

January 2010

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Recommended Citation

Li-ann Thio, *Constitutional Accommodation of the Rights of Ethnic and Religious Minorities in Plural Democracies: Lessons and Cautionary Tales from South-East Asia*, 22 Pace Int'l L. Rev. 43 (2010)
Available at: <http://digitalcommons.pace.edu/pilr/vol22/iss1/2>

CONSTITUTIONAL ACCOMMODATION OF THE RIGHTS OF ETHNIC AND RELIGIOUS MINORITIES IN PLURAL DEMOCRACIES: LESSONS AND CAUTIONARY TALES FROM SOUTH-EAST ASIA

Li-ann Thio*

I. MANAGING BABEL¹

An enduring problem for constitutional design and democratic practice within the context of a plural society with ethnic, religious and linguistic religious minorities is the need to address the fears and aspirations of these groups in relation to threats to their identity and autonomy.² It is difficult to secure unity in the face of

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¹ LI-ANN THIO, *MANAGING BABEL: THE INTERNATIONAL LEGAL PROTECTION OF MINORITIES IN THE TWENTIETH CENTURY*, at xxvii (2005). ("The gap between the ideal of a common humanity and the sober realities of the lack of solidarity among groups of human beings is encapsulated in the ancient spectre and symbol of 'Babel'. In Judeo-Christian tradition, the origin of nations and languages is traced to Babel where God disrupted the unity of mankind, who then shared a common language, by multiplying their tongues. Messianic prophecy looks towards the day when this fracture will be healed and the vision of the universal brotherhood of humankind restored and realised. The traditional test for the existence of a nation was that of language, which was considered 'an outward sign of a group's peculiar identity'. Babel is deployed here as a metaphor for a universalist vision of humanity, which underscores the egalitarian tenets of human rights law, but a vision tempered by an appreciation of human history. This history is characterised by diversity, conflicting agendas with respect to autonomy or control over resources and peoples and in some cases, by ethnic and religious hatred, xenophobia and aggressive nationalism which demonises and excludes the 'Other'.") *Id.*

² See Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, G.A. Res. 47/135, Annex, U.N. Doc.

the disintegrative tendencies of profound ethnic and cultural conflict. Divided societies pose a deep problem for democratic government where bare majoritarianism must be qualified by counter-majoritarian checks. It is crucial to nation-building and economic development, which facilitates basic standards of living, to succeed in the continuing endeavor to resolve inter-group conflict which disrupts social stability and fuels separatist sentiments.

To this end, the imposition of a mono-ethnic state on a multi-ethnic society or a uniform religion on a religiously diverse society would be a futile and dangerous route to tread. This is because "[t]hose who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard."³

Peace and a just order are integral to a state based on the rule of law. Constitutions play an important, though non-exclusive, role in articulating standards, guaranteeing rights, and establishing institutions and processes which safeguard normative aspirations such as respect for human dignity, ethnic and religious diversity and social harmony, political freedoms, and basic standards of material welfare. Added to this is the task of structuring a government strong enough to govern and to facilitate human welfare and economic development as national priorities.

Constitutional government informed by the principles of human rights, democracy, and the rule of law contribute towards the eradication of corruption, political oppression, economic privation, and the development of a just system of ordered liberty.⁴ This requires a vision of the constitution as a justice-seeking instrument rather than merely as a tool for the efficient pursuit of

A/RES/47/135/Annex (Dec. 18, 1992). Minority concerns usually relate to (1) Recognition of Identity and Non-Discrimination; (2) Cultural rights such as language rights, educational rights; (3) respect for their religion and traditional customs and (4) participation through political representation and in economic development.

³ *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

⁴ A constitutional system which nurtures constitutionalism would include the delimitation of public powers by the Constitution which courts judicially enforce, with judicial review being initiated by any party that feels aggrieved by law or executive action. The law must safeguard the equal treatment of all persons and the purposes for which discretionary powers are conferred must be clearly identified to promote a fair and reasonable exercise of these powers, rather than arbitrary exercises.

public policy and to maintain public order.⁵ The function of the constitution may include the identification of a national identity or shared public values, erecting institutional safeguards to hold abuses of power accountable and stipulating processes by which legislation and executive action acquire legitimacy.⁶ Increasingly, “the very definition of the state . . . must reflect the ethnic diversity of the polity, and acknowledge that the state is an aggregation of ethnically and linguistically distinct regions and sometimes of several distinct nationalities.”⁷

Legal structures are often constructed to respond to a range of ‘harms’ or ‘wrongs’ a vulnerable minority group fears or has historically experienced.⁸ These would include coercive assimilation, state endorsed settlement schemes designed to alter the dominant regional status of minorities, and the worst-case scenario of genocide.⁹ In the task of nation-building and political maturation, there is a dual imperative to secure space for groups who wish to preserve their distinct traits and lifestyle and to ensure that their individual members enjoy and appreciate the equal rights and obligations that attend citizenship in a common polity.¹⁰ To cohere this polity, the task must be founded on shared

⁵ See generally Ruth Gavison, *What Belongs in a Constitution*, 13 CONST. POL. ECON. 89, 89-105 (2002); DONALD S. LUTZ, PRINCIPLES OF CONSTITUTIONAL DESIGN 17 (2006).

⁶ Randy E. Barnett, *Constitutional Legitimacy*, 103 COLUM. L. REV. 111, 145-46 (2003); Richard H. Fallon Jr., *Legitimacy in the Constitution*, 118 HARV. L. R. 1787; CARL J. FRIEDRICH, LIMITED GOVERNMENT: A COMPARISON 110 (1974).

⁷ Neelan Tiruchelvam, *The Crisis of Constitutionalism: South Asian Perspectives*, in CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD 361, 363 (Douglas Greenberg et al. eds., 1993).

⁸ These may include: (a) exclusion from public and private sector employment opportunities because of language or religious requirements; (b) exclusion from high public office; (c) denial of land ownership rights; (d) refusal to allow minorities to hold elected office on the basis of language or other discriminatory criterion; (e) economic development projects in minority regions which benefit the majority instead of the minority; (f) expropriation of traditional lands without proper compensation or transmigration policies; (g) refusal to use minority language in public schools and administration where warranted by substantial numbers of speaks of a minority language; (h) discriminatory denial of citizenship rights; and (i) prohibiting minority language and religious practices in private.

⁹ See, e.g., THIO, *supra* note 1, at 129-132; Johannes Morsink, *Cultural, Genocide, the UDHR and Minority Rights*, 21 HUM. RTS. Q. 1009 (1999).

¹⁰ Joel E. Oesterich, *Liberal Theory and Minority Group Rights*, 21 HUM. RTS. Q. 108 (1999); Allan Rosas, *Internal Self-Determination*, in MODERN LAW OF SELF-DETERMINATION 225-52 (Christian Tomuschat ed., 1993); WILL KYMLICKA,

fundamental values and all citizens, whether they belong to a majority or minority groups, must have the opportunity to be socialized in and to effectively participate in public life, in its political, economic and social-cultural dimensions.¹¹

The vulnerability of racial and religious minorities to disadvantage, exclusion, or maltreatment often stems from their numerical inferiority and resulting political marginalization.¹² In this context, the specter of majoritarian tyranny may arise where laws do not apply equally to citizens who are governed instead by the pull of ethnic or religious affiliations.¹³ Unadulterated democracy is literally the expressed will of the majority; it is "silent on many issues regarding human rights and restraint of power."¹⁴ Furthermore, division can be imported where political entrepreneurs "prey on parochialism, religion and other similar distinctions."¹⁵

MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS (1995).

¹¹ The 1993 Vienna Declaration and Programme of Action urged the promotion of the 1992 UN Declaration on Minorities, urging states to adopt appropriate measures which included those which would facilitate minorities in their "full participation in all aspects of the political, economic, social, religious and cultural life of society and in the economic progress and development in their country." *Vienna Declaration and Programme of Action*, pt. II, ¶¶ 25-27, U.N. Doc. A/CONF.157/23 (July 12, 1993). See also Organization for the Security and Cooperation in Europe: High Commissioner on National Minorities, *Lund Recommendations on the Effective Participation of National Minorities in Public Life*, HCNM.GAL/4/99 (June 30, 1999), available at <http://www.osce.org/hcnm/23623.html>; Krzysztof Drzewicki, *Ten Years of the Lund Recommendations on the Effectiveness Participation of National Minorities in Public Life: Reflections on Progress and Unfinished Business*, 16 INT'L J. ON MINORITY & GROUP RTS. 511 (2009).

¹² Minority group members can be outvoted on matters critical to the survival of their community which is a threat not faced by members of majority communities since they usually can protect their own interests through their control of the state machinery.

¹³ Tiruchelvem, *supra* note 7, at 362. In the South Asian context, the focus of post Independence constitutional discourse shifted from an anti-colonialist concern with independence and popular sovereignty to "the need for restraints on the majoritarian principle." *Id.* This is because as culturally resurgent majorities began to flex their political muscle and deploy legislative and executive power "to deny equal treatment to ethnic and cultural minorities, a vote in the hands of an intolerant majority was soon viewed as an instrument of oppression." *Id.*

¹⁴ Lawrence W. Beer, *Introduction: Constitutionalism in Asia and the United States*, in CONSTITUTIONAL SYSTEMS IN LATE TWENTIETH CENTURY ASIA 1, 12 (Lawrence W. Beer ed., 1992).

¹⁵ Yash Ghai, *The Theory of the State in the Third World and the Problematics of Constitutionalism*, in CONSTITUTIONALISM AND DEMOCRACY:

Constitutions as a political technology designed to organize power, are predicated on a distrust of human nature and a greater faith in institutions to channel and restrain power by setting the legitimate borders of government action. As the supreme law of the land subject to a special amendment procedure, constitutions are designed to be above populist passions, most notably, by containing counter-majoritarian checks as a form of a long-term pre-commitment strategy framing a constitutional bargain, along whose terms a minority group may accede to membership in a new polity. In a sense, this insulates the Good from the vagaries of the popular and majoritarian overreaching.

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. This would include enshrining government structures which guarantee minority representation as well as implementing modes of accountability which may be activated where minority rights and/or concerns are adversely affected. This may take the form of:

- (1) A general individual rights regime based on the norm of non-discrimination; the focus is on a shared life in the common domain as equal citizens.
- (2) Special measures or minority group rights over and above general human rights; these may relate to religious, cultural and linguistic freedom, educational rights, participatory rights in relation to shaping local and national policy, and the right to maintain cross-frontier contacts with a focus on securing equality.
- (3) Schemes of minority protection which center around positive government obligations rather than justiciable rights; these may include the creation of separate courts or dispute resolution mechanisms to protect cultural practices; affirmative action programs or non-territorial forms of autonomy, e.g., equal state support to all educational institutions providing basic standards, set and monitored by the state, are met.
- (4) In some cases, particularly where ethnic-religious cleavages are territorially based, forms of spatial autonomy such as federalism,

TRANSITIONS IN THE CONTEMPORARY WORLD 361, 363 (Douglas Greenberg et al. eds., 1993).

confederalism, and confederation¹⁶ may be useful methods to adopt pursuant to the principle of “internal self-determination.”¹⁷

Constitutions cannot create social utopias and, as Lutz notes, they are “supposed to aid the moving of conflict from the streets and the battlefields to arenas of compromise and persuasion, and not to produce peace per se.”¹⁸ Certain performance criteria by which we may evaluate the quality of a ‘constitutional democracy,’ which does not exist by mere dint of the existence of a constitutional text, include:

- (1) A constitution that is followed rather than ignored;
- (2) A constitution based on and supportive of the rule of law;
- (3) Free elections involving essentially all of the adult population;
- (4) Two or more competitive parties; and
- (5) At least one peaceful transfer of power between competitive parties or between significantly different party coalitions, through the free electoral process, or else confidence that an electoral outcome that would replace the currently dominant party or party coalition would be accepted peacefully.¹⁹

At the end of the day, it is not merely the form of constitutional government that is important; rather, the constitutional culture or ethos of tolerance and mutual respect are important in maintaining social peace. A plural society or community that desires peace and an integrated society must set its face against ethnic and religious hatred and aggressive nationalism which demonizes and excludes the ‘Other’. It must both honor and give expression to a constitutional culture

¹⁶ This involves two elements: first, power-sharing, which “denotes the participation of representatives of all significant communal groups in political decision making, especially at the executive level;” second, group autonomy entails giving groups “authority to run their own internal affairs, especially in the areas of education and culture.” Arend Lijphart, *Constitutional Design for Divided Societies*, 15 J. DEMOC. 96, 97 (2004), available at http://ksghome.harvard.edu/~pnorris/ACROBAT/stm103.%20articles/lijphart%20Constitutional_Design.pdf.

¹⁷ THIO, *supra* note 1, at 19.

¹⁸ Donald Lutz, *Thinking About Constitutionalism at the Start of the Twenty-First Century*, 30 PUBLIUS 115, 125 (2000).

¹⁹ *Id.* at 119.

respectful of human and group rights and committed to sustaining ethnic-religious pluralism within the national order. Beyond rule-following and legalism, attention must be paid to the quality of constitutional norms and the public values espoused. Only then can a true spirit of inclusive fraternity displace the wry observation that “if all men are brothers, the ruling model is Cain and Abel.”²⁰

This article seeks to set out principles to optimize the constitutional accommodation of ethnic and religious minorities in plural societies committed to constitutional democracy. It draws from international standards and the lessons of best and worst practices which may be gleaned from the constitutional practice of various South-East Asian constitutional orders whose societies are racially and religiously diverse. A key idea is that a well-functioning civil society is not nurtured by enforced uniformity, but by tolerance and mutual respect for different racial and religious groups. If members of a politically non-dominant minority group feel protected by laws and legal processes, and if citizenship is inclusive, this will solidify their commitment to the state and enable them to focus on what is shared, rather than what divides, in cultivating a sense of common citizenship.

Constitutions speak to the economic, political, and social dimensions of state-society relations, both constituting and being constituted by these ground-level realities. Items on the menu of options, which may inform a constitutional minority protection scheme pursuant to preserving the multi-ethnic character of the polity, include individual rights relating to religious freedom and equal protection clauses, special group rights such as linguistic or cultural rights, permanent affirmative action programs to equalize opportunities, pluralism, forms of secularism, and power-sharing schemes.²¹ The protection of religious freedom and the linguistic and cultural traits of minorities are not optional extras but are essential to the workings of constitutional democracy in a plural society. The denial of human rights flows from undemocratic,

²⁰ Arthur Leff, *Unspeakable Ethics, Unnatural Law*, 1979 DUKE L.J. 1229, 1249.

²¹ Such schemes could go beyond the elected branch of government to include the civil service, judiciary, police, and military, e.g., through specifying ethnic quotas or through a broad constitutional provision favoring the general objective of broad representation, which the government can be charged with practically implementing.

authoritarian rule and an absence of constitutionalism. Thus, all sectors of society should have a role in the making of the constitution and its practical operation through the legal techniques of rights, duties to consult in forming policies which affect minority interests, legislative oversight bodies and agencies able to receive complaints about minority abuses in order to investigate these complaints, and remedial mechanisms to correct such abuses. This buttresses the legitimacy and durability of the constitution where stakeholders have a role in its formation and subsequent operation. This would also include the ability to activate a sufficiently muscular checks and balances scheme and to have effective formal and informal channels to shape the legislative agenda. An optimal balance must be sought between recognizing minority status, permitting some degree of self-government, and integration with society at large. This could include:

- (1) Measures to ensure effective participation in national government, including the allocation of resources to autonomous areas;
- (2) Measures to encourage power-sharing in deeply divided societies and those with many different ethnic or other groups;
- (3) Measures to ensure appropriate communal balance in law enforcement, including recruitment to the police, the army and the judiciary; and
- (4) Measures to ensure fair participation of members of minorities in mainstream economic activity, including employment in the public and major private sectors.²²

II. HUMAN DEVELOPMENT AND ECONOMIC GROWTH – REMEDIAL CONSTITUTIONALISM (CONSTITUTIONAL ACCOMMODATION AND CONFLICT PREVENTION)

A. The Internal North-South Divide: When Economic

²² U.N. Econ. & Soc. Council [ECOSOC], Danish Centre for Human Rights, Working Group on Minorities, 8th session, *Report of an International Seminar on Autonomist and Integrationist Approaches to Minority Protection*, ¶ 25, U.N. Doc. E/CN.4/Sub.2/AC.5/2002/WP.1 (Apr. 3-4, 2002).

Underdevelopment Correlates with Racial-Religious Minorities

A crucial component to political stability is healthy economic growth. It requires a rule of law-based state to facilitate legal certainty and stability, and is integral to attracting foreign investment and trade, and to underpinning financial services and commerce. Following from this, one clear source of social agitation is where there is an inequitable distribution of economic fruits between the core-periphery, in relation to resource management and profit allocation.

For example, previously, the Indonesian government with its center in the Javanese center of Jakarta did not fairly share revenue with the province of Aceh in Sumatra derived from the province's considerable forestry, gas, and oil resources, which constituted 11% to 15% of Indonesia's total export earnings.²³ Of this, only 5% was returned to Aceh through development subsidies, perpetuating the state of under-development through such uneven investment flows and exploitative economic policies.²⁴ This was addressed by the Special Autonomy Law on Nangroe Aceh Darussalam (Law No. 18 of 2001), which effects a redistribution of revenue whereby Aceh is to receive 70% of oil revenues rather than the current 5% and 80% of the agricultural and fishing revenues.²⁵ Legislation, by effecting redistributive justice, promotes peaceful co-existence and empowers minority groups to realize their right of internal self-determination. Social justice and development is an integral aspect of the peace architecture.

