Constitutions & Religious Minorities:
Safeguarding the Rights of Religious Minorities

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I. Introduction

The role of ethnic, religious and linguistic minorities in a country’s political and cultural life is often contentious. The relationship between religious minorities and the state is particularly complex and is related to the role of religion in the state in general, but also to how national culture and identity have been defined historically. In some cases, a particular religion has been historically understood as intrinsic to national identity, while in other cases, national identity and religion are not closely linked. The urge to establish a national identity on the basis of a single religious identity often leads to inadequate protection for the rights of religious minorities. In other situations, a history of conflict might exist between various religious groups, rendering co-existence under a single state challenging.

In countries undergoing significant social and political changes, such as countries exiting civil wars or undergoing democratization processes, the relationship between the state and minorities often becomes especially challenging. In such situations, political leaders tend to emphasize a strong link between the state and the majority group’s religion, culture and language. The weakness of state institutions and the pressures of electoral politics both lead to a prominence of culture, religion and ethnicity in politics. This phenomenon was observed in several Eastern European states with substantial minorities within their borders after the fall of the Soviet Union. In those states, a group of policies emerged which aimed to strengthen the link between the state and the majority group as a means for achieving stability within the state and cohesion within the majority group in the midst of great uncertainty.

This paper discusses the role of constitutions and constitution-drafting in democratic consolidation, briefly examines international standards related to religious minorities, and presents the case of Indonesia in terms of its approach to the protection of religious minorities. It is important to note that the protection of religious minorities under the constitution and the law varies across countries. The differences tend to reflect variations in how countries define national identity, the place of minorities in their history, the size of the minority populations, and other issues.

It is worth noting that constitutional guarantees on the protection of religious minorities are most effective when they are clear, do not contain vague or conflicting articles, and do not leave a lot of room for interpretation by implementing laws or yet-to-be-established institutions. It is also worth noting that the content of constitutions and laws, on one hand, and their implementation on the other, can be quite different. The establishment of a well-functioning justice system and the political will to implement the constitution are prerequisites for the protection of minorities. Additionally, incorporating provisions on religious minorities in constitutions is an important means for safeguarding their participation within a country’s cultural and political life.

With respect to religious minorities, constitutions tend to address multiple issues: i) the role of religion in the state, whether there exists one or more official religions, and whether this religion(s) is accorded certain privileges; ii) the freedom of citizens to exercise a religion of their choice; iii) the state’s role in protecting that freedom and, in some cases, creating the conditions for the minority to thrive; iv) the right of the minority to be protected from religious discrimination.
II. Constitutions, constitutionalism and the constitution-drafting process

Constitution writing presents a unique opportunity to discuss and define the nature of state and its relationship with its citizens. It is an opportunity to construct the foundations for peace and democratic consolidation. The importance of constitutions cannot be underestimated. While democracy ensures a rotation of power between changing majorities, constitutionalism defines the limits within which majorities may exercise power. The constitution-making process has several goals: to represent the will of the people, to achieve a consensus on the future of the state, and to enshrine respect for universal principles such as respect for human rights and democratic governance.

There exists a potential for tension between democratic and constitutional principles in the constitution-drafting process. Constitutionalism limits majority decisions. A constitution is a set of norms and principles limiting the political power of the majority and protecting the rights of individuals and minority groups. Constitutions form an obstacle to certain political changes that could have been carried out if the majority always ruled. Another tension between democracy and constitutionalism is that democracy institutionalizes uncertainty because, in most circumstances, the winner of elections cannot be accurately predicted well in advance, while constitutionalism institutionalizes long-term principles that are very difficult to change. While democratic principles dictate that political outcomes are to some extent indeterminate, and that no group can be certain that their interests will ultimately triumph, constitutional principles limit this uncertainty by defining the boundaries within which political power can be used.

There are several reasons why a government should be restrained and uncertainty checked. Of prime concern is the risk that a government might use its powers to serve the interests of a narrow interest group and that it will violate the rights of some individuals simply to promote the interests of other individuals. Also, constitutionalism creates the expectation of stability and duration of political institutions and therefore allows for long-term planning for the members of the society. If state institutions are constantly changing, individuals in power will be tempted to exploit their positions for private purposes while those outside positions of power will hesitate to invest in long-term projects.

