

RACE, MULTI-CULTURAL ACCOMMODATION AND THE CONSTITUTIONS OF SINGAPORE AND MALAYSIA

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I propose to question Dr. Ramraj's recent argument in this Journal that September 11th has "exposed the increase in ethnic tensions in Singapore and Malaysia", and that there have been "divisive social consequences" for these two countries. I question his prescription that "for Singapore . . . policies and legislation based on race should be abolished" and that the "same may be said of Malaysia". Finally, I question his argument that legal and policy assistance in respect of any group can only be made in a politically neutral way, and that traditional group traits should be held hostage to individual moral choice. Dr. Ramraj prizes individual moral self-authorship in a way which dismisses the need to achieve substantive justice for the various communities in Singapore and Malaysia, and which ignores the terms and histories of the constitutions of these two nations. His arguments, even if not colour-blind, proceed from a version of constitutional colour-blindness, and ignore the needs of identity and multi-culturalism in these two nations.

I. INTRODUCTION

In his recent article,¹ Dr. Victor Ramraj criticises what he calls "ethno-racial essentialism" in Malaysia and Singapore—"the idea that one's ethnicity or, as it is more commonly expressed, one's race, is a fundamental and 'fixed' or inescapable part of one's identity".² More specifically, he criticises such "essentialist thinking" as a perceived basis for managing harmonious race relations. He makes no sustained reference to what the constitutions of these two countries say on race, but refers instead to certain regulatory and governmental practices where one's race is acknowledged, factored-in, or otherwise counts. His complaint is about that, for he argues for what he calls an "accommodative liberal" approach, instead.

I propose to question Ramraj's thesis on three principal grounds. Firstly, I question the attention he has actually given to the terms, nature and histories of the Singapore and Malaysian *Constitutions*. Secondly, I shall contend that his failure to attend to the constitutional bounds of policy on this issue results in an unfortunate failure to apply a constitutionally-informed framework of analysis, a framework which I here call "multi-cultural constitutionalism". I argue that there is a difference between constitutional and unconstitutional forms of ethno-racial essentialism. Thirdly, I argue that Ramraj's extra-constitutional thesis, in addition to its marginalization of

* Faculty of Law, National University of Singapore. My greatest debt is to my law school colleague, Dr. Victor Ramraj, for our exchange on some of these matters at a recent Faculty seminar following the publication of his article. All errors and omissions remain mine.

¹ Victor V. Ramraj, "The Post-September 11 Fallout in Singapore and Malaysia: Prospects for an Accommodative Liberalism", [2003] S.J.L.S. 459.

² Elsewhere, he refers to the fact that "ethnic groups" are considered "categorically distinct, in ways that are fixed or immutable"; Ramraj, *supra* note 1 at 464–7.

the *Constitutions* and constitutional histories of Singapore and Malaysia involves assumptions of official neutrality that are akin to a discredited colour-blind formal neutrality in constitutional thought in liberal rights scholarship.

II. THE SINGAPORE AND MALAYSIAN *CONSTITUTIONS*

A. *The Singapore Constitution*

Articles 152(2) and 153 of the Singapore *Constitution*,³ respectively, “recognise” the special position of the “Malays” and the Muslim religion. The *Constitution* does not contain a separate clause defining who the Malay people are, except for the reference in Article 152(2), which explains that they are “the indigenous people of Singapore”, and that “accordingly” the Government has the “responsibility to protect, safeguard, support, foster and promote”, amongst other things, their “social and cultural interests and the Malay language”. Article 153, on the other hand, which is commonly recognised as a reinforcement of Article 152(2) says: “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”.

Article 153 allows, for example, for the application of Muslim personal law.⁴

Since government must accord with the *Constitution*, policy and decision-making definitions of the Malays must therefore, according to Article 152(2), account for the constitutional fact that they are the indigenous people of Singapore, that they form a social and cultural group, and that they have a special interest in (the protection, safeguarding, and support given to, as well as the fostering and promotion of) the

³ References to the Singapore *Constitution* are to the 1999 Revised Edition, as amended subsequently.

⁴ *Administration of Muslim Law Act* (Cap. 3, 1999 Rev. Ed. Sing.). Justice cannot here be done to a complex subject, but note in comparison with the other ethnic groups that: “It is well known that in 1961, by enacting the Women’s Charter, the Singapore Legislative Assembly abolished all existing non-Muslim marriage systems including Chinese custom and replaced them with one system based essentially upon the English civil marriage model”: Leong Wai Kum, “Common Law and Chinese Marriage Custom in Singapore”, in A.J. Harding, *The Common Law in Singapore and Malaysia—A Volume of Essays Marking the 25th Anniversary of the Malaya Law Review* (Singapore: Butterworths, 1985), 177 at 194. That really did away with Singapore Chinese and Hindu personal law, for at least in the case of the Chinese, it was well recognised that during the colonial period, at the height of common law pluralism: “No Chinese ever brought a commercial dispute, based on Chinese custom, to the colonial courts”, and that these were dealt with exclusively by the clan and Chinese commercial associations: M.B. Hooker, “Law and the Chinese Outside China”, in M. Barry Hooker, *Law and the Chinese in Southeast Asia* (Singapore: Institute of Southeast Asian Studies, 2002), 1 at 9. Likewise, for Malaysia, see the entry into force on 1 March 1982 of Malaysia’s *Law Reform (Marriage and Divorce) Act*, Act 164, which provides for monogamous marriages and the solemnization and registration of such marriages, and amends and consolidates the law relating to divorce. However, two prominent saving clauses are sections 3 and 5. Section 3 exempts Muslims, and generally also the natives of Sabah and Sarawak as well as the aboriginal peoples of West Malaysia. Section 5 states, on the other hand, that persons who on entry into force of the *Act* on 1 March 1982 “under any law, religion, custom or usage to one or more spouses” became incapable, for the duration of that marriage, of contracting into a marriage with another: R.H. Hickling and Wu Min Aun, *Conflict of Laws in Malaysia* (Malaysia/Singapore/Hong Kong: Butterworths Asia, 1995) at 128. One fascinating feature of Professor Leong’s view above is also the robust argument therein that the damage to Chinese custom was earlier done. Compare M.B. Hooker, “English Law and the Invention of Chinese Personal Law in Singapore and Malaysia” in Hooker, *Law and the Chinese* at 95.

Malay language. I cannot suppose that Dr. Ramraj is questioning any of these as bases for identifying who the Malay people are in Singapore, even if these criteria are viewed (as he puts it) as a “fundamental and ‘fixed’ or inescapable part of one’s identity”. If he did, he would not deserve our serious attention. In other words, he must accept as a preliminary constraint, that multi-culturalism in Singapore (and so too in Malaysia, as I argue below) is constitutionally constrained from the outset.

Assuming therefore that the abovementioned constitutional traits are taken into account in policy and decision-making, could he be suggesting that the Government takes other traits into consideration—traits which are taken to be “fixed or immutable”—which if so, would attract constitutional challenge? He gives us no reason for thinking that, but says simply:

That one’s race still has a public and official salience in Singapore is evident on application forms (both in the public and private sectors), government documents, and citizenship identity cards; in language and education policy; in public housing policy; and in the dissemination of community support services through ethnic-based support groups.⁵

Elsewhere, he says that:

The mixed message being sent is that whatever these ethnic groups have in common as Asians, there are nevertheless other differences that make them categorically distinct, in ways that are fixed or immutable.⁶

But, as we have seen, once we take the Singapore *Constitution* into account, this cannot be a criticism of the manner of identification of the Malays (Article 152(2)) and the constitutional provision on the Muslim religion (Article 153). Yet the apparent problem with which he is concerned does not (also) appear to have to do, *specifically*, with how other groups are defined, such as the Chinese, Indians and Eurasians, for example. Nor does he suggest that, properly speaking, the *Constitution* which requires recognition of the special position of the Malays and provision for the Muslim religion prohibits recognition of other groups.

With two especially notable exceptions, the *Constitution* is therefore over-inclusive, in that it imposes some constraints on how the Malay community may be defined, but under-inclusive in specifying how other races should be treated.

The first notable exception is that the *Constitution’s* guarantee of equality in Article 12 includes a guarantee extended to any racial group where race becomes an issue. Article 12, in other words, encompasses race discrimination. Secondly, the *Constitution’s* guarantee of the right to profess, practice and propagate one’s own religion would add another layer of protection where race overlaps with religious affinity.

Both Articles 12 and 15 are “colour-blind”. That, however, does not mean that the Singapore *Constitution* is itself colour-blind (Article 152(2) is clearly not). The Report of Singapore’s Constitutional Commission of 1966, chaired by the former Chief Justice, Mr. Wee Chong Jin, puts it thus:

Whilst a multi-racial secular society is an ideal espoused by many, it is a dire necessity for our survival in the midst of turmoil and the pressures of big power

⁵ Ramraj, *supra* note 1 at 464–5.

⁶ *Ibid.* at 467.

conflict in an area where new nationalisms are seeking to assert themselves in the place of the old European empires in Asia. In such a setting a nation based on one race, one language and one religion, when its peoples are multi-racial, is one doomed for destruction.⁷

Insofar as Dr. Ramraj is advocating a species of colour-blindness then, in that the policy and decision-making criteria used for race-based differentiations must be scrutinised for their over- and under-inclusiveness, he must also show how that squares with Article 152(2), and in the case of political rights such as Articles 12 and 15, how strict scrutiny would necessarily be better.

