reflected in a country's constitution and other respective laws

The Tenth Amendment to the US Constitution is a citable example on this point, which expressly reserves the powers not delegated under the Constitution or prohibited by it to the respective states, or to the people. The US courts have affirmed this position in several leading cases. In **Butchers' Union case**, ***Field J*** observed "…all men are endowed, not by the edicts of Emperors or decrees of Parliament or Acts of Congress, but by their Creator, with certain inalienable rights' that is, rights which cannot be bartered away or give away except the punishment of crime, and among these are life, liberty and pursuit of happiness, and to secure these, not grant them but secure them, governments are instituted among men, deriving their just powers from the consent of the governed."[lxvi]

Although under the Indian Constitution, there is no similar provision like the tenth amendment to the US Constitution, in ***Gopalan case Sastri J***. stated "It is true to say that, in a sense, the people delegated to the legislative, executive and the judicial organs of the State their respective powers while reserving to themselves the fundamental rights which they made paramount by providing that, the State shall not make any law which takes away or abridges the rights conferred by that Part (of the Constitution) …"[lxvii]
Hence, the state does not have moral, political or legal right to deny or deprive the rights of its citizens, including the right to religious manifestation, unless the people belonging to the faith which state intends to deny or deprive, give free permission to do so or agree with the state as the part of the terms in the social contract.

The secularism or neutralism (not Indian or US model) is not a universal doctrine on right protection, but it is used as the tool for the political expediency by the government of the day to restrict rights. The rights could not be controlled under any other concepts as the controlling mechanisms must be confined to what was agreed under the ICCPR and other international conventions. These concepts which were intended to restrict the right to freedom of religions militates against universal values, norms and acceptance. The rights could not be restricted proportionately even through the national approach because it will be a violation of the terms

of the social contract by the state. If the right to religious manifestation is restricted through state approach or compulsion, it is against the universal human right values as the human rights are universal, inalienable, indivisible, equal, equitable and non-discriminatory and inherent to every individual without discrimination as every human being is born with these rights and entitled to them. The act of denying the right to manifestation of religion like prohibiting wearing a head scarf is also an act of *liberticide (*the act of destructing liberty).

Hence, the restrictive approach to the right to freedom of religion as some states adopt through state mechanism is no doubt will defeat the very objective of the human right law and international law on the protection of the right to freedom of religion. In other words, it is the act of surrendering the human right values, international law and universal peremptory norms to narrow political expediencies.

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