During the constitution drafting process, decisions are made as to the limits and practices of the state, and the rights and duties of the citizens. This process is a rare moment in a state’s history when detailed discussion can rise above the give-and-take of everyday majority politics and focus on the nature and future of the state. The process of drafting a constitution may significantly contribute to national reconciliation and gain legitimacy if it facilitates public participation and negotiation among key groups on key principles. Thus, constitution-making has the potential of contributing both to the short-term goal of conflict resolution and to the long-term goal of strengthening state institutions.

III. Key international principles

International human rights documents include a number of principles regarding the place of religious minorities in the state. These principles safeguard the rights of individuals to practice the faith of their choice, to be protected from religious discrimination, and to be protected from forced conversion to another religion. Additionally, broader international human rights principles such as equality among all persons, freedom from discrimination, equal access to justice, equality in political participation freedom of opinion and expression,
and freedom of association are also important to safeguarding the role of religious minorities in society.

The Universal Declaration of Human Rights (UDHR, Articles 2, 18) and the International Covenant on Civil and Political Rights (ICCPR, Articles 18 & 27) establish freedom of thought, conscience, religion or belief for everyone. These rights include the freedom to manifest religion or belief, individually or in community with others, in public or in private. It also includes the freedom to worship, teach, practice and observe any religion or belief. These documents also protect individuals from being forced to adopt a religion against their will.

In addition, the “Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities” adopted by the UN General Assembly in 1992 provides that states will “protect the existence and the identity” of minorities and “encourage conditions for the promotion of that identity” (Article 1). It also states that religious minorities have the right “to profess their own religion in private and in public freely and without interference or any form of discrimination.” It further provides minorities effective participation in cultural, religious, social, economic and public life. The Declaration asks states to “create favorable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language and religion (Article 4)”. There is therefore a positive responsibility of states to not only protect minorities but to actively create the conditions for these minorities to thrive.

The Declaration on the Elimination of All forms of Intolerance and of Discrimination based on Religion or Belief adopted in 1981 also emphasizes the freedom of thought, conscience and religion (Article 1), prohibits discrimination based on religion (Articles 2, 3 & 4), and specifies that freedom of religion includes freedom to worship or assemble in connection with a religion, to establish appropriate institutions, to disseminate publications, to teach a religion, to receive financial contributions, and to train and designate leaders (Article 6).

IV. The case of Indonesia

Indonesia is home to more Muslim citizens than any other country in the world but it is not an Islamic state. Most of its citizens are Muslim and the majority of them practice Sunni Islam. Roman Catholics account for 3 percent of the population and Hindus 6 percent. There are also smaller groups of other Christian denominations, Buddhists, and adherents of the Ahmadiyah. In 1999, Indonesia held its first free elections. Over the next 10 years of the democratization process, religiosity surged after decades of discouragement by the former regime. The place for Islam in the Indonesian legal and political systems is an issue of ongoing debate with some Muslim groups pushing for greater role and the state, for the most part, resisting such demands.¹

While not an Islamic state, Indonesia is also not a secular state. The Indonesian constitution’s preamble contains the Pancasila, namely the state ideology which sees a key role for religion in the state and consists of five pillars: Belief in one God, Humanitarianism, National Unity, Representative Democracy and Social Justice. These principles form the state’s foundation. The Pancasila encourages a role for religion in the state along with the

other four principles. Furthermore, it essentially establishes that “one's religious belief is both a right and an obligation of Indonesian citizenship. [It] also appears to compel the government to not only safeguard religious freedom but to utilise the machinery of the state to encourage and promote the exercise of faith, including Islam.”

Importantly, the Indonesian constitution contains several provisions guaranteeing freedom of religion for citizens. These include:

1) Article 28E(1), which gives citizens freedom to "embrace a religion and to worship in accordance with that religion."

2) Article 29(2), which reaffirms Article 28E(1), stating that the "state is to guarantee the independence of every citizen to embrace their respective religion and to worship in accordance with that religion and belief."

3) Article 281(1), which states that the right to religion, along with several other constitutional rights, "cannot be limited in any way."

4) Article 27, which provides for equality and nondiscrimination for all residents of Indonesia.

However, Indonesia has a controversial criminal blasphemy provision, Article 156(A) of the Penal Code, which is based on Law No. 1/PNPS/1965, adopted by presidential decision in 1965 (on the “Prevention of Misuse or Blasphemy against Religion”). Law No. 1/PNPS/1965 defines the officially acknowledged religions: Islam, Protestantism, Catholicism, Hinduism, Buddhism and Confucianism. The law’s first paragraph states: “Every person is prohibited from deliberately speaking about, recommending, or lending support to interpretations of a religion that is adhered to in Indonesia [i.e. Indonesian religions], or participating in religious activities that are similar to those of a religion, interpretations and activities, which deviate from the central teachings of that religion.”