B. *The Malaysian Constitution*

A similar, although not identical, problem arises for Dr. Ramraj in respect of the Malaysian *Constitution*.⁸

Malaysia's *Constitution* is confessional, where Article 3 states that Islam is the official religion of the Federation, and Article 11(4) permits State and Federal laws, as the case may be, to restrict or control the right to propagate a religion amongst persons who profess Islam as their faith.⁹ These provisions are not "colour-blind" since the special position of the Malays and of the *bumiputra* of Sabah and Sarawak (including the reservation of quotas in respect of services, permits, & c.) are protected under Article 153 of the Malaysian *Constitution*, and Article 152, likewise, states that *Bahasa Melayu* shall be the official language of Malaysia, while there are other provisions such as Articles 89 and 90 protecting Malay reservation and customary lands from being dealt with by non-Malays.

Article 160(2) of the Malaysian *Constitution* goes on to define "Malay"; namely:

... a person who professes the religion of Islam, habitually speaks the Malay language, conforms to Malay custom and—

- (a) was before Merdeka Day born in the Federation or in Singapore or born of parents one of whom was born in the Federation or in Singapore, or is on that day domiciled in the Federation or in Singapore; or
- (b) is the issue of such a person . . .

In contrast, such a definition of the Malays was rejected in Singapore by the Wee Commission in 1966. According to the Wee Commission's explanation, such a definition could deracinate Singapore's Malays, or persons who are not otherwise Malay could fall within such a definition.¹⁰ The difficulty arises in respect of the latter

⁷ Report of the Constitutional Commission (1966) (General Introduction).

⁸ References to the Malaysian *Constitution* are, unless the context shows otherwise, to the 1997 Reprint, as amended subsequently. However, for convenience, I have generally relied on the English version of *Federal Constitution (as at 10th September 2002)* (Kuala Lumpur: International Law Book Services, 2002).

⁹ There is, of course, no equivalent provision to Malaysia's Article 11(4) in the Singapore *Constitution*. For an account of this aspect of the Malaysian *Constitution*, see Ahmad Ibrahim, "The Position of Islam in the Constitution of Malaysia" in Tun Mohamed Suffian, H.P. Lee & F.A. Trindade (eds.), *The Constitution of Malaysia, Its Development: 1957–1977* (Kuala Lumpur: Oxford Univ. Press, 1978) at 41.

¹⁰ Report of the Constitutional Commission (1966) at para. 35.

part of the Wee Commission's explanation, for it could be suggested here that (the Wee Commission at least) may have had an "essentialist" definition of the Malays in mind in the case of the Singapore *Constitution*. But, clearly, that is not the case. The deracination point applies where religion may become a matter of choice (which in Singapore's "definition" of "Malay" it could, legally), or where someone who is not indigenous to Singapore becomes included in that definition. The "requirement" of indigenous status is not, however, an essentialist characteristic in that it does not of itself specify whether, for example, a Malay person whose forebears had emigrated and now wishes to return to Singapore should (or should not) be considered "Malay". There is therefore no evidence here that Singapore's approach is "essentialist".

Likewise, it would be hard to see how, once the Malaysian *Constitution* is factored in, where Dr. Ramraj's problem could arise. The Wee Commission's rejection of the Malaysian definition in Article 160(2) of the Malaysian *Constitution* for inclusion in Singapore's *Constitution* was the opposite of essentialism. Singapore's *Constitution* allows individuals to depart by choice from the "Malaysian" definition (at least under Singapore's civil law), but prohibits acquisition of the "special position" of Singapore's indigenous Malays by those who are not indigenous to Singapore.¹¹ In Malaysia's case, however, there is one critical difference. Apostasy is also the subject of state law as matters pertaining to the Muslim religion and Malay custom fall within the competence of the States. Individual States within the Federation may, as Dr. Ramraj notes, make apostasy a punishable offence. The provision has, of course a very long history, beginning with the treaty arrangements between the Rulers and the British, and also the later arrangements made in respect of the Federated and Unfederated Malay States.¹² Most importantly, however, the Malaysian *Constitution* posits a definition of the Malay people which is inextricably tied to the Muslim religion. I do not want to say here that such constitutional terms are immutable,¹³ but it would be a grave neglect if greater attention were not paid to the actual and historical significance of this aspect of the Malaysian *Constitution*, and the sensitivities therein involved.

In all this, there is a very thin line between taking certain characteristics to be a feature of the members of the group, and saying that to be a member of a group, one must possess certain features. "Race-essentialism" *per se* can be misleading in extreme cases, but it cannot be bad simply because a *general* classification of group affiliation is somehow required. This last is particularly true of constitutional and

¹¹ The Wee Commission said: "First, certain citizens of Singapore, who are not of the Malay race, or not born in Singapore, would be accorded 'the special position' by virtue of their profession of Islam, their observance of Malay custom and their habitual speaking of the Malay language. Secondly, all those Malays, citizens of Singapore, who choose to renounce Islam (admittedly very few) would be excluded from the benefit of 'the special position' . . .": *ibid.* at para. 35 (footnote omitted).

¹² See Tun Haji Mohd. Salleh bin Abas, "Traditional Elements of the Malaysian Constitution" in F.A. Trindade & H.P. Lee (eds.), *The Constitution of Malaysia: Further Perspectives and Developments (Essays in Honour of Tun Mohammed Suffian)* (Petaling Jaya: Fajar Bakti: 1986), 1 at 6–7.

¹³ See *Phang Chin Hock alias Ah Tee v. Public Prosecutor* [1980] 1 M.L.J. 70 (*per Suffian L.P.*), in which the application of the "basic features" ("Kesavananda") doctrine on the facts was rejected. But as commentators have since noted, whether the basic features doctrine may be applicable to the Malaysian *Constitution* was left unanswered there, and likewise in the later case of *Mark Koding v. Public Prosecutor* [1982] 2 M.L.J. 120 at 123 (Suffian L.P.). If there could be cause to say that any provision of the Malaysian *Constitution* could constitute a basic feature thereof, Article 160(2) would, to my mind, be a prime candidate.

other rules on which such definitions may (or may have to be) based since rules are after all merely structured preferences. Ramraj's point cannot be about the impropriety of giving space to any structured preferences at all (*i.e.* "rule-scepticism"), but about the fact that structured preferences may be (or become) bad when they do rely on classifications that are arbitrary and which resist scrutiny. I shall return to this distinction between the two different sorts of objection to ethno-racial essentialism, below.

For now, it is important to consider the relationship between Islam and being "Malay". This is described by Tun Haji Mohd. Salleh bin Abas in the following terms:

The notion of a non-Muslim Malay is alien to the Malay mind. Such a person would be *murtad*—excluded from the faith. To be a Malay one must be a Muslim, although he may not be a practising or devout Muslim.

This complete identification of religion with race is so fundamental to Malay thought that the religion of Islam has become an important constituent element in the legal and constitutional definition of 'Malay'.¹⁴

Dr. Ramraj's criticism is, however, similar to that of the Malaysian political scientist and historiographer, Farish A. Noor:

We were Hindus and Buddhists before, and before that we were pagan animists who lived at peace with nature. The coming of the great religions—Hinduism, Buddhism and Islam—and the arrival of new modernist schools of thought should not be seen as distinct episodes that keep our histories apart. Instead they should be seen as layers of civilizational acculturation that have added depth to our collective sense of identity, who we were, who we are, and who we want to be in the future . . . We would be able to face the future with much greater confidence if we could admit our own internal heterogeneity and complexity, rather than continually trying to deny the past and to homogenize the present into one flat, monolithic discourse of sameness.¹⁵

What is noticeable in the passage from Noor above, however, is that Noor concedes that "Malayness" is viewed in connection with Islam. Insofar then as a general definition of who the Malay people are is concerned, giving a very important place to Islam would therefore be justified.

III. CONTRASTING STRUCTURED PREFERENCES AND "ETHNO-RACIAL ESSENTIALISM"

A. Rule-Based Classifications, Generally

Thus, at *one level*, Ramraj's argument seems then to be an *a priori* argument about the uses of general race classifications. If so, that would ignore the fact that the Malay community in Singapore is a group, or that the Malay or in fact any other

¹⁴ Tun Haji Mohd. Salleh bin Abas, in Trindade & Lee, *supra* note 12 at 5–6.

¹⁵ Farish A. Noor, *The Other Malaysia: Writings on Malaysia's Subaltern History* (Kuala Lumpur: SilverfishBooks: 2002) at 230.

community in Malaysia is a group, and that the group itself, with its group-based interests, may be widely considered both in Malaysia and in Singapore to deserve specific legal provision. Dr. Ramraj cannot be saying that general classifications of this sort are objectionable for he also argues that liberalism is misunderstood if it is taken to be hostile to the need to take such group bonds into account.¹⁶

Take the example of the Malay language. Should the Malay language fall by the way-side in daily life, could that not be a threat more to the existence of the group than to any particular individual? Likewise, the use of Mandarin or indeed Tamil. Take a second example. If something derogatory is said of an individual as a member of a particular group or class, would that not hurt the group or class as a whole, as opposed to merely hurting the feelings of the individual? This second example is the basis of criticisms by some scholars in the United States, for example, that formal colour-blindness which focuses on the harm actually done to an individual, and attention (merely) to (liberal-individualistic) tort law requirements such as the injury, harm or damage done to the individual, or the requirement of causation, for example, ignore the damage done to the group as a whole.¹⁷ This Dr. Ramraj accepts:

... a focus on substantive legal principles permits the courts to prevent discrimination where, for instance, facially neutral rules have an adverse impact on minority groups, or to uphold restrictions on rights to protect or compensate minorities from, say, more powerful (e.g. hate) speech.¹⁸

But can a focus on substantive legal principles be permitted in constitutional terms? The Malaysian *Constitution* defines a “Malay” in Article 160(2), for example, not only as “a person who professes the religion of Islam”, but also one who “habitually speaks the Malay language”, and “conforms to Malay custom”. These features of a “Malay” preclude probing judicial scrutiny.

