FORIS
WORKING GROUP
REPORT
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Institutional Religious Freedom and the Common Good

Significance, Challenges, and Policy Implications

RELIGIOUS FREEDOM INSTITUTE

Introduction

The Religious Freedom Institute's (RFI) Freedom of Religious Institutions in Society (FORIS) Project is a three-year initiative funded by the John Templeton Foundation that aims to clarify the meaning and value of institutional religious freedom, examine how it is faring globally, and explore why it is worthy of public concern.

FORIS seeks to advance scholarship, inform policymakers, and influence cultural understandings on institutional religious freedom in the United States and around the world. Religious liberty is not an individual right alone, but rather includes the right of religious communities to gather in synagogues, churches, mosques, temples, and other houses of worship. Freedom of religion also includes the right of faith communities to establish religious institutions such as schools, hospitals, ministries to the poor, universities, and countless others that seek to embody the teachings of their respective religious traditions. Institutional religious freedom encompasses this full range of congregational and organizational expressions of religious faith. FORIS critically engages with both the proper meaning and scope of that freedom as well as its contributions to a society's common good.

About the Religious Freedom Institute

A non-profit organization based in Washington, D.C., RFI is committed to achieving broad acceptance of religious liberty as a fundamental human right, a source of individual and social flourishing, the cornerstone of a successful society, and a driver of national and international security. RFI seeks to advance religious freedom for everyone, everywhere.

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FORIS
Freedom of Religious Institutions in Society

Contents

Introduction

The report that follows emerges from a working group of scholars associated with the FORIS Project. It provides, in condensed form, an introduction to the most salient and cross-cutting themes the authors addressed in their research conducted under FORIS auspices.[1] Naturally, the report reflects the authors' respective areas of expertise in the Middle East and North Africa, South and Southeast Asia, and the United States. The findings presented here should therefore be taken as an illustrative snapshot rather than a universal and panoramic review of issues related to institutional religious freedom (IRF) globally.

We begin, in Section I, by discussing the value of IRF before making some recommendations, in Section II, about how IRF should be studied. In Section III, we consider less obvious and less frequently recognized threats to IRF. Finally, in the concluding paragraphs, we discuss some complications for global IRF advocacy.

I. Why *Institutional* Religious Freedom

Institutional religious freedom, or IRF, is a central element of religious freedom. No religion is entirely without communal and institutional elements. Even if we conceive of religion as a matter of individual conscience, religious institutions are critical to the formation and flourishing of religious individuals. Religious institutions allow for corporate religious action, provide venues for resolving doctrinal disputes, establish processes for reforming religious practice and belief, and offer supportive community. Concurrently, religious institutions function as avenues for nurturing, identifying, and (as necessary) removing religious leaders. In sum, religious institutions are therefore neither secondary nor extraneous to religion. For this reason, legal constraints on religious institutions inevitably entail constraints on religious individuals. Any thorough protection of individual religious freedom must therefore also include protection of institutional religious freedom.

No freedom is absolute, and reasonable regulation of religious institutions is to be expected. The over-regulation of religious institutions, however, introduces certain risks, particularly when the over-regulation is discriminatory, capriciously applied, or infringes upon affairs internal to the workings of religious institutions (e.g., their ability to determine doctrine, direct worship, appoint leaders, manage their own financial and institutional affairs, and ultimately to carry out their mission). Over-regulation is frequently a tool of government repression, whether of religion in general, religious minorities, or minorities within the religious majority. Moreover, a pattern of over-regulation often tempts the state to engage in ever more expansive projects of enforced reformation and homogenization. Such projects, however, inevitably create resentment, encourage religious dissimulation, and promote the growth of reactionary religious movements that reject both religious tolerance and secular governance. There are, therefore, significant risks involved in the over-regulation of religious institutions, as we discuss in Section III.

Conversely, there is a great deal of social value inherent in the preservation of IRF. Religious institutions provide a check on government power and authority, nurture civic virtue and a spirit of volunteerism, contribute in substantial ways to the national economy, and produce social capital. Below we consider each of these contributions in order.

1.1 - Providing a check on government power and authority

Scholars have convincingly argued that what allowed for the emergence of normative church-state separation in Europe was the institutional strength of the Roman Catholic Church. Because the Church could rival the state in authority and influence, the two were forced to negotiate separate jurisdictions and spheres of influence.[2] Paul Marshall, quoting Harold Berman, extends the argument: "The competition between the ecclesiastical and the secular court had a lasting effect on the Western legal tradition. Plural jurisdiction and plural legal systems became a hallmark of Western legality … Underlying the competition [between church and state] … was the limitation of the jurisdiction of each."[3] Conversely, for Ahmet Kuru, in contexts without strong religious institutions, or where the authority and power of religious institutions have been successfully undermined by political authorities (e.g., much of the Middle East after the 11th Century), religion-state separation is unlikely to emerge.[4] Notably, in both cases, these authors demonstrate that social structures that are largely the unintended consequence of societal struggles and path dependencies are more important in the formation of religious liberty than the putative inclination or disinclination of particular cultures or religions towards religious freedom.

1.2 - Nurturing Civic Virtue

In the 1830s, French political scientist Alexis de Tocqueville famously observed Americans' penchant for forming voluntary associations, and remarked that these associations inculcated what social scientists today call the virtue of other-mindedness. They did so, according to Tocqueville, by encouraging "a long series of small services, hidden deeds of goodness, a persistent habit of kindness, and an established reputation of selflessness."[5]

However, while religious voluntary associations are, as Tocqueville noted, a particularly prominent element of the American social landscape,[6] they are not unique to the United States. In most societies, many (if not most) voluntary associations are religious. One of the justifications for preserving IRF, then, is to preserve the virtues that such associations are able to nurture. Among other issues, such virtues can only be gained through *voluntary* service. No government can inculcate them by force or decree.