Furthermore, Article 156(A) assigns up to five years of imprisonment for anyone who “deliberately in public gives expression to feelings or commits an act: a) which principally has the character of being at enmity with, abusing or staining a religion, adhered to in Indonesia; or b) with the intention to prevent a person to adhere to any religion based on the belief of the almighty God.”

The above blasphemy laws essentially give authority to the state to determine what constitutes a deviation from the central tenets of a religion and to outlaw unorthodox interpretations of the official religions. The laws mean that Indonesian citizens are required to self-identify as members of one of the six faiths, and that they may not profess atheism as an alternative. The rights of atheists and unrecognized religious minorities are restricted, and even members of the six recognized religions are subject to criminal penalties if their beliefs and practices diverge from the officially sanctioned versions of their faiths. Importantly, the measures lack clarity as to what acts constitute blasphemy or religious defamation. The laws’ application has given rise to a number of human rights abuses, including on the freedom of

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4 Platzdasch, 2010, 2.
religion and expression, right to due process, freedom from arbitrary detention, and freedom from discrimination.\(^7\)

In 2009, the law was challenged at the Constitutional Court based on the argument that it contravenes the state doctrine *Pancasila* and the constitution of 1945, which both guaranteed freedom of religion. The legal counsel for the petitioners argued: “Our constitution guarantees religious freedom. All religious groups deserve equal treatment. Therefore, this law, which gives the government the power to intervene in religious matters, must be annulled.”\(^8\) However, on 19 April 2010, the Constitutional Court of Indonesia upheld the law. The majority of the judges argued that the law “was still needed to maintain public order among religious groups.” The chairman of the National Commission on Human Rights (Komnas Ham) criticized the ruling, accusing the court of failing in its obligation to uphold constitutional protections.\(^9\)

In addition, UN bodies have argued that the 1965 law is in contradiction with the 1945 Constitution, as well as with the ICCPR, article 18 of which has been ratified into Indonesia’s Law No. 12/2005.\(^10\)

The blasphemy laws contribute to a climate of intolerance, and are used to justify extralegal discrimination against religious minorities. In recent years, Islamic extremist groups have carried out violent attacks on churches, homes, community centers, Ahmadiya mosques, and businesses that serve alcohol, claiming they were protecting Islam from insult. Human rights activists argue that many attacks have been committed with complete impunity as police and prosecutors did not adequately investigate and prosecute cases.\(^11\)

Additionally, the blasphemy laws were used to justify the 2008 Joint Ministerial Decree on Ahmadiyya, which severely restricts Ahmadis’ ability to practice their faith and bans them from proselytizing. The decree effectively falls just short of an outright ban on Ahmadiyya.\(^12\) Ahmadiyyah is a group that consider themselves Muslim but who some Muslims consider heretics.\(^13\) It is estimated that about 400,000 Ahmadis live in Indonesia. Approximately 17 provinces and regencies in Indonesia have issued local decrees banning the Ahmadiyyah faith in Indonesia.\(^14\)

Violent attacks have also taken place against churches. According to one report, there have been attacks on more than 430 churches since 2004\(^15\) and more than 180 attacks on Ahmadiyyah properties since the 2008 decree. Finally, minority religions report that local governments refuse to issue permits required under a 2006 decree on building houses of worship. Prevailing laws require that any religious community wishing to establish a place of

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13. The Ahmadiyah faith is banned in several countries, including Bangladesh, Malaysia, Pakistan and Saudi Arabia.
worship needs to have at least 60 percent approval from the people who are living in the local area in question. This situation makes it impossible for small communities to have a place of worship as it is impossible for them to secure the required percentage from the members of other religions.  

Human rights activists argue that the “proliferation of laws limiting the rights or religious minorities and the failure to prosecute those who attack religious minorities or otherwise infringe on their rights to freedom of religion have buttressed a culture that seeks to marginalize –through increasingly violent means- religious minorities”.  

V. Conclusion

The example of Indonesia demonstrates that constitutional provisions regarding religion and religious minorities need to be clear in order to effectively protect minorities. In the case of Indonesia, the protection of religious freedom by the constitution has been undermined by subsequent legislation, contributing to an environment that is tolerant of both discrimination and violence against minorities.