Ethnic conflict aggravated by economic disparity between the core and periphery may be compounded by a sense of historical grievance and a desire fueled by a resurgent religious fervor which translates into a political movement to place a different social system on a formal legal basis, such as the desire to impose *hudud* law in Aceh.²⁶ This is exacerbated when a dominant majority tries

²³ Li-ann Thio, *International Law and Secession in the Asia-Pacific Region*, in *SECESSION: INTERNATIONAL LAW PERSPECTIVES* 297-354, 322 (Marcelo G. Kohen ed., 2006).

²⁴ *Id.* at 322.

²⁵ *Mega Offers Aceh More Autonomy*, STRAITS TIMES (Sing.), Aug. 16, 2001, at 4.

²⁶ The Achinese constitute 90% of the population in Sumatra and take pride in their distinct 400 year history as an important Islamic sultanate before coming under the control of the Dutch East Indies colonies. ANTHONY SMITH, *ACEH, SELF*

to impose its language and culture to coercively assimilate a non-dominant minority. For example, attempts to impose the Thai language and Buddhist culture on the Pattani Malay in South Thailand have fueled calls by the Pattani United Liberation Front for a separate Islamic territory.²⁷ This resistance to "Siamisation" is compounded by a sense of regional grievance that stems from the under-developed nature of southern Thailand relative to the rest of the country. The exacerbation of socio-economic cleavages and the economic "north-south" divided by racial-religious differentiation also shapes the character of the Mindanao question in south Philippines. This economically under-developed region which is plagued by violence, fueling insecurity, sustains separatist sentiment.²⁸ Various separatist groups such as the Moro Islamic Liberation Front ("MILF") have been raging a bloody separatist war since 1978 for an independent Islamic state in Mindanao, which is rich in minerals.²⁹ The Muslim Moros, who make up 5% of the Philippines' eighty-two million population, nurse a sense of grievance, united by a strong ethnic or religious identity, against the majority Catholic Filipinos, fearing the weakening of their religious-cultural traditions through coercive assimilationist measures, as well as a dilution of their numbers through Catholic transmigration.³⁰ Attempts at concluding peace

DETERMINATION CONFLICT PROFILE, FOREIGN POLICY IN FOCUS (2002), <http://selfdetermine.irc-online.org/conflicts/aceh.html>.

²⁷ Kazi Mahmood, *Thailand Perpetuating the Taming of Islam in Patani* (2002), available at <http://www.islamonline.net/English/Views/200203/article9.shtml>.

²⁸ See Astrid S. Tuminez, *The Past Is Always the Present: The Moros of Mindanao and the Quest for Peace*, (Southeast Asia Research Ctr., Working Paper Series No. 99, 2008), available at www.cseas.niu.edu/PhilAccess/Tuminez_Mindanao%20Conflict.pdf.

²⁹ J.D. Appleton et al., *Mercury Contamination Associated with Artisanal Gold mining on the Island of Mindanao, the Philippines*, 228 SCI. TOTAL ENV'T 95 (1999); William N. Holden & Daniel R. Jacobson, *Ecclesial Opposition to Mining on Mindanao: Neoliberalism Encounters the Church of the Poor in the Land of Promise*, in 11 WORLDVIEWS: GLOBAL RELIGIONS, CULTURE & ECOLOGY 155 (2007), available at <http://www.ingentaconnect.com/content/brill/wov;jsessionid=1bbnj97lq3c3c.alice>; Salvatore Schavo-Campo & Mary Judd, *The Mindanao Conflict in the Philippines: Roots, Costs and Potential Peace Dividend* (World Bank Social Development Papers, Conflict Prevention and Reconstruction Paper No. 24, 2005).

³⁰ Nathan Gilbert Quimpo, *Options in the Pursuit of a Just, Comprehensive and Stable Peace in the Southern Philippines*, 41 ASIAN SURVEY 271 (2001).

agreements have not been wholly successful.³¹ The resulting threat to the indivisibility of the state and the lack of peace has scared off investors, leaving the region mired in poverty.³²

Thus, “internal colonialism”³³ undermines the enjoyment of “internal self-determination.”³⁴ In such cases, conflict pre-vention may be achieved through devising constitutional schemes to facilitate national reconciliation by accommodating demands for autonomy through protecting group rights and devising decentralized forms of government which balances the needs of the province with those of the center. Relevant factors that should inform this task would include:

- (1) Establishing a democratic political system;
- (2) Training an efficient and non-corrupt bureaucracy able to effectively devise and implement policy; and
- (3) Sufficiently empowering provincial government to discharge the tasks of government through a genuine transfer of political authority and resources from the centre and to bring about progressive socio-economic change to eradicate poverty.³⁵

Poor governance, funding deficits, and a lack of broad-based support can scuttle autonomy experiments, as in the case of Muslim Mindanao.³⁶ The constitutional regime established by the 1987 People’s Constitution provides for the creation of autonomous regimes in Muslim Mindanao (“ARMM”) “within the framework of this Constitution and the national sovereignty as well as territorial

³¹ Abhoud Syed M. Lingga, *Rethinking State Policies and Minority Rights: Getting the Mindanao Peace Process Moving*, Institute of Bangsamoro Studies (Occasional Paper No. 2008-02, June 2008), available at <http://library.upmin.edu.ph/philmin/bangsamoro/IBS%20Occasional%20Paper%202008-02%20-%20Lingga.pdf>.

³² Daniel Joseph Ringuet, *The Continuation of Civil Unrest and Poverty in Mindanao*, 24 CONTEMP. SE. 33 (2002).

³³ M. Sornarajah, *Internal Colonialism and Humanitarian Intervention*, 11 GA. J. INT’L & COMP. L. 45 (1981).

³⁴ Internal self determination may be understood as an umbrella term relating to minority rights and political participation rights. ANTONIO CASSESE, SELF DETERMINATION OF PEOPLES: A LEGAL APPRAISAL 348-55 (1995).

³⁵ RUTH LAPIDOTH, AUTONOMY: FLEXIBLE SOLUTIONS TO ETHNIC CONFLICTS (1996); AUTONOMY AND ETHNICITY: NEGOTIATING COMPETING CLAIMS IN MULTI-ETHNIC STATES (Yash P. Ghai ed., 2000).

³⁶ SCHIAVO-CAMPO & MARY JUDD, *supra* note 29.

integrity of the Republic of the Philippines.”³⁷ The Constitution also empowers the Congress of the Philippines to create organic acts for each region which provides “for special courts with personal, family, and property law jurisdiction consistent with the provisions of this Constitution and national laws.”³⁸ The ARMM currently composes six provinces.³⁹

The Moro National Liberation Front (“MNLF”), one of the chief secessionist groups, refused to recognize the ARMM.⁴⁰ Under the terms of a 1996 accord, the Autonomous Region of Muslim Mindanao was established, as was the Southern Philippines Council for Peace and Development, to replace the provisional government chaired by MNLF leader, Nur Misuari.⁴¹ A splinter MNLF group, the Moro Islamic Liberation Front (“MILF”), rejected this plan and fighting resumed in 2001 after Misuari was ousted on corruption charges.⁴² It is clear that economic development plans play an important role in stabilizing states. While peace and development efforts are currently being pursued by the Arroyo administration, this is itself disrupted and hindered by armed separatist struggles led by the MILF⁴³ and Abu Sayyaff. The MILF seeks the creation of a separate Islamic state.⁴⁴ The continuing state of instability and civil strife undoubtedly hampers the development of the region, which is integral to the pacification of minority concerns and the vindication of minority interests.

³⁷ CONST. (1987), Art. X, (Phil.), *available at* <http://www.chanrobles.com/article10autonomousregions.htm>.

³⁸ *Id.*

³⁹ *See generally* ASIAN INST. OF JOURNALISM AND COMM’N, WEBSITE ON MUSLIM MINDANAO FOR JOURNALISTS AND OTHER COMMUNICATORS, *History of ARMM* (2008), <http://www.muslimmindanao.ph/armm.html> (last visited Jan. 14, 2010).

⁴⁰ THIO, *supra* note 23, at 333.

⁴¹ *Id.*

⁴² Li-ann Thio, *International Law and Secession in the Asia and Pacific Regions*, in *INTERNATIONAL LAW PERSPECTIVES* 297, 333-34 (Marcelo G. Kohen ed., 2007).

⁴³ Soliman M. Santos, *Peacetalk: End in Sight?*, MINDA NEWS, Sept. 24, 2008, http://www.mindanews.com/index.php?option=com_content&task=view&id=5206&Itemid=266.

⁴⁴ *See generally* ANGEL RABASA & PETER CHALK, *INDONESIA’S TRANSFORMATION AND THE STABILITY OF SOUTHEAST ASIA* (Rand 2001) 87 (2001), *available at* http://www.rand.org/pubs/monograph_reports/MR1344/MR1344.ch9.pdf.

B. Transforming Constitutions to Address Ethnic Tensions in Divided Societies⁴⁵ from Integration to Autonomy

The special autonomy scheme for Aceh, constructed to operate within the unitary framework of Indonesia, is instructive.⁴⁶ In adopting this scheme, the central government marked a shift from a policy of repressing ethno-nationalist groups towards satisfying their ethnic-based demands for accommodation. This required an ideological shift from an integrationist philosophy of state which focused on the consolidation and centralization of government power which had, incidentally, been adopted as a unifying anti-colonial strategy. The scheme had mutated into the non-recognition and brutal, systematic military suppression of separatist movements, such as the Free Aceh Movement, which was formed in the 1970s. This produced regional instability.

Indonesia began to democratize after 1998 when authoritarian strongman, President Suharto, was removed from office. In the face of demands for decentralization in a country with some fifty ethnic groups, steps were taken to inject more flexibility into the organicist⁴⁷ political system to address these ethno-nationalist demands, through regional autonomy laws.⁴⁸ This espoused a unifying Indonesian nationalism and the downplaying of cultural

⁴⁵ Lijphart, *supra* note 11, at 99-106. Among the prescribed forms are elections by proportional representation, parliamentary government, power-sharing at cabinet level in ethnic terms, a head of state elected by parliament or whose office is combined with the prime minister's, federalism and decentralization, publicly funded autonomous schools.

⁴⁶ Originally, the plan was for Indonesia to have a federal structure but this was abandoned in favor of a unitary state by 1950. A fear related to a federal structure is that it might weaken the central government and serve as a prelude to secessionist claims.

⁴⁷ This has been defined by Supomo, the main architect of the 1945 Independence Constitution as "a theory in which the state was committed not to individual rights or particular classes but to society conceived as an organic whole." Jacques Bertrand, *Indonesia's Quasi-Federalist Approach: Accommodation Amid Strong Integrationist Tendencies*, 5 INT'L. J. CONST. L. 576, 580 (Oct. 2007) (quoting David Bourchier, *Totalitarianism and the "National Personality": Recent Controversy About the Philosophical Basis of the Indonesian State*, in IMAGINING INDONESIA: CULTURAL POLITICS AND POLITICAL CULTURE 161 (Barbara Martin-Schiller & James William Schiller eds., 1997)). As such the Constitution did not provide for the special representation for particular regions or ethnic groups in enshrining the principle of the unitary state and forbidding the designation of any subdivision as "states".

⁴⁸ REGIONALISM IN POST-SUHARTO INDONESIA (Maribeth Erb et al. eds., 2005).

differences through a common language (Malay) and the Pancasila philosophy (five principles of state) which affirmed, non-specifically, a "belief in (one) God".⁴⁹ This form of secular nationalism rejected the Islamist desire to identify Islam as the official state religion.⁵⁰ Regional resistance to the central government stems from disillusionment with the centralization of political power, its failure to fairly distribute the gains of natural resources exploitation, and the military repression of groups like the Acehnese pursuant to preserving the unitary orientation of the state.⁵¹

C. Representation of Regions in Central Government: Power-Sharing

Since 1998, there have been institutional changes, reflecting a shift from an integrationist to accommodationist approach: "integration favours a single identity that is coterminous with the state; accommodation on the other hand leads to flexible legal arrangements that recognise and empower ethnic diversity in a variety of ways."⁵²

Integrationists consider that stability is yielded where cultural diversities are relegated to the private realm in institutional terms, while in the public realm, equal citizenship rights are recognized.⁵³ This is individualist in orientation. Conversely, accommodationists argue that group differences remain relatively inflexible in many circumstances and that integration will thus produce instability.⁵⁴ Sounder strategies lie in fostering accommodation through pluralist federation, consociation, and multi-cultural policies.

Commentators note the institutional changes have been "near

⁴⁹ Article 29(1) of the Indonesian Constitution states: "The state shall be based upon belief in one god." INDON. CONST. [UUD '45] art. 29(1), *available at* <http://www.embassyofindonesia.org/about/pdf/IndonesianConstitution.pdf>.

⁵⁰ This would have alienated Christian groups from joining the nationalist movement against the Dutch.

⁵¹ THIO, *supra* note 23, at 322.

⁵² Bertrand, *supra* note 47, at 580.

⁵³ Henry J Steiner, *Ideals and Counter-Ideals in the Struggle for Autonomy Regimes for Minorities*, 66 NOTRE DAME L. REV. 1542 (1991).

⁵⁴ *Id.* at 1542.

revolutionary.”⁵⁵ One of the changes included a constitutional amendment to respect the “diversity of regions”⁵⁶ and to provide for autonomy and transfer of competences, except for matters left to the federal government such as foreign policy, defense, security, justice, monetary and fiscal policy, as well as religion.⁵⁷ In addition, regions are now represented in the Regional Representative Council, a separate legislative chamber, which is considered primarily consultative in nature.⁵⁸ Thus, regions now have a dedicated institution in which they are represented in the central government.

D. Special Laws for Provinces and the Institutionalization of Autonomy: The Aceh Example – More Equitable Resource Sharing and Control Powers; Detailed Powers of Regional Government

In relation to Aceh, the government adopted various pieces of special legislation to effectuate this, which appears to have produced a higher degree of stability, the latest being Law No. 11 of 2006 (with 210 articles),⁵⁹ which supersedes earlier laws. The latest legislation has been more successful as it has addressed matters, such as fiscal issues, with greater specificity than past laws. The July 2001 Special Autonomy Law (which has thirty-four articles) provides that Aceh should receive 70% of the oil revenue rather than merely 5% and 80% of the agriculture and fisheries revenue.⁶⁰ This seeks to integrate the province into national

⁵⁵ Bertrand, *supra* note 47, at 592.

⁵⁶ INDON. CONST. [UUD '45] arts. 18, 18A-B.

⁵⁷ Undang-Undang Republik Indonesia Nomor 32 Tahun 2004 Tentang Pemerintahan Daerah [Law No. 32, 2004 of the Republic of Indonesia on Regional Government], arts. 1-3, 10-18.

⁵⁸ Bertrand, *supra* note 47, at 593. Each province has the same number of representatives, irrespective of size, and the Regional Representative Council has the power to propose legislation to the People's Representative Assembly and participate in discussing bills, as well as to oversee region-specific laws. *Id.*

⁵⁹ MEMORANDUM OF UNDERSTANDING BETWEEN THE GOVERNMENT OF THE REPUBLIC OF INDONESIA AND THE FREE ACEH MOVEMENT (Aug. 15, 2005), <http://www.aceh-mm.org/download/english/Helsinki%>. This emerged from the Helsinki Memorandum of understanding signed between the Indonesian government and the Free Aceh Movement on August 15, 2005. This specifically allows the Free Aceh Movement combatants to disband and transform into a political organization. *Id.*

⁶⁰ This was not entirely satisfactory since the central government retained the power to calculate the amounts, collect taxes and transmit revenues to the

society by addressing deep-rooted grievances. In addition, the root causes of ethnic conflict tension may be traceable to the exclusion of Acehnese language in many public institutions, under-representation of Acehnese in public life and disadvantageous land policies.

Under Law No. 11 of 2006,⁶¹ Indonesia, while not embracing a federalist structure, has sought to stabilize its polity through “quasi-federal forms” while preserving an overall integrationist tone towards managing ethnic differences as well as the form of a unitary state. This is accomplished by devolving more localized administrative powers and increasing the percentage of fiscal resources to be retained locally. In addition, the central government is under a duty to consult the province with respect to decisions affecting the region. To remedy the vagueness in the 2001 Law, the 2006 Law sets out more clearly and in specific detail the powers of the governor as well as a removal mechanism, those of the Aceh legislature which have been given greater oversight powers in relation to corruption, and the obligations of the Aceh government to provide social services and the electoral process for the governor and regency heads.⁶² Under the 2001 Law, the Aceh police was a branch of the Indonesian National Police and the governor only had a weak consultative role in the appointment of police chief; under the 2006 Law, the Aceh government has stronger oversight powers over security forces. For example, the

provinces. The 2001 Law provided that for 8 years, Aceh government would get 80% share of tax revenues from forestry, mining and fisheries with 55% oil revenues and 40% gas revenues going to the province. After eight years, this would be reduce to 35% oil revenues and 20% gas revenues. Bertrand, *supra* note 47, at 600-01.