1.3 - Contributing to the National Economy

Religious institutions contribute in significant ways to their national economies, and their charitable contributions are particularly remarkable. Studies from the United States provide the clearest evidence in this regard, though their findings are likely somewhat generalizable. Americans volunteer nearly 7 billion hours a year, annually injecting an

estimated $167 billion into the economy.[7] To the extent, then, that religious organizations around the world encourage volunteering (and they often do), they contribute to the financial success of their respective nations, while also quite effectively (and for pennies on the dollar[8]) supplementing government efforts to eradicate poverty, homelessness, addiction, and criminality/recidivism.[9]

It is true that a substantial portion of the voluntary labor contributed by individuals within religious institutions serves religious institutions themselves. However, religious institutions commonly serve non-members and can often rival local governments in terms of the quality and breadth of educational and medical services they provide, particularly to impoverished communities. Moreover, statistics from the United States suggest that those who volunteer donate to charity at twice the rate of non-volunteers, and more regularly talk to neighbors, participate in civic organizations, attend public meetings, and vote in local elections.[10] They are also two or three times more likely to volunteer in other, non-religious contexts.[11] They have even been shown to encourage non-religious people in their orbit to volunteer.[12]

1.4 - Producing Social Capital

Life within religious institutions also contributes to the formation of the supportive social networks commonly referred to as "social capital." Certain advantages of being enmeshed in social networks are obvious: acquaintances in networks can help members get jobs and gain access to governmental, educational, medical, and financial services. Other benefits are more subtle. Robert Putnam, for example, has argued that close-knit communities are likely to feature greater levels of trust and reciprocity among members. In turn, this trust and reciprocity can contribute to a more cohesive and stable society by reducing transaction costs and improving information flows while enhancing cooperation.[13]

It is important to note that there are potential downsides to close-knit communities, in the sense that they can also serve to exclude or otherwise turn against outsiders. Critics of Putnam's work, and even Putnam himself (in the distinction he makes between "bonding" and "bridging" capital), have acknowledged this point.[14] Robert Hefner also discusses these dynamics and the potential dangers of social capital in the context of Indonesia, while Ahmet Kuru has done the same with regard to 19th century America.[15]

Nevertheless, a rapidly expanding body of research is revealing that participation in the life of religious institutions has been linked to better coping skills,[16] increased life expectancy,[17] stress reduction,[18] better self-reported health,[19] better overall flourishing and well-being,[20] better social integration and support,[21] better mental and physical health,[22] a greater tendency towards forgiveness,[23] effective crime reduction,[24] more effective prisoner rehabilitation,[25] more positive family relations,[26] less substance use/abuse,[27] greater healthcare utilization,[28] and better coping strategies in stressful conditions.[29] According to Putnam, one of the primary reasons why religious people report being more satisfied with their lives is because they attend religious services and build stronger social networks than many nonreligious people are able to build.[30] Diminishing IRF, therefore, inevitably comes at a great financial, social, and psychological cost to society.

II. Methodological Issues

Much advocacy and even scholarship surrounding IRF exhibits too narrow a focus. In what follows, we argue for a more complex consideration of IRF, one that attends to: 1) minority, majority, minority-within-the-majority (MWMaj), and disprivileged minority-within-the-minority (MWMin) concerns; 2) constitutional provisions and statutory law, both as written and (importantly) as *implemented*; and 3) legal restrictions and social constraints. Highlighting both social constraints and legal restrictions has the additional benefit of training our gaze on negative and positive freedoms, informal and formal social arrangements, as well as local and national dynamics.

2.1 - Beyond Minority Rights

Advocacy around IRF issues frequently focuses on the harassment and restriction of religious minorities, and justifiably so. Minorities generally lack the political and social capital to press for their own rights. Additionally, among religious communities in general, minorities are far more vulnerable to violence and even genocidal extermination than others. Below, in our discussion of international threats to IRF, we therefore, naturally, include discussion of minority concerns. However, a full understanding of IRF dynamics in any particular location requires attention to the religious freedoms of all communities. Moreover, there is an obvious strategic justification for developing a more complete and nuanced understanding of IRF issues: Majority religious communities ultimately will be more likely to productively accept criticism of the systems that (generally) privilege them if those offering the criticism also acknowledge the IRF concerns of majorities.

In India, for example (as discussed below), minorities find their religious freedoms constricted by the constitution, statutory law, social harassment, and occasionally even violence. But Hindus, who constitute the majority, also express concerns about what they consider government intrusion upon their internal affairs, particularly in the judiciary's reformatory tendencies, which periodically lead, for example, to the enforcement of gender equity in restrictive or traditionally patriarchal temple spaces. The intent of highlighting majority along with minority concerns is not to assert their equivalence. Generally speaking, religious majorities enjoy many compensatory freedoms that religious minorities do not. Moreover, acknowledging both minority and majority concerns in a particular country should not be construed as an assertion that the country has appropriately balanced them. Still, it is important for both the scholarly and strategic reasons already discussed to pay attention not only to minority, but also to majority IRF issues.

Similarly, a much-neglected element of research on IRF is the situation of MWMaj religious communities. Such communities often find at least some of their freedoms restricted even more extensively than those of minorities. In predominantly Muslim Pakistan, for example, Shias are repressed, often violently, while Ahmadis (or Ahmadiyyas) have been constitutionally excluded from the legal definition of Islam. Consequently, Ahmadis have been unable to claim their rights as Muslims without

denying their core identity.[31] Alevi Muslims in Turkey are likewise (if less violently) restrained.[32] For this reason, in many predominantly Muslim Middle Eastern countries, Christians and Jews often retain a great deal more freedom than MWMaj communities with regard to their *internal* religious affairs (e.g., the appointment of leaders and the determination of doctrinal and ritual norms) despite being severely restricted in terms of their external freedoms (e.g., the freedoms to criticize Islam, proselytize, and/or marry women outside their tradition). They also retain a right denied to members of many Muslim majorities: the right to convert away from a particular expression of their natal faith to another form of that faith, to convert to other faiths, or to convert away from religion altogether.[33]

Of all IRF dynamics, perhaps the most overlooked is the relationship of relatively privileged minorities and relatively disprivileged minorities. Frequently, minority communities that enjoy relatively greater freedoms than other minority communities resist the expansion of their freedoms to others within their faith. In India, for example, higher-caste Christian communities often ally with Hindu nationalist political parties and against their lower-caste co-religionists, while Christian communities less committed to evangelism (e.g., Catholic, Orthodox, and mainline Protestant communities) abandon their more evangelistic Christian brethren when they are harassed, restricted, or attacked in the context of their proselytization.[34] Likewise, as witnessed between Christian denominations whose relationships are characterized by competition and rivalry, there are often power struggles within the same religious tradition. In Egypt, for example, precariously but relatively better positioned Coptic Christians squelch dissent within their own ranks and resist advocating on behalf of (and at times work actively to undermine) Protestant and Catholic Christians.[35] In Indonesia, evangelical Protestants have periodically resisted the expansion of religious rights to adherents of indigenous religious traditions.[36] In this way, then, privileged minorities participate in (or at least tacitly accept) the restriction of freedoms both of other minority religions and of minorities within their own religious communities.[37] In this way, then, privileged minorities participate in (or at least tacitly accept) the restriction of freedoms both of other minority religions and of minorities within their own religious communities.