It is not difficult to understand, after all, where the Framers of the Malaysian *Constitution* were coming from. There is an abundance of empirical and historical evidence of the importance of just such group-membership criteria, or “gateway principles” in respect of membership of the Malay race. Take the importance of “Malayness” in the following example. In the narrative of the *Hikayat Hang Tuah*, the legendary hero of the Malay people and an Admiral of the Fleet during the period of the Malacca Sultanate is said to have declared: “*Tak kan Melayu hilang di dunia*” (“The Malays shall not perish on this Earth”).¹⁹ Here then is an iconic statement that makes the existence of a “*Bangsa Melayu*” (or “Malay race”) not only axiomatic,

¹⁶ “Liberals . . . do not reject the importance of the community; what they question is the manner in which the state sustains or protects it”; Ramraj, *supra* note 1 at 476.

¹⁷ See (for example) Patricia J. Williams, *The Alchemy of Race and Rights* (Cambridge Massachusetts: Harvard University Press, 1991) at 110–2; Alan Freeman, “Legitimizing Racial Discrimination through Anti-Discrimination Law: A Critical Review of Supreme Court Doctrine” (1978) 62 Minn. L.R. 1049 and Alan Freeman, “Racism, Rights and the Quest for Equality of Opportunity: A Critical Legal Essay”, (1988) 23 Harv. C.R.-C.L.L. Rev. 295.

¹⁸ Ramraj, *supra* note 1 at 477.

¹⁹ Upon the Portuguese capture of Malacca on 24 August 1511, the Peguans of Burma asked for and received their pardon, soon followed by the Javanese and the Hindus, the Sultan and his son retreated, seeking to make their stand inland at Pagoh, but finally both withdrew to Pahang. Only Hang Tuah “kept up a series of harassing attacks” on the enemy: F.J. Moorhead, *A History of Malaya and Her Neighbours*, Volume One (London: Longman, 1957) at 168. Tregonning adds that the Malaccan Javanese, Indians and Chinese were “apathetic or openly on the side of the

but deserving of safeguard and protection. Another example is the slogan “*Melayu hidup*” (“Long live the Malays”). Similar expressions of early (Malayan) Malay nationalism speak of such a “*bangsa*” (or “race”).²⁰ Likewise, if political examples are sought to be used by Dr. Ramraj, Dato’ Onn Jaafar, whom Ramraj cites, and who is widely reputed to have single-handedly united the Malays of pre-Independence Malaya spoke of such a “Malay race” in his speech at the First UMNO General Assembly in 1947, where he said:

*Sekianlah saya berseru dengan seruan yang saya tidak henti-hentikan kepada sekalian bangsa Melayu yang sebangsa, sedarah, seketurunan, seagama. Marilah kita bersatu dengan tidak membeza-bezakan sama ada kita datang dari Bugis, dari Banjar, dari Jawa, dari Bali, dari Sumatera dan sebagainya melainkan kita tumpukan kepada bangsa yang satu sahaja itu... Sekianlah, disudahi dengan seruan Hidup Melayu!*²¹

The phrase “*Melayu yang sebangsa, sedarah, seketurunan, seagama* refers to the Malay people as people of “one race, one blood, one descent and one religion”.

These are random examples. My point is to show the ineluctable connexion between such sentiments which once, and now, arguably capture the larger portion of the self-perception of the Malay people on the one hand, and the Malay special position clauses in the Malaysian and Singapore *Constitutions* on the other. True, the approach taken in Singapore differs from that taken by Malaysia. Notably, the Malay community of Singapore is not defined by reference to religion, but as the Wee Commission had noted at the time, this is not to say that only “very few” Malays would be non-Muslim.²²

What both Malaysia and Singapore have historically in common in respect of the special position clause once to be found in the Federation of Malaya Agreement of 1948 is the adoption of that clause as a permanent feature of both *Constitutions* during the pre-independence talks that led to the Federal Constitution of Malaya of 1957.

Portuguese”: K.G. Tregonning, *A History of Modern Malaya* (Singapore: University of London Press, 1964) at 44.

²⁰ For example: “. . . hak kebangsaan orang Melayu jadi sangat lemah. Orang-orang Melayu menjadi bangsa yang tersingkir di luar Bandar tidak ada di daerah perniagaan di tanahairnya sendiri. Hal inilah yang menimbulkan kesedihan hati saya . . .”. Again, to quote as illustration from that same source: “Sesungguhnya akibat membuka Negeri Melayu ini telah mandatkan berbagai kesan yang membawa bencana kepada kehidupan Bangsa Melayu . . .”. See Noor, *supra* note 15, in which these passages from a common source are quoted at 83 and 85, respectively. My loose translation of these passages would be: “. . . the rights of the Malay race have become attenuated. The Malay people have, as a race, been ousted from the cities, and they no longer find themselves in the trading areas on their own soil. It is this matter that has caused my heart to ache . . .”; “So long as the result of opening up the Malay Country has brought all manner of disastrous consequences on the livelihood of the Malay Race . . .”.

²¹ Dato’ Onn Jaafar, “Darah Berteriak kepada Darah dan Bangsa kepada Bangsa”, *Ucapan di Majlis Mesyuarat Agung UMNO di Kelab Seremban, Negeri Sembilan, Mac 1–2, 1947*. (Speech at the UMNO General Assembly in the Seremban Club, Negeri Sembilan, 1–2 March 1947); reprinted in Mohamed Abid, *Reflections of Pre-Independence Malaya* (Kuala Lumpur: Pelanduk, 2003) at 117 and 121. My loose translation, again: “As such, I appeal, and urge unrelentingly, to all of the Malay Race, of one race, blood, descent, [and] religion. Come, let us unite without drawing distinctions as to whether we have originated from *Bugis, Banjar, Java, Bali, Sumatera*, and the like other than that we focus only on that one race . . . Let me conclude with this appeal [-] Long live the Malays!”.

²² Report of the Constitutional Commission (1966) at para. 35.

Even so, it is not only the self-perception of the Malay community which is captured in the history of the special position clause in both the Malaysian (Article 153) and Singapore (Article 152) *Constitutions*. In an immeasurably important and remarkable work by Dr. Joseph M. Fernando of the *Universiti Malaya*, based on records that have recently become publicly available at the Public Records Office in London under the United Kingdom's thirty-year rule, he recounts the history of the special position clause from the Alliance Memorandum, through the Reid Commission's deliberations and the tripartite talks between the "Malay" United Malays National Organization (or "UMNO"), the "Chinese" Malayan Chinese Association ("MCA") and the "Indian" Malayan Indian Congress ("MIC"), to the final insertion of that clause in the "permanent" part of the Malayan Constitution of 1957.

According to Dr. Fernando, the special position clause was initially the subject of inter-ethnic compromise at the Alliance Memorandum phase where there was agreement within the Alliance (principally the Malay UMNO under the leadership of Tunku Abdul Rahman, and the Chinese MCA led by Tan Siew Sin) that the Malay special position should only amount to a transitional measure to assist the Malays economically.²³ Likewise, the Reid Commission resolved to insert that clause only in the "temporary provisions" part of the draft Constitution, thereby requiring a two-thirds majority to preserve it after 15 years while bolstering fundamental liberties, achieving a compromise on multi-linguism with Malay being the "official" language (but that Chinese and Tamil should be used "exceptionally" in the legislature for ten years, leaving Parliament thereafter to decide on this), and by not specifying an official religion.

At this juncture, there was controversy within the Reid Commission caused by the dissent of Justice Abdul Hamid of West Pakistan. At issue was the liberal approach taken by the majority of the Committee members, which would have the Malay special position clause phased out in time as had been agreed in the Alliance Memorandum. Justice Hamid's genuine concern that special protection accorded to the Malays could be eroded if not more firmly entrenched spurred him on to lone dissent. Eventually, Hamid was persuaded by the other members to withdraw his dissent.²⁴ However, during the "tripartite talks" (the Working Party negotiations under the chairmanship of Sir Donald MacGillivray) between the UMNO, MCA and MIC the "special position" clause was removed and placed in the "permanent" part of the Draft Malayan Constitution, thus in radical reversal requiring (instead) a two-thirds majority in Parliament for its subsequent amendment or removal. What is curious is that the MCA representative had apparently not grasped this last legal implication of moving the "special position" clause to the permanent part of the Draft Constitution.²⁵ That, in any event, is the history of the clause in Articles 152 and 153, respectively, of the Singapore and Malaysian *Constitutions* today with which we are concerned.

We cannot neglect the important constitutional and historical dimensions to multiculturalism in Malaysia and Singapore, and which required broad definitions of ethnic groups in the constitution itself, and even contemporary policy-making, legislation,

²³ Joseph M. Fernando, *The Making of the Malayan Constitution*, M.B.R.A.S. Monograph No. 31 (Kuala Lumpur: The Malaysian Branch of the Royal Asiatic Society, 2002) at 93.

²⁴ *Ibid.* at 126–131, 136–141.

²⁵ *Ibid.* at 168–169.

and subsidiary regulation. However, there is a second prong to Ramraj's views which cannot be so easily glossed over, or dismissed.