⁶¹ Undang-Undang Republik Indonesia Nomor 11 Tahun 2006 Tentang Pemerintahan Aceh [Law No. 11, 2006 of the Republic of Indonesia on Aceh Government], *available at* http://www.bra-aceh.org/download/archive/loga/loga_law_on_the_governing_of_aceh_english_version.pdf. This can be modified by the Indonesian Parliament, but since it specifies that the Aceh Parliament must review and approval any Aceh-specific legislation from the Indonesian Parliament, it opens the door to challenging national legislation in courts. An unofficial translation is available at www.unorc.or.id/file/download_up.php?f=301.pdf.

⁶² Law No. 11/2006, arts. 223, 256 (2006) (Indon.), on the Governing of Aceh with Explanatory Notes, *translated by* United States Agency for International Development [USAID], *available at* http://www.bra-aceh.org/download/archive/loga/loga_law_on_the_governing_of_aceh_english_version.pdf.

governor and legislature must be consulted and must give their approval to a candidate for the Aceh chief of police and the Law requires the military to respect human rights and local customs which is unprecedented insofar as no regional legislature has ever had legislative power to restrict military forces.⁶³ The Law seeks to pacify grievances and provide some kind of accountability for military wrongdoings by providing for a truth and reconciliation commission to investigate past armed forces abuses.⁶⁴

In addition, the 2006 Law provides an even greater share of resources than the 2001 Law, including 70% of oil and gas revenues from the state's share of income in these resources, and 80% of revenues from other provincial resources. The method of calculating these revenues is more specific, in order to mitigate manipulation and deal with past perceptions that the central government was retaining more than its fair share of total revenues.⁶⁵ In addition, the Aceh government now enjoys the authority to administer all natural resources, which is "an unprecedented delegation of powers over revenues."⁶⁶

The province of Aceh has been awarded two significant special exceptions from the general law of the land. First, local political parties have the right to organize, and do not need to have a national outlook as is required elsewhere in Indonesia.⁶⁷ Second, as a special concession to Aceh, religion falls within its provincial jurisdiction, whereas it is a matter falling within the jurisdiction of the central government for the rest of the country.⁶⁸

These legal developments have given Aceh province a clearer legal basis for implementing Islamic law in a comprehensive manner,⁶⁹ although the central government retains some measure

⁶³ *Id.* arts. 202-03, at 83.

⁶⁴ Bertrand, *supra* note 47, at 603.

⁶⁵ *Id.* at 602.

⁶⁶ *Id.*

⁶⁷ Ben Hillman, *Bullets to Ballots: Aceh in 2009*, FAR E. ECON. REV., Dec. 4, 2009, <http://www.feer.com/essays/2009/december51/bullets-to-ballots-aceh-in-2009>; Irwandi Yusuf, *Elections Must be Peaceful in Aceh*, JAKARTA POST, Feb. 21 2009, <http://www.thejakartapost.com/news/2009/02/21/elections-must-be-peaceful-aceh.html>.

⁶⁸ Katie Hamann, *Aceh Province Legislators Vote to Impose Stricter Sharia Law*, VOANEWS.COM, Sept. 15, 2009, <http://www1.voanews.com/english/news/a-13-2009-09-15-voa9-68709782.html>.

⁶⁹ This includes implementing the law relating to human relationships which may address the sale and purchase of goods, banking, borrowing money,

of control, for example, by appointing religious court Justices.⁷⁰ Aside from according broader competence to the Islamic courts of justice, the new institution of the *Wilayatul Hisbah* (syariah police) has been established; it is tasked with overseeing Islamic regulations on dress, alcohol, gambling, and “immoral acts,” but has no powers of arrest.⁷¹ There have been concerns that Aceh is a “pilot project” for those who wish Indonesia to jettison its secular foundations and replace it with an Islamic state, which would be oppressive to non-Muslims as well as moderate Muslims.⁷²

It appears that the recalibration of center-periphery powers through autonomy laws, which qualifies the integrationist approach, has eased tensions between the provinces and the central government. However, its longevity remains to be seen.

E. Privileged Treatment and the Problems of Perpetuation – Bumiputera Policy

A cautionary tale may be gleaned from the Malaysian context, where the legal system is based on the Westminster model of parliamentary government.⁷³ The Federal Constitution of Malaysia, adopted in 1957 after a period of Anglo-Malayan negotiations, constitutionalized economic and other privileges for the majority Malays and other indigenous groups falling with the category of “*bumiputera*” (sons of the soil).⁷⁴ This provision was

mortgages, mining, establishment of companies, regulating human labour: Under Article 39 of Qanun No. 10/2002, the Islamic courts of justice can decide such related matters beyond personal and family law.

⁷⁰ Hasnil Basri Siregar, *Islamic Law in a National Legal System: A Study on the Implementation of Shari'ah in Aceh*, 3 ASIAN J. COMP. L., art. 4 (2008), available at <http://www.bepress.com/asjcl/vol3/iss1/art4/>.

⁷¹ There have been clashes with the secular security forces, e.g., over a dance at a cultural event which the syariah police considered “did not reflect the Islamic atmosphere and should be stopped instantly”: *Aceh Forces Clash over Dance*, STRAITS TIMES (Sing.), Aug. 9, 2008, at C5.

⁷² Ana Gomes, Op-Ed. & Comment., *Aceh's Harsh Islamic Law is an Ominous Sign-Int'l Herald Trib.*, N.Y. TIMES, Sept. 13, 2006, available at <http://www.iht.com/articles/2006/09/13/opinion/edgomes.php>.

⁷³ Deborah A Johnson & Anthony Milner, 'Westminster Implanted: The Malaysian Experience', in WESTMINSTER LEGACIES: DEMOCRACY AND RESPONSIBLE GOVERNMENT IN ASIA AND THE PACIFIC (Haig Patapan et al. eds., 2005).

⁷⁴ Jaclyn Ling-Chien Neo, *Malay Nationalism, Islamic Supremacy and the Constitutional Bargain in the Multi-ethnic Composition of Malaysia*, 13 INT'L J. ON MINORITY & GROUP RTS. 95 (2006).

designed to assuage fears of the Malays who constitute some 54% of the population⁷⁵ in relation to the economic dominance of the Chinese minority community.

Former Prime Minister Abdullah Badawi, in speaking of the Malaysian power-sharing model, described the priority in the post-Independence era when Malaysia was “an ethnic time bomb waiting to explode,” of implementing an inclusive approach, which empowered all ethnic and religious groups by giving them a collective stake in decision-making. Part of this social contract, enshrined within the Constitution, was:

[T]he agreement by the indigenous peoples to grant citizenship to the immigrant Chinese and Indian communities. This changed the character of the nation, from one that originally belonged to the indigenous peoples to one that Chinese and Indian citizens could also call their own. Chinese and Indians now share political power with the Malays and sit in the Federal Cabinet and State Executive Councils. In return for being granted these political rights, the immigrant communities agreed to special economic privileges for the indigenous peoples, given their disadvantaged position. This constitutes the political, economic, legal and moral foundation for the distributive justice policies of the country.⁷⁶

In addition, Malay was constitutionally recognized as the national language, and Islam as the official religion of the Federation. Under Article 153(1) of the Federal Constitution of Malaysia,⁷⁷ the head of state or Yang di Pertuan Agong (King) is obliged to “safeguard the special position of the Malays and natives of any of the States of Sabah and Sarawak and the legitimate

⁷⁵ See generally JOSHUA CASTELLINO & ELVIRA DOMÍNGUEZ REDONDO, MINORITY RIGHTS IN ASIA: A COMPARATIVE LEGAL ANALYSIS ch. 4 (2006). Chinese represent about 25% of the population, Indians about 8%, and indigenous groups about 12 percent. *Id.*

⁷⁶ H.E. Dato' Seri Abdullah Haji Ahmad Badawi, Prime Minister Malay., Keynote Address at Asia Media Summit: The Challenges of Multireligious, Multiethnic and Multicultural Societies, ¶¶ 20-21 (Apr. 19, 2004), available at <http://www.un.int/malaysia/PM%20Statement/PM041904.htm>.

⁷⁷ MALAY. CONST. art. 153(1). These special privileges were a continuation of those enjoyed by the Malays, which the British had recognized in treaties they entered into with Malay sultans. Thus, this created in the Malay mind a sense that Malaysia belongs to Malays and the privileges were their entitlement by birthright.

interests of other communities”⁷⁸ Pursuant to this, special provisions may include reserving public service positions, scholarships, educational and training privileges, and licenses for trade and business, as required by federal law for Malays and natives of Sabah and Sarawak.⁷⁹

It is true that economic disparity between the wealthy Chinese minority and the Malay majority is a cause of social tension. The effect of this regime of privileged treatment, however, is that it is both under and over-inclusive, given its avowed purpose of equalizing or minimizing social-economic disparities.⁸⁰ Starkly put, it is because such privileged treatment excludes poor Chinese and rich Malays. A more holistic policy of distributive justice would be means-oriented rather than race-oriented. In addition, this affirmative action program for the majority has bred a dependency or entitlement mentality amongst the privileged communities.⁸¹ Article 153 has been invoked to support *Ketuanan Melayu*, the Malay supremacy nationalist belief that the Malays are the lords of Malaysia, as opposed to a non-racist conception of a

⁷⁸ Malaysia has an ethnically plural composition: Malays account for 54.1% and other Bumiputeras account for 11.8% of the total population; the Chinese account for 25.3% of the population and the Indians, 7.7%. SAW SWEE-HOCK, *THE POPULATION OF MALAYSIA* 71 (2007).

⁷⁹ MALAY. CONST. art. 161A(6)-(7). “Natives” are defined in article 161A as meaning (a) in relation to Sarawak, a person who is a citizen and either belongs to one of the races specified in Clause (7) as indigenous to the State or is of mixed blood deriving exclusively from those races; and (b) in relation to Sabah, a person who is a citizen, is the child or grandchild of a person of a race indigenous to Sabah, and was born (whether on or after Malaysia Day or not) either in Sabah or to a father domiciled in Sabah at the time of the birth. Clause (7) provides that the races to be treated for the purposes of the definition of “native” in Clause (6) as indigenous to Sarawak are the Bukitans, Bisayahs, Dusuns, Sea Dayaks, Land Dayaks, Kadayans, Kalabits, Kayans, Kenyags (Including Sabups and Sipengs), Kajangs (including Sekapans, Kejamans, Lahanans, Punans, Tanjongs dan Kanowits), Lugats, Lisums, Malays, Melanos, Muruts, Penans, Sians, Tagals, Tabuns and Ukits. Notably, this definition excludes indigenous people such as the Orang Asli on Peninsula Malaysia. *Id.*

⁸⁰ Huang Thio Su Mien, *Constitutional Discrimination Under the Malaysian Constitution*, 6 MALAY. L. REV. 1 (1964).

⁸¹ M. BAKRI MUSA, *THE MALAY DILEMMA REVISITED - RACE DYNAMICS IN MODERN MALAYSIA* (1999); THOMAS SOWELL, *AFFIRMATIVE ACTION AROUND THE WORLD: AN EMPIRICAL STUDY* 55-77 (2004); Nazry Bahwari, *Will Malaysia Ever be Colour-Blind?*, GUARDIAN.CO.UK (Malay.), Nov. 16, 2009, <http://www.guardian.co.uk/commentisfree/2009/nov/16/malaysia-race/print>; PETER WOOD, *CLIENTAGE AND CONTUMELY: HOW GROUP PREFERENCES FOSTER DEPENDENCY AND RESENTMENT* 275, 275-87 (2008).

Malaysian Malaysia. Although Article 153 was drafted as a temporary provision,⁸² it is today seditious to discuss its repeal and the special rights of Malays in all political, social and economic spheres.⁸³ Critics further argue that government policy such as the National Economic Policy (“NEP”) is constitutionally *ultra vires*.⁸⁴ The NEP sought to correct economic imbalance and eradicate poverty.⁸⁵ Some measures pursuant to this involved giving *bumiputera* real estate at discounts of 5% to 15% and adopting regulations setting a minimum equity holding for *bumiputera*.⁸⁶ It set the target of transferring 30% of the nation’s wealth to Malays by 1990.⁸⁷

The NEP has apparently created a Malay middle class which its supporters argue has averted social conflicts and a return to the racial riots of the past.⁸⁸ Indeed, Malay politicians have been known to say that if minorities were unhappy with the status quo, they could return to India or China; one even declared that if Malay privileges were taken away, there would be “blood flowing in the streets.”⁸⁹

Critics allege that the unfortunate side-effects⁹⁰ of the policy include corruption in the award of government contracts and open

⁸² The Reid Commission, which drafted the Merdeka Constitution, agreed that the privileges should continue for some fifteen to twenty years unless Parliament provided otherwise. The Alliance parties, including the governing UMNO party, agreed for a review of the position fifteen years after Independence in an oral communication which was omitted from the Alliance memorandum for reasons of political sensitivity. See JOSEPH M. FERNANDO, MONOGRAPH NO. 31, THE MAKING OF THE MALAYAN CONSTITUTION 85-86 (2002).

⁸³ Pub. Prosecutor v. Ooi Kee Saik, [1971] 2 M.L.J. 108 (Malay.); Fan Yew Teng v. Pub. Prosecutor, [1975] 2 M.L.J. 235 (Malay.).

⁸⁴ Mohammad Rizal Salim & Zalina Abdul Halim, *The Boundaries of Law: A Socio-Legal Perspective of Malaysia's Economic Policy*, 8 GLOBAL JURIST ADVANCES 1 (2008), available at <http://www.bepress.com/gj/vol8/iss2/art7>.

⁸⁵ *Id.*

⁸⁶ *Id.*; see also R Rasiah & I Shari, *Market, Government and Malaysia's New Economic Policy*, 25 CAMBRIDGE J. ECON. 57-78 (2001).

⁸⁷ Ho Khai Leong, *Dynamics of Policy-Making in Malaysia: The Formulation of the New Economic Policy and the National Development Policy*, 14 ASIAN J. PUB. ADMIN. 204-227 (1992), available at sunzi1.lib.hku.hk/hkjo/view/50/5000368.pdf.

⁸⁸ See Rizal Salim & Abdul Halim, *supra* note 84.

⁸⁹ James Chin, *Malaysia's Broad Mix Still Waiting to Merge Happily*, CANBERRA TIMES, July 11, 2008, available at <http://www.canberratimes.com.au/news/opinion/editorial/general/malaysias-broad-mix-still-waiting-to-merge-happily/809296>.

⁹⁰ *Id.*

racial discrimination in university intake and civil service jobs.⁹¹ This has polarized Malays and non-Malays and caused resentment and a sense of being treated as second class citizens, compounded by the excessive emphasis on the Malay language and culture in the public school system.⁹² Indeed, the idea was that affirmative action was meant to be temporary until Malays were economically on par with non-Malays.⁹³ The creation of a class of Malays over-reliant on government subsidies thwarts efforts to develop a united nation and perpetuates a simmering source of ethnic tension fueled by Malay nationalism and non-Malay grievances.⁹⁴ While the NEP was designed ultimately to promote national unity by reducing income disparity between the races, its racist orientation does not help bridge any ethnic divide. In particular, the *bumiputera* varsity quota remains a major source of resentment nursed by the Chinese against Malays.⁹⁵

This resentment translated into a loss of political support. In turn, the loss of political support manifested in the outcome of the 2008 Malaysian General elections, where the ruling Barisan Nasional ("BN") coalition, which had been in power for fifty-one years, suffered its worst post-Independence losses and lost its two-thirds majority in parliament and several states.⁹⁶ Prime Minister Badawi, whose policies were blamed for the decline in BN's political fortunes, resigned and handed the reins of power to Prime Minister Razak Najib in April 2009.⁹⁷ In seeking to recapture the support of the disaffected Indian and Chinese minority groups, Mr. Najib has been speaking of the need to unite Malaysia's many

⁹¹ Article 136 of the Federal Constitution requires that civil servants be treated impartially regardless of race. MALAY. CONST. art. 136.

⁹² Graham K Brown, *Making Ethnic Citizens: The Politics and Practice of Education in Malaysia*, 27 INT'L J. EDUC. DEV. 318, 318-30 (2007).

⁹³ Rizal Salim & Abdul Halim, *supra* note 84, at 1-30.

⁹⁴ Malay political leaders have also criticized the Malays for being lazy, ungrateful and over-reliant on *bumiputera* benefits. See generally DR. MAHATHIR MOHAMAD, *MALAYS FORGET EASILY* (2001).

⁹⁵ Thomas Fuller, *Malaysia to End Quotas That Favor Ethnic Malays*, N.Y. TIMES, July 1, 2009, at A17, available at <http://www.nytimes.com/2009/07/01/world/asia/01malaysia.html>.

⁹⁶ Abdul Rashid Moten, *2004 and 2008 General Elections in Malaysia: Towards a Multicultural, Bi-party Political System?*, 17 ASIAN J. POL. SCI. 173, 173-94 (2009).

⁹⁷ *Najib Appointed New Malaysian PM*, BBC NEWS, Apr. 3, 2009, <http://news.bbc.co.uk/2/hi/asia-pacific/7980554.stm>.

racial groups and of appreciating their contribution to Malaysia.⁹⁸ One of the recent reversals in policies include ending the *bumiputera* quota for the services sector in an attempt to improve Malaysia's international competitiveness in the global economy.⁹⁹ It seems that national considerations can trump communal considerations.