2.2 - Beyond Constitutional Law

Those seeking to analyze issues of IRF thoroughly must look beyond constitutional proclamations and include within their investigation both an examination of statutory law and a more ethnographic consideration of the implementation of relevant laws. For example, while all but six states in the Middle East have constitutions that grant citizens freedom of conscience, all Middle Eastern states still regulate religions, including Islam, through statutory law and other provisions.[38] Similarly, India's constitution declares it a "sovereign, socialist, *secular* democratic republic" (emphasis added), and enshrines "freedom of conscience and the right to freely profess, practice, and propagate religion…" Still, a subsequent Supreme Court of India decision narrowed the definition of "propagate" expressly to exclude the right to convert another to one's faith. This latter decision declared as constitutional various

state laws that ban conversion by force, fraud, and inducement, and in some cases also require registration and requests for permission prior to conversion. Therefore, to understand fully the situation of IRF in India, as elsewhere, one must attend not only to the constitutional provisions themselves but also to subsequent judicial decisions interpreting them, periodic failures to implement them, translation of constitutional provisions into statutory law, and the sometimes capricious harassing and biased application of law, constitutional and statutory, by various government authorities.[39]

2.3 - Beyond the Law

As foreshadowed by the previous paragraph, an important factor to consider when assessing the nature of IRF in any particular context is the extent to which social pressures impose restrictions on religious activities not otherwise prohibited by law. This consideration is implicit in Timothy Shah's definition of IRF as the "presumptive right of a religious institution to be free from coercive interference *on the part of individuals*, *social groups*, governments, or of any human power in three main areas or dimensions: self-definition, self-governance, and self-directed outward expression and action."[40]

In Pakistan, for example, suicide bombings targeting Shias, violent and murderous attacks against Christians, and allegations of blasphemy (often used to settle scores) intimidate religious minorities, prevent them from exercising what freedoms they have, and underscore their subordinate status.[41] Similarly, violent attacks on Muslims in India prevent the consumption of beef even in states where it is legal, and deter interfaith marriages of Muslim men to Hindu women. Violent attacks on Christians in India similarly restrict Christian worship and even legal forms of proselytization.[42] Around the world, government failures to prosecute or even identify the perpetrators of such acts embolden them. Once they achieve a certain degree of power within society, their willingness to use violence can prevent any serious governmental attempt to reform restrictive laws or expand religious freedom. Over time, then, in such situations, militant groups, rather than the rule of law, come to determine the extent of IRF.[43] In some cases, as should be clear, such social harassment and violence punishes activities prescribed by law (e.g., denying alleged offenders due process). In other cases, the intent of social harassment and violence is to establish prohibitions (e.g., against beef eating or heterodox beliefs and practices) that do not yet exist in law.

Highlighting the imbrication of social pressures and legal constraints also reminds us to consider positive and negative freedoms, formal and informal social arrangements, and national and local dynamics. Amartya Sen famously framed freedom in terms of both positive and negative capabilities. *Positive freedoms* pertain to what people have the freedom to do; whereas *negative freedoms* are freedoms *from* undesirable things, such as social violence, capricious and discriminatory applications of existing law, etc. Social harassment and violence is unfortunately often quite effective at constraining both positive and negative institutional religious freedoms.

Attending to social pressure also allows us to recognize the importance of informal, rather than merely formal, social structures.

In Egypt, for example, the formal arrangements of constitutional writ, statutory law, and government policy are complicated by the informal power of the security apparatus. The Egyptian government's security apparatus functions as the channel through which such formal arrangements are filtered and by which they are extended, enforced, or not enforced. Attending to social pressures also reminds us that structures governing IRF are dynamic, not static, and therefore require real-time attention to current arrangements of power and authority.[44]

Finally, highlighting the role of social pressure in the implementation of religious freedom law reminds us that the experience of institutional religious freedom often differs broadly from region to region within particular countries. Such differences cannot be explained solely by referencing the character of the constitution and statutory law. Rather, explaining regional differences requires an examination of locally relevant social dynamics. For example, in both Egypt and India, violent attacks on Christians and their places of worship have been more common in rural areas. In India, socially-imposed constraints placed on the religious freedom of Muslims and Christians are more common in the North than in the South and and Northeast regions. Meanwhile, in Indonesia, attacks on the country's small Shia and Ahmadi minorities have been overwhelmingly concentrated in six of the country's thirty-four provinces, all regions in which powerful Islamist rebellions operated only a generation prior. In nearly every country, one finds substantial regional differences in ethnic and political composition, economic development and work participation, the existence and impunity of local toughs and militant groups, and the quality, preparation, and corruptibility of police officers. All of these differences have the power to alter substantially the experience and implementation of religious freedoms and restrictions.

III. A Typology of Indirect Threats

In this section, we leave aside the most obvious and direct infringements upon IRF (i.e., the outlawing of certain or all religions, the closure of places of worship, the arrest of religious believers and leaders, severe or genocidal state and/or social violence against religious groups, etc.) and—following our own advice as shared in the previous section—look more broadly at some of the more subtle, and, in some cases, overlooked ways in which countries around the world circumscribe IRF. We begin with what may seem at first blush to be an unrelated matter, i.e., the denial of academic and press freedoms and the freedom to protest. We then discuss the uneven application of otherwise unobjectionable laws, the over-privileging of majority rights (and theological positions), and the over-regulation of religious communities. In the end, we also discuss the dangers of over-regulation, the consequences of which include religious dissimulation and the rise of reactionary and intolerant religious and/or anti-religious movements.

