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Religious Minorities in Asia: Between the Scylla of Minority Protection and Charybdis of Religious Freedom Rights?

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Abstract: This article examines the intersection of religious freedom and minority protection within the Asian context. It argues that, to the extent that a focus on minority protection draws greater attention to the collective and communitarian dimensions of religious practice, it has the potential to enrich the discourse on religious freedom protection. I identify three areas of possible convergence—first, where a minority-focused regime leads to a richer understanding of the intersections between culture, language, and religion; secondly, where a focus on minority protection leads to positive measures by the state to protect religious minorities; and thirdly, where a minority regime founds a right of religious minorities to political participation. Nonetheless, I will also point out that there are limits to minority protection. It may even be a double-edged sword, as it serves to reify differences with the rest of society and risks permanently marginalizing the group as a minority. This could be the case even if there are institutional designs, formal or informal, to provide for religious minorities' political participation.

Keywords: religious minorities; religious persecution; religious freedom; minority regime; Asia; constitutional law; state and religion



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1. Introduction

Religious minorities in Asia seem to be in a bad state. Systemic violence against Muslim Rohingyas in Buddhist-majority Myanmar ([US Documents Systematic Violence Against Myanmar Rohingya 2018](#); [Beech 2019a, 2019b](#)), attacks on Christian churches in Muslim-majority Malaysia ([Mydans 2010](#)), increased violence against Muslims in Hindu-majority India ([Griswold 2019](#))—these are just some of the reported instances of violence and persecution against religious minorities in Asia ([Al Syechabubakar 2013](#)). Besides outright violence, there are also more insidious legalized forms of persecution, such as the prosecution of religious minorities for allegedly blasphemous speech. The high-profile blasphemy prosecution and conviction of former Jakarta governor Basuki Tjahaja 'Ahok' Purnama, a known Christian, in Muslim-majority Indonesia ([Widiyanto 2019](#)), and of Asia Bibi, a Christian woman, in Muslim-majority Pakistan are only some of the more well-known cases involving religious minorities. Asia Bibi was initially sentenced to death by the lower courts, before her conviction was overturned by the Supreme Court of Pakistan ([Mst. Asia Bibi v The State 2018](#)), bringing relief to international human rights advocates but public outcry in Pakistan ([Barker and Iqbal 2018](#)). Such religious violence and persecution are not limited to religious majoritarian countries. Reports show, for instance, that religious minorities also face difficulties in some non-majoritarian countries ([McDermid 2019](#)). Neither are religious majorities the exclusive perpetrators of religious violence against religious minorities. In some places, inter-religious conflict can also take place between religious minorities. For instance, the devastating Easter bombings in Buddhist-majority Sri Lanka in several Christian churches were widely attributed to a radical Muslim group ([Beech et al. 2019](#)).

It is noteworthy that these religious minorities are experiencing violence, persecution, and prosecution across countries in Asia that generally have written constitutions containing guarantees of religious freedom. In many instances, these constitutional guarantees

of religious freedom have been interpreted restrictively or overlooked. Constitutional guarantees have been interpreted away to protect dominant majoritarian interests. The focus of this special issue is therefore extremely timely. The question of whether and how a focus on minority protection could contribute to the protection of religious freedom of minorities is a highly pertinent, but perhaps insufficiently studied one. The discourse and understanding of religious freedom have increasingly taken on an individualist orientation. This is so much so that some scholars have questioned whether freedom of religion is merely freedom of choice or simply freedom of conscience (Ahdar 2018; Sandel 1989) or is redundant because it could simply be protected under other associated rights such as freedom of speech and freedom of association (Leiter 2014). Such an approach, grounded in voluntarist conceptions of personhood (Sandel 1989, p. 611), risks overlooking the collective and communitarian aspects of religious practice. As Sandel puts it, “conscience dictates, choice decides” (Sandel 1989). Religious freedom is more than just a freedom to choose one’s belief, although as will be seen below, even this is contested in some Asian states.

This article therefore argues that to the extent that a focus on minority protection draws greater attention to the collective and communitarian dimensions of religious practice, it has the potential to advance discourse on religious freedom protection. I identify three areas of possible convergence—first, where a minority-focused regime leads to a richer understanding of the intersections between culture, language, and religion; secondly, where a focus on minority protection leads to positive measures by the state to protect religious minorities; and thirdly, where a minority regime founds a right of religious minorities to political participation. Nonetheless, I will also point out that there are limits to minority protection. It may even be a double-edged sword, as it serves to reify differences with the rest of society and entrench the group as a minority. By asserting their status as a religious minority there is a risk that the group would be permanently marginalized. This is even if there are institutional designs, formal or informal, to provide for political participation for religious minorities. Thus, even while religious freedom discourse has seemed to drown out the particular vulnerabilities of religious minorities (hence the reference to the Charybdis of religious freedom), a turn to minority protection may also bring about dangers of permanent marginalization (as represented by the reference to the Scylla of minority protection).

Section 2 provides background on the range and depth of religious diversity in Asia, as well as an overview of the approach to religious freedom and minority protection. Section 3 examines the Asian resistance to human rights and minority protection discourse as an outcome of its post-colonial context. Section 4 examines the three ways in which a focus on minority protection could supplement rights protection for religious minorities. Section 5 concludes with some reflections on the limits of intertwining minority protection mechanisms with religious freedom protections.