B. Scrutinising Group Classifications

At a second, and I think more fundamental level, Ramraj's arguments are not simply about the freedom of individuals to associate as they please (a so-called "associational autonomy"-type consideration), but also about where and how we set our boundaries in respect of the (general) group classifications that we employ (see Section VII, below).²⁶ My contention here is that there are (justified) constitutional bounds to that, where Malaysia's *Constitution* serves as an example. But more importantly, judicial scrutiny of such constitutional classifications threatens not only the constitutional fabric, but also constitutionally embodied group entitlements. This second-level objection to Ramraj's thesis is not about "traditionalists" wanting "all of the power that they might want over their members and as against other groups", where he is only interested in a minimum protection that "nevertheless affords ethnic minority groups some tools for preserving their traditional ways of life by permitting the state to provide some forms of cultural support".²⁷ It is about presuming that such classifications make sense, as opposed to the liberal tendency (still) to presume that groups are *prima facie* illiberal.²⁸ That, in my view, is why Ramraj comes near to equating non-strict scrutiny of classifications as (*prima facie*) "essentialist".

But to understand Ramraj's position more clearly, we need, firstly, to explore a closely related issue that is raised in his paper; namely, constitutional "colour-blindness". Clearly, Ramraj is not advocating colour-blindness as such. But he does argue for the strict scrutiny of (all) race-based classifications in the law. My objection is a deeper one—that his strict scrutiny argument proceeds from colour-blindness.

IV. "COLOUR-BLINDNESS"

The root of Dr. Ramraj's "strict scrutiny" argument (of race-based classifications) lies in Harlan Fisk Stone's fourth footnote in the 1938 case of *United States v. Carolene Products Company*.²⁹ There, Justice Stone applied the ("formal", "rational-nexus" or) "rational basis" test. Stone took the view that the Supreme Court would presume the constitutionality of laws "affecting ordinary commercial transactions" if there was "some rational basis within the knowledge and experience of the legislators." This is the test which the Singapore courts have, for example, applied in Article 12 (equality) cases.³⁰ Thus, the availability of counterexamples do not void a legislative or regulatory classification in respect, say, of a purported equality violation so long

²⁶ Williams, *supra* note 17 at 102.

²⁷ Ramraj, *supra* note 1 at 480.

²⁸ For a powerful critique of liberalism in this regard, see Karen Engle, "Female Subjects of Public International Law: Human Rights and the Exotic Other Female" (1992) 26 *New Eng. L. Rev.* 1508, reprinted in Philip Alston, *Human Rights Law* (Aldershot: Dartmouth, 1996), 323.

²⁹ 304 U.S. 144 (1938).

³⁰ *Kok Hoong Tan Dennis v. Public Prosecutor* [1997] 1 S.L.R. 123 (High Court of Singapore, *per* Yong Pung How C.J.); *Public Prosecutor v. Taw Cheng Kong* [1998] 2 S.L.R. 410 (Court of Appeal of Singapore, *per* Yong Pung How C.J.).

as a reasonable person could find sufficient correlation between the mischief which the legislative or regulatory distinction seeks to combat and the trait used as the basis of legislative or regulatory classification.³¹ But there is a blind-spot in applying the rational basis test. It is problematic since legislatures do not typically act for any reason. The test tends, in other words, in favour of the legislative or regulatory classification, distinction, or differentiation in the first place.³² To address that blind-spot in the rational basis test, we have to turn to Stone's famous "footnote four" in *Carolene Products*: "There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution . . ."³³

That is the crux of Dr. Ramraj's strict scrutiny argument. Ramraj suggests that race essentialism hamstrings the equality clause (Article 12) in the *Constitution*. Since a strict scrutiny doctrine has not been applied by the Singapore courts in Article 12 (equality) cases, Singapore's equality jurisprudence "implicitly endorses ethno-racial policies and assumptions on the basis that there is no discrimination where legislative distinctions are made 'between class and class'".³⁴ He cites the case of *Dennis Kok*,³⁵ in which the claim to legal equality of the Jehovah's Witnesses was addressed by way of the application of a formal test of equality despite the matter coming within the ambit of Article 15 (freedom of religion).³⁶ He says: "This formal approach to equality enables essentialist policies to escape constitutional scrutiny by the courts as distinctions are not considered problematic . . ."³⁷

His criticism of race essentialism and the absence of a doctrine of strict scrutiny dovetail in support, therefore, of strict scrutiny as a means of addressing perceived race essentialism. For example, discrimination may also entail religious, as opposed to some non-religious form of discrimination. Likewise, attention to the religious dimension specifically (Article 15) could inform race discrimination as opposed to simply treating racial groupings as self-evident classes for the purposes of a formal test of treating like classes alike.

The true difference, however, between the United States *Constitution* and the Singapore and Malaysian *Constitutions* is that the United States *Constitution* is itself "colour-blind".³⁸

In contrast, the Malaysian *Constitution* (Article 153) expressly provides for the constitutional permissibility of affirmative action policies in favour of the majority

³¹ John Hart Ely, *Democracy and Distrust—A Theory of Judicial Review* (Cambridge Massachusetts: Harvard University Press, 1980) at 31.

³² *Ibid.* at 251 (note 69).

³³ 304 U.S. 144 (1938), 151–153.

³⁴ Ramraj, *supra* note 1 at 466.

³⁵ *Kok Hoong Tan Dennis v. Public Prosecutor* [1997] 1 S.L.R. 123 (High Court of Singapore, *per* Yong Pung How C.J.).

³⁶ As Ramraj puts it (*i.e.* in "strict scrutiny" terms): "The formal approach to equality is applied even though the discrimination in question involved discrimination based on religion, which is expressly prohibited by Article 12(2) of the Singapore Constitution": Ramraj, *supra* note 1 at 467.

³⁷ *Ibid.*

³⁸ As Professor Ely puts it, speaking of the United States *Constitution*: "The constitutional text doesn't give us a clue . . .": Ely, *supra* note 31 at 31. See further Neil Gotanda, "A Critique of 'Our Constitution is Color-Blind'" (1991) 44 *Stan. L. Rev.* 1.

Malays which have been promoted and implemented by successive Malaysian governments.³⁹ Thus, a key provision in this regard is Article 153(2):

(2) Notwithstanding anything in this Constitution, but subject to the provisions of Article 40 and of this Article, the Yang di-Pertuan Agong shall exercise his functions under this Constitution and federal law in such manner as may be necessary to safeguard the special provision of the Malays and natives of any of the States of Sabah and Sarawak and to ensure the reservation for Malays and natives of any of the States of Sabah and Sarawak of such proportion as he may deem reasonable of positions in the public service (other than the public service of a State) and of scholarships, exhibitions and other similar educational or training privileges or special facilities given or accorded by the Federal Government and, when any permit or licence for the operation of any trade or business is required by federal law, then, subject to the provisions of that law and this Article, of such permits and licences.

Article 153(3) adds that:

(3) The Yang di-Pertuan Agong may, in order to ensure in accordance with Clause (2) the reservation to Malays and natives of any of the States of Sabah and Sarawak of positions in the public service and of scholarships, exhibitions and other educational or training privileges or special facilities, give such general directions as may be required for that purpose to any Commission to which Part X applies or to any authority charged with responsibility for the grant of such scholarships, exhibitions or other educational or training privileges or special facilities; and the Commission or authority shall duly comply with the directions.

Likewise, quotas for educational places (Article 153(8A)) and the issuance of trading permits and licences in favour of the Malays and native peoples of Sabah and Sarawak (Articles 153(6) and (8)) are provided for.

Today, the suggestion that the *Constitution* should be colour-blind would also (unfortunately) amount to sedition under Malaysian law insofar as that should question the Malay language provision in Article 152 (below), or the special position of the Malays under Article 153, or the position of the Rulers under Article 181.⁴⁰ That amendment of the *Sedition Act* of 1948 and Clause 4 of Article 10 of the Malaysian *Constitution* was, however, the direct result of the tragic experience of the events of 13 May 1969.⁴¹ Having said that, there are “saving provisions” to the effect that such powers cannot, for example, be implemented such as to deprive a person of a public office held by him, or the discontinuance of any scholarship, exhibition or other training or educational privilege enjoyed by him (Article 153(4)), or the termination or non-renewal when such renewal might reasonably be expected in the ordinary course of events of licences and permits held by him (Article 153(7)). Thus, coupled with the fundamental liberties specified in Part II of the Malaysian *Constitution*, these

³⁹ For a trenchant critique, see Huang-Thio Su Mien, “Constitutional Discrimination under the Malaysian Constitution”, (1964) 6 M.L.R. 1.

⁴⁰ See *Public Prosecutor v. Ooi Kee Saik* [1971] 2 M.L.J. 108 (High Court of Malaysia, per Raja Azlan Shah J.). See also F.A. Trindade & H.P. Lee, “Suffian’s Contribution to Malaysian Constitutional Law”, in Trindade and Lee, *supra* note 12, 190 at 195.

⁴¹ Tun Haji Mohd. Salleh bin Abas, in Trindade & Lee, *supra* note 12, 1 at 13.

saving provisions reflect the Reid Commission's intent to secure a common space for all Malaysians.