III. MINORITIES AND POLITICAL PARTICIPATION

A general observation about institutional design is that in heterogeneous societies with deep ethnic and religious divisions, it is not advisable to have a purely majoritarian system, which usually entails the indefinite exclusion from power of a minority group, placing it in a position of permanent political non-dominance and potentially without an outlet to air their grievances. The more pure a parliamentary system is, the closer it approximates the majoritarian model. Unitary systems generally work best with homogenous populations.¹⁰⁰

Institutional means must be found to include these minority groups in the process not only of constitutional government, but also of constitution-making. A shift from a majoritarian to a more consensual model of decision-making is reflected in the greater attention paid to deliberative processes with multiple entry points, to ensure that the legislative process takes into account non-majoritarian concerns. So structured, institutions can produce more consensualist politics.

⁹⁸ "We must reach out to all parts of Malaysia - to all our diverse communities. In our national discourse and in pursuing our national agenda, we must never leave anyone behind. We must reach out to the many who may have been disaffected and left confused by political games, deceit and showmanship." *PM Najib's Maiden Speech: 'One Malaysia. People First. Performance Now.'* STAR ONLINE (Malay.), Apr. 3 2009, available at <http://thestar.com.my/news/story.asp?file=/2009/4/3/nation/20090403201619&sec=nation>. See also Choi Tuck Wo, *Najib: 1Malaysia a Concept for the World* STAR ONLINE (Malay.), Oct. 7, 2009, <http://thestar.com.my/news/story.asp?file=/2009/10/7/nation/4854896&sec=nation>. The 1Malaysia website is at <http://www.1malaysia.com.my/>.

⁹⁹ Adib Zalkapli, *Najib Drops Bumiputera Quota for Services Sector*, MALAY. INSIDER, Apr. 22, 2009, <http://www.themalaysianinsider.com.my/index.php/malaysia/24151-najib-drops-bumiputera-quota-for-services-sector>.

¹⁰⁰ See generally YASH GHAI, PUBLIC PARTICIPATION AND MINORITIES (2003).

A. Making Constitutions

As an example of consensualist politics, a ninety-nine member Constitution Drafting Assembly was put in charge¹⁰¹ to draft the exemplary 1997 Thai Constitution (now superseded by the 2007 draft produced after the September 2006 bloodless military coup).¹⁰² The process of composing the Assembly is instructive. The People got their say through an electoral process by which members were chosen from provinces, a total of seventy-six members, one for each province. The remainder consisted of twenty-three members chosen from lawyers, political scientists, politicians and civil servants. The key principle is that representatives should be chosen on an inclusive basis, to ensure that the final product is not dominated or hijacked by any one particular group (particularly bureaucrats, technocrats or the military).¹⁰³

B. Electoral Systems

In terms of electoral systems, some of the best practices include designing a system to include members of different groups within the same unit or legislative body. Ensuring that minorities have a voice in policy-making to express their concerns through guaranteeing legislative representation is an important consideration in ordering a Constitution. This can be accomplished through various methods, but it is crucial to also secure political freedoms of speech, assembly and association. This is necessary for a vibrant multi-party system where political groups are able to form and to campaign for support.

¹⁰¹ James R Klein, *The Constitution of the Kingdom of Thailand, 1997: A Blueprint for Participatory Democracy* 9-14 (Asia Found. Series, Working Paper No. 8, 1998), available at <http://asiafoundation.org/pdf/wp8.pdf>. See Andrew Harding, *May There be Virtue: New Asian Constitutionalism in Thailand*, 3 AUSTL. J. ASIAN L. 24 (2001).

¹⁰² Erik Martinez Kuhonta, *The Paradox of Thailand's 1997 "People's Constitution": Be Careful What You Wish for*, 48 ASIAN SURV. 373, 373-92 (2008); see also Bjorn Dressel, *Thailand's Elusive Quest for a Workable Constitution, 1997-2007*, 31 CONTEMP. SE. ASIA J. INT'L & STRAT. AFF. 296 (2009).

¹⁰³ See Harding, *supra* note 101.

C. Ethnic Politics and Multi-Ethnic Coalition Government

In Malaysia, ethnic politics have not been legally barred within its multi-ethnic society; instead, it is “allow[ed] . . . responsible expression.”¹⁰⁴ Malaysia practices a form of parliamentary government based on the Westminster model and the principle of simple plurality (first past the post), and the one-man, one-vote model.¹⁰⁵

In practice, this has produced multi-ethnic coalition government among political parties which are ethnically and racially based. For example, the ruling Barisan Nasional coalition, which has governed Malaysia since Independence in 1957, is dominated by UMNO (Malays), MCA (Chinese), and MIA (Indians).¹⁰⁶ Within a multi-ethnic coalition, ethnic and region-based interests are moderated.¹⁰⁷

D. Proportional Representation

Alternatives to a purely majoritarian system include proportional representation systems or intermediate systems, such as those which are generally majoritarian but offer guaranteed representation to particular minorities. While the proportional representation system produces proportionality and minority representation (the percentage of votes a group receives translates into a similar percentage of legislative seats), Singapore has always rejected this approach for fear it would produce communal politicking and a weak coalition government contrary to the

¹⁰⁴ Badawi, *supra* note 76, ¶ 24.

¹⁰⁵ TOMMY THOMAS, THE PEOPLE'S REPRESENTATIVES: ELECTORAL SYSTEMS IN THE ASIA-PACIFIC REGION 152-62 (Graham Hassall & Cheryl Saunders eds., 1997).

¹⁰⁶ DIANE K. MAUZY, BARISAN NASIONAL: COALITION GOVERNMENT IN MALAYSIA (1st ed. 1983).

¹⁰⁷ Ethnic relations have always been the leitmotif of Malaysian politics since the Country's independence in 1957. The government has been a coalition of ethnic-based political parties. The Alliance, which ruled the country from 1957 to 1972, was a coalition of political parties composed of the United Malays National Organization (UMNO), the Malaysian Chinese Association (MCA), and the Malaysian Indian Congress (MIC). After 1972, the Alliance was broadened to include several smaller parties and was renamed the National Front (*Barisan Nasional*). The dominant political party in the coalition is undoubtedly the UMNO. See generally Jaclyn Ling-Chien Neo, *Malay Nationalism, Islamic Supremacy and the Constitutional Bargain in the Multi-ethnic Composition of Malaysia*, 13 INT'L J. ON MINORITY & GROUP RTS. 95 (2006).

objectives of a developmentalist state.¹⁰⁸

E. Institutionalizing Multi-Racial Politics: The Group Representation Constituency and Minority Legislative Representation

Singapore practices a system of parliamentary democracy whereby the will of the people is broadly the basis of the authority of government, with the Singapore government asserting that it is accountable through periodic secret free elections. This is based on the Westminster model of parliamentary government, the elements of which include:

- (1) A unicameral or bicameral chamber whose members are freely elected by universal adult suffrage;
- (2) From one of more political parties;
- (3) Executive power vested in a head of state but primarily exercised by cabinet government headed by a prime minister as head of government;
- (4) The head of government is chosen from the political party commanding the support of the legislative majority and answerable to that elective chamber;
- (5) A recognized opposition; and
- (6) A set of constitutional conventions.¹⁰⁹

In 1988, Singapore altered its one-man one-vote electoral system based on single member wards by introducing the Group Representation Constituency ("GRC"), where multi-member teams contest an electoral ward.¹¹⁰ The original rationale of the GRC

¹⁰⁸ Indeed, the prevailing philosophy in the early days of independence was assimilationist in assuming that the interests of minority communities are best secured by protecting the equal rights of all citizens, regardless of race or religion. Statement of S. Rajaretnam, Minister for Foreign Affairs, SING. PARL. DEB. vol. 25, cols. 1353-1372 (Mar. 16, 1967). See generally JACLYN LING-CHIEN, THE PROTECTION OF MINORITIES AND THE CONSTITUTION: A JUDICIOUS BALANCE, in EVOLUTION OF A REVOLUTION: FORTY YEARS OF THE SINGAPORE CONSTITUTION 234-59 (Li-ann Thio & Kevin Y. L. Tan eds., 2009) (discussing Singapore's minority's protection under its constitution).

¹⁰⁹ Modified from William Dale, *The Making and Remaking of Commonwealth Constitutions*, 42 INT'L & COMP. L. Q. 67, 72-73 (1993).

¹¹⁰ Li-ann Thio, *The Right to Political Participation in Singapore: Tailor-Making a Westminster-Modelled Constitution to fit the Imperatives of 'Asian'*

scheme was to promote political stability by institutionalizing multi-racialism in the composition of Parliament.¹¹¹ Each GRC team must field a candidate from a stipulated minority group.¹¹² A nominal number of eight single member constituencies (“SMCs”) were retained.¹¹³ The ostensible purpose of the scheme was to guarantee minority representation in Parliament. However, the reasons given for the subsequent enlargement of GRC team sizes from three-member teams to teams ranging from four to six members was unrelated to the original objective of guaranteeing minority representation; instead, these amendments were designed to serve the unrelated purposes of facilitating the operation of town councils and community development councils, which are forms of local governance.¹¹⁴

After the 1984 elections, the ruling People’s Action Party (“PAP”) expressed the fear that younger voters preferred candidates best suited to serve their own needs, disregarding the importance of returning “a racially balanced party slate of candidates.”¹¹⁵ Thus, a corrective measure to ensure that majority rule did not eventuate in the neglect of minority interests was introduced in the form of the GRC, which is basically a mega-constituency created by the merging together of three former SMCs.¹¹⁶ It is contested on the basis of teams of four to six candidates. In assembling multi-racial teams, political parties would have to enter into inter-ethnic party alliances which would moderate racial politics. In effect, the PAP government was institutionalizing its own political practice of fielding a slate of multi-racial candidates and thereby requiring other political

Democracy, 6 SING. J. INT’L & COMP. L. 181, 216-19 (2002).

¹¹¹ *Id.*

¹¹² SING. CONST. art. 39A(2), available at <http://statutes.agc.gov.sg/>.

¹¹³ SING. CONST. art. 39A; Parliamentary Elections Act, ch. 218, § 8A(1)(a) (Sing.).

¹¹⁴ For a critique of the GRC scheme in hindering political pluralism (the political opposition has never won a GRC ward since its inception in 1988 and critics argue that the GRC scheme serves to perpetuate the hegemony of the People’s Action Party which has been in power since independence in 1965), see THIO, *supra* note 110, at 181-243.

¹¹⁵ The racial composition of Singapore is approximately 77.7% Chinese, 14.1% Malay, 7.1% Indians and 1.1% ‘Other’ races. See Andreas Ackermann, *They Give Us the Categories and We Fill Ourselves in: Ethnic Thinking in Singapore*, 4 INT’L J. ON MINORITY & GROUP RTS. 451 (1997).

¹¹⁶ Thio, *supra* note 110, at 216-19.

parties, some of which were ethnic-based, to practice multi-ethnic politics.¹¹⁷ Notably, the Constitution itself does not stipulate a minority quota and only provides that a minority candidate be fielded in each GRC.¹¹⁸ An increase in the size and numbers of GRCs might entail a corresponding quantitative decline in minority representation.

F. Legislative Oversight?

The government has also created constitutional institutions to supervise legislation and protect minority groups against discrimination. The Singapore Government, for example, adopted the proposal of the 1966 constitutional commission for a multi-racial watchdog body called the Council of State, designed to scrutinize potentially discriminatory legislation.¹¹⁹ This quasi Second Chamber was later renamed the Presidential Council on Minority Rights ("PCMR"), tasked with reviewing legislation which had "differentiating measures."¹²⁰ This was defined in Article 68 as measures which in their practical application would be "disadvantageous to persons of any racial or religious community." Its members include the Chief Justice, Prime Minister (PM), senior Cabinet members, and the Attorney General.

Law Minister EW Barker traced its origins to the 1958 Kenyan constitution.¹²¹ Upon independence, Kenya removed this institution for fear it would perpetuate racial discrimination and undermine ministerial responsibility.¹²² Nevertheless, Barker considered this "a promising innovation" in Singapore to ensure harmonious social relations; being advisory in nature, it could not

¹¹⁷ Li-ann Thio, *The Passage of a Generation: Revising the 1966 Constitutional Commission*, in *THE EVOLUTION OF A REVOLUTION: 40 YEARS OF THE SINGAPORE CONSTITUTION* 7-49, 40 (Li-ann Thio & Kevin YL Tan eds., 2008).

¹¹⁸ SING. CONST. art. 39A(2).

¹¹⁹ Thio, *supra* note 117, at 60.

¹²⁰ SING. CONST. art. 68.

¹²¹ Conversely, Gerald de Cruz argued that its historical origins were "entirely local", stemming from the proposal for a Council of Races to scrutinize laws to prevent discrimination on the grounds of race, religion and sex in the proposed People's Constitution for Malaya (including Singapore) put forward in 1947 by Pan-Malayan Council of Joint Action and Pusat Tenaga Raayat that appeared in *STRAITS TIMES*, May 28, 1969. Gerald de Cruz, *The Presidential Council*, 1 SING. L. REV. 20, 20-25 (1969).

¹²² Thio, *supra* note 119, at 18.

significantly impede the legislative agenda, leaving “the legislative primacy of Parliament unaffected.”¹²³ This was favored over proposals to have a Committee of minority representatives chosen directly by minority groups to represent minorities in the elected chamber of Parliament or to elect or nominate minorities to sit in an Upper House.¹²⁴ The desire to not allow minorities to directly elect minority representatives has remained a consistent feature of PAP policy, fearing that it would spark communalism and destabilize society.

The deficiencies of the PCMR as a mechanism of legislative oversight have been well documented.¹²⁵ All PCMR proceedings are held *in camera*.¹²⁶ Article 87 provides that “any Minister, Minister of State or Parliamentary Secretary specially authorized by the Prime Minister” may attend these private meetings.¹²⁷ The lack of publicity diminishes its potential role as a watchdog against racial discrimination. Furthermore, it is hampered in its task to protect minority rights and obstruct the passage of discriminatory legislation which might impair communal harmony. This is because the PCMR only receives legislative bills after the third reading, rather than during second reading where it could more effectively highlight controversial provisions to parliamentarians and conceivably have some input in the substantive content of the bill, before its enacted.¹²⁸ If the PCMR received the bill and could render its report, whether adverse or otherwise, before the second reading, parliamentarians could have the benefit of its analysis before debating the bill.

Even when the PCMR finds a “differentiating measure” in a bill, it has limited powers. The PCMR may make an adverse report to the Speaker who will present the bill to Parliament for

¹²³ Law Minister Edmund William Barker, 25 Sing. Parl. Rep., col. 1389, at 1431-32 (Mar. 17, 1967).

¹²⁴ REP. CONST. COMM., at 13, para. 46 (1966) (Sing.).

¹²⁵ See Thio Su Mien, *The Presidential Council*, 1 SING. L. REV. 2 (1969); David Marshall, *The Presidential Council*, 1 SING. L. REV. 9 (1969).

¹²⁶ Li-ann Thio, *The Passage of a Generation: Revisiting the 1996 Constitutional Commission*, in THE EVOLUTION OF A REVOLUTION: 40 YEARS OF THE SINGAPORE CONSTITUTION 7-49, 44 (Li-ann Thio & Kevin YL Tan eds., 2009).

¹²⁷ SING. CONST. art. 84.

¹²⁸ Article 78(1) of the Singapore Constitution only obliges the Speaker to present an authentic copy of the bill to the PCMR after its third and final stage, prior to the presentment for presidential assent, after the conclusion of parliamentary deliberations. SING. CONST. art. 78(1).

amendment. A check exists insofar as Article 78(6)(a) provides that such a bill cannot be presented to the President for assent unless the Speaker certifying it is free of 'differentiating measures.'¹²⁹ However, a two-thirds parliamentary majority can easily circumvent this under the Article 78(6)(c) procedure by endorsing a motion to present the bill to the President notwithstanding an adverse report. The cabinet's ability to muster this parliamentary majority is a given, as the current government overwhelmingly controls eighty-two of eighty-four elected parliamentary seats in a dominant one party state. The only "check" is the resultant publicity the overriding of an adverse report may elicit. However, no adverse report has ever been made.

Any legislative oversight body must have sufficiently strong powers to constitute a real check against discriminatory legislation; the public should have access to it to facilitate focused citizen participation in policy-making, and such body should have the opportunity to contribute to the process of legislative scrutiny, rather than exist merely as a cosmetic body or psychological comforter. Weak and ineffectual institutions are unlikely to alleviate minority fears of majority abuse. To effectively protect minorities, institutions should be constructed to ensure effective modes of accountability, transparency and participation.

IV. SOCIAL-CULTURAL DIMENSION OF MINORITIES ISSUES – NATIONAL IDENTITY AND TRIBAL LOYALTY

Nationalism can be fostered through symbols and myths or even through enshrining an official religion in the Constitution, though this can be very divisive in a multi-religious, multi-ethnic setting.¹³⁰

The call to accord constitutional status to a religion indicates the importance of religion as a source of legitimacy and as an influential component of the worldview of religious believers.