2. Religious Diversity, Religious Freedom, and Religious Minority Protection in Asia

Religious diversity is not unique to Asia, but the range and depth of its diversity are somewhat distinctive. By most counts, Asia is the most religiously diverse region in the world. A comprehensive 2014 Pew Research study shows, for instance, that half of the world’s most religiously diverse countries are in the Asia-Pacific region (Global Religious Diversity 2014). The study looks at the percentage of each country’s population that belongs to eight major religious groups (Buddhism, Christianity, Hinduism, Islam and Judaism, religiously unaffiliated, adherents of folk or traditional religions, and those belonging to the other religious groups such as the Baha’i faith, Jainism, Shintoism, Sikhism, Taoism, Tenrikyo, Wicca and Zoroastrianism) as of 2010. Among the Asian countries studied, Singapore, Taiwan, and Vietnam scored the highest on Pew’s religious diversity index, alongside South Korea, China, and Hong Kong which are among the countries with very high levels of religious diversity. Others in the region have high or moderate levels of religious diversity. Indeed, only a handful of Asian countries are ranked with low levels of religious diversity, and these are Afghanistan, Timor-Leste (East Timor), the Philippines,

Thailand, Cambodia, Pakistan, and Bangladesh (Global Religious Diversity 2014; Keck 2014). This religious diversity sits alongside a similarly wide range of ethnic, linguistic, and cultural diversity. These diverse identity markers, sometimes cross-cutting and other times reinforcing, add to the complexity of studying the rights of religious minorities in the region.

There are two important implications to this broad diversity; first, there are many religious groups that are in a permanent minority in various countries in Asia; and secondly, there is significant intra-regional diversity in terms of majority-minority configurations. Thus, Muslims may be in the dominant majority in countries like Brunei, Indonesia, Malaysia, Pakistan, and Bangladesh, but form significant minorities in others like the Philippines, China, Singapore, Myanmar, India, and Sri Lanka. Similarly, Buddhists may be the dominant majority in Myanmar, Thailand, and Sri Lanka, but significant minorities in Malaysia and Indonesia. Further, Christians may be in the majority in Philippines, but in the minority in most other countries in Asia. Accordingly, any approach to manage this religious diversity based on a single minority protection or rights regime would need to be sensitive to this intra-regional diversity, and potential geopolitics arising from kin-state concerns.

Significantly, minority rights do not feature prominently in Asian discourse on rights. Most constitutions in Asia do not make references to minorities as rights-holders. Even states that do make references to minorities in the constitutional text do not always give regard to religious minorities. Part of this lack of emphasis on minority protection is historical; the international regime on minority rights and protection traces its genealogy as a solution to a distinctly European problem (Thio 2002, p. 410; Anand 1966). Where the constitutions do make reference to religious minorities, these do not necessarily guarantee minority rights. Instead, some provisions merely authorize the state to protect minorities whereas others obligate the state to do so. One can identify three types of the constitutional provisions—those that grant some minority *rights*, those that impose state obligations to protect minorities, and those that grant states the option to protect minorities.

On the first type, India stands out as a jurisdiction in Asia that grants “[a]ll minorities, whether based on religion or language . . . the right to establish and administer educational institutions of their choice” (Constitution of India 1949, Art. 30(1)). This provides limited rights of autonomy, but only over educational institutions. More constitutions fall within the second type. For instance, Article 152 of the Singapore constitution states:

- (1) It shall be the responsibility of the Government constantly to care for the interests of the racial and religious minorities in Singapore.
- (2) The Government shall exercise its functions in such manner as to recognize the special position of the Malays, who are the indigenous people of Singapore, and accordingly it shall be the responsibility of the Government to protect, safeguard, support, foster and promote their political, educational, religious, economic, social and cultural interests and the Malay language (Constitution of the Republic of Singapore 2021, Art. 152).

This provision, together with a corresponding constitutional provision authorising legislation for the administration of Muslim law, sets out a constitutional basis for the Singapore government to statutorily administer personal religious laws for Muslims, who are predominantly Malay, through the Syariah courts and an Islamic religious council. Another country whose constitution imposes a state obligation to protect religious minorities is Bangladesh. Article 23A of the Bangladesh constitution proclaims that the state “shall take steps to protect and develop the unique local culture and tradition of the tribes, minor races, ethnic sects and communities” (Constitution of the People’s Republic of Bangladesh 2011, Art. 23A), thus imposing a state obligation.

The third type of constitutional provision can be found in the Myanmar constitution, for instance. The 2008 Constitution of Myanmar explicitly gives recognition to four religions—Christianity, Islam, Hinduism and Animism—as “religions existing in the Union” at the time the constitution came into operation (Constitution of the Republic of the Union

of Myanmar 2018, Art. 362). These are in addition to Buddhism, which is given special protection as the religion professed by the majority. This constitutional recognition means that “[t]he Union may assist and protect the religions it recognizes to its utmost” (Constitution of the Republic of the Union of Myanmar 2018, Art. 363). The operative word here is “may”.

The paucity of minority rights provisions in the constitutions of Asian jurisdictions must be contrasted with the prevalence of the right to religious freedom guaranteed in those same constitutions. Countries in Asia, except Brunei and the Maldives, contain some reference to the right to freedom of religion in their constitutions. The scope and content of these provisions vary. For instance, the Philippines constitution guarantees extensive protection for religious freedom with a clause modelled after the U.S. constitution. Article III, section 5 states that “[n]o law shall be made respecting an establishment of religion, or prohibiting the free exercise thereof” and that “[t]he free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed” (Constitution of the Republic of the Philippines 1987, Art. III, s. 5). The constitution of Indonesia also contains a very broad clause guaranteeing that “[e]very person shall be free to choose and to practice the religion of his/her choice, to choose one’s education, to choose one’s employment, to choose one’s citizenship, and to choose one’s place of residence within the state territory, to leave it and to subsequently return to it” (Constitution of the Republic of Indonesia 2002, Art. 28E(1)). Clause (2) of Article 28E further guarantees that “[e]very person shall have the right to the freedom to believe his/her faith, and to express his/her views and thoughts, in accordance with his/her conscience” (Constitution of the Republic of Indonesia 2002, Art. 28E(2)). Notably, both the Philippines and Indonesia are not confessional countries, although their populations are respectively predominantly Roman Catholic/Christian and Muslim.