While Singapore does not have an equivalent "sedition" provision, it is equally inconceivable that the Malay "special position" clause in Article 152(2) should come into question. As the Wee Commission pointed out, for example, no representations were made before it to suggest the removal of that provision.⁴² To further complicate matters, the Singapore *Constitution*, but for that special position clause, is silent on quotas, while the Singapore Government has long taken a principled stance against affirmative action strategies and policies in favour of the Malay people of Singapore. Instead, successive governments have emphasized the belief in equally-applicable meritocratic policies instead. It should not be underestimated how important this is to the consciousness of the Singapore people. Tun Salleh Abas puts it like this:

The concept of equality advocated under the political slogan of "Malaysian Malaysia" was aimed no doubt at eradication of alleged discrimination and unequal treatment resulting from application or misapplication of Article 153. But the Malays were upset and saw this slogan as an attempt to question and whittle down their position. The propagation of this theme resulted in the withdrawal of Singapore from Malaysia in 1965.⁴³

Senior Minister Lee Kuan Yew puts it this way:

I had let down many people in Malaya, Sabah and Sarawak. They had responded to our call of a Malaysian Malaysia. Had they not done so and there was no danger of widespread racial collisions if the Malaysian government arrested us, Singapore would not have been expelled. Because they rallied round and felt as passionately as we did about a Malaysian Malaysia, we were expelled. By accepting separation, I had failed them.⁴⁴

Even with that in mind, the Malaysian *Constitution* and the Singapore *Constitution* share a similar past that has led to the "special position" clause in both constitutions. That clause has its early roots in Clause 19(1)(f) of the Constitution of the Federation of Malaya Agreement of 1948, and which imposed an obligation to safeguard the special position of the Malays and the legitimate interests of other communities, first, on the British High Commissioner during the era of the Federation,⁴⁵ then on the *Yang di-Pertuan Agong* in the case of the 1957 Federal Constitution, and subsequently under the Malaysian *Constitution*.⁴⁶ It is almost certain that Singapore to some extent inherited "Clause 19(1)(f)" from the Constitution of the Federation of Malaya Agreement when such a clause made its way into the Singapore (Constitution) Order in Council of 1958 preceding full internal self-government in the following year and upon joining Malaysia in 1963 under the Sabah, Sarawak and Singapore (State Constitutions) Order in Council of 1963.⁴⁷

Taking the case of Malaysia first, Article 153(1) states that it shall also be the responsibility of the *Yang di-Pertuan Agong* to "safeguard . . . the legitimate interests

⁴² Report of the Constitutional Commission (1966) at para. 34.

⁴³ *Ibid.*

⁴⁴ Lee Kuan Yew, *The Singapore Story* (Singapore: Prentice Hall, 1998) at 649.

⁴⁵ Tun Haji Mohd. Salleh bin Abas, in Trindade & Lee, *supra* note 12 at 10–12.

⁴⁶ *Ibid.*

⁴⁷ Report of the Constitutional Commission (1966) at para. 34.

of other communities in accordance with the provisions of this Article”. Likewise, while Islam shall be the official religion of the Federation, Article 3(1) of the Malaysian *Constitution* also states that “other religions may be practised in peace and harmony in any part of the Federation”. Finally Article 152(1) of the Malaysian *Constitution* which establishes the Malay language as the national language of Malaysia does so provided, in sub-clauses (a) and (b), that:

- (a) no person shall be prohibited or prevented from using (otherwise than for official purposes), or from teaching or learning, any other language; and
- (b) nothing in this Clause shall prejudice the right of the Federal Government or of any State Government to preserve and sustain the use and study of the language of any other community in the Federation.

Similar provision is to be found in the Singapore *Constitution* in Article 153A(2), which while stipulating that Malay shall be the national language provides protection to other languages in near-identical terms with Article 152(1) of the Malaysian *Constitution*, above. However, Singapore’s *Constitution*, as we have seen, is not confessional but secular in nature, and Islam has no official place beyond the provision in Article 153.⁴⁸ As we have also seen, Article 153 requires Parliament in Singapore to make provision for the regulation of Muslim religious affairs (*e.g.* the administration of Muslim personal law), and for constituting a Council to advise the President in matters relating to the Muslim religion. In addition, Singapore has no provision equivalent to Article 153(1) of the Malaysian *Constitution*, but states without qualification the special position of the Malays in Article 152(2) of the Singapore *Constitution*.

It is therefore surprising that Dr. Ramraj could say that “for Singapore . . . policies and legislation based on race should be abolished”.⁴⁹ Is he suggesting the repeal of Article 152(2) of the Singapore *Constitution*? He says “[t]he same may be said of Malaysia”,⁵⁰ being only slightly more circumspect in his recommendations in respect of Malaysia where he adds:

But the extremely sensitive question for Malaysia in this context is the extent to which the religious consequences of apostasy ought to be such that, while leaving the religion may be prohibited internally, it remains, from a legal perspective, a genuine option.⁵¹

Could that (truly) be a “genuine” option in light of the definition of “Malay” in Article 160(2) of the Malaysian *Constitution*, which defines “Malay” to mean someone who professes the religion of Islam?

In his absence of attention to the constitutional history of multi-culturalism in Malaysia and Singapore, and especially the constitutional history of “Clause 19(1)(f)” (*i.e.* Articles 153 and 152, respectively, of the Malaysian and Singapore *Constitutions*), Dr. Ramraj’s recommendations have omitted the single most important issue here, which is the history of the Malayan peoples. That history is today

⁴⁸ See Thio Li-ann, “The Secular Trumps the Sacred: Constitutional Issues Arising from *Colin Chan v. Public Prosecutor*”, [1995] 16 Sing. L. Rev. 26.

⁴⁹ Ramraj, *supra* note 1 at 479.

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

seen in the importance of laws and policies that foster multi-culturalism in Malaysia and Singapore. It is far too simplistic to say, as Ramraj does, that these various group bonds and affiliations are simply the product of the British colonial authorities' "divide and rule approach, according to which each ethnic group was kept apart, in a separate enclave, and was left to tend to its own needs".⁵² The collapse of the Malayan Union was the collapse of a British proposal, after all.

Professor Cannadine puts the matter in its broader light:

It was not just that the British aristocracy benefited from the expansion of the British Empire: it was also that the very process of expansion led to contact with indigenous aristocracies, both old and new . . . The essence of the system of "indirect rule", as evolved by Sir Frederick Lugard in Nigeria, was that the British governed through the established native chiefs, as they later did in much of tropical Africa, in Malaya and in the League of Nations mandates in the Middle East.⁵³

That this of course gave rise to extraordinarily thorny issues in British Malaya was simply a practical (or, perhaps more accurately, an impractical) outcome. Rupert Emerson described it thus in 1937:

The British are faced by the dilemma inherent in indirect rule: the continued maintenance of the old forms of government and the old ruling caste . . . In Malaya this dilemma presents peculiarly difficult problems because of the difference in race between the rulers and large bodies of the ruled . . .⁵⁴

We are not determined by colonial history. Ramraj effaces the constitutional bargains struck in Malaysia and Singapore, the intent of the Framers of the Malaysian and the Singapore *Constitutions*, and says that we have been manipulated to treasure our identities as members of particular groups. Why? Because he fails to grasp that individual rights while necessary (and exemplified in Parts II and IV of the Malaysian and Singapore *Constitutions*, respectively) are insufficient. Group rights are not simply to be tolerated by liberals because of the social ubiquity of group bonds, but group rights are interdependent upon individual rights not only in a derivative but fundamental way. What I call "derivative theories" of group rights merely *concede* that even liberal philosophers live in societies, and cannot so easily escape the messy issues thrown up by community bonds on questions of identity and choice.⁵⁵ No one, it is true, but an out-and-out libertarian would argue against this. But understanding

⁵² *Ibid.* at 464.

⁵³ David Cannadine, *Aspects of Aristocracy* (London: Penguin, 1995) at 109. And again: "Since the British would govern these colonies but (in the main) not settle them, the princely states of the Indian Empire provided a more immediately applicable model than the great dominions . . . Collaboration, rather than marginalization was to be the prevailing mode of management. Respect for traditional tribal structures and support for those rulers who headed them were early on established . . . One indication of this was in Malaya . . .": David Cannadine, *Ornamentalism—How the British Saw Their Empire* (London: Penguin, 2001) at 58–59.

⁵⁴ Rupert Emerson, *Malaysia* (Kuala Lumpur: University of Malaya Press, 1964) at 338.

⁵⁵ See Stephen Mulhall and Adam Swift, *Liberals and Communitarians*, 2nd ed. (Oxford: Blackwell, 1992) at 191–222.

that is *not* enough—what I mean is this:

. . . to define abstractly, as part of moral philosophy or of the protection of human rights, what constitutes a people, *without* reference to nation states or to complex social and historical particularities *that cannot be turned into abstract general criteria*, seems to me to be preposterous.⁵⁶

To take the interdependence of individual and group rights seriously, or as being fundamentally important however, is to accept that individual and group rights could genuinely conflict,⁵⁷ and not that any conflict should simply be resolved by modified liberal axioms.

V. “THE IDEA OF A COMMON AND SEPARATE DOMAIN”

Without saying anything of our history, Dr. Ramraj advocates “accommodative liberalism”. He disarms, first, by saying that accommodative liberalism pays heed to community bonds and associations, and that ignorance of this commendable feature to accommodative liberalism could well have led to liberalism being mistakenly given a bad name and to its rejection by the Governments of both Malaysia and Singapore.⁵⁸ But his argument for governance is nonetheless of the sort that liberal axioms from on high are to be applied. Viewed in this way, it must seem incomprehensible that the accommodations that have had to be made over time seem to be driven by pragmatism instead, and are therefore unprincipled to liberal eyes. I shall focus in particular, for reasons that would become clearer below, on the example of Singapore.