3.1 - Denial of Academic, Press, and Protest Freedom

Governments in the United States, Egypt, India, and around the globe have in recent years passed laws further restricting the right to protest, increased fines and prison sentences for those accused of running afoul of them, and responded more and more regularly to protestors with overwhelming military or police violence.[45] Myanmar provides the most egregious and extreme current example. However, many restrictions on the right to protest are more subtle than those imposed by Myanmar's military regime. In 2014, Egypt, for example, passed a new protest law that required government authorization as a prerequisite for engaging in collective public action. This law has had a chilling effect on public demonstrations.[46] In early 2021, India detained and then briefly imprisoned a 21-year old woman, Disha Ravi, under sedition charges. Prompting the Indian government's heavy-handed response, Ravi had shared an informational "toolkit" supporting the ongoing farmers' protests with Greta Thunberg (who subsequently shared it publicly).[47]

Similarly, many countries continue to target press freedoms. China recently imposed restrictive laws on Hong Kong journalists. Press and Internet freedoms[48] have fallen precipitously in India, where under the government of Narendra Modi journalists are now regularly pressured, threatened, arrested, and attacked by state and social actors.[49] Similarly, according to Amnesty International, "arbitrary arrest, detention, and baseless criminal prosecutions are used as instruments of press censorship" in Pakistan.[50]

Academic and human rights organizations are also under threat. The Egyptian government generally discourages social science research. It hounds researchers pursuing empirical work for Western universities. In India, as elsewhere, government officials have gained control over an ever-broadening swath of media outlets, while encroaching increasingly into university spaces, threatening to disrupt or cancel conferences it does not like (through fiat or mob violence), and moving to alter

school textbooks to perpetuate a partisan Hindu nationalist perspective on social and historical affairs. The Modi government has also increased restrictions on the receipt of foreign donations and used such regulations to shut down national and international human rights and climate action organizations (such as Amnesty International and Greenpeace) that the Indian government accuses of engaging in "undesirable activities against public interest."[51]

While such issues may seem ancillary to the preservation of IRF, they are not. Protest, press, and academic freedoms ensure the publication of incidents of violence, vandalism, and other forms of harassment perpetrated against religious minorities. Without them, there is little hope that those who have had their freedoms circumscribed can air their grievances, gain a hearing, hold public officials accountable, and find relief. Even the mere airing of grievances provides a form of psychological relief to the oppressed. Without such freedoms, ordinary citizens are prevented from pressing their cases publicly. Negotiations are pushed underground, where only elites can participate and transparency is limited.

3.2 - Uneven Application of the Law

Amnesty International has reported on the discriminatory application of Pakistan's laws (particularly its anti-blasphemy laws) upon the country's religious minorities. The resulting proceedings, which sometimes involve accusations against children and people with cognitive disabilities, often "violate the right to fair trial, including the fundamental principle of presumption of innocence."[52] In contravention of international law, penalties can even include death, as dramatically revealed in the famous case of Asia Bibi, a Christian who was condemned to death before later being acquitted and allowed to emigrate.

In Egypt, the security apparatus often circumscribes and blocks access to the rule of law, pressing Coptic Christians attacked in sectarian violence to "resolve" tensions with their Muslim neighbors through reconciliation committees rather than seeking justice through the courts. One lever of power commonly exercised by the security apparatus is to arrest both perpetrator(s) and victim(s), implicitly suggesting that the victims are responsible for Muslim-Christian tensions. Victims are even threatened with criminal penalties if they press their case against perpetrators.

Christians and Muslims attacked in India often find themselves similarly arrested if they approach the police to register a case. They also suffer from wildly uneven application of laws like the various state "Freedom of Religion" acts (called "anti-conversion laws" by their critics) that prohibit conversion by "force, fraud, and inducement," and in some cases require prior registration or permission from law enforcement officers for conversion. Vague terminology in these and other laws (including the anti-blasphemy and anti-insult laws discussed below) leave them vulnerable to abuse and biased application. This vagueness frustrates not only those targeted by the laws but also those *opposed to conversion* (who believe that laws, interpreted widely, forbid any and all evangelism, and who, observing that not all those who publicly proclaim their faith are arrested, are tempted to take matters into their own hands). As a consequence, even

pastors preaching in their own churches have sometimes been attacked by mobs that accuse them of transgressing the Freedom of Religion Laws. In fact, quite regularly, when mobs attack Christian communities and Christian leaders approach the police to file a report, police officers sympathizing with the mobs book them under one or another of these easily abused laws. Yet at the same time, Hindus converting Muslims and Christians to Hinduism have never been prosecuted under such laws, even when good evidence of financial allurement was at hand.[53]

Around the world, religious minorities (and MWMaj communities) are threatened by the capricious and partisan application of existing laws. This uneven application undermines the fair application even of appealing laws. The uneven application of the laws is especially exacerbated by the passage of partisan laws clearly intended (such as India's "Freedom of Religion" laws) to target a particular community. In situations where the police are poorly trained, uninformed, or easily corrupted, such laws can be turned easily into tools of harassment that can be used to harry disfavored religious communities with spurious charges even if rarely resulting in actual convictions.

3.3 - Over-privileging of Majority Rights

In the conclusion, we acknowledge that it is difficult in every case to balance the rights of majority and minority religious communities. However, there are several situations in which it is clear that majority institutional religious freedoms have been privileged to the clear detriment of minority and MWMaj religious communities. Some of these situations are more obvious, such as: 1) the enforcement of state religions, 2) the implementation of laws based in significant ways upon the majority's religious law (as in Syria, Tunisia, Saudi Arabia, Pakistan, Iran, and Iraq), 3) required public school education about the majority religion, 4) preferential financing of majority religious clergy or houses of worship (as in Germany), and 5) constitutional provisions (such as those in Sri Lanka) favoring one religion over all others. To take just one example, in Saudi Arabia, Sunni Muslims have rights that are denied to Shias. Fatwas have been issued preventing Shias from selling property. Schoolbooks and the media perpetuate narratives treating Shias as heretics. The state systematically discriminates against them in hiring and contracts.[54]

Below, we discuss two more subtle and overlooked situations that involve an over-privileging of majority religious rights: 1) the definitional erasure of religious communities based on majority conceptions of good, proper, and/or orthodox religion, 2) and both anti-blasphemy and anti-outrage laws (under which we also consider prohibitions against proselytization).