In contrast, several other countries in Asia provide for much narrower rights to religious freedom, and may even subordinate them to state laws, such that some may question whether these can be regarded as ‘rights’, in the strictest sense of the word. For instance, Article 30 of the Laos constitution provides that “Lao citizens have the right and freedom to believe or not to believe in religions” but does not contain any reference to the right to practice and worship with other believers (Constitution of the Lao People’s Democratic Republic 1991, Art. 30). Instead, Article 9 of the constitution states that “[t]he State respects and protects all lawful activities of Buddhists and of followers of other religions” and “mobilizes and encourages Buddhist monks and novices as well as the priests of other religions to participate in activities that are beneficial to the country and people” (Constitution of the Lao People’s Democratic Republic 1991, Art. 9). There is an additional injunction prohibiting “[a]ll acts creating division between religions and classes of people” (Constitution of the Lao People’s Democratic Republic 1991, Art. 9). This subordination of religious freedom to competing public interests is also manifest in the Pakistan constitution where the “right to profess, practice and propagate [one’s] religion” is prefaced by the words: “[s]ubject to law, public order and morality” (Constitution of the Islamic Republic of Pakistan 2004, Art. 20).

To be clear, the presence of constitutional promises of religious freedom does not necessarily translate to actual protection (Madeley 2015, p. 215). Furthermore, how religious freedom clauses are interpreted is also critically shaped by constitutional arrangements of state and religion (Neo forthcoming). Different state-religion arrangements also tend to constitute different permutations of religious freedom issues (Neo forthcoming). Asian constitutional systems can be categorized into three umbrella groups based on their constitutional relationship with religion. These are, first, states that explicitly prioritize religion; second, statist or communitarian states that explicitly subordinate religion to state interests; and third, states that explicitly commit to separation of state and religion (and are non-confessional, but not necessarily non-religious). These categories are not meant to be comprehensive or mutually exclusive, but they allow us to identify and understand the emergence of patterns of religious freedom claims as an outcome of particular state-religion

arrangements. As an example, we can identify two types of resistance to an absolute right to belief. Under international law, it is often said that the forum internum is inviolable. However, this is not universally agreed among Asian states. In confessional states, changes in religious composition is often tied to political power and influence, and any weakening of the numerical strength of the religious majority could be seen as threatening the majority group's political dominance. Accordingly, one would find severe restrictions on the right to choose one's religion in several countries with religious majorities that are specifically targeted at the majority group. Malaysia, Myanmar, Pakistan, and Brunei have legal restrictions that are clearly tied to the perceived need to control conversion out of the majority religion. We can also see anti-conversion laws, which restricts the right to proselytize or propagate religion to persons from the majority religion (see, e.g., [Hertzberg 2016](#)).

On the other hand, countries that explicitly subordinate religion to state interests may protect the right not to believe, but for reasons distinguishable from countries that separate state and religion. For these countries, religion is seen as a potential source of mobilization and competition. The right not to follow any religion may thus be turned on its head as a reason to regulate and control religion. Interestingly, two countries that explicitly provide for the right not to believe in their constitution are socialist states that subordinate religion to state interests—Laos and Vietnam. The Laos provision is mentioned above, whereas the constitution of Vietnam expressly extends freedom of religion to the freedom not to follow any religion ([Constitution of the Socialist Republic of Vietnam 2013](#), Art. 24). In comparison to the two groupings discussed, the third group—states that explicitly commit to the separation of state and religion tend to protect the right to believe or not to believe—do not have strong political interests in regulating the right to believe. This is at least one argument in favor of secularism that appears to be well-supported in Asia. Nonetheless, the argument for secularism is at most a limited one since, in Asia, the separation of religion from the state is the exception rather than the norm. Most Asian countries regulate religion and are entangled with religion, including those that proclaim their constitutional system to be “secular” or “separated” from religion. This is the case even in East Asian states where the political traditions have conceived of the state and society in terms that were “essentially religious, but not confessional” ([Dubois 2018](#), p. 50). Thus, even where the state proclaims some division between state and religion, these appearances can be deceptive when the state itself operates like a religious entity, as in Japan. In such a context, rites of a religious character can simultaneously be seen in civic terms.

3. Rights and Sovereignty in Asia: A Distinctive Layer of Complexity?

Saba Mahmood argues that European historiography sees “the symbolic birth of the concept of religious liberty [as] deeply intertwined with the establishment of the principle of state sovereignty, territorial exchange between warring parties, and the creation of an inter-state protocol for handling what used to be called religious dissidents’ but later came to be regarded as ‘religious minorities’” ([Mahmood 2012](#), p. 421). That is not the experience of Asian states. Instead, some Asian states see religious freedom as part of an externally developed human rights movement; thus, not as a marker of sovereignty but as a potential basis for undermining national sovereignty. The experience of colonialization and imperialism contributes to this view. Almost all countries in Asia have been colonized by a European state at some point. The British Empire ruled over Brunei, Hong Kong, Malaysia (formerly Malaya, North Borneo and Sarawak), Myanmar (formerly Burma), Papua New Guinea, Singapore, and the Indian sub-continent; the French colonized Cambodia, Laos, and Vietnam, which together constituted French Indochina; the Dutch colonized Indonesia (formerly the Dutch East Indies); the Portuguese held Macau, Timor-Leste (East Timor) and parts of India; and the Americans possessed the Philippines ([Kratoska 2001](#)).