Multi-culturalism in Singapore is circumscribed not only by the special position clause in Article 152(2) and the Muslim religion clause in Article 153, but importantly also by the fundamental liberties granted under the Singapore *Constitution*, such that where policies to foster multi-culturalism violate individual rights, they would simply be unconstitutional.⁵⁹ Notably in this regard, the Wee Commission took the view that group rights in Singapore are, in fact, best protected in Singapore to the extent that individuals have rights to profess, practice and propagate their religion, to legal equality under the *Constitution*, to life and liberty under the *Constitution*, and so on:

We find . . . the growth of a national spirit amongst the many people of many races who now regard Singapore as their home . . . and we believe that there is a growing

⁵⁶ Emphasis added. Eugene Kamenka, “Human Rights, Peoples’ Rights”, in James Crawford (ed.), *The Rights of Peoples* (Oxford: Clarendon, 1988) at 126, 134. My point is a slightly different one from the concession that even liberals are, as a matter of fact, members of actual societies. I believe the fact that (even) liberals live in actual societies is uninteresting in itself. What *is* interesting is its *significance* to our having and making moral choices: Charles Taylor, *Sources of the Self—The Making of the Modern Identity* (Cambridge: Cambridge University Press, 1989).

⁵⁷ Gillian Triggs, “The Rights of ‘Peoples’ and Individual Rights: Conflict or Harmony?” in Crawford, *ibid.* at 141.

⁵⁸ Ramraj, *supra* note 1, 461 at 474–475.

⁵⁹ See, for example, the Singapore Prime Minister’s suggestion that one way to handle the recent controversy over the “*tudung*” (or Muslim head-scarve) issue in Singapore was this: “. . . to go to court to challenge the ‘no tudung’ rule”. Accordingly, “[i]f the court found that the Government was wrong, it would comply with the court’s decision”: Ahmad Osman “PM Firm on *Tudung* Issue” *The Straits Times* (3 February 2002), online: Factiva <<http://www.factiva.com>>.

awareness and acceptance amongst these peoples that in spite of their different origins, their destinies are inextricably intertwined . . . and that their future and the future of the nation lies in a non-racial approach to all problems under a form of government which would enable the growth of a united, multi-racial, free and democratic nation in which all its citizens have equal rights and equal opportunities.⁶⁰

The fundamental liberties which the Wee Commission took to constitute the core of multi-racialism impose the outer parameters of permissible legislative action and governmental policy. No Government in Singapore can base any policy on the loss of any of the fundamental liberties enshrined in the *Constitution* when one leaves a group, precisely because the *Constitution* grants colour-blind rights to individuals (not groups) in order to protect the groups to which they belong. What the *Constitution* does in Article 152 is, therefore, to add (only) an additional layer of constitutional protection in respect of the special position of the Malays.

Within a residual space then, lying outside the fundamental liberties of all Singaporeans as well as Articles 152(2) and 153, what is Ramraj's objection to the current policies or policy-perceptions of the Singapore Government, if any? Is he somehow against the view, for example, of taking the various groups in Singapore society as "mosaics which form a harmonious whole, with each piece retaining its own colour and vibrancy"?⁶¹

Dr. Ramraj uses the tragedy of September 11 as a point of departure. He contends (in a sentence on which more will be said later) that "... [t]he aftermath of September 11 has also exposed the increase in ethnic tensions in Singapore and Malaysia."⁶²

He cites Dr. Lily Zubaidah Ibrahim amongst others for saying that multi-racialism (*i.e.* a multi-racial policy) threatens to become reduced to "rhetorical [sloganeering]",⁶³ and thus Dr. Ramraj concludes that since "[p]olicies which discourage individuals from revising their identities or deny them the opportunity to do so also encourage essentialist thinking and stereotyping more generally", "essentialist assumptions and policies also need to be reconsidered" in the aftermath of September 11.⁶⁴

Dr. Ramraj refers to the imposition of racially-defined quotas for public housing block occupancies, whose avowed aim is to get the various races in Singapore to intermingle,⁶⁵ the (financial and other forms of) support given to ethnic self-help groups such as the *Yayasan Mendaki* (the Council for the Education of Muslim Children), the Singapore-Indian Development Association (S.I.N.D.A.), the Chinese

⁶⁰ Report of the Constitutional Commission (1966) at para. 10.

⁶¹ "Media's Role in Sealing Social Unity" *The Straits Times* (7 September 1998), online: Factiva <<http://www.factiva.com>>.

⁶² Ramraj, *supra* note 1 at 471.

⁶³ *Ibid.* at 473.

⁶⁴ *Ibid.* at 473–474.

⁶⁵ See (for example) Lee Kuan Yew, *From Third World to First—The Singapore Story: 1965–2000* (New York: Harper Collins, 2000) at 209, acknowledging that while this had led to lower prices than the market rate for Malay homes because a percentage cap on the number of homes per block that could go to Chinese buyers meant that "the small number of Malay or Indian buyers are not able to pay the higher price that the Chinese majority can", "this is a small cost for achieving our larger objective of getting the races to intermingle".

Development Assistance Council (C.D.A.C.), and the Eurasian Association.⁶⁶ He omits to mention, however, that these are all parts of a larger concerted approach towards handling the very delicate issue of race relations in multi-ethnic Singapore. Other measures which dovetail with these include, for example, the amendment to the *Constitution* in 1998 which culminated in Article 39A (Group Representation Constituencies or “G.R.C. scheme”), aimed at ensuring minority political representation in Parliament (“Malay, Indian and other minorities” included). *Mendaki* and the G.R.C. Amendment are, on this basis, welcome developments in that they show something of the Government taking its obligations under Article 152(2) of the *Constitution* seriously.⁶⁷ While there has been no litigation on what precise sorts of actions are required of, or prohibited to the Government, the Government is constitutionally required, in my view, to be vigilant in respect of its compliance with the terms of Article 152(2).⁶⁸

It is not therefore clear how the demands of accommodative liberalism, if we take both communitarian-type accommodation and liberalism as two key components, have not been met, or could better be met, especially when we also account for the constitutional liberties in Part IV of the *Constitution* of Singapore. In all this, Ramraj ignores what Dr. Thio Li-ann rightly points out, that Singapore could hardly be said to adopt an “essentialist” approach to race if we take the politically significant G.R.C. Amendment (Article 39A), and religious freedom (Article 15) as examples. Thio notes:

... the non-conflation of “Malay” with Muslim with respect to the criteria for defining minority Malay candidates for purposes of GRC elections: Article 39A, Constitution of the Republic of Singapore. Also, Singapore’s religious liberty clause rejected the Malaysian model which protects Islam by restricting propagation of other faiths among Muslims.⁶⁹

⁶⁶ See (for example) Diane K. Mauzy and R.S. Milne, *Singapore Politics under the People’s Action Party* (London: Routledge, 2002) at 111–3.

⁶⁷ As Mauzy & Milne put it (*ibid.* at 110), speaking of the G.R.C. scheme: “The Malays originally opposed the Group Representation Constituencies (GRCs) because they did not want Malays elected ‘in the armpit’ of the Chinese . . . but they now mostly accept the value of guaranteed representation”.

⁶⁸ It is difficult, in light of the wording of Article 152(2) alone to take Dr. Kevin Tan’s view that “Art 152 is declaratory rather than mandatory in nature. It declares clearly the intention of the Constitution’s framers to ensure that future governments continue to remain sensitive to the special position of the Malay community in Singapore, but at the same time does not impose any specific duty since the key word in Art 152 is ‘interests’ and not ‘rights’”: Kevin Y.L. Tan, “Fifty Years of the Universal Declaration of Human Rights: A Singapore Reflection”, (1999) 20 *Sing. L. Rev.* 239 at 248. The operative word is, to my mind, “shall”. It is an injunction which the Framers have imposed on successive governments. The question as to what kinds of matters would likely be justiciable is a separate legal question. For some further evidence of what today’s Article 152(2) of the Singapore *Constitution* could have been intended to mean, see the discussion of (what was) Article 161G of the *Constitution* of Malaysia (added in 1963, repealed in 1965), *infra*, footnote 125. Having said that, one potentially critical difference which comes to mind in support of what Tan says involves the question of *locus standi*. The Singapore courts have affirmed that *locus standi* to bring suit for the infringement of liberties guaranteed under Part IV of the Singapore *Constitution* is something a citizen has *qua* citizen in respect of any and all of the fundamental liberties contained in the *Constitution*. Arguably, this may not be so easily established in respect of a perceived constitutional violation under Article 152, for the reason (as Tan points out) that no “right” is expressed; see *Chan Hiang Leng Colin & Ors. v. Minister for Information and the Arts* [1996] 1 S.L.R. 609 (*per* Karthigesu J.A.).

⁶⁹ See Thio Li-ann, “Recent Constitutional Developments: Of Shadows and Whips, Race, Rifts and Rights, Terror and *Tudungs*, Women and Wrongs”, [2002] *Sing. J.L.S.* 328 at 368 (note 189).