Indonesia's history provides clear examples of the definitional erasure of religious communities in ways that lead to a denial of their IRF. Hundreds of thousands of Indonesians follow indigenous religions known as *agama leluhur* and new religious and mystical movements known as *kepercayaan* ("beliefs" or "spiritual beliefs") or *aliran kebatinan* ("spiritual currents"), terms that clearly distinguish them from world religions like Christianity, Islam, and Buddhism. While the Indonesian

constitution ensures freedom of "religion," the *agama leluhur*, *kepercayaan*, and *aliran kebatinan* remain in definitional limbo. They are *like* religions, and acknowledged in various bureaucratic contexts. However, they are neither formally recognized as religions nor given the rights granted to officially recognized religious traditions because they do not fit the legal definition of religion. To fulfill the Indonesian government's criteria to be legally deemed a religion, a religion must exhibit, *inter alia*, the following attributes: a prophet or a founding seer, a holy book, standardized ritual, international recognition, and "a teaching about the oneness of God.[55] Most Muslim and some Christian authorities support this status quo, and, in fact, the more restrictive conceptions of religion and which religious communities deserve religious liberty have only gained in power since the earliest years of Indonesia's independence.[56]

In Pakistan, a Sunni Muslim majority has imposed its own orthodoxy on Shia, Ismaili, and Ahmadi Muslim minorities. The Sunni majority has threatening to deny these Muslim minority communities the special privileges accorded to Muslims by defining them as something other-than-Muslim. A 1974 constitutional amendment defined Ahmadis as non-Muslim because of their heterodox belief in an additional prophet after Muhammad (the only instance of a sect being excluded from the fold of a majority religion through constitutional amendment, which effectively turned a theological question into a matter of law).[57] Having thus declared Ahmadis non-Muslim, the government then went about systematically denying them the rights of other Muslims. The government required them to declare the founder of Ahmadi Islam an imposter if they wished to be identified as "Muslim" on their passports and national identity cards. It also forbade them (in 1976) from voting with Muslims in separate electorates, which essentially disenfranchised them, and legally barred them (in 1984) from calling themselves Muslim or using Muslim terms for their mosques or calls to prayer. Understanding themselves as Muslim, but being unwilling to repudiate their founder, the Ahmadi are in a bind from which there is no hope of extrication. Equally troubling is the fact that such concessions to majority religious conceptions of orthodox belief inevitably encourages the majority to press its definitional rights even further; the ink was barely dry on the 1974 amendment before some Sunnis began calling for a similar approach to Shias and Ismailis.[58]

Laws forbidding blasphemy, insulting or defaming religion, or the causing of religious offense or outrage are another manifestation of the over-privileging of majority religious rights and constitute a pervasive threat to IRF from the Middle East to Indonesia. In Pakistan, such laws especially exacerbate the persecution of Ahmadis, among other pernicious effects upon IRF. Article 295A of the Pakistan Penal Code threatens ten years' imprisonment to those who deliberately and maliciously act to outrage the religious feelings of any class by insulting its religion or religious beliefs. Article 295B penalizes defiling the Holy Quran with imprisonment for life. Article 295C threatens death to those who utter derogatory remarks about Muhammad. Article 298A recommends three years of imprisonment for making insulting remarks about "holy personages." Article 298B recommends a penalty of three years for Ahmadis who use certain Islamic epithets

and titles. Lastly, Article 298C makes it illegal for an Ahmadi to call him- or herself a Muslim.[59]

Similar provisions in the Indian Penal Code have been used to arrest and sometimes prosecute Christian proselytizers in India. In Indonesia, at both the national and district level, state controls leveled on minority Muslims like the Ahmadis have been especially severe. These state controls have amounted in some districts to outright bans on Ahmadi preaching or even congregational worship. State controls on proselytization by Christians and other religious minorities have been far less severe, but in principle proselytization by any religious community to citizens already practicing a state-recognized religion is legally proscribed. Similarly, in nominally secular Turkey, sundry regulations—zoning, environmental impact, building codes—are used to deny Christian sects legal personhood and the right to call a functioning place of worship a "church." Many sects exist in legal limbo; though they are allowed to function inconspicuously in buildings whose locations can be readily shared via the Internet, they are unable to explicitly advertise their properties as belonging to a specific church. These restrictions limit their ability to worship freely and proselytize.[60]

There are manifold problems with anti-blasphemy and anti-outrage laws. First, they are triggered easily, and therefore can be abused by members of the majority religion as a convenient way of cowing religious minorities and adherents of MWMaj religions into submission, settling scores, dealing blows to rivals, or blackmailing them for money, jobs, property, or sexual favors. In Pakistan, for example, claims of blasphemy made under Article 295C require immediate imprisonment without bail. This means that the mere accusation of blasphemy leveled by a Muslim has the power to put the accused behind bars. No wonder, then, that between 1987 and 2002, Pakistan has prosecuted more than a thousand citizens for blasphemy, and as of May 2019 more than 200 Christians were in prisons facing charges of having insulted Islam or the Prophet Muhammad.[61] In September 2020 alone, more than fifty Shias (one of them three years old) were booked on blasphemy and anti-terrorism charges.[62] Judges who show leniency towards the accused risk being accused themselves of engaging in blasphemy-by-association. Politicians who advocate on their behalf risk being assassinated, as was the fate of former Punjab state governor, Salman Taseer. And let us not forget that for Ahmadis, merely identifying themselves as Muslim (or being accused of it) is considered an insult to Islam under these provisions.[63]

Second, the laws put the onus on adherence of minority or MWMaj religions to avoid causing offense. Not only do laws against blasphemy and causing religious offense over-privilege the *feelings and sentiments* of the majority by putting them above the legal rights of minorities to equal protection under the law, but they also invite adherents of majority religions to *perform* their outrage in order to bring the law into force. And when the performance of outrage achieves results, it invites yet more performances of outrage. In a perverse manner, then, laws forbidding the causing of religious outrage actually engender it. When the mere existence of religious minority and MWMaj religious communities can be construed as an

offense, it is difficult to see how minority communities can act upon the rights they theoretically should be able to enjoy.