¹²⁹ SING. CONST. art. 68 (defines "differentiating measure" as "any measure which is, or is likely in its practical application to be, disadvantageous to persons of any racial or religious community and not equally disadvantageous to persons of other such communities, either directly by prejudicing persons of that community or indirectly by giving advantage to persons of another community.").

¹³⁰ See, e.g., Mark Juergensmeyer, *The Debate over Hindutva*, 26 RELIGION 129 (1996); BRENDA COSSMAN & RATNA KAPUR, *SECULARISM'S LAST SIGH?: HINDUTVA AND THE (MIS) RULE OF LAW* (2002).

However, it also reveals a clash of competing constitutional paradigms in terms of how to organize law, society, and the individual. In South-East Asia, Islamic revivalism has fueled calls for a legal system based on Islamic law, which clashed with common law systems after the American model (Philippines), hybridized by Spanish civilian influences, or the British model (Malaysia). As Harding noted: “[T]he failure of Islamic law to attain the status of global doctrine in maritime South East Asia probably represents the largest single remaining grievance in connection with the imposition of colonial law.”¹³¹ With the introduction of colonial rule and the principle of secular government with some limited accommodation of minority religion, legal pluralism has confined the operation of Islamic law to a narrow range of matters pertaining to personal, customary, and family law.¹³²

Secularism itself as a constitutional principle is a useful ordering device for state-religion relations insofar as it does not adopt the form of a substantive, anti-theistic ideology which is hostile towards religious belief.¹³³ Rather than descend into a form of secular fundamentalism, the principle of secularity operates as a framework under which disparate religious groups may peacefully co-exist. This requires that religious (and non religious) groups are treated equally under the law, that is, the state is to adopt a neutral posture towards religious groups.

However, a resurgence of religiosity and its demands to enter into the public realm challenges the secular framework. This could be in the form of demanding the implementation of religious law, such as the Islamic *syariah*, pursuant to establishing an Islamic state where religion and politics are unified, not separated. Alternatively, where there are calls to recognize an official state

¹³¹ Andrew Harding, *Global Doctrine and Local Knowledge: Law in South East Asia*, 51 INT'L & COMP. L. Q. 35, 40 (2002).

¹³² Donald L. Horowitz, *The Qur'an and the Common Law: Islamic Law Reform and the Theory of Legal Change*, 42 AM. J. COMP. L. 543, 543-80 (1994).

¹³³ See, e.g., András Sajó, *Preliminaries to a Concept of Constitutional Secularism*, 6 INT'L J. CONST. L. 605, 605-29 (2008); John Finnis, *On the Practical Meaning of Secularism*, 73 NOTRE DAME L. REV. 491 (1998); Ian T. Benson, *Notes Towards a (Re) Definition of the "Secular"*, 33 U. BRIT. COLUM. L. REV. 519, 519-49 (2000); William M. McClay, *Two Concepts of Secularism*, 13 J. OF POL'Y HIST. 47 (2001); T.N. Madan, *Secularism in Its Place*, 46 J. ASIAN STUD. 759 (1987); Paul F. Campos, *Secular Fundamentalism*, 94 COLUM. L. REV. 1814 (1994).

religion, which would privilege it, sparking off tension with religious minorities. This is because in such situations, the state has been called upon not to serve as neutral arbiter between competing religious claims, but to afford preferential treatment to the religious beliefs and practices of a resurgent religious group.

A. Malaysia: Judicial Revisionist of the Constitutional Pre-Commitment to Promote Malay/Islamic Supremacy and the Threat to Human Rights

The Singapore and Malaysian approach towards the scope of religious liberty differs starkly, although the Article 15 religious guarantee clause under the Singapore Constitution derives from Article 11 of the Federal Constitution of Malaysia.¹³⁴ Singapore seceded from the federation in 1965 and embarked upon its own distinctive approach towards securing religious liberty in a multi-religious setting.¹³⁵

The very notion of “accommodative secularism”¹³⁶ in the Singapore context relates to the Constitution’s guarantee of religious freedom being premised on “removing restrictions to one’s choice of religious belief,” as the state is agnostic about religious truth claims. However, Article 11 of the Malaysian Constitution is construed more strictly; it provides that “[e]very person has the right to profess and practice his religion and, subject to Clause (4), to propagate it.”¹³⁷ The Singapore version excludes reference to state legislative power to enact anti-propagation laws.

The more restrictive Malaysian approach has been most apparent in apostasy cases, which have stirred both racial and

¹³⁴ MALAY. CONST. art.11, available at <http://confinder.richmond.edu/admin/docs/malaysia.pdf>.

¹³⁵ Li-ann Thio, *Control, Co-Optation and Co-Operation: Managing Religious Harmony in Singapore's Multi-Ethnic, Quasi-Secular State*, 33 HASTINGS CONST. L.Q. 197 (2006). The religious breakdown of the Singapore population has been reported as follows: Buddhists & Taoists (51%); Muslims (15%); Christians (15%); Hindus (4%); No Religion (13%) and Other Religions (2%). DAVID CHAN, ATTITUDE ON RACE AND RELIGION: SURVEY ON SOCIAL ATTITUDES OF SINGAPOREANS (SAS) 2001 (2002), available at <http://www.mcys.gov.sg/MCDSFiles/download/MCDS-RR.pdf>.

¹³⁶ Nappalli Peter Williams v. Inst. of Technical Educ., [1999] 2 S.L.R. 569, 576 ¶ 29 (Sing. Ct. App. 1999).

¹³⁷ Clause 4 reads: “State law and in respect of the Federal Territories of Kuala Lumpur and Lubuan, federal law may control or restrict the propagation of any religious doctrine or belief among persons professing the religion of Islam.” MALAY. CONST. art. 11.

religious tensions. This has arisen in relation to the so-called “body snatcher” cases, where a deceased Hindu who had apparently converted to Islam without his wife’s knowledge, had his body appropriated by the state Islamic agency for Muslim burial, contrary to the wishes of the wife who insisted he was Hindu.¹³⁸

Although the civil courts have declined to hear apostasy cases asserting a lack of jurisdiction on dubious grounds, given the involvement of a constitutional issue, certain High Court Justices, unable to separate their religious affiliations from their official duties, have nonetheless proffered attenuated readings of the scope of religious freedom.¹³⁹

Contrary to international human rights standards, the right to “profess” a religion has been restrictively construed to exclude a right to free conscience, including the “freedom to change . . . religion.”¹⁴⁰ In *Daud bin Mamat v. Majlis Agama Islam*, the High Court Justice held that exiting a religion “is certainly not a religion” and, in the absence of an express right to renounce religion, to infer that Article 11(1) protected this “would stretch the scope of [Article] 11(1) of the Federal Constitution to ridiculous heights, and rebel against the canon of construction.”¹⁴¹ Apostasy or religious conversions are a particularly sensitive issue within the Muslim community in Malaysia, although there are divergent opinions as to whether the law should punish apostates or whether this should be a matter for the afterlife as “there is no compulsion in Islam.”¹⁴² In the notorious case of *Lina Joy*,¹⁴³ which involved a Malay Muslim woman who had converted to Christianity and

¹³⁸ Devinder Singh, *Moorthy Buried as a Muslim*, NEW STRAITS TIMES (Malay.), Dec. 12, 2005, at 4.

¹³⁹ *Id.* at 197-226.

¹⁴⁰ Universal Declaration of Human Rights, G.A. Res. 217A, art. 18, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948).

¹⁴¹ *Id.*

¹⁴² *E.g.*, verse 2:256 of the Quran. See generally Abdullahi An-Niam, *Human Rights in the Muslim World* 3 HARV. HUM. RTS. J. 13 (1990).

¹⁴³ *Lina Joy v. Majlis Agama Islam Wilayah Persekutuan dan lain-lain*, [2007] 4 M.L.J. 585, *aff'g* *Lina Joy v. Majlis Agama Islam Wilayah & Anor*, [2004] 2 M.L.J. 119 (Malay.). See also Li-ann Thio, *Apostasy and Religious Freedom: Constitutional Issues Arising from the Lina Joy Litigation*, 2 MALAY. L.J. 1 (2006). For a discussion of the Federal Court decision (which did not introduce any substantially new argument not already canvassed at the lower judicial levels), see Joshua Neoh, *Islamic State and the Common Law in Malaysia: A Case Study of Lina Joy*, GLOBAL JURIST 8.2 (2008), available at http://works.bepress.com/joshua_neoh/.

unsuccessfully sought to have this reflected through changing her name and religion on her identity card, the High Court Justice raised a “public order”¹⁴⁴ argument as a limitation on Article 11(1). Justice Faiza Thamby Chik stated that if Muslims were allowed to convert out of Islam at will, this would affect Article 11, Sections (4) and (5), which served to protect harmony and safeguard the “interests of Muslims and non-Muslims.”¹⁴⁵

Thus, rather than free agency, a Muslim’s personal choice to change religious affiliation implicated public order, contrary to *Minister for Home Affairs Malaysia v. Jamaluddin bin Othman*, which the Justice did not discuss, despite its relevance.¹⁴⁶ The Supreme Court quashed an Internal Security Act preventive detention order issued against Jamaluddin, a Malay Christian convert who was involved in a program to propagate Christianity among Malays, apparently converting six Malays to Christianity.¹⁴⁷ Rejecting the argument that such activities could create tensions between the Christian and Muslim communities, the Court found no security threat under the terms of the Act.¹⁴⁸ Article 11 could be exercised provided it did not “go beyond what can normally be regarded as professing and practicing one’s religion,” as this liberty was subject to general laws.¹⁴⁹

To Justice Chik, a Muslim seeking to convert out of Islam had to get a Syariah court declaration of apostasy (even though this is near impossible either because there is no legal provision

¹⁴⁴ Article 11(5) of the Singapore Constitution provides: “This Article does not authorize any act contrary to any general law relating to public order, public health or morality.” SING. CONST. art. 11(5).

¹⁴⁵ *Lina Joy v. Majlis Agama Islam Wilayah*, [2004] 2 M.L.J. 119, 133 ¶ 29 (Malay.).

¹⁴⁶ *Id.*

¹⁴⁷ One of four allegations for the grounds of detention was that the respondent “converted into Christianity six Malays.” *Malaysia v. Jamaluddin bin Othman*, [1989] 1 M.L.J. 418 (Malay.) (quoting Hashim Yeop A Sani CJ, Minister for Home Affairs).

¹⁴⁸ See Nicole Fritz & Martin Flaherty, *Unjust Order: Malaysia’s Internal Security Act*, 26 FORDHAM INT’L L.J. 1345 (2003).

¹⁴⁹ Bari criticized *Jamaluddin* as a decision which “could not fit into the history and character” of the Federation as he thought it failed to consider the supremacy of Islam in article 3 or to “take into account the intimate relationship between the Malays and Islam” which would presumably lead to a greater readiness to find public order imperiled. Abdul Aziz Bari, *Islam in the Federal Constitution: A Commentary on the Decision in Meor Atiquilahman*, 2 MALAY. L.J., at cxxxiii (2002).

facilitating this and because the courts have never granted a Malay an apostasy order); that is, the decision was not decided by constitutional standards but by religious standards. Justice Chik referred to Article 160 of the Malay Constitution which defines “Malay” as a “person who professes the religion of Islam, habitually speaks the Malay language, conforms to Malay custom . . .” He then stated that Lina Joy, as an ethnic Malay, “remains in the Islamic faith until his or her dying days.”¹⁵⁰ Thus, if this is the correct legal interpretation, Malays are barred from converting out of Islam. This violation of conscience and the freedom to choose, change or reject a religion is an oppressive ascription of constitutional identity. A more humane and rights-based approach towards handling apostasy and religious freedom would be to exclude a *murtad* (former Malay Muslim) from the constitutional definition of “Malay” and the privileges this class is entitled to as *bumiputera*.

Further, if Justice Chik’s interpretation is correct, an equal protection issue under Article 8 arises. A non-Malay convert to Islam (*mualaf*) who decides to leave Islam must report such decision to the relevant state Islamic authority who determines the validity of such renunciation: *Hun Mun Meng*.¹⁵¹ Thus, distinct regimes emerge for three categories of Malaysian citizens based on their religious identity. First, all Malays are *ipso facto* Muslims by dint of Article 160, regardless of personal choice. Thus, renouncing Islam would be a legal impossibility, as the Constitution assigns an immutable religious identity. Recourse to the Syariah court to determine the validity of a declaration of apostasy would be redundant. Second, all non-Malay Muslims who decide to leave Islam have a qualified right to change religion, contingent upon receiving official religious approval from the relevant state religious authority. This reduces religious freedom to a license. Third, all non-Muslims persons professing a faith enjoy unhindered freedom of religious choice; religious freedom is conceived of as an inherent individual entitlement, consonant with the human right to religious freedom. Thus, the application of Article 11(1) differs, owing to the judicial erection of different regimes governing Muslim and non-Muslim religious choice.

¹⁵⁰ *Lina Joy*, [2004] 2 M.L.J. 119 at 143H, ¶ 58.

¹⁵¹ *Majlis Agama Islam Negeri Sembilan v. Hun Mun Meng*, [1992] 2 M.L.J. 676, 143I, ¶ 58 (Malay.).

Muslims are afforded a truncated scope of religious liberty and receive unequal protection. The dictates of the positive syariah law, so conceived and applied by Syariah courts, apparently trump constitutional norms by creating an exceptional regime where constitutional norms do not apply, contrary to the tenet of constitutional supremacy.

Furthermore, Justice Chik invoked Article 3 in a dubious, legally unsound manner by extending the application of Islamic values in Malaysian public law, contrary to precedent.

Article 3 provides that Islam is the religion of the Federation, but other religions may be practiced in peace and harmony in any part of the Federation. In the Supreme Court decision of *Che Omar bin Che Soh v. Public Prosecutor*, the meaning of "Islam" in the constitutional context was discussed.¹⁵² British colonial rule, by introducing a secular legal system, had rolled back and confined the application of Islamic laws to personal matters, dividing Islam into public and private spheres,¹⁵³ not treating it as *ad-adeen*.¹⁵⁴ Islam itself is holistic in terms of prescribing a way of life and does not differentiate between the temporal and spiritual.

Lord President Tun Salleh Abas, a Muslim, recognized that Islam was "not just a mere collection of dogmas and rituals," but "a complete way of life covering all fields of human activities, may they be private or public, legal, political, economic, social, cultural, moral or judicial."¹⁵⁵ Nevertheless, he distinguished this from the meaning of "Islam" in Article 3. In feeling bound to adopt the meaning of "Islam" as comprehended by the constitutional framers, "until the law and the system is changed," he stated:

[W]e have to set aside our personal feelings because the law in this country is still what it is today, secular law, where morality not accepted by the law is not enjoying the status of law. Perhaps that argument should be addressed at other forums or at seminars and, perhaps, to politicians and

¹⁵² *Che Omar bin Che Soh v. Pub. Prosecutor*, [1988] 2 M.L.J. 55 (Malay.).

¹⁵³ *Id.* at 56H-I.

¹⁵⁴ SIMON C. SMITH, *BRITISH RELATIONS WITH THE MALAY RULERS FROM DECENTRALISATION TO MALAYAN INDEPENDENCE 1930-1957*, 102 (1995).

¹⁵⁵ *Che Omar*, 2 M.L.J. at 56C (quoting SAYED ABUL 'ALA MAUDOOD, *THE ISLAMIC LAW AND CONSTITUTION* (7th ed. 1980)).

Parliament.¹⁵⁶

British rule thus “secularized” public law and confined the scope of application of Islamic law:

The development of the public aspect of Islam had left the religion as a mere adjunct to the ruler’s power and sovereignty. The ruler ceased to be regarded as God’s vicegerent on earth but was regarded as a sovereign within his territory. The concept of sovereignty ascribed to humans is alien to Islamic religion because in Islam, sovereignty belongs to God alone. By ascribing sovereignty to the ruler, *i.e.*[,] to a human, the divine source of legal validity is severed and thus the British turned the system into a secular institution. Thus all laws including administration of Islamic laws had to receive this validity through a secular fiat. Although theoretically because the sovereignty of the ruler was absolute in the sense that he could do what he likes, and govern according to what he thought fit, the Anglo/Malay Treaties restricted this power The law was only applicable to Muslims as their personal law . . . during the British colonial period, through their system of indirect rule and establishment of secular institutions, Islamic law was rendered isolated in a narrow confinement of the law of marriage, divorce and inheritance only.¹⁵⁷

In addition, when the Independence Merdeka Constitution was being drafted, there were reservations over the inclusion of the word “Islam” in Article 3.¹⁵⁸ The sole dissenting member of the Reid Constitutional Commission, Pakistani Justice Abdul Hamid, supported the Alliance¹⁵⁹ proposal to include in the text an “innocuous” Islam clause.¹⁶⁰ This was adopted after assurances were given that its inclusion did not change the status quo

¹⁵⁶ *Id.* at 57E-F.

¹⁵⁷ *Id.* at 56I-F (quoting MICHAEL BARRY HOOKER, *ISLAMIC LAW IN SOUTH-EAST ASIA* (1984)).

¹⁵⁸ Joseph Fernando, *The Position of Islam in the Constitution of Malaysia*, 37 J. SE. ASIAN STUD. 249, 253 (2006).