However, Dr. Ramraj also advances the well-worn accusation of “a paternalistic, government-knows-best approach whereby individual political liberties, including freedom of speech, freedom of religion, and freedom of association, all take second place to stability and security”.⁷⁰ To this, he adds his observation that a “deferential approach to the government is equally present in the constitutional jurisprudence of both Singapore and Malaysia”.⁷¹

The recent controversy over the “*tudung*” issue,⁷² on whether four female school pupils should be permitted to wear Muslim head-scarves to school is, however, instructive here. There, the Government’s approach to constitutional multiculturalism was brought into sharp relief against the backdrop of the heightened state of public awareness brought on by the incident. Potentially, that issue concerns religious freedom (Article 15) and the political rights of liberty (Article 9) and equality (Article 12). The Prime Minister, who urged that the matter be brought to court, gave his assurance that the Government of the day will abide by any judicial decision.⁷³ That “model” would seem also to apply equally in respect of official approaches to ethnicity in so far as the issues of ethnicity and religion overlap.

Similarly, the Government’s language and education policies reflect the same two-prong approach of supporting the use of English while promoting the learning of the cultural languages of the various groups.⁷⁴ That working model of managing multi-culturalism is aptly described thus by Thio:

The idea of a common space also connotes a corresponding separate domain and this is well-accepted in minority rights discourse. Minorities desire to ensure the safeguarding of their group identity and autonomy while also being able to effectively participate in the larger socio-political order.⁷⁵

Thio also describes the Singapore Government’s two-prong model as involving “the idea of a common and separate domain”. According to Thio, this approach requires the nurturing of a common space for all Singaporeans coupled with the preservation of autonomous cultural spheres for minority groups.

While the idea of such a common space or domain sits squarely with the 1966 Wee Commission’s preference for (liberal) rights which all Singaporeans would hold in common with each other as the best way to protect a range of minority rights and interests, the Singapore Government has thus been seen to have since departed from this approach.⁷⁶ Mauzy and Milne explain this current policy: “The long-term hope of multi-racialism is that by allowing ethnic diversity, rather than suppressing it, while simultaneously discouraging ethnic group competition and treating the groups

⁷⁰ Ramraj, *supra* note 1 at 468.

⁷¹ *Ibid.*

⁷² Thio, “Recent Constitutional Developments”, *supra* note 69, 354 *et seq.*

⁷³ Ahmad Osman “PM Firm on *Tudung* Issue” *The Straits Times* (3 February 2002), online: Factiva <<http://www.factiva.com>>.

⁷⁴ Mauzy and Milne, *supra* note 66 at 103–6.

⁷⁵ Thio, “Recent Constitutional Developments”, *supra* note 69 at 360. For contrasts and comparisons, see (for example) Ian MacDuff, “Biculturalism, Partnership and Parallel Systems: the Context of Maori Rights”, in William Twining (ed.), *Issues of Self-Determination* (Aberdeen: Aberdeen University Press, 1991) at 102.

⁷⁶ See further Mauzy and Milne, *supra* note 66 at 99–113. See also Thio Li-ann, “The Right to Political Participation in Singapore: Tailor-Making the Westminster Model to Suit the Imperatives of Asian Democracy”, (2002) 6 Sing. J.I.C.L. 181 at 202.

fairly (i.e. meritocracy), a supra-ethnic unity or civic nationalism/patriotism will emerge.”⁷⁷

While such an approach does have its risks, Dr. Ramraj seems to have got his underlying factual assumptions wrong where he says below that there have been “increased ethnic tensions”.⁷⁸ If this is true, it would therefore justify (in part) his argument that a policy of accommodative liberalism could be a better way of avoiding these tensions in the future. According to Dr. Ramraj:

The basic argument in this article is that the best response to the divisive social consequences of the September 11 attacks and their reverberations in Southeast Asia is to shift away from the illiberal practices of the past toward an accommodative brand of liberalism and, indeed, that this shift is already slowly taking place.⁷⁹

His principal reason, however, for suggesting that there have been “increased ethnic tensions” lies, it appears, in the phraseology of the recent Remaking Singapore Committee’s Report, “*Changing Mindsets, Deepening Relationships*”:

Tribal fault lines have been accentuated. Although race, language and religion have always posed challenges in Singapore’s context, recent global trends point to an escalation in religious and ideological extremism. Even as we protect our country from potential physical danger, we need to ensure that these globalised ideological battles do not threaten our social fabric.⁸⁰

It is clear, however, that all the Committee is saying, in the introduction to its report, is that an “accentuation” of “tribal fault lines” has resulted from (perceptions of) external events. It is also clear that the remarks in the Committee’s report are purely pre-emptive and do not report actual events in this regard. The Committee is therefore not saying, as Dr. Ramraj suggests that “[t]he aftermath of September 11 has also exposed the increase in ethnic tensions in Singapore and Malaysia”.⁸¹

I say this with the greatest respect, but Dr. Ramraj provides no basis then to show how “illiberalism”, as he calls it, has thereby caused an increase in ethnic tensions. He also fails to show that liberal (accommodative) regimes have been spared an actual increase in ethnic tensions. While there are no figures for the post-September 11 climate of opinion in Singapore, a *Straits Times* report prior to September 11 did, however, show that 70 percent of 1,114 Singaporeans aged 20 and above surveyed between 29 December 1999 and 15 January 2000 thought that ethnic relations were better in 2000 than they were ten years ago. Admittedly, fewer than one in two (about 48 percent) would trust someone of another race if race riots were to break out. But out of the 1,114 people surveyed, 308 (less than 28 percent) were Malays, while 281 (about 25 percent) were Indians,⁸² figures which (incidentally) compare favourably with the fact that the Malay community currently comprises 14 percent, while the

⁷⁷ Mauzy and Milne, *ibid.* at 113.

⁷⁸ Ramraj, *supra* note 1 at 471.

⁷⁹ *Ibid.* at 480.

⁸⁰ *Changing Mindsets, Deepening Relationships: The Report of the Remaking Singapore Committee* (Singapore: Government of Singapore, 2003) at 10.

⁸¹ Ramraj, *supra* note 1 at 471.

⁸² Irene Ng, “Racial Ties Now Better, But . . .” *The Straits Times* (27 February 2000), online: Factiva <<http://www.factiva.com>>.

Indian community comprises 7.7 percent of a total population which is 77 percent Chinese.

Turning to Malaysia, Dr. Khoo Boo Teik of the *Universiti Sains Malaysia* recently explained that “three dates and their respective importance are worth recalling” in appreciating the current situation in Malaysia in respect of race-relations.⁸³ The first critical date (April 1995) represents the end of an affirmative action policy initiated under the Government of Tun Abdul Razak in the aftermath of the 1969 racial riots in Malaysia. This drew from the conclusion of the National Operations Council led by Tun Razak himself that the riots were the result of Malay frustration over their relative economic backwardness.⁸⁴ The second was when Malaysia suffered the East Asian economic crisis in July 1997, and responded with capital controls apparently amidst (later critical) policy differences between the Prime Minister, Dato’ Seri (now Tun) Dr. Mahathir bin Mohamad and his then Deputy, Dato’ Seri Anwar bin Ibrahim.⁸⁵ The third (September 1998) marks the rifts in the United Malays National Organization caused by the removal, subsequent trial and imprisonment of Dato’ Seri Anwar.

According to Khoo, the second and third events above explain the current (political) pattern of race-based community relations in Malaysia. The removal of the former Deputy Prime Minister caused a noticeable split in Malaysian “Malay” politics. As the subsequent elections in 1999 showed, the coalition Government of which UMNO is the dominant party was returned amidst strong signs that the Chinese, being the largest minority group, by supporting the Coalition was in fact backing UMNO.

The underlying point is that Malaysian politics and society cannot be viewed in colour-blind terms, even if beyond the bearings given by the *Constitution*, the fluidity of Malaysian politics means that Malaysian multiculturalism is, by and large, not so easily discerned compared to the case of Singapore. Having said that, that Malaysia practices a similar model of managing multi-culturalism by having, at the same time, a “common” and a “separate” domain is not in doubt.⁸⁶ While the Malays in Malaysia are beneficiaries of affirmative action, the fundamental liberties currently contained in Part IV of the Singapore *Constitution* were derived from what originally was Part II of the Malaysian *Constitution*.⁸⁷

⁸³ Khoo Boo Teik, *Beyond Mahathir—Malaysian Politics and its Discontents* (London: Zed Books, 2003) at 159.

⁸⁴ See (for example) the historical account given in Khoo Boo Teik, *Paradoxes of Mahathirism—An Intellectual Biography of Mahathir Mohamad* (Kuala Lumpur: Oxford University Press, 1995) at 103–58.

⁸⁵ Khoo, *Beyond Mahathir*, *supra* note 83 at 71–98.

⁸⁶ For a critique of the policy of successive Governments in Malaysia, but which nonetheless accepts multi-racialism as a continuous policy of “inclusivist” Malaysian nationalist politics by successive Administrations over the years, see Sumit K. Mandal, “Transethnic Solidarities, Racialisation and Social Equality” in Edmund Terence Gomez (ed.), *The State of Malaysia: Ethnicity, Equity and Reform* (London/New York: Routledge: 2004) at 49, citing Cheah Boon Kheng, *Malaysia: The Making of a Nation* (Singapore: Institute of Southeast Asian Studies, 2002) at 236.