We may conceive of laws forbidding or restricting proselytization (such as India's "Freedom of Religion" laws, described above) as a species of laws prohibiting outrage and insult. In a few select countries with no overwhelming religious majority, such laws may be intended to preserve social harmony. In an overwhelming number of cases, however, they are intended to maintain the status quo, prevent the proselytization and decline of majority religious communities, and preserve the freedom of majority religious communities *from* religious disturbance or criticism, while being exclusively or almost exclusively used against minority and MWMaj communities. Laws restricting proselytization generally, restricting proselytization by foreigners, restricting proselytization in public spaces, restricting attempts to convert adherents away from the majority community, or banning proselytization altogether are on the books across the globe. Such laws can be found in places as disparate as Armenia, Azerbaijan, Cambodia, Chad, China, Comoros, Greece, India, Indonesia, Malaysia, Moldova, Myanmar, Nepal, Niger, North Korea, Pakistan, Singapore, Somalia, Sudan, Tuvalu, Vietnam, as well as the majority of Middle Eastern and Central Asian countries, including those not listed here.[64] (Generally speaking, significant restrictions on proselytization are rare in the Americas.) As noted above, laws such as these are ripe for abuse. For instance, prohibitions against proselytization are often enforced not only legally, but also through social harassment (e.g., dubious arrests on spurious charges) and/or violence.

3.4 - Over-regulation

Various forms of over-regulation represent an additional threat to IRF. Requirements that religious institutions and their places of worship be registered, such as in Sri Lanka, Egypt, and elsewhere, are often abused by majorities (through denials or interminable delays) to harass and prevent the growth and religious expression of minority and MWMaj communities. Such registration requirements inexorably put religious communities in a bind. If they refuse to comply, they are unable to build places of worship and/or worship together. If they comply and allow their addresses to be added to an official register, they make it easier for their opponents to find and target them with acts of vandalism or violence. Requirements that those who wish to convert must first register with or seek the permission of local law enforcement officers, such as those in some Indian states, have a similar effect. They effectively prevent official conversion by entrapping potential converts in a byzantine-esque bureaucratic process. Moreover, like so many of the issues discussed in this report, registration requirements such as these are vulnerable to abuse by local officials, meaning that what is nationally legal may become, for all practical purposes, locally illegal.

The regulation of religious institutions' work in society can also impinge upon IRF. Such work presents a regulatory conundrum. When faith-based organizations offer to provide educational or social services to those outside their own communities, they often "straddle the perceived boundary between public and private."[65] Issues arise in particular when religious communities are "partly acculturated"[66] (rather than fully

or not at all acculturated), meaning that while they share much in common with those outside their community, they retain distinctive beliefs on or approaches to issues such as immigration, nondiscrimination (against people based on gender or sexuality), etc.

Should such communities be required to adhere to generally applicable laws from which they might be exempt within their own private religious spheres when operating in public and with people outside of their own religious community? The difficulty in resolving this question is related to a broader challenge that we discuss in the conclusion, which is how appropriately to balance the rights of religious communities against the rights of others and the interests of society in promoting non-discrimination and establishing generally straightforward and broadly applicable law and legal interpretations. On the one hand, legal regimes that impose popular social norms upon religious institutions risk infringing upon the IRF of these religious institutions. On the other hand, providing exemptions prevents the even and universal application of laws (including laws prohibiting discrimination against racial or sexual minorities).

In the United States, the question has recently risen in court cases considering whether religious organizations offering educational, medical, or social services have the right, based on their religious beliefs (adherence to which may transgress generally applicable law), to: 1) insist on hiring candidates from their own communities for some positions if they do not do so in every case, 2) deny their services (e.g., adoption facilitation) to same-sex couples without risking their licenses or government funding offered to other similar organizations, and 3) provide food and water to illegal migrants crossing the desert at the southern border. To deny such communities the right to transgress these generally applicable laws would be to impinge upon their freedom to serve others and carry out their mission as religious organizations.

These issues are complicated by factors such as: 1) the need to define the relevant harm to others (i.e., Is every denial of services an unacceptable discriminatory harm, or is the harm significantly lessened when services are available from other providers, such that religious freedom should prevail in those cases?); and 2) the tendency, especially in a polarized America, for each side of the political spectrum to favor claims of freedom only for those views with which they sympathize (e.g., progressives tend to favor only the immigrant-assistance claims, while conservatives tend to favor only the sexual-traditionalist claims).

After a period of uncertainty, contradictory court rulings, and public debate, U.S. courts considering these cases have tended to rule in favor of the religious organizations.[67] Notwithstanding, the precise extent of religious exemptions continues to be hotly debated, litigated, and recalibrated. And other Western nations like Canada are less protective when religious institutions move to serve people beyond their faith community while still seeking to adhere to their religious norms. For example, the Supreme Court of Canada upheld actions by two provinces to deny accreditation to a law school at an evangelical Christian university on the ground that the school required students to commit to standards

of opposite-sex-only sexual intimacy within marriage.[68]

Restrictions on the receipt of foreign funds can also infringe upon IRF. All governments take an interest in funds arriving from abroad and naturally prohibit funds arriving to support illegal activities. What is problematic is the use of foreign fund regulations to prevent criticism or political dissent, or to squelch organizations associated with minority or MWMaj religious communities. As noted above, for example, critics have accused the Modi government in India of using foreign funding regulations to disproportionately shut down both national and international organizations critical of government policies or associated with Islam and Christianity. (The clamp down also reportedly had the unintended effect of reducing and obstructing foreign aid organizations attempting to assist in the country's response to the COVID-19 pandemic.)[69] Elsewhere, in the context of the global "war on terror," some governments are tempted to label foreign Muslim organizations as "terrorist organizations," an accusation which they utilize as a convenient way to prevent Muslim organizations from funding local initiatives. For example, a bill introduced by Senator Ted Cruz in 2015, the "Muslim Brotherhood Terrorist Designation Act of 2015" threatened Muslim charitable efforts in the United States. The Act did not pass, but many other foreign Muslim organizations have been dubiously labelled as "terrorist organizations" in the United States, complicating and having a chilling effect on Muslim charitable giving both to and from Muslim organizations abroad.[70]

IV. Conclusion: Difficulties, Challenges, and Delicate Balances

Advocacy for IRF requires a certain degree of comfort with ambiguity. There is no magic formula or universally applicable model. In this section we briefly delineate two reasons why: 1) the complicating role of competing definitions of religion and the good life in the crafting of IRF law and practice, and 2) the difficulty of balancing majority and minority rights.