¹⁵⁹ The Alliance was a combination of the political parties of the three main communities in Malaysia: United Malays National Organisation (UMNO), Malayan Chinese Association (MCA) and Malayan Indian Congress. Since independence, UMNO has dominated the system of parliamentary government.

¹⁶⁰ Fernando, *supra* note 158, at 256.

regarding Islam's symbolic role in the constitutional order.¹⁶¹ The Alliance assured the Colonial Office that "Malaya would be a secular state," without elaborating upon the meaning of secularity.¹⁶² Within the Alliance, the United Malays National Organization ("UMNO") leaders had to ensure their non-Muslim counterparts that the clause would be symbolic and that it was not intended to have practical effect,¹⁶³ and would not entail the creation of a Muslim theocracy, in order to secure their acquiescence.¹⁶⁴ As UMNO and Alliance leader Tunku Abdul Rahman clarified during 1958 legislative council debates, Malaysia "is not an Islamic state as it is generally understood, we merely provide that Islam shall be the official religion of the State."¹⁶⁵ The understanding was that Article 3 merely fixed the official religion.

B. Malaysia and Islamic Revivalism: Breaching the Social Compact and Precipitating Tensions

As borne out through constitutional history and apex court precedent, Malaysia is constitutionally a secular state.¹⁶⁶ Constitutional orthodoxy has been blithely disregarded in subsequent cases, in the face of political Islamic revivalism, which has seeped into judicial reasoning. Justice Chik in *Lina Joy*, argued that Article 3 had a "far wider and meaningful purpose" than merely a symbolic role, and emphasized that by dint of Article

¹⁶¹ REPORT OF THE FEDERATION OF MALAYA CONSTITUTIONAL COMMISSION (1957), ¶ 161, reprinted in KEVIN YL TAN & THIO LI-ANN, CONSTITUTIONAL LAW IN MALAYSIA AND SINGAPORE 968 (Butterworths Asia 2d ed. 1977).

¹⁶² FERNANDO, *supra* note 82, at 162-63. See also J. Norman Parmer, *Constitutional Change in Malaya's Plural Society*, 26 FAR E. SURVEY 149 (1957).

¹⁶³ A.J. Harding, *Islam and Public Law in Malaysia: Some Reflections in the Aftermath of Susie Teoh's Case*, 1 MALAY. L.J., at xci (1991); FERNANDO, *supra* note 82, at 162.

¹⁶⁴ FERNANDO, *supra* note 82, at 162-63.

¹⁶⁵ CONTEMPORARY MALAYSIA 156 (Wu Min Aun ed., 1999) (quoting Official Report of Legislative Council Debates (1958)). In 1984, former Prime Minister Tunku Abdul Rahman stated: "this country is a secular state. It means that it is not a Muslim state. Islam is the official religion of this country, but other religions have a right to play their part as far as religion is concerned. That is about it but it is not absolutely a secular state because if it were so, there would be officially no religion. The Constitution has more or less settled the point." Tunku Abdul Rahman Putra, *The Role of Religion in Nation Building*, in CONTEMPORARY ISSUES ON MALAYSIAN RELIGIONS 25 (Tunku Abdul Rahman Putra et al. eds., 1984).

¹⁶⁶ Joseph M. Fernando, *The Position of Islam in the Constitution of Malaysia*, 37 J. SE. ASIAN STUD. 249, 249-66 (2006).

3, “Islam is given a special position and status.”¹⁶⁷ He then took a quantum leap of illogic in positing the supremacy of Article 3 and his vision of Islam, which qualified the Article 11 religious freedom guarantee. Justice Chik sought to give effect to the supremacy of Islamic values and a particular Islamic view of apostasy through attributing a quasi-*grundnorm* status to Article 3 and through that, to syariah law. This is creative revisionism, which displays infidelity to constitutional history, lacks any principled analysis, ignores the canons of constitutional construction, and demonstrates how Justices can abdicate their task in succumbing to the politicization of Islam in a country where political parties seek to outstrip each other through religious fervor to gain popular support.

One of the functions of the constitution is that it serves as a pre-commitment strategy, entrenching principles on whose basis minorities join a polity. In the case of Malaysia, this was the secularity of the Malaysian state. These latter-day judicial interpretations ride roughshod over constitutional values by ascribing supreme status to Islam¹⁶⁸ and interpreting

¹⁶⁷ [2004] 2 M.L.J. 119 at 127C, ¶ 12.

¹⁶⁸ This was evident in the High Court case of Meor Atiqulrahman bin Ishak v. Fatimah bte Sihi, [2000] 5 M.L.J. 375, decided on August 6, 1999 by the High Court of Seremban concerning the Serban Controversy, which was reversed by the Federal Court. Justice Noor had treated the supremacy of Islam as a sort of quasi-constitutional *grundnorm* framing his interpretive matrix. He declared: “Islam is not of equal status with the other religions; it does not sit alongside or stand together. Islam sits above, it walks first, and is placed in an open space with a loud voice. Islam is like the teak tree – tall, firm and able. Otherwise, Islam will not be the religion of the Federation but just another of the few religions professed in the country and everybody would be equally free to practice any religion, with none better than any other.” He considered the government duty bound to actively promote Islam: “[T]he government is responsible for taking care of, improve and develop Islam as is done by the current government, for example building mosques and religious centers, sponsoring musabqah al-Quran, reciting the al-Quran, restricting acts forbidden by Islam like banning alcohol, gambling, prostitution and undesirable cultures, and by right should include making laws to ensure that religious places of other religions do not exceed or compete with National / State Mosques in terms of location and prominence, size and overly-majestic architecture, or too many and everywhere without control. Other religions must be arranged and directed to ensure that they are practiced peacefully and do not threaten the dominant position of Islam, not just at the present but more importantly in the future and beyond.” (Translated from Malay). For an analysis, see Li-ann Thio & Jaclyn Ling-Chen Neo, *Religious Dress in Schools: The Serban Controversy in Malaysia*, 55 INT’L & COMP. L. Q. 671, 671-88 (2006).

constitutional provisions through the preferred Islamic values of certain Justices. This importation of Islamic values into public law discounts the concerns of religious minorities that Malaysia would become a Muslim theocracy,¹⁶⁹ and the conditions of the social compact which grounded their entry into the Malaysian federation. This has been a cause of fear and tension and a source of political instability. Infidelity to constitutional values can thus precipitate social instability, whether in a court of law or a court of public opinion.

Whereas “secularism” in Singapore entails the government treating all religions equally and with a respectful attitude,¹⁷⁰ in Malaysia, Islam is given a privileged position,¹⁷¹ reflecting the desire of certain sectors to break Islamic values free from the narrow confines on personal and religious life so that it can influence and shape public law and public life, and indeed, non-Muslims.¹⁷² This has disquieted other religious minorities and has

¹⁶⁹ FERNANDO, *supra* note 82, at 217 (discussing the assurances given by UMNO leaders to British officials that Malaya would be a secular state and not a theocracy).

¹⁷⁰ A Government official has noted that while Singapore is secular, it is not atheistic, that the government should not be antagonistic to religious beliefs and the government “is secular but it is certainly not atheistic.” *Singapore’s Political Arena*, STRAITS TIMES, May 27, 2009, available at www.law.nus.edu.sg/news/archive/2009/ST270509.pdf. See also Li-ann Thio, *Control, Co-optation and Co-Operating: Managing Religious Harmony in Singapore’s Multi-Ethnic, Quasi-Secular State*, 33 HASTINGS INT’L & COMP. L. REV. 197, 197-253 (2007); Li-ann Thio, *Secularism, the Singapore Way*, STRAITS TIMES, Oct. 30, 2007; Li-ann Thio, *Religion in the Public Sphere of Singapore: Wall of Division or Public Square?*, in RELIGIOUS DIVERSITY AND CIVIL SOCIETY: A COMPARATIVE ANALYSIS 73-104 (Bryan S. Turner ed., 2008).

¹⁷¹ There are constitutional provisions which relate to Islam apart from Article 3, such as Article 12(2) which provides that state funds can be awarded to Islamic educational institutions, so it is clear Malaysia does not practice a strict separationist model of religion and state. MALAY. CONST. art.12(2).

¹⁷² For example, in child custody cases where a non-Muslim couple fight for custody of their children, after the husband converts to Islam, it has been held that non-Muslims are subject to the jurisdiction of syariah courts, even though the Constitution provides that syariah courts have limited jurisdiction over specified matters and only over Muslims. List II (State List) Para. 1 of the Malay Constitution reads: “Except with respect to the Federal Territories of Kuala Lumpur and Labuan, Islamic law and personal and family law of persons professing the religion of Islam, including the Islamic law relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy guardianship, gifts, partitions and noncharitable trusts; Wakafs and the definition and regulation of charitable and religious endowments, institutions, trusts, charities and charitable institutions operating wholly within the State;

harmed Malaysia's reputation for respecting religious diversity and religious freedom.¹⁷³

C. Philippines and Muslim Mindanao: Gridlock in the Face of Intransigence Between the Supreme and the Divine

The call for an Islamic state in the south of Philippines by separatist groups to establish a system of life and governance acceptance of Moro Muslims raises various contentious constitutional clashes.¹⁷⁴

The desire to have the Islamic Quran as the basic law of the land clashes with the status of the Philippines Constitution as the supreme law of the land, flowing from its direct promulgation by the sovereign Filipino people.¹⁷⁵ This reflects a central tenet of modern democracy but, as Santos observes, "it is simply unthinkable to subordinate the God-given Quran to the man-made or even people-made Philippine Constitution. This is a matter or article of faith, where exalting the Constitution would be akin to shirk (idolatry), one of the worst sins in Islam The Quran trumps the Constitution."¹⁷⁶ In this worldview, the Quran is a "veritable super-Constitution which covers the laws of marriage and family, of property and succession, of trade and commerce, of crime and punishment, of society and government, and of all other spheres of life."¹⁷⁷ This would include political ideology and, as such, it could not be inferior to the Constitution.¹⁷⁸ This school of

Malay customs. Zakat, Fitrah and Baitulmal or similar Islamic religious revenue, mosques or any Islamic public places of worship, creation and punishment of offences by persons professing the religion of Islam against precepts of that religion, except in regard to matters included in the Federal List; the constitution, organization and procedure of Syariah courts, which shall have jurisdiction only over person professing the religion of Islam and in respect only of any of the matters included in this paragraph, but shall not have jurisdiction in respect of offences except in so far as conferred by federal law[], the control of propagating doctrines and beliefs among persons professing the religion of Islam; the determination of matters of Islamic law and doctrine Malay custom."

¹⁷³ Hannah Beech, *Malaysia's Crisis of Faith*, TIME (Magazine), May 30, 2007, available at <http://www.time.com/time/world/article/0,8599,1626300,00.html>.

¹⁷⁴ SOLIMAN M. SANTOS JR., THE MORO ISLAMIC CHALLENGE: CONSTITUTIONAL RETHINKING FOR THE MINDANAO PEACE PROCESS 13 (2001).

¹⁷⁵ CONST. (1987), PmbL., (Phil.).

¹⁷⁶ SANTOS, *supra* note 174, at 14.

¹⁷⁷ *Id.*

¹⁷⁸ Santos notes that Islamists view the modern Western secular principle of

Islamic orthodoxy is contrary to the constitutional principle of the separation of Church and State and the provision against the establishment of religion.¹⁷⁹ This concept is borrowed from the American model, although it is not followed dogmatically.¹⁸⁰

Short of a regime permitting religious autonomy and the implementation of religious law, such as that in Law No. 11 of 2006 in relation to Aceh, it is difficult to broker peace and compromise in the face of two dueling and intransigent public philosophies over the source of supreme law as a basis for ordering social life.

Ultimately, a clear delineation of jurisdiction between religious and civil courts and an indication of which is superior in the judicial hierarchy helps secure a peaceful co-existence, provided this is accepted and not used by religious entrepreneurs to stir up political unrest. A case in point is the inter-relationship between syariah courts and the civil courts in Singapore. Here, the syariah court is subject to some degree of oversight by the civil High Court, as in the case of *Mohd Ismail bin Ibrahim v. Mohd Taha bin Ibrahim*.¹⁸¹ Here, the defendant-trustee had sought the opinion of the Fatwa Committee of Islamic Religious Council ("MUIS") (which gives religious rulings) as to validity of will according to Muslim law under AMLA (Administration of Muslim Law Act).¹⁸² It found that various religious leaders from MUIS misconstrued the validity of a Muslim's will and one of them, the Mufti, who had validated the will as a beneficiary, had

church-state separation as the root cause for the lack of morality and decline in spirituality in many Western / Western-oriented governments and societies. *Id.* at 18.

¹⁷⁹ CONST. (1987), Art. III § 5, (Phil.) "No law shall be made respecting an establishment of religion, or prohibiting the free exercise thereof." *Id.* The 1987 Philippines Constitution also prohibits the appropriation of public money for religious uses and prohibits religious political parties). *Id.*

¹⁸⁰ *Id.*, e.g., support of military chaplains, tax exemptions, the presidential oath and the invocation of God in the constitutional preamble.

¹⁸¹ *Mohd Ismail bin Ibrahim v. Mohd Taha bin Ibrahim*, [2004] 4 S.L.R. 756; see also Hairani Saban Hardjoe, *Hukum Faraid and the Application of AMLA as "The Statutory Adjunct of Muslim Law in Singapore": Legal Reflection on the Case of Mohamed Ismail Bin Ibrahim v. Mohd Taha Bin Ibrahim*, LAW GAZETTE, Oct. 2006, available at <http://www.lawgazette.com.sg/2006-10/default.htm>.

¹⁸² Administration of Muslim Law Act ch. 3 (2005) (Sing.), available at http://statutes.agc.gov.sg/non_version/cgi-bin/cgi_retrieve.pl?&actno=Reved-3&date=latest&method=part [hereinafter AMLA].

contravened the common law rule against bias.¹⁸³ Justice Rubin noted that “[i]t is an important principle of Western as well as Muslim jurisprudence that a person cannot be a Justice in his own course” and the involvement of the Mufti who chaired the MUIS fatwa committee tended to “present the process in a somewhat lesser light.”¹⁸⁴ In evaluating Islamic law and its four sources (Quran [holy text], Hadith [tradition of Prophets, oral precepts], Ijmaa [consensus among scholars] and Qiyas [reasoning by analogy]),¹⁸⁵ Justice Rubin, a civil court Justice, adopted a cautious approach in evaluating expert opinion from both sides. For example, he took note of whether an opinion was broadly shared or whether there were differing viewpoints on the issue in assessing its weight.¹⁸⁶

Essentially, the High Court Justice was informing the Mufti and MUIS fatwa committee that they had misconstrued Islamic law under AMLA (as opposed to Islamic law simpliciter); thus the fatwa committee is not an authority unto itself. Furthermore, when the counsel for MUIS said that the Mufti Tuan Isa was “not legally trained in civil law and is called to testify only on Muslim law,” this perplexed Justice Rubin.¹⁸⁷ This is because Tuan Isa was distinguishing Muslim law simpliciter as opposed to Muslim law as regulated by AMLA as a statute enacted by the secular institution of Parliament. Justice Rubin noted that AMLA was “an essential statutory adjunct of Muslim law in Singapore.”¹⁸⁸ This indicates that religious or Islamic law is subordinate to secular law and that the religious courts are not applying divine law in an unbounded fashion, but only to the extent permitted by statute. This indicates the limited role of syariah courts as courts of limited or inferior jurisdiction, empowered to give out inheritance certificates setting out the fixed proportions of each legal heir. As

¹⁸³ Mohd Ismail bin Ibrahim v. Mohd Taha bin Ibrahim, [2004] 4 S.L.R. 756, 780 ¶ 55; *see also* PETER CANE, INTRODUCTION TO ADMINISTRATIVE LAW 143-167 (2004).

¹⁸⁴ *Mohd Ismail*, [2004] 4 S.L.R. at 780, ¶ 55.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* ¶ 43 (Justice Rubin noting “I do not propose to second-guess the scholarship and erudition contained in the said commentary” but notes that the work is not a single viewpoint but rather provides “differing viewpoints of two well-respected shaiks (leaders).”).

¹⁸⁷ *Id.* ¶ 63.

¹⁸⁸ *Id.* ¶ 63.

the religious court was not a court of superior jurisdiction, the High Court in its exercise of supervisory jurisdiction was tasked with ensuring that the terms of Section 114 of AMLA with respect to testamentary disposition were observed.¹⁸⁹ In this sense, secular law regulates the boundaries of sacred law.

D. Multi-Religious Societies and the Agnostic State as Protector of Racial and Religious Minorities: Secularism, Singapore Style

The failure to accommodate sizeable Muslim minorities of some ten million through reaching a just peace settlement has stymied the economic development of Muslim Mindanao in the South Philippines. There have been two failed attempts to negotiate peace in 1976 and 1996¹⁹⁰ in this Catholic-majority state, largely owing to political corruption, poor governance and the non-accommodation of Moro Muslims.