To be clear, the tension between state sovereignty and human rights law is by no means only an Asian or third-world phenomenon ([McGoldrick 1994](#)). The tension between sovereignty and rights has a long history that dates back to even before many Asian countries gained statehood. For example, the framers of the United Nations Charter

had notably rejected proposals to incorporate a bill of rights in the text, with countries including Australia and New Zealand displaying concern about their domestic practices being scrutinized by an international body (Thio 2005, p. 111; Lauren 1996, p. 162). In post-colonial Asia, sovereignty has been a particularly touchy point of contention as criticism of a state's human rights practices is often also seen as the continuation of imperialist control (see e.g., Castellino and Redondo 2006, pp. 13–14). The spirit of distrust and defiance is reflected for instance in a speech by the first Indonesian President Sukarno delivered at the 1955 Bandung Conference, where he rousingly said that colonialism was not dead but “has also its modern dress, in the form of economic control, *intellectual* control, actual physical control by a small but alien community within a nation” (Timossi 2015, emphasis added). The Final Communiqué of the 1955 Bandung Conference affirmed respect for fundamental human rights, but also for “sovereignty and territorial integrity of all nations” (Final Communiqué of the Asian-African Conference of Bandung 1955, p. 168).

This discourse of cultural resistance to human rights is also encapsulated in the “Asian values” debate. While there are slightly different models of “Asian values”, they overlap in their emphasis on communitarianism or collectivism, as well as the higher priority given to order, stability, and economic growth against individual freedoms and autonomy (Peerenboom 2003). There is generally a preference for a perfectionist or paternalistic state in which the state actively sets the moral agenda for society, as opposed to the idea of a liberal neutral state, which is more commonly idealized in Anglo-European states (Castellino and Redondo 2006, p. 21). Thus, the ‘Asian values’ debate is often couched as a clash between individualism and communitarianism (De Bary 1998; Tan 2011; Tan and Duxbury 2019). Critics of ‘Asian values’ argue that the discourse is often used by authoritarian regimes for self-serving ends, and to excuse violations of rights in the name of ‘culture’ and ‘values’ (Castellino and Redondo 2006, pp. 17–18). While there may be instrumental reasons, part of the objections have stemmed from genuine resentment towards the human rights policies of ‘Western’ powers (Castellino and Redondo 2006, p. 21).

While the ‘Asian values’ debate has coalesced around human rights, this emphasis on cultural and territorial integrity could also be employed to understand resistance to minority protection in Asia. Not only at the domestic level, there has also been little attention to minority protection at the regional level. Even within the Association of Southeast Asian Nations [ASEAN], which is the only permanent regional grouping in Asia, minority rights or protection has not been a priority.¹ ASEAN documents make virtually no reference to minorities or indigenous peoples (Meijknecht and de Vries 2010, p. 76). Instead, the various ASEAN documents employ the language of cultural diversity and unity. The ASEAN Charter, which entered into force in December 2008, included principles emphasizing “respect for the different cultures, languages and religions of the peoples of ASEAN” as well as “their common values in the spirit of unity in diversity” (Charter of the Association of Southeast Asian Nations 2007, Art. 2(2)(l)). Similarly, the ASEAN Human Rights Declaration, adopted in 2012, similarly does not make direct reference to the rights of minorities. Instead, the Declaration merely states that the rights of “vulnerable and marginalized groups are an inalienable, integral and indivisible part of human rights and fundamental freedoms” as one of its general principles (ASEAN Human Rights Declaration 2013, General Principle 6). In contrast, the ASEAN Human Rights Declaration recognizes that every person has “the right to freedom of thought, conscience, and religion” and that “[a]ll forms of intolerance, discrimination and incitement of hatred based on religion and beliefs shall be eliminated” (ASEAN Human Rights Declaration 2013, Art. 22). The Declaration also states that “education shall enable all persons to participate effectively in their respective societies, promote understanding, tolerance and friendship among all nations, racial and religious groups, and enhance the activities of ASEAN for the maintenance of peace” (ASEAN Human Rights Declaration 2013, Art. 31(3)).

Minority groups thus tend to be seen as potential contributors to diversity and congregations of *individual* rights-holders within Asia. The terms of the debate focuses on the tolerance, at times even celebration, of diversity, but almost always do not go so far as to

endorse the creation of rights for minority groups. At times, within the ASEAN context, minority groups could also be seen as potential threats to ASEAN's commitment to "One Vision, One Identity, One Community" (Meijknecht and de Vries 2010, p. 81). The only exception to the general silence on minority rights in Asia is the 1993 Bangkok Declaration, which was adopted by ministers and representatives of Asian states during a meeting in preparation for the World Conference on Human Rights. It is significant because it was put together to present a united front in setting out the aspirations and commitments of the Asian region. Among others, the Declaration referred to "the importance of guaranteeing the human rights and fundamental freedoms of vulnerable groups such as ethnic, national, racial, religious and linguistic minorities, migrant workers, disabled persons, indigenous peoples, refugees and displaced persons" (Final Declaration of the Regional Meeting for Asia of the World Conference on Human Rights 1993, Art. 11). It was one of the rare occasions in which Asian states made reference, collectively, to minorities as a group. Its impact in this regard however has not been significant.