4.1 - Competing Definitions of "Religion" and the "Common" Good"

In our working group's FORIS policy report, "America's International Religious Freedom Policy Must Account for Competing Local Definitions of Religion and the Common Good," we noted that "[d]istinctive local understandings of religion help explain various ways governments intervene in internal religious affairs," while "[l]ocal definitions of 'the common good' also influence conceptions of the nature and limits of religious liberty."[71] A culture where the majority considers all religions equally efficacious and values harmony over liberty will naturally structure religious freedom differently than one that does not. One cannot therefore hope to impose or even recommend one's own model of religious freedom in another context without first addressing these fundamental differences.

Because of international differences in conceptions of religion and the common good, advocacy for IRF and religious freedom more generally must begin with a careful assessment of these fundamental disparities, followed by an equally careful mapping of the legal, social, and political dynamics that impinge upon the actual practice of IRF locally (as described in Section II), and the local movements and coalitions interested in and capable of consolidating and promoting religious religious freedom effectively. And because these dynamics are, indeed, dynamic, those advocating for IRF abroad must constantly recalibrate and refine their precise IRF recommendations in thoughtful dialogue with the people who would be putting them into practice in their own societies.

However, when governments do not permit dialogue and treat religious freedom as an existential threat, a different posture will be required on the part of those seeking to promote IRF. They may need to look for partners among religious leaders and human rights advocates on the ground, while simultaneously resorting to economic sanctions, public declarations of condemnation, and other diplomatic approaches to apply pressure to regimes that systematically infringe on this vital dimension of the fundamental human right to religious freedom.

While the realities mentioned prior require a certain degree of humility among IRF advocates, it need not lead to a flimsy relativism. There remain certain ideals by which governments' diverse approaches to IRF may be judged. For example, and drawing from the discussion above, IRF laws should be transparently constructed and evenly applied (both across different religions, and, where applicable, across religious and non-religious institutions).

Moreover, regulation of religion should recognize and begin with the presumption that religious institutions are a public good, and that religious freedom is a basic human right to be maximized to the greatest extent possible (while respecting other human rights). In the end, the goal should be "religious liberty for the largest number of religious individuals, communities, and institutions possible," along with the "least intrusive and least coercive forms of religious regulation possible."[72]

4.2 - Balancing Majority and Minority Rights

Governments attempting to adjudicate matters of IRF will likely observe, and be forced to mediate what we might call a clash of institutional religious freedoms.[73] The issue is particularly complex in democracies with large religious majorities. The experience of Indonesians is instructive in this regard. The Jakarta Charter, which came to form the preamble of the 1945 Indonesian constitution (abrogated in 1949 but reinstated in 1959) included the obligation for adherents of Islam to carry out Islamic (Shar'ia) law. Ever since, successive Indonesian governments have had to balance the desire of some Islamist groups to extend that obligation to all Indonesians. Dissenting Muslim and other religious minorities have bridled at the expectation that they should be governed by a specific set of Islamic norms. Fundamentally, the question is whether the state should uphold the ideals of universal and equal citizenship, even if to do so the government must deny at least some Muslims what they might reasonably conceive of as elements of their own IRF.[74] Stated conversely, an obligation one religious community considers absolutely fundamental to its own IRF—in this instance, the obligation to establish Islamic law not only for individuals but as a governing principle for the entire nation—would, if granted as a right, substantially impinge upon the religious liberties of others. Hence, an important caveat here would be that seeking a religious monopoly through the agency of the state that is binding upon all people within the political community regardless of their religious commitments, amounts to an illicit exercise of religious freedom—or perhaps—not an exercise of religious freedom at all.

There are echoes of this tension in India, where a portion of the Hindu community advocates for replacing minority religious communities' unique "personal laws" (which govern matters such as marriage, divorce, inheritance, and divorcee maintenance) with a universal law derived from that currently followed by Hindus.[75] Similar tensions can be found elsewhere around the globe, particularly if we consider individual religious freedoms along with institutional religious freedoms. In the history of the United States, for example, blue laws, alcohol prohibition, restrictions on polygamy, and government holidays for Christmas represent the imposition of norms emerging originally or primarily among adherents of the majority on other religious (and non-religious) communities whose adherents do not support them as broadly. These examples raise further questions about the circumstances in which exceptions to the enforcement of generally applicable laws (some purported, some actual) might be made, which leads directly to our next point.

Religious communities periodically seek exemption from otherwise universally applicable laws (e.g., laws requiring military service or proscribing discrimination based on race, gender, or sexuality). Generally speaking, U.S. courts have been highly deferential to the rights of religious communities in these circumstances. The same cannot be said of legislative and executive authorities in the United States that often refrain from such deference, leading to the array of cases in recent years in which the courts have intervened on these matters. Nevertheless, in most cases, U.S. courts defer to the rights of religious institutions to manage their internal affairs (e.g., by carving out the "ministerial exception" that allows religious institutions to demand that employees engaged in critical institutional work adhere to the religious institution's norms, including norms regarding gender and sexuality, and to fire them at will if they do not).[76]

Courts have also tried to find ways of addressing the harm to others inflicted by these exemptions, in some cases simply presuming that the market will provide alternatives to those denied employment or educational, healthcare, or other services. In other cases, courts have found alternative ways to provide those services under the guiding principle that it is better for the government to remediate these harms than to substantially burden the freedom of religious institutions to govern their internal affairs. For example, in the Hobby Lobby case, the Supreme Court held that the government could not require family-owned companies founded on or governed by faith-based principles to cover contraception or potential abortifacients in in their employees' health insurance plans when an alternative means to insure contraception cost-free was available: the company's insurer would provide the coverage in a separate policy with no cost to the employer (insurers could afford to make such provision because contraception saves medical costs).[77] In these cases, the judiciary's interpretation of the constitution and statutory law favor the protection of minority freedoms over the right of the majority to impose all of its favored norms. The accommodation that the Hobby Lobby Court ultimately ordered was limited, but commentators and activists remain polarized over how far such religious protections may go and how far the current Court is likely to push them.[78] Our discussion of the significant benefits that stem from institutional religious freedom lead us to support significant protection in these categories of cases. But the precise lines can be difficult to draw, including lines between "internal" and "external" matters and lines determining what sort of asserted "third-party harms" may override institutional religious freedom.