In contrast, Singapore has successfully addressed the question of politically accommodating Muslim minorities while pursuing the egalitarian policy of meritocracy. This stems from the apprehension of the centrality of religion and ethnicity to their lives, motivating the search for legal methods to incorporate these identities and to permit their expression in the public sphere. While the Singapore Constitution does not contain specific minority rights, Article 12 prohibits discrimination, *inter alia*, on the basis of race.¹⁹¹ Article 15 guarantees the religious freedom of persons and of religious institutions to hold property, manage their own affairs, and generally enjoy the communal dimensions of religious life.¹⁹² While there is no scheme of special privileges for Malays, Article 152 imposes a constitutional responsibility on the government to “constantly . . . care for the interests of the racial and religious minorities in Singapore.”¹⁹³ In exercising its functions, the government is to “recognize the special position of the Malays, who are the indigenous people of Singapore, and

¹⁸⁹ *Mohd Ismail*, [2004] 4 S.L.R. ¶¶ 60-65, at 781-783.

¹⁹⁰ The Tripoli Agreement, Phil.-Moro National Liberation Front, Feb. 8, 2006; Philippines-Mindanao Peace Agreement, Phil-Moro National Liberation Front, Sep. 2, 1996.

¹⁹¹ SING. CONST. art. 12(2).

¹⁹² *Id.* art. 15(2)-(3).

¹⁹³ *Id.* art. 152.

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.”¹⁹⁴ In affirming the multicultural character of Singapore society, Article 153A recognizes the four official languages of “Malay, Mandarin, Tamil, and English,” while Malay is the national language.¹⁹⁵ In addition, nothing is to prejudice the Government’s right “to preserve and sustain the use and study of the language of any other community in Singapore.”¹⁹⁶

E. Statutory Facilitation of Muslim Communal Life – Pragmatic Secularism

From the outset, a conscious decision was taken not to have an established religion: “[l]et us face up to this problem of multi-culture, multi-religions and multi-languages. Alone in South East Asia, we are a State without an established church.”¹⁹⁷ Indeed, the principle of religious accommodation and legal pluralism is constitutionally enshrined. Article 153 provides: “The Legislature shall by law make provision for regulating Muslim religious affairs and for constituting a Council to advise the President in matters relating to the Muslim religion.”¹⁹⁸ Pursuant to this, Chapter 3 of the Administration of Muslim Law Act (“AMLA”) was adopted.

The Muslim community, through the Islamic Religious Council (“MUIS”), is statutorily empowered under the AMLA to collect funds for building mosques.¹⁹⁹ Muslims enjoy the privilege of utilizing government machinery to aid in collections for the Mosque Building funds. This privilege is not extended to any other religious minorities, even though the Hindus have so requested.²⁰⁰

¹⁹⁴ *Id.* art. 152(2).

¹⁹⁵ *Id.* art. 153A.

¹⁹⁶ *Id.* art. 153A(2)(b).

¹⁹⁷ *No Dominance by Religious Group over Others – Lee*, STRAITS TIMES, (Sing.), Jan. 5, 1967, at 6.

¹⁹⁸ SING. CONST. art. 153.

¹⁹⁹ AMLA, *supra* note 182, ch. 3, pt. V, §§ 74-79.

²⁰⁰ *Id.* ch. 3, pt. V, § 78. Compulsory Muslim contributions towards the Mosque Building Fund are collected through the Central Provident Fund system pursuant to Section 78 of AMLA, with this concession being recognized as a “special one” which would “not be a precedent for other religious or ethnic groups.” *Id.* It was not thought necessary to introduce legislation to allow donations to the Hindu Endowments Board to be collected through the CPF Board as “it would be no less

MUIS also is empowered to continue the Islamic charitable practice of collecting *zakat* to meet the social welfare needs of the poorer members of the community.²⁰¹

That the state is able to lend support to a religious group flows from its version of “accommodative secularism” and the judicial confirmation that the establishment, in terms of financial or non-financial support, of a religion, is not proscribed.²⁰² However, this does entail some degree of state involvement in matters related to religion. For example, the President of the syariah court is appointed by the President of Singapore, on the advice of the Cabinet.²⁰³ The government also has a role in appointing up to seven members of the Majlis Ugama Islam (Islamic Religious Council, a statutory body), whose functions as stipulated in Section 3 includes advising the Singapore President “in matters relating to the Muslim religion in Singapore,” and to administer related matters including halal certification, haj pilgrimages and religious schools. MUIS focuses on helping the Muslim community to develop and to integrate national society, while preserving religious and cultural identity and practices. Indeed, the civil courts in *Angliss Singapore Pte, Ltd. v. Public Prosecutor*²⁰⁴ upheld a conviction under Section 88 of AMLA which makes it an offence of strict liability for the sale of halal food, whether by a Muslim or non-Muslim seller, without MUIS certification and approval.²⁰⁵ In this case, the food, “Dewfresh” chicken nuggets, was halal but exhibited the wrong label, which lacked MUIS approval. In noting absolute liability and the fact that there was no intent to provoke racial discord in this case, Justice Rajah observed that “Parliament has deemed it fit that the religious sensitivity or welfare of the general public should warrant a high standard of care by all those engaged in the particular activities governed by statutes imposing

convenient for Hindus to make their regular contributions . . . through the POSB.” DR. AHMAD MATTER, SING. PARL. REP. NO. 42, cols. 309-11 (Dec. 3, 1982) (noting contributions from Hindus for Temples, etc., and Monies from Muslims for Mosques, etc.).

²⁰¹ Section 3(d) of the AMLA states that “to administer the collection of zakat and fitrah and other charitable contributions for the support and promotion of the Muslim religion or for the benefit of Muslims in accordance with this Act.” AMLA, *supra* note 182, ch. 3, pt. II, § 3(2)(d).

²⁰² *Chan v. Pub. Prosecutor*, [1994] 3 S.L.R. 662 (Sing.).

²⁰³ AMLA, *supra* note 182, ch. 3, § 7(1)(a).

²⁰⁴ *Angliss Singapore Pte, Ltd. v. Pub. Prosecutor*, [2006] 4 S.L.R. 653 (Sing.).

²⁰⁵ *Id.* ¶¶ 29, 31.

strict liability,” and that “Parliament views halal certification as an issue of vital importance.”²⁰⁶ Justice Rajah also noted that Section 88 of AMLA only provided for individuals, rather than corporate entities, to be sued. This lacuna was addressed when AMLA was amended in 2008 to enhance sentences for breaching halal regulations and to allow both individuals and corporations to be prosecuted. The Muslim Affairs Minister, Yaacob Ibrahim, acknowledged his gratitude to Justice Rajah for his “astute observation and suggestion that AMLA be amended” and stated that “I believe every Muslim in Singapore will take comfort in knowing that the authorities take a serious view of a matter that is important to all Muslims.”²⁰⁷ Muslim parliamentarian Hawazi Daipi observed that Parliament, in amending AMLA in 2008 to confer upon MUIS the power to collect fines of up to SGD \$2000, indicated the “unique role” of MUIS, the Islamic Religious Council of Singapore, established by statute, in a multi-racial, multi-religious society:

It is significant that while Singapore Muslims are a minority of the Singapore population comprising of approximately 14% of the population, the Bill envisages MUIS, a body regulating Muslim affairs, having the authority to fine anyone or any corporation who disrespects Muslims by misrepresenting *halal* certification or breaching other matters. To me, this reflects the Singapore Government’s commitment to fostering respect for important religious practices and safeguarding the interests of minorities in Singapore.²⁰⁸

Thus, secular law is channeled towards realizing the concerns of a significant religious minority in relation to their dietary laws. There is no strict and dogmatic separation of religion and state in this respect, where the government discharges its constitutional responsibility under Article 152(1) to “constantly care for the interests of the racial and religious minorities in Singapore.” In particular Article 152(2) of the Constitution provides that the government shall exercise its functions in a manner which

²⁰⁶ *Id.* ¶ 31, at 666.

²⁰⁷ YAACOB IBRAHIM, 85 SING. PARL. REP. NO. 85 (Nov. 17, 2008), available at <http://www.parliament.gov.sg/Publications/sprs.htm>.

²⁰⁸ *Id.*

recognizes “the special position of the Malays” as Singapore’s indigenous peoples, and thereby the government is “to protect, safeguard, support, foster and promote their political, educational, religious, economic, social and cultural interests and the Malay language.” It does so through its accommodative approach towards enforcing standards protecting Muslim dietary laws.²⁰⁹

In contrast, the Philippines adopted the American doctrine of the “separation of church and state.”²¹⁰ In the 2003 decision of *Islamic Da’Wah Council of the Philippines, Inc. v. Office of Muslim Affairs*,²¹¹ the Supreme Court declared that halal certification could not be done by a government agency as this would entail having a government body rule on religious matters, i.e., being involved in a religious function.²¹² They rejected an argument that

²⁰⁹ AMLA also permits polygamy, contrary to the general norm of monogamy enshrined in the Woman’s Charter (Ch. 353). These gender inequalities norms had to be subject to insulation from the application of the Convention for the Elimination of All Forms of Discrimination against Women (1979) which Singapore acceded to in 1995. Singapore attached a reservation stating: “In the context of Singapore’s multi-racial and multi-religious society and the need to respect the freedom of minorities to practise their religious and personal laws, the Republic of Singapore reserves the right not to apply the provisions of articles 2 and 16 where compliance with these provisions would be contrary to their religious or personal laws.” CONVENTION FOR THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (CEDAW), RESERVATIONS AND DECLARATIONS (2001), available at http://www.bayefsky.com/html/singapore_t2_cedaw.php. See generally Li-ann Thio, *She’s a Woman, But She Acts Very Fast*, in MIXED BLESSINGS: LAW, RELIGIONS, AND WOMEN’S RIGHTS IN THE ASIA-PACIFIC REGION 241-77 (Amanda Whiting & Carolyn Evans eds., 2006); Li-ann Thio, *The Impact of Internationalization on Domestic Governance: The Transformative Potential of CEDAW*, 1 SING. J. INT’L & COMP. L., 278, 278-350 (1997).

²¹⁰ CONST. (1987), Art. II, (Phil.) available at <http://www.lawphil.net/consti/cons1987.html>. Section 6, Article II of the 1987 Philippine Constitution provides that “[t]he separation of the Church and State shall be inviolable.” *Id.*

²¹¹ *Islamic Da’Wah Council Phil., Inc., v. Office Executive Sec’y President Phil.*, G.R. No. 153888 (Jul. 9, 2003). (Phil.), available at http://www.lawphil.net/judjuris/juri2003/jul2003/gr_153888_2003.html. The Office of Muslim Affairs or OMA was created by Executive Order No. 697 in 1981 “to ensure the integration of Muslim Filipinos into the mainstream of Filipino society with due regard to their beliefs, customs, traditions, and institutions.” *Id.* OMA deals with the societal, legal, political and economic concerns of the Muslim community as a “national cultural community” and not as a religious group. *Id.* Given the principle of separation of Church and State extant in the Philippines, the state must ensure the OMA does not intrude into purely religious matters lest it violate the non-establishment clause and the “free exercise of religion” provision found in Article III, Section 5 of the 1987 Constitution. *Id.*

²¹² *Id.* “Without doubt, classifying a food product as halal is a religious

the state was validly exercising its police powers in protecting Filipinos' "right to health and to instill health consciousness in them."²¹³ The Court agreed with the petitioner's contention that "[i]t is unconstitutional for the government to formulate policies and guidelines on the halal certification scheme because said scheme is a function only [of] religious organizations, entity or scholars can lawfully and validly perform for the Muslims."²¹⁴ Clearly, some of the statutory functions of Singapore's MUIS would contravene the Philippines' doctrine of the "separation of church and state." Thus, the Singapore model of secularism is not dogmatic or doctrinaire, but pragmatic.

F. Equality of Opportunity and Meritocracy for Religious Minorities

Sufficient political and cultural space has been accorded to Muslim minorities, who are predominantly Malay, to identify with Singapore's economic success rather than to resent it.²¹⁵ The policy of meritocracy centers around ensuring equal access to education, such that success is predicated on merit, rather than on ethno-religious identity. Muslim students, like students of any other faith, may excel and enjoy the social mobility that accompanies it.

On the contrary, it has been observed that educational institutions catering to Muslims in the autonomous regions in the Philippines are comparatively deficient, given the poor quality of educators, particularly in relation to English language

function because the standards used are drawn from the Qur'an and Islamic beliefs. By giving OMA the exclusive power to classify food products as halal, EO 46 encroached on the religious freedom of Muslim organizations like herein petitioner to interpret for Filipino Muslims what food products are fit for Muslim consumption. Also, by arrogating to itself the task of issuing halal certifications, the State has in effect forced Muslims to accept its own interpretation of the Qur'an and Sunnah on halal food." *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ Pavin Chachavalpongpun, *Tackling Unrest in Thai South: S'pore Offers Examples for Inter-faith Relations*, STRAITS TIMES (Sing.), Jul. 20, 2008, available at http://app.mfa.gov.sg/pr/read_content.asp?View,7758; Speech, Prime Minister Lee Hsien Loong, Mendaki's 25th Anniversary Dinner and Awards Presentation (Sept. 2, 2007), transcript available at <http://www.pmo.gov.sg/News/Speeches/Prime+Minister/Speech+by+PM+Lee+at+Mendakis+25th+Anniversary+Dinner+and+Awards+Presentation.htm> (detailing achievements of Malay community).

proficiency,²¹⁶ which translates into unequal educational opportunities. Consequently, many Moros are unable to pass the national civil service examination, which means less access to employment opportunities. This hinders both poverty alleviation and economic development in the autonomous areas. In terms of the private sector, the perception that Catholics are favored over Muslims generates a “victim” mentality amongst Muslims.²¹⁷

The Singapore government treads a fine line in seeking to reconcile the cultural needs of the Malay Muslim minority with those of national objectives. For example, the government plan to require compulsory primary education under the Compulsory Education Act (Chapter 51) was criticized as a threat to madrasahs (Islamic religious schools), and therefore to Muslim religious and cultural activity.²¹⁸ The fear was that the real intention was to eliminate the last bastion of autonomous Islamic activity in Singapore. To allay these fears, the government struck a compromise by exempting madrasahs from the statutory regime. Madrasahs are an important source of cultural identity and producer of future religious leaders. However, madrasahs were still subject to minimal educational standards and national primary school examinations, designed to ensure the future employability of its graduates.²¹⁹ Thus, the government does

²¹⁶ The English language proficiency of many teachers in the Autonomous Region in Muslim Mindanao (ARMM) is equivalent to that of Grade 2 and 3 students in public elementary schools nationwide. Only 5 per cent of all teachers in the region are qualified to teach, according to a study conducted by the United States Agency for International Development. Taharudin Piang Ampatuan et al., *Ensuring a Thriving Community*, STRAITS TIMES (Sing.), June 28, 2008, available at <http://www.pvtr.org/pdf/ICPVTRinNews/Ensuring%20a%20thriving%20community.pdf>.

²¹⁷ Ampatuan et al., *supra* note 216.

²¹⁸ See Press Release, PERGAS, Pergas' Stand on Compulsory Education, (Mar. 31, 2000), available at <http://www.pergas.org.sg/Resources/PReleases.htm>. See generally Lily Zubaidah Rahim, *Governing Islam and Regulating Muslims in Singapore's Secular Authoritarian State* (Asia Research Centre, Murdoch Univ., Working Paper No. 156, 2009), available at <http://www.warc.murdoch.edu.au/wp/wp156.pdf>.

²¹⁹ Mukhlis Abu Bakar, *Between State Interests and Citizen Rights: Whither the Madrasah*, in *SECULARISM AND SPIRITUALITY: SEEKING INTEGRATED KNOWLEDGE AND SUCCESS IN MADRASAH EDUCATION IN SINGAPORE* 29 (Noor Aisha Abdul Rahman & Lai Ah Eng eds., 2006). See also Tan Tey Keong, *Social Capital and State-Civil Society Relations in Singapore* 1, 1 n.3 (Nat'l Univ. of Sing. & Adjunct Fellow Inst. of Policy Studies, Working Paper No. 9, 2001), available at

retain some supervisory oversight over religious schools while preserving a degree of cultural and religious autonomy for a religious institution sufficient to placate a concerned minority.²²⁰

Even where serious public health issues are concerned, the Singapore Government, acting consistently with its Article 152 obligation, has demonstrated sensitivity towards Muslim concerns in the field of human organ transplants and even the burial of Muslim SARs (Severe Acute Respiratory Syndrome) victims during the 2003 crisis. Muslims were granted an exception to SARs control measures of cremating victims by being allowed immediate burial in two sealed body bags.²²¹ In protecting the interests of the Muslim community, Muslims are given privileged treatment through policies such as the government sponsored “one mosque per town” program.²²² This pragmatic secularism, unlike the stricter separationist model practiced in the Philippines, is not constitutionally barred as links between state and religious institutions and are not precluded by a “establishment” clause. Chief Justice Yong, in *Colin Chan v. Public Prosecutor*, noted that “the Singapore Constitution does not prohibit the “establishment of any religion,” which relates to providing financial or non-pecuniary support for a religion, as the Singapore government does in relation to Islam.²²³

While seeking to be neutral between religions, the government appreciates the close conflation in fact between race and religion (Malay and Islam) and is solicitous towards protecting Malays and their sensitivities in the interest of social harmony. For example,

<http://www.spp.nus.edu.sg/ips/docs/publications/wp9.pdf>.

²²⁰ Bakar, *supra* note 219, at 36-48.

²²¹ Jane Lee, *No Wakes for Suspected SARs Deaths*, STRAITS TIMES (Sing.), Apr. 24, 2003, at H4.