Asia's lack of focus on minority groups is not because it is particularly successful in ensuring integration or harmonious inter-group relations. In fact, there is often a strong regulatory and social emphasis on ethnic identity and differences in many pluralistic societies in Asia. Many Asian countries continue to employ highly developed systems of ethnic classification, which is used for census and other administrative purposes (Meijknecht and de Vries 2010, p. 78; Ackermann 1997). The classification grid becomes the primary lens by which regulation, including of religious groups, is framed. They are used to allocate rights, privileges, and sometimes even citizenship. As Hadden observes, "the main focus of official policy is on the development of national unity by assimilation rather than by providing separate or autonomous structures" (Hadden 2003, p. 9). In addition, the approaches of some Asian states to minority protection are also often shaped by its connection to developmental aims. There is a sense in some states that religious and cultural diversity is a hindrance to national progress or even a threat to national security by governments except perhaps where tourism is concerned. Assimilation of ethnic minorities is thus at times tied in with state ambitions to industrialize and modernize the economy (Meijknecht and de Vries 2010, p. 81). Official programs bringing development assistance, healthcare and education can be a cover for (forced) acculturation, assimilation and resettlement, and often contribute to the degeneration of minorities and indigenous peoples. Efforts to acculturate minority groups through education, proficiency in the national language, participation in a cash economy and conversion to the majority religion effectively denude minority cultures and religions (Meijknecht and de Vries 2010; Neo 2018a, p. 111).

Meijknecht and de Vries argue that the lack of attention and formal recognition for minorities and indigenous peoples in Asia means that there is a lack of protection for their identity and culture (Meijknecht and de Vries 2010, pp. 80–81). Without formal recognition, there is no political category or vocabulary for which legal protection can be made available to minority communities. Human rights advocates have decried the silence on minorities and indigenous peoples in Asia as effectively "an outright denial of their existence" (Ethnic Minorities and Indigenous Peoples: The Insignificant Others in ASEAN 2007). The lack of formal recognition could result in a "denial of the rights to citizenship, to effective participation in government and to the recognition of their distinctive histories, cultures and lifestyles, notably in the context of national development policies" (Hadden 2003, p. 9).

Within this context, enhancing religious minority protection regime in Asia would be an uphill task. A further aggravating factor is that even within the minority protection regime, religious minorities also tend to be overlooked. Ghanea observes that while religious minorities have been one of the three most explicitly recognized categories of minorities in the minority rights regime, they have largely been excluded from consideration under the umbrella of minority rights (Ghanea 2012, p. 60). Thus, the international community has normally addressed religious minorities "under the 'freedom of religion or belief' umbrella in international human rights and not under minority rights" (Ghanea 2008,

p. 309). Despite the limitations today, one could nonetheless, on a more optimistic note, examine the extent to which religious minorities could be better protected in Asia today.

4. Religious Minorities and Minority Protection

One critical distinction that needs to be made is between minority protection and minority group rights. Even while some have referred to a “minority rights regime” (Ghanea 2012, pp. 62, 79), it bears emphasizing that the international law approach conceptualizes the individual, and not the group, as the rights holder. This is reflected in the [Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities](#) (1992), where the rights holders are the persons, individuals, who belong to minority groups. General Comment No. 23 on Article 27 of the ICCPR also clearly states that the rights contained therein are “rights conferred on individuals” (CCPR General Comment No. 23: [Article 27 \(Rights of Minorities\)](#) 1994, p. 1). The minority protection regime does not necessarily grant group or collective rights to religious corporate bodies (Thio 2005, p. 175; Eide 2000, p. 2). The reversion to focusing on minorities at the international arena was “designed to remedy the perceived deficiencies in universal human rights protection in relation to group identity and concerns” (Thio 2005, p. 162). The significant shift encapsulated in the minority protection regime is in the conceptualization of the individual as embedded within a community.

Minority protection proponents have had to navigate the two poles of individualism and communitarianism, and the outcome was a commitment to individual human rights but with a special sensitivity to minorities, whether ethnic, religious, social or linguistic (Thio 2005, p. 163). While consensus on who is a minority has proven problematic, an influential definition is the one provided by Francesco Capotorti, Special Rapporteur the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, who defined a minority as:

A group, numerically inferior to the rest of the population of a State, in a non-dominant position, whose members—being nationals of the State—possess ethnic, religious, or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity directed towards preserving their culture, traditions, religion or language. (Capotorti 1979, p. 96)

Accordingly, a significant contribution of the minority protection regime is in drawing attention to and enhancing an understanding of the communal dimensions of human existence, and by extension, religious practices.

Minority protection cannot substitute religious freedom rights, but could supplement them indirectly. For instance, minority rights can allow a religious group to better assert its common identity as a group. Here, religion plays two functions—first, as a basis for a specific freedom, i.e., the right to religious freedom, and second, as a basis for minority status. The terms used in international law indicate that persons can be considered to belong to a group where they share in common a culture, religion, and/or language (CCPR General Comment No. 23: [Article 27 \(Rights of Minorities\)](#) 1994, p. 2). These are not cumulative requirements. In assuming minority status, the group may then highlight its vulnerabilities and the need for greater protection of its identity, which could include its religious identity. In this regard, I will highlight three ways in which a focus on minority protection may contribute to a richer and expanded understanding for the protection of the rights and religious freedom of minorities.