Although the United States is deeply divided, it tends toward the libertarian pole of the regulatory continuum on such matters; in contrast, other countries like Saudi Arabia and China demarcate the opposite, forcefully regulative pole. India inhabits an interesting middle ground. While India's Constitution enshrines the principle of *non-establishment* of religion by government, it does not similarly enshrine *noninterference* in religion. Indian courts have therefore engaged in the regulation of both internal and external religious affairs, particularly (but not exclusively) with regard to the majority religion of Hinduism. In the regulation of internal religious affairs, the the judiciary has been guided by what Jacobsohn calls an "ameliorative

approach,"[79] and justices have considered it their prerogative to *manage* and *reform* religious practice in pursuit of what Dhavan calls "reformatory justice."[80]

Relevant to the discussion about competing definitions of religion above, this approach does not merely take religions as they are, but also pronounces on what they *should be* (i.e., modern, rational, tolerant, inclusive, egalitarian, and not "superstitious").[81] Acting on these principles, judges have arrogated to themselves the right to circumscribe practices deemed not "essential" to a particular religion (and also, importantly, the right to determine which practices are "essential" in the first place). In non-essential matters, public religious institutions must defer to otherwise generally applicable law. Working from these principles, the Indian judiciary has, for example, forced Hindu temples (and some Muslim shrines) that prohibited the entry of women or members of lower-caste communities to allow it. In fact, in several court cases, the judiciary has gone so far as to say that "any religious practice deemed to be discriminatory loses its status *as* [an essential] religious practice *by virtue* of being discriminatory."[82] Indian courts have also upheld the right of state governments to manage the external affairs of Hindu temples, considering the largest among them a kind of public trust.[83]

The contrasting cases of India and the United States allow us to discern the relative advantages and disadvantages of different approaches to balancing majority and minority freedoms. In the United States, what is lost in the ability of the government to impose otherwise applicable law and protect racial and sexual minorities from employment discrimination and denial of services, is gained in the preservation of the broadest possible individual and institutional religious freedoms. In India, alternatively, what is lost in institutional religious autonomy and freedom is gained in the ability of the government to impose otherwise applicable laws, protect its citizens from gender or caste-based discrimination, and ensure the efficient, fair, and transparent management of large, wealthy religious institutions. The Indian approach tends to please progressives and displease traditionalists; the approach in the United States tends to do the opposite.

The history of predominantly Muslim regions of the Middle East should provide something of a warning to governments that might be inclined to overregulate or impose significant measures of reform on religions within their jurisdiction. There, as Timur Kuran has argued, assertively secularizing regimes of the 20th century denigrated religious belief and practice, restricted clerical activities, outlawed certain religious acts deemed unmodern, and placed mosques and other religious spaces under surveillance. Signs of Muslim piety (e.g., veiling, beards, fasting during Ramadan, or going on hajj to Mecca) became liabilities in employment and politics, or were prohibited altogether.[84]

The exclusion of Islamic piety from public life drove Islamic belief and practice underground, sowed discontent, and encouraged "religious preference falsification,"[85] which is the tendency for people to act differently in public (in matters of religious belief and practice) than they would in private. From these seeds of discontent grew energetic support for charismatic and assertive Muslim

leaders willing to buck the system publicly and give voice to long suppressed grievances, rights claims, and aspirations, such as those espoused by Hasan al-Banna in Egypt, Said Nursi in Turkey, and Ruhollah Khomeini in Iran that took hold in their areas of influence, or rulership (in the case of Khomeini).

In country after country, the movements of such religious thought leaders eventually toppled assertively secularist regimes. Public demonstrations of piety, rather than impiety, became the norm. The impious, rather than the pious, were now driven to falsify their religious preferences publicly. Catalyzing this historical oscillation between assertively secularist and assertively Islamist regimes is their mutual distrust. Both fear that the other, if given some freedom, will ultimately aim for total, tyrannical, and intolerant power. They do not trust each other to reciprocate freedom. In a sense, both now can draw upon history to claim that these fears are not unfounded.

This potential for regimes enforcing secularism and regimes enforcing religious piety mutually to produce and entrench one another underscores the critical importance for social freedom, peace, and cohesion of what Alfred Stepan famously called the "twin tolerations"[86]—that is, the "toleration of religious citizens... [to] accord democratically elected officials the freedom to legislate and govern without having to confront denials of their authority based on religious claims," and the willingness of government officials and lawmakers to "permit religious citizens, as a matter of right, to freely express their views and values within civil society, and to freely take part in politics, as long as religious activists and organizations respect other citizens' constitutional rights and the law."[87] Importantly, Stepan consistently argued, there was nothing inherent to Islam that made predominantly Muslim societies incapable of developing the twin tolerations (as he argued were present in Tunisia after 2011).[88]

Rather, and recalling our prior argument about the importance of social and political institutions in the development of religious liberty, any society with the requisite *institutional* limits on both secular and religious power can achieve a workable balance. That said, the development of such institutions in places that currently lack them is no small task, and it is for this reason that religious liberty advocates would do well to focus on helping to generate, support, and expand them. Achieving balance, however, does not necessarily mean giving equal measure. The tendency toward excess, corruption, or even repression on part of those who control the state's coercive capacities, especially when considered against the array of social goods that accompany institutional religious freedom outlined in this report, point to recognizing, in law and culture, a firm presumption in favor of the freedom of religious institutions in society.

Endnotes

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Religious Freedom Institute

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