²²² See Press Release, Encik Othman Wok, Minister of Social Affairs, Ministerial Statement on the Increase in the Rate of Mosque Building Fund Contributions in Parliament (June 29, 1977), *available at* <http://stars.nhb.gov.sg/stars/tmp/ow19770629s.pdf>. “The Majlis Ugama Islam Singapura supports the policy of the Government in building one new mosque in each new town where the Muslim population is sufficiently large and agrees that this is the most practical way to meet the religious needs of the Muslims as they are resettled in the new towns.” *Id.* This is funded through the Mosque Building Fund Scheme whereby employers are required to pay a small contribution per Muslim employee per month to the fund and recover this from their Muslim employee wages. *See id.*

²²³ *Colin Chan v. Pub. Prosecutor*, [1994] 3 S.L.R. 662, 681 (Sing.).

in 2005, two bloggers²²⁴ were charged under Section 4(1)(a) of the Sedition Act (Chapter 290) with anti-Muslim posts, as these were acts with a “seditious tendency” defined in Section 3(1)(e) as an act “to promote feelings of ill-will and hostility between different races or classes of the population in Singapore.”²²⁵ Senior District Justice Richard Magnus noted the appropriateness of a custodial sentence for such offences given “the special sensitivity of racial and religious issues in our multi-cultural society.”²²⁶ He alluded not only to the “current domestic and international security climate,”²²⁷ but to the 1964 race riots and the Maria Hertogh incident in the 1950s.²²⁸ Senior District Justice Magnus underscored how “callous and reckless remarks on racial or religious subjects [could] cause social disorder [in] whatever medium or forum they are expressed, [including the Internet with] its ubiquitous reach.”²²⁹ He noted:

The virtual reality of cyberspace is generally unrefereed. But one cannot hide behind the anonymity of cyberspace, as each accused has done, to pen diatribes against another race or religion. The right to propagate an opinion on the Internet is not, and cannot, be an unfettered right. The right of one person’s freedom of expression must always be balanced by the right of another’s freedom from offence, and tampered by wider public interest considerations. It is only appropriate social behaviour, independent of any legal duty, of every Singapore citizen and resident to respect the other races in view of our multi-racial society. Each individual living here irrespective of his racial origin owes it to himself and to the country to see that nothing is said or done which might incite the people and plunge the country into racial strife and violence. These are basic ground rules. *A fortiori*, the Sedition Act statutorily

²²⁴ Pub. Prosecutor v. Koh Song Huat Benjamin, [2005] S.G.D.C. 272 (Sing.) [hereinafter *Benjamin*].

²²⁵ *Id.* Notably, in 2006, a person who posted an offensive cartoon of Jesus Christ on his blog received a ‘stern warning.’ Zakir Hussain, *Blogger Who Posted Cartoons of Christ Online Being Investigated*, STRAITS TIMES (Sing.), June 14, 2008, available at <http://www.asiamedia.ucla.edu/article-southeastasia.asp?parentid=49563>.

²²⁶ *Benjamin*, [2005] S.G.D.C. at 272, ¶ 6.

²²⁷ *Id.* ¶ 6.

²²⁸ *In Re Maria Huberdina Hertogh v. Amina Binte Mohamed*, [1951] 1 M.L.J. 12 (Sing.).

²²⁹ *Benjamin*, [2005] S.G.D.C. at 272, ¶ 7.

delineates this redline on the ground in the subject at hand. Otherwise, the resultant harm is not only to one racial group but to the very fabric of our society.²³⁰

Senior District Justice Magnus noted that seditious speech threatened to harm not only a sector of the community (“one racial group”) but the nation at large (the “very fabric of our society”).²³¹ He took judicial notice of the importance of “basic ground rules,” the unwritten or informal rules of our “social constitution” which fashion how we exercise our rights, which invariably entail some responsibilities.²³² These social duties, distinct from legal duties, inhere in every citizen and resident, obliging them “to respect the other races in view of our multi-racial society,” to ensure “that nothing is said or done which might incite the people and plunge the country into racial strife and violence.”²³³ Although such social norms should be implicitly understood, Senior District Justice Magnus felt the need to articulate these expressly, particularly to the younger generation of Singaporeans with “short memories”²³⁴ who lacked an appreciation of how provoking racial and religious sensitivities can threaten social harmony. A sense of duty is bolstered by an understanding of history.

These prosecutions have been characterized as “an example of our commitment to multi-racial cohesion,” while acknowledging that elsewhere “such prosecution could be considered as infringement of freedom of expression.”²³⁵ Free speech jurisprudence is thus context-based and limits are placed where these threaten racial and religious harmony, which are considered key components of the rule of law.²³⁶ Unlike a society with a homogenous population “with settled customs and expectations [where] social responsibility . . . is enforced by peer pressure, non-homogenous societies face unique challenges.”²³⁷ The rule of law

²³⁰ *Id.* ¶ 8.

²³¹ *Id.* ¶ 8.

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.* ¶ 6.

²³⁵ Shunmugam Jayakumar, Keynote Address at the IBA Rule of Law Symposium: The Meaning and Importance of the Rule of Law (Oct. 19, 2007), transcript available at <http://app2.mlaw.gov.sg/News/tabid/204/ctgy/Speech/currentpage/5/Default.aspx?ItemId=141>.

²³⁶ *Benjamin*, [2005] SGDC at 171, ¶ 18.

²³⁷ *Id.* ¶ 17.

makes expectations “transparent” and reduces the friction arising from social interaction. The government position is that “[h]armony in a diverse society cannot be achieved with a *laissez-faire* system; or the different ethnic, religious, cultural and language groups will have their own song sheet and the government as conductor will not produce harmony.”²³⁸

By treating all religions as equal and allowing them to flourish, rather than imposing any one, the Muslim community sees value and benefit in Singapore’s model of quasi-secularism, and its policies of multi-racialism and multi-culturalism. This acceptance of the system has allowed the government to unify a diverse society. An environment of civil peace between ethnic or religious groups helps to foster mutual accommodation, whereas conflict heightens difference and hinders human development.

G. The 2007 Thai Constitution: Buddhism as an Official Religion?

One of the proposals associated with the drafting of the new Thai Constitution was that of enumerating Buddhism as a national religion, since it is a core component of Thai national identity.²³⁹ Although almost 95% of the sixty-five million Thais profess Buddhism as their religion and the King has always, in fact, been a Buddhist, Thailand is a secular state, although leading commentators consider that Buddhism is the “implied” state religion.²⁴⁰ This issue was raised during the drafting of the 1997 Constitution, but the decision taken was to preserve the status quo of constitutional secularism, an official indifference to religion while recognizing religious freedom, to avoid offending other religious communities and causing social division.²⁴¹

The Constitution Drafting Assembly (“CDA”), appointed by the

²³⁸ *Id.*

²³⁹ See BUDDHA DHARMA EDUCATION ASSOCIATION, *Buddhism in Thailand* (2002), http://www.buddhanet.net/pdf_file/buddhinthai.pdf; Duncan McCargo, *Buddhism, Democracy and Identity in Thailand*, 11 ROUTLEDGE 155 (2004).

²⁴⁰ Vitit Muntarbhorn, *Human Rights in the Era of “Thailand Inc.”*, in HUMAN RIGHTS IN ASIA: A COMPARATIVE LEGAL STUDY OF TWELVE ASIAN JURISDICTIONS, FRANCE AND THE USA 328 (Randall Peerenboom et al. eds., 2006).

²⁴¹ Andrew Harding, *Buddhism: Human Rights and Constitutional Reform in Thailand*, 2 ASIAN J. COMP. L. 1, 5 n.17 (2007).

military junta which seized power in September 2006, voted in June 2007 (by sixty-six to nineteen vote) not to include Buddhism.²⁴² The governing fear was that, owing to the sensitivity of religion and given that there was no precedent for an official religion, including a reference to Buddhism might prove divisive, even where Buddhists enjoy an overwhelming majority. This is because naming a national religion could be seen as an oppressive assimilationist measure by the Thais in the under-developed Muslim-majority south which has experienced an insurgency since 2005.²⁴³ This could inflame the conflict. There, Islamic law applies with respect to family matters, administered by religious courts. The state also provides funding in an effort to integrate Muslim minorities into Buddhist and Muslim educational institutions, and provides funds for religious education programs in public and private schools.²⁴⁴ It also provides daily allowances for Buddhists and Muslims holding senior ecclesiastical and administrative posts.²⁴⁵ An outstanding issue which remains to be settled is whether to permit the establishment of religious schools that teach Islam. The views over this issue are polarized, ranging from the desire to respect cultural diversity to the fear that such schools would be venues for dissent, radicalism and even terrorism.

The preamble to the 2007 draft Constitution states that it contains significant principles, including that of “upholding all religions” and references the Buddhist era.²⁴⁶ The supremacy of

²⁴² *Thai Charter Drafters Reject Buddhism as National Religion*, YAHOO! NEWS / AFP, Jun. 30 2007, <http://pluralism.org/news/view/16773>.

²⁴³ When Siam took control over Pattani in South Thailand under the Anglo-Siamese Treaty of 1909, it took coercive steps to weaken Islamic identity and to strengthen a mono-ethnic Buddhist populace. Local rulers were replaced by Thai rulers, Islamic schools were closed and around World War Two, men were required to wear western-style trousers, Muslims were prevented from adopting Muslim names or using the Malay dialect and shariah law was replaced by Buddhist laws of marriage and inheritance, generating resentment. The Pattani separatist movement following World War Two is an attempt by a Muslim Malay minority with a distinct cultural identity and lifestyle, to throw off a government which imposed a dominant Buddhist Thai culture. Andrew Forbes, *Thailand's Muslim Minorities: Assimilation, Secession or Coexistence?*, ASIAN SURVEY 38, 1056-73 (May 1982).

²⁴⁴ Prashanth Parameswaran, *Islamic Education as a Peacemaking Tool: A Case Study of Southern Thailand*, GLOBAL POL., Oct. 16, 2007, <http://www.global-politics.co.uk/issue4/Parameswaran/>.

²⁴⁵ Harding, *supra* note 241, at 11.

²⁴⁶ THAIL. CONST. pmbl., available at <http://www.asianlii.org/th/legis/>

the Constitution is affirmed (Chapter I, Section 6) and following past Constitutions, Chapter II Section 9 provides that “[t]he King is a Buddhist and Upholder of religions.”²⁴⁷ It contains no minority or group rights as such, though it recognizes the right of “[p]ersons assembling to be a community” as having the right to conserve their customs and culture and participate in the management of natural resources and the environment.²⁴⁸ This appears to be directed at indigenous groups and such communities that can sue government agencies to vindicate these environmentally oriented community rights.

Religious freedom of individuals is thus safeguarded by Section 37, which provides that:

A person shall enjoy full liberty to profess a religion, a religious denomination or creed, and observe religious precepts or commandments or exercise a form of worship in accordance with his belief; provided that it is not contrary to his civic duties, public order or good morals.²⁴⁹

In exercising the liberty referred to in paragraph one, a person shall be protected from any act of the State, which is derogatory to his rights or detrimental to his due benefits on the grounds of professing a religion, a religious denomination or creed or observing religious precepts or commandments or exercising a form of worship in accordance with his different belief from that of others.

All Thais, irrespective of religion, enjoy equal protection under the Constitution.²⁵⁰ Interestingly, it is a constitutional duty of every person to uphold “religions”²⁵¹ and a state obligation under Chapter V (Directive Principles of Fundamental State Policies) Part V, Section 79, to protect religions, especially Buddhism, (which is the only religion named in the Constitution) as a source of civic virtue and to ensure inter-religious harmony.²⁵² There are

const/2007/1.html.

²⁴⁷ *Id.* ch. II, § 9.

²⁴⁸ *Id.* ch. III, pt. 12, § 66.

²⁴⁹ *Id.* ch. III, pt. 3, § 37.

²⁵⁰ *Id.* ch. I, § 5. The Thai people, irrespective of their origins, sexes or religions, shall enjoy equal protection under this Constitution.

²⁵¹ *Id.* ch. IV, § 70.

²⁵² THAIL. CONST. ch. V, § 79. The State shall patronize and protect Buddhism as the religion observed by most Thais for a long period of time and other

specific provisions relating to Buddhist clergy, such as their disenfranchisement on election day.²⁵³ Such provisions were all present in the 1997 Constitution. While this disenfranchisement clause may appear *prima facie* to be discriminatory, as it does not apply to other religions; this provision in fact reflects the special position of Buddhism within the Thai constitutional order insofar as the apex law considers that Buddhism does not permit its adherents to be politically partisan. The principle of religious disqualification actually upholds a central Buddhist tenet that clergy not be involved in earthly affairs, given the focus of Buddhism on attaining karma to achieve nirvana (release from earthly suffering). In other words, a Buddhist tenet trumps a constitutional guarantee of religious freedom and non-discrimination on the basis of religion.

The move to identify Buddhism as the national religion reflects a strain of Buddhist nationalism and a possible decline in the policy of religious tolerance, if such nationalism turns against minority faiths. Buddhist activists were motivated by a fear that Buddhism was under siege, given the attacks by the 1.3 million ethnic Malay Muslims in the separatist south against Buddhist clergy and buildings.²⁵⁴ Indeed, reportedly, entire Buddhist communities had fled to escape brutal violence.²⁵⁵ It was thought that the official recognition of Buddhism was necessary to ensure it continues the country's main religion.

As a cautionary tale, some Buddhists argue against raising the status of Buddhism through the Constitution, pointing to the negative effects of the successful parallel effort to constitutionally enshrine Buddhism in Sri Lanka, a country mired in civil conflict.²⁵⁶ The mixture of Buddhism and nationalism is a

religions, promote good understanding and harmony among followers of all religions as well as encourage the application of religious principles to create virtue and develop the quality of life. *Id.*

²⁵³ *Id.* ch. VI, pt. II, § 100.

²⁵⁴ Doug Bandow, *A Buddhist Threat to Religious Freedom?*, FRONTPAGEMAGAZINE.COM, Sept. 10, 2007, <http://97.74.65.51/readArticle.aspx?ARTID=28029>.

²⁵⁵ Seth Mydans, *Thais Struggle with Violent Insurgency*, N.Y. TIMES, Feb. 26, 2007, available at <http://www.nytimes.com/2007/02/26/world/asia/26thailand.html>.

²⁵⁶ Article 9 of the Sri Lankan Constitution accords the "foremost place" to Buddhism. See SRI LANKA CONST. ch. 2, § 9, available at http://www.priu.gov.lk/Cons/1978Constitution/Chapter_02_Amd.html.

dangerous mix in Sri Lanka and illustrates how, when a religious group gains political power, it may pursue a discriminatory agenda against minority faiths.²⁵⁷ The problem with enthroning an official religion, the religion of the majority, is that this might be seen as a threat to religious minorities and the ascription to them of second-class citizenship; this divides, rather than unites. By promoting the rights of minorities, e.g., through the education system, the government could undercut accusations that it is seeking to undermine Islamic culture and in that way facilitate a peaceful resolution of a tragic situation.

V. CONCLUSION

To accommodate racial and religious minorities in a society, attention needs to be paid both to constitutional and non-constitutional solutions, to ensure the protection of the identity and culture of minorities, their effective participation in government, and economic development within the framework of national unity. There is no uniform "one size fits all solution," as institutions must fit the needs of the demos, taking into account their history and other contextual factors. However, certain measures should be avoided in the interests of ethno-religious pluralism and social stability. Forcible assimilation and repressive measures against minority groups, utilizing the "tools of coercion" left behind by colonial rulers in Asia and Africa, which made political leaders "careless of cultivating the consent of the ruled,"²⁵⁸ will only exacerbate conflict and thwart the forging of a durable peace.

Culture precedes institutions. Thus, an ethos of racial and

²⁵⁷ For example, a Buddhist nationalist group, the Jathika Hela Urumaya sought to turn Buddhism into the official religion in Sri Lanka and to discriminate against minority faiths, to enact laws banning missionaries and penalizing "unethical" conversions of Buddhists. By holding that proselytization was not a protected religious liberty, the Sri Lanka supreme court truncated the scope of religious freedom in characterizing health care offered by a Catholic medical group, which it refused to recognize as an improper "allurement." See Lanka Liberty, Brief on Sri Lanka's Proposed Anti-Conversion Legislation: Information, Observations, and Analysis, <http://www.lankaliberty.com/reports/Anti-ConversionLegislationBrief.doc>.

²⁵⁸ Yash Ghai, *The Theory of the State in the Third World and the Problematics of Constitutionalism*, in CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD, 186-196, 191 (Douglas Greenberg et al. eds., 1993).

religious tolerance, if not a celebration of racial and religious diversity as a strength, is a form of unity in diversity united by a common sense of citizenship and political ideals, and a necessary partner in producing just peace in divided societies. A sense of security, of having a stake, is necessary to inculcate a sense of commitment to the polity. Constitutionalism is closely related to the process of value formation. Representative democratic institutions send a signal of political inclusivity that can help in the continuing efforts to build democratic values, such as respect for individual and group freedoms, civic virtues, and communitarian attitudes on which strong foundations of durable institutions must rest, towards the public value of securing an ordered liberty. In the final analysis, one central factor in judging the quality of a country's civilized governance must reside in how it treats its minorities.