4.1. Intersection of Culture, Language, and Religion: A More Wholistic View of Religious Freedom?

First, by focusing on the collective interests, one can draw greater attention to religious culture and the intersections between language, culture, and religion, and bring about a more holistic and contextualized view of religion and religious practice. This could be especially important for minorities within religious majorities who may adopt different practices, even while subscribing to the same religious tradition. Pluralistic practices within major religious traditions have sometimes been overlooked in religious freedom

adjudication. Courts have used dominant interpretations to exclude minority practices from religious freedom protection. In an earlier article, I have argued that legal definitions of religion can flatten out religious pluralism in its insistence on drawing clear categories for protection (Neo 2018b). Legal definitions often end up reflecting “dominant social and cultural attitudes toward preferred religions (whether consciously or unconsciously)”, thus overlooking the fact that religious communities are “not homogenous” (Jamal 2015, p. 93). This disadvantages new or different creeds, as well as disfavored religions that are seen as not religions, not real religions, or as pseudo-religions (Gunn 2003, p. 195).

Minority protection may add to the legal discourse by giving voice to minority religions as well as minorities within majorities, drawing attention to “internal interpretational diversity” (Neo 2018b, p. 578). This means that a more robust notion of religious minorities would require us to see that even global religions can be heterogenous and may be shaped by “local particularities” (Neo 2018b, p. 578; see also Zucca 2015, p. 388²). In highlighting some groups as minorities, even within majority religions, one is recognizing that “religious traditions are living traditions”, “subject to the influence of local practices” and is often more syncretic than sometimes assumed (Neo 2018b, p. 578). Within religious freedom adjudication, one may sometimes find a distinction drawn between culture and religion, between cultural practice and religious practice. This distinction is then used to justify not extending constitutional protection to a particular practice for being “cultural” rather than “religious”. However, the distinction between the two is not so easily determined, and in fact, religious adherents do not always subjectively see a difference between the two. In practice, religion and culture are often enmeshed.

As an example, one might point to the 1994 Malaysian case of *Hjh Halimatussaadiah bte Hj Kamaruddin v Public Services Commission, Malaysia & Anor*, where a religious practice was excluded from constitutional protection after effectively being characterized as ‘cultural’. This case concerned the right of a Muslim woman to wear the face veil. The applicant had been dismissed from her public service job for wearing a black covering (*purdah*) over her whole body from head to foot, with only a slit exposing her eyes. This violated an internal circular that prohibited female civil servants from wearing certain forms of clothing including jeans, slacks, shorts and any dress which covered the face while at work. The applicant filed a constitutional challenge, arguing that her religious freedom had been infringed. She claimed that, as a Muslim, she was required by the *Quran* and by the *Hadith* of the Prophet Muhammad to cover her face and not to expose it in public. The Supreme Court (then the highest court in Malaysia) dismissed the constitutional challenge, taking the view instead that wearing the *purdah* “has nothing to do with the appellant’s constitutional right to profess and practice her Muslim religion” (*Hjh Halimatussaadiah bte Hj Kamaruddin v Public Services Commission, Malaysia & Anor 1994*, p. 62C–D). The Court engaged in a theological discussion of what Islam requires and, despite being a secular court, determined that “Islam as a religion does not prohibit a Muslim woman from wearing, nor requires her to wear a *purdah*” (*Hjh Halimatussaadiah bte Hj Kamaruddin v Public Services Commission, Malaysia & Anor 1994*, p. 71C). Instead, the Court considered wearing the *purdah* to be “a myth or misconception” among certain groups of Muslims in Malaysia (*Hjh Halimatussaadiah bte Hj Kamaruddin v Public Services Commission, Malaysia & Anor 1994*, p. 71C), and appeared to accept face coverings as a “custom”, rather than a religious obligation (*Hjh Halimatussaadiah bte Hj Kamaruddin v Public Services Commission, Malaysia & Anor 1994*, p. 72A–B).

The distinction between custom and religion was thus used to deny religious freedom protection. One might ask whether the outcome could have been different if the applicant had claimed protection as member of a religious minority, in addition to claiming religious freedom protection. This would of course only be possible if the applicant could show that she was a person belonging to a religious minority group. If so, one could realistically envisage that she would have been able to argue that her right to wear a *purdah* was a custom practiced by a religious minority and was to be protected as such. As a religious minority, albeit a minority within a religious majority, she could conceivably show that

the practice of wearing a *purdah* was part of her *religious* culture, and not that it had to be accepted universally as part of religious requirements. Such an approach could potentially allow for greater interpretational diversity and protection for greater pluralism within religions.

Another Malaysian case points to the interconnectedness of religion, culture, and language. It also raises the fascinating question of whether a minority group can claim a distinctive right to use a national language for their religious worship. The *Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri* judgement concerned the right of Malaysian Catholics to use the word *Allah* in their Malay language publications. Christians are in the minority in Malaysia, where about 60% of the population are Muslims. There is also a constitutional provision stating that Islam is the religion of the Federation while guaranteeing that “other religions may be practised in peace and harmony in any part of the Federation” and that all persons have the right to religious freedom ([Federal Constitution of Malaysia 1957](#), Arts. 3(1) and 11(1)). The minority status of Christians is not in doubt. At stake in the case was a long-established practice of using the word *Allah* in their Malay language Bibles, publications, sermons, prayers, and hymns. This practice has a long historical lineage, dating back to the 19th century, way before the creation of the Malaysian nation-state. Early translations of the Bible, known in Malay as *Al-Kitab*, used the word *Allah* to refer to the Christian god.³ However, amidst rising Malay-Muslim nationalism, the Malaysian government moved to ban *The Herald*, a weekly Catholic newsletter, from using the word *Allah* in their Malay language publication.

The Catholic Church challenged the ministerial order, arguing that the prohibition violated the Catholic Church’s constitutional right to profess and practice its religion, including the right to manage its own religious affairs, and to instruct and educate its congregation in the Christian religion. Free speech violations were also raised. The Church initially won at the High Court (*Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri & Anor 2010*, pp. 101D–114D, 120I–121H) but lost on the government’s appeal to the Court of Appeal (*Menteri Dalam Negeri & Ors v Titular Roman Catholic Archbishop of Kuala Lumpur 2013*, pp. 495–96, 509–12, 521–22). The Federal Court ultimately denied the Church’s application for leave to appeal (*Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri & Ors 2014*, pp. 789–94). Significantly, the Court of Appeal held that the use of the word *Allah* was not protected under the constitution because it was not an ‘essential practice’ (*Menteri Dalam Negeri & Ors v Titular Roman Catholic Archbishop of Kuala Lumpur 2013*, pp. 512E–G; [Neo 2018b](#), pp. 585–86). Instead, the court upheld the government’s justification that it was necessary to prohibit the Catholic Church from using the term *Allah* because it would otherwise cause confusion to the Muslim majority, which also uses the word *Allah* to refer to the Islamic God. This has, at best, a tenuous link to public order.

Leaving aside the broader critique of the essential practice test, which originated from India ([Sen 2010](#), pp. 40–67; [Dhavan and Nariman 2004](#), p. 259; [Neo 2018b](#)), the Court of Appeal’s ruling clearly failed to give adequate protection to religious minorities ([Harding 2013](#), p. 12).⁴ It would be interesting to consider if an added minority right to linguistic identity could have buttressed the Catholic Church’s claim. As mentioned, Christians in pre-independence Malaysia have, for many centuries, practiced a culture of speaking and praying in the Malay language, which was the *lingua franca* of the region. A right to linguistic and cultural identity could provide nuance to the religious freedom claim, as it is not merely a right to practice one’s religion according to the general and universal doctrines of the religion. Instead, the focus on minority protection might allow an argument to be made that it is a specific way of practicing one’s religion, one that is embedded within a linguistic and cultural context ([Neo 2014](#), p. 756). This of course begs the question as to whether a national language could be regarded as part of the linguistic interests of a minority group. One might nonetheless argue that the extent to which the language itself creates a distinctive religious-cultural way of life should render it capable of being protected as a minority interest. In other words, a minority protection regime should

obligate the state to protect a religious minority's particular cultural and linguistic way of practicing their religion.

4.2. Positive Measures to Protect: Supplementing a Negative Liberty to Religious Freedom

Secondly, one possible added advantage of a minority protection frame, as opposed to religious freedom frame, lies in the nature of state obligation. While religious freedom tends to be couched as a negative liberty, i.e., as rights against state interference, minority protection regimes require the state to take positive measures "necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practise their religion, in community with the other members of the group" [CCPR General Comment No. 23: Article 27 \(Rights of Minorities\) \(1994\)](#). According to the Human Rights Committee, the protection of rights of persons belonging to minority groups is "directed towards ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of society as a whole" [CCPR General Comment No. 23: Article 27 \(Rights of Minorities\) \(1994\)](#). This may entail autonomy and educational rights, such as providing resources for parents to realize their right to educate their children according to their own faith. Positive measures to protect religious autonomy may also encompass allocating state resources to administer personal law for religious minorities. One can see this for instance in Singapore where the constitutional obligation imposed on the government to care for the Muslim minorities is partly fulfilled through a constitutionally authorized personal Muslim law system. Under Singapore's Administration of Muslim Law Act, a system of Syariah courts/tribunals and an Islamic religious council administers Islamic-based laws in the areas of marriage, divorce, inheritance, and religious obligations ([bin Abbas 2012](#)).

The accommodation of religious minorities through positive state obligations to support religious activities can level the playing field between minority communities and the general population, especially vis-à-vis the religious majority ([Shachar 2001](#), p. 2). Notably, this goes beyond a common aspect of religious freedom right for religious groups to manage their own affairs and to establish their own institutions ([Ahdar and Leigh 2015](#), pp. 375–76). Such rights are negative rights; guaranteeing that religious groups enjoy freedom from state intervention in the regulation of their own affairs. Notably, such systems of autonomy may "unwittingly allow systematic maltreatment of individuals within the accommodated group" ([Shachar 2001](#), p. 2) and result in insulating religious practices from constitutional values ([Kymlicka 1995](#), p. 153). One such particular conflict is between religious autonomy and equality. Okin, for instance, argues that since some group rights can, in fact, endanger women, we should not accept group rights that permit oppressive practices just because it is claimed that they are fundamental to minority cultures whose existence may otherwise be threatened ([Okin 1999](#)). A state-supported regime of autonomy for religious minorities could, at times, be more effective at reconciling constitutional commitments to equality and religious minority protection. Shachar has also argued for a "joint governance" approach aimed at enhancing jurisdictional autonomy of religious and cultural minorities while providing viable legal-institutional solutions to the problem of sanctioned intra-group rights violation ([Shachar 2001](#)).

4.3. Right to Political Participation

Thirdly, a focus on minority protection may give rise to greater attention on the need to enhance political participation by religious minorities. As Thio argues, "[a] constitution may contribute to the pacification of minorities, mute ethnic tensions, and promote the peaceful co-existence of disparate groups within the state framework by promoting their effective protection, recognition, and participation in all aspects of public life" ([Thio 2010](#), p. 47). The way to do this is not necessarily through a focus on religious freedom rights, but through a focus on implementing modes of political participation and accountability for religious minority groups ([Ahdar and Leigh 2015](#), p. 375). Notably, any religious freedom right to manage the group's own affairs does not extend to being included in

the political processes of the state. Religious minorities may be left alone to conduct their own affairs, but they have no guarantees of being included in the political structures of a particular polity.

A minority regime could therefore contribute to greater protection for religious minorities by requiring power-sharing arrangements. Power sharing and group autonomy are two principles that have been proposed as being key to the successful establishment of democratic government in divided societies (Lijphart 2004, p. 97; Gurr 1993, p. 292). Power sharing refers to the inclusion of representatives of all significant groups in political decision-making, while group autonomy allows for these groups to have authority to run their own internal affairs (Lijphart 2004, p. 97; 1977⁵). One power sharing model is that of consociationalism, which tends to rely on ethnic political parties to create grand coalitions among the political elite of different ethnic communities (Lijphart 1977; 2004, p. 97). However, ethnic cooperation, and indeed power sharing, *broadly understood*, could also be realized using other strategies (Horowitz 2014). An alternative prescription for divided societies is centripetalism, which aims “to put in place institutional incentives for cross-ethnic behavior in order to encourage accommodation between rival groups” (Reilly 2011, p. 57). Consequently, centripetalists favor multi-ethnic political parties (which can encourage inter-group accommodation) and electoral incentives for crosscutting cooperation (Reilly 2011, p. 57). A recognition of the embedded plurality of Asian societies, and the need to manage, rather than ignore ethnic, religious, cultural, and linguistic pluralities is key to ensuring social and political stability. Constitutions must be able to construct social consensus and national unity while allowing for a pluralistic conception of the *demos* (Neo and Bui 2019).

A minority regime that ensures religious minorities are included in the political process could be more effective in protecting their rights than a strictly individual rights-based regime. This is because religious minorities could be included as part of the political majority, rather than as simply a narrow marginalized group. There is a coalescing of majority and minority interests when the religious majority recognizes that protecting minority rights is a crucial aspect of social, political, and economic stability and prosperity. In deeply divided societies especially, religious minorities are best protected when the majority sees the protection of minorities’ rights and interests as a necessary part of the public interest. In this regard, it is interesting to look at a constitutional provision in Timor-Leste, Asia’s youngest country, which intertwines inter-religious cooperation with community interest. Besides declaring that the “State recognizes and respects the different religious denominations, that are free in their organization and in the exercise of their own activities, with due observance of the Constitution and the law”, Article 12 of the Timor-Leste constitution also states that the state “promotes the cooperation with the different religious denominations that contribute to the well-being of the people of East Timor” (Constitution of the Democratic Republic of Timor-Leste 2002, Art. 12). This connects inter-religious cooperation with the well-being of the people generally.

5. Conclusions

Minority protection can enrich the discourse on religious freedom protection by supplementing, without substituting, religious freedom protection. It bears noting however that a turn to minority protection could create its own paradoxical problems. In calling for minority protection, religious minorities inevitably “draw attention to the uniqueness of the group as distinct from the majoritarian identity of the nation” (Mahmood 2012, p. 446). By doing so, religious minorities tend to amplify their distinctiveness and reify their differences with the majority (Mahmood 2012, p. 446). They may further set themselves apart from the majority and from the polity by emphasizing other bases for differentiation—ethnic, cultural, and/or linguistic—to accentuate their distinctiveness as a religious minority. This may lead to a paradoxical situation where, in claiming for more protection as minorities, religious minorities may end up deepening their marginalization in society, which potentially exposes themselves to greater discrimination and persecution.

A strong minority regime may also be a double-edged sword for minority voices within a religious minority. The minority within the minority may be further insulated from state protection because any attempt to seek constitutional protection, most likely on the basis of discrimination, would be resisted as an attempt to destroy the minority group's religious identity. Accordingly, a focus on religious identity as a subject of protection may also aggravate tensions between group and individual rights, while conflicts between the group's religious freedom rights and other rights, particularly equality, may be accentuated by the group's minority status. One might point to the example of Tibetans and Uighur Muslims in China, where despite being recognized minority groups, neither a minority protection regime nor a religious liberty regime have been necessarily helpful in advancing the discourse on rights-protection (UNHCR 2020). Instead, the worry is that a strong emphasis on their status as minorities may well contribute to further exclusion and marginalization. A focus on minority protection could highlight the particular vulnerabilities of religious minorities, thus avoiding being obscured under general religious freedom rights. At the same time, emphasizing one's minority status in order to claim protection can come with trade-offs, and lead to religious minorities being permanently marginalized or could even accelerate forced assimilation. Such minoritization is particularly dangerous in the context of rising religious nationalism in some countries where groups are not only cast as minorities but also as outsiders, even as threats to national security and sovereignty (Neo and Scharffs 2021).⁶ Ultimately, context matters for the possibilities of navigating the Scylla of minority protection claims and the Charybdis of religious freedom rights.

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Notes

- ¹ Note for instance that Tan and Duxbury's comprehensive 2019 book on human rights in ASEAN did not address minority rights (Tan and Duxbury 2019).
- ² Significantly, Zucca notes the impact of local experiences in discussing different theories of religious freedom (Zucca 2015).
- ³ The Bible was translated into the Malay language as early as 1612 by Dutch missionaries.
- ⁴ The Malaysian Bar devoted a substantial portion of its October–December, 2013 newsletter Praxis to critiquing the “Allah” case (see e.g., Harding 2013).
- ⁵ These principles lie at the heart of consociational democracies (Lijphart 1977).
- ⁶ For instance, Gorski and Türkmen-Derivoğlu define religious nationalism as social and political movements that claim to speak on behalf of a nation, and defines the nation in religious terms, which results in a very high level of political animosity to those outside of the constructed boundaries of religious and political communities. (Gorski and Türkmen-Derivoğlu 2012).

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