⁸⁷ For the historical evolution of the Singapore *Constitution*, see Kevin Tan, “The Evolution of Singapore’s Modern Constitution: Developments from 1945 to the Present Day” (1989) 1 Sing. Ac. L.J. 1. While the Wee Commission’s recommendations were debated at length in Parliament in 1966, it is not clear why some of the proposals were not adopted. Dr. Kevin Tan has traced some of the steps. During a conversation between the late Mr. Eddie Barker and Dr. Tan, Mr. Barker had (according to Dr. Tan) explained: “The Wee Chong Jin Constitutional Commission 1966 was Lee Kuan Yew’s idea. The new constitution never materialized because a new constitution was sure to bring problems. After a while you

VI. "SOFT AUTHORITARIANISM", CULTURAL RELATIVISM, AND "ASIAN VALUES"

One final piece of the puzzle in seeking to understanding Dr. Ramraj's argument for accommodative liberalism in the case of Malaysia and Singapore lies in his allusions to, and revival of, the decade-long global debate between "liberal" and "soft authoritarian" proponents of good governance, and between "universal" and "culturally relative" conceptions of legal and political rights.

That contest had its early beginnings in the World Conference on Human Rights in Vienna in 1993, wherein Western diplomats accused East Asian countries of being soft on civil and political rights while East Asian countries (such as Malaysia and Singapore) countered with culturally-relativist arguments emphasising the context of East Asian countries. According to Mr. Bilahari Kausikan of Singapore's Ministry of Foreign Affairs:

The West went to Vienna accusing Asia of trying to undermine the ideal of universality, and determined to blame Asia if the conference failed. Inevitably, Asia resisted. The result after weeks of wrangling was a predictable diplomatic compromise ambiguous enough so all could live with it, but that settled very few things. There was no real dialogue between Asia and the West. . . . If anything, the Vienna conference may only have hardened attitudes on both sides and increased the deep skepticism with which many Asian countries regard Western posturing on human rights.⁸⁸

Kausikan's point is supported by Aryeh Neier, the former Director of Human Rights Watch. As Neier says:

Kausikan points out that the Reagan and Bush administrations focused much of their own effort in the human rights field on the anticommunist struggle and the post-Cold War trend is now away from rights that are 'relatively precisely defined in international law toward the promotion of hazier notions of 'freedom' and 'democracy'. Many in the movement might have the same criticism.⁸⁹

By "the movement", Neier means those in the global non-governmental human rights community such as Human Rights Watch. The difficulty that arose for non-governmental rights groups (not uncommon in having to decide upon their stand in respect of the positions of individual countries) was that:

The Reagan and Bush administrations argued that prompting electoral democracy worldwide would empower critics of such practices as torture to mobilize opposition in their own countries. The right to take part in free and fair elections then

just let it be, especially if it's working. Better to carry on with what you have"; Lam Peng Er & Kevin Y.L. Tan (eds.), *Lee's Lieutenants* (Singapore: Allen & Unwin, 1999) at 90 [Lam & Tan]. Speaking to law students in 1978, then Prime Minister Lee Kuan Yew had also explained that, after due consideration, he felt it would be better to stick with what worked and not "trade oil lamps for new ones"; Lam & Tan at 90 (note 125). The existence of a draft "new constitution" was raised sporadically in the press between 1965 and 1968, but nothing came of it; Lam & Tan at 90 (note 124). However, preparations were made, apparently, in respect of the drafting of a new constitution for Singapore, with such figures as the (then) Australian, New Zealand and Indian Chief Justices named as possible members of a proposed drafting committee; Lam & Tan at 90 (note 123).

⁸⁸ Bilahari Kausikan, "Asia's Different Standard" (1993) 92 Foreign Policy 24.

⁸⁹ Aryeh Neier, "Asia's Unacceptable Standard" (1993) 92 Foreign Policy 42.

became the ultimate human right from which all other rights would flow. . . . The movement objected that this approach politicized human rights.⁹⁰

This “politicisation” of rights remains a feature of United States human rights policy,⁹¹ or what Professor Louis Henkin of Columbia University has called America’s “export-only policy” of human rights.⁹²

There is also another, less well-intentioned feature to the felt need to take an adverse view of East Asia. Even unwittingly, Ramraj’s argument risks becoming bound up with this strand of thought:

Is the West . . . now to stand by while East Asia uses abhorrent methods to help it overtake in the fast lane of world trade? Are East Asian opinion-makers correct in arguing that the expectations and problems of their massive region, coupled with what they see as the self-interest and hypocrisy of the West, exempt them from moving towards representative government, independent law and individual freedoms?⁹³

That latent insecurity is then expressed thus:

Should the authoritarian experiment come off, and especially if the West stands by without attending to its own social sores, moral and economic primacy may pass into East Asian hands . . . East Asia then, will not simply dominate the world economy within a generation but become the model of choice for less-developed countries . . .⁹⁴

By ignoring these dimensions to the issue, one dismisses certain important contextual truths. According to Dr. Ramraj, however:

Much of the resistance to greater liberalism in Singapore and Malaysia can be attributed to a failure to appreciate fully the significant debate within modern liberal thought and the extent to which many contemporary liberals have acknowledged the importance of community . . . Liberalism is typically associated with the “West” (generally with the United States in mind) and is regarded as ultra-individualistic, essentially unconcerned with community, culture, or tradition. This individualistic liberalism is typically contrasted with a communitarian approach . . .⁹⁵

I would disagree. It would be misplaced to think that somehow “illiberalism” in Malaysia and Singapore is (truly) based on some theoretical misunderstanding, or (in the other extreme caricature) that it is simply a political knee-jerk reaction to “the West”. Take, again, the following passage from a speech by C.V. Devan Nair as far

⁹⁰ *Ibid.*

⁹¹ Peter Danchin, “Unilateralism and the International Protection of Religious Freedom: The Multilateral Alternative” (2002) 41 *Columbia Journal of Transnational Law* 33.

⁹² Louis Henkin, *The Age of Rights* (New York: Columbia University Press, 1990) at 74.

⁹³ Eric Jones, “Asia’s Fate—A Response to the Singapore School”, (1994) *The National Interest*, Spring Issue, 18 at 20.

⁹⁴ *Ibid.* at 21.

⁹⁵ Ramraj, *supra* note 1 at 474.

back as 1976:

Traditional values, which our forefathers from China, India and Malaysia brought with them, are breaking down as a result of the accelerated deculturation process in our society. Singaporeans are neither orientals nor occidentals, and may well get the worst of both worlds, and the virtues of neither. The vacuum must be filled, with the inculcation of Singapore-centred humanistic values, drawing from the best and highest values of East and West . . .⁹⁶

Dr. Ramraj ignores the fact that the “Values” debate *is* about the search for normative bearings, not about how, as he puts it: “Citizens are told to define themselves negatively—by what they are not—rather than affirmatively by the values that they stand for.”⁹⁷

Moreover, he cites Singapore’s *Shared Values* White Paper⁹⁸ to further demonstrate that the issue *is* theoretical; namely, that “individualistic liberalism is typically contrasted with the communitarian approach” to governance. His is not the only criticism of public law and policy based on contesting the White Paper.⁹⁹ Curiously, what I think is the most important passage in the *Shared Values* Paper is paragraph 50:

Some have . . . proposed including . . . political values among the Shared Values. However, this would significantly widen their scope. The Shared Values focus on the relationship between the individual and society. This is in itself an ambitious objective. Extending them to cover the relationship between the voter and the government will bring in an altogether different set of issues, and risk diffusing their primary focus.¹⁰⁰

⁹⁶ C.V. Devan Nair, “Education for Survival”, Address to the 30th Anniversary Dinner of the Singapore Teacher’s Union, October 16, 1976, reprinted in C.V. Devan Nair, *Not by Wages Alone: Selected Speeches and Writings of C.V. Devan Nair, 1959–1981* (Singapore: Singapore National Trades Union Congress, 1982), 280, 282. Malaysia is perhaps more complex in this regard, not least because of recent subsequent events. However, a similar official attempt in Malaysia to aspire “internally” to shared values may be found in the form of the *Wawasan 2020* concept of a “*Bangsa Malaysia*” (or “Malaysian Nation”), and the associated concept of “*Melayu Baru*” (or “New Malay”), both of which were formulated during the 90s and which remain subject to conflicting academic appraisal at this stage, particularly in respect of how these concepts would relate to the current official approach to multi-cultural accommodation in due course. Compare, for example, R.S. Milne & Diane K. Mauzy, *Malaysian Politics under Mahathir* (London/NY: Routledge, 1999) at 166 and Edmund Terence Gomez, “Introduction: Politics, Business and Ethnicity in Malaysia: A State in Transition?”, in Gomez, *supra* note 86, 1 at 20. Nonetheless, at least one scholar has argued that “the central themes” in the *Wawasan 2020* (including the “*Bangsa Malaysia*” and “*Melayu Baru*” concepts) and another notion, namely Anwar Ibrahim’s “Asian Renaissance” notion of “*masyarakat madani*” (civil society) “remain the same” where we are also not talking about “just another brew of Asian Values”, as opposed to something which “is not purely anti-Western but inclusive”. Having said that, it is not disputed that “[n]either Anwar nor Mahathir want Asia and Malaysia respectively to adopt the Western model of modernity completely or to strive for a mimicry of the Western model”; Claudia Derichs, “Competing Politicians, Competing Visions: Mahathir Mohamad’s *Wawasan 2020* and Anwar Ibrahim’s *Asian Renaissance*”, in Ho Khai Leong & James Chin (eds.), *Mahathir’s Administration: Performance and Crisis in Governance* (Singapore/K.L.: Times, 2001), 188 at 191, 201, 203.

⁹⁷ Ramraj, *supra* note 1 at 464.

⁹⁸ White Paper on *Shared Values* (Singapore: 2 January 1991), Cmnd, 1 of 1991.

⁹⁹ Thio Li-ann, “An ‘i’ for an ‘I’? Singapore’s Communitarian Model of Constitutional Adjudication”, (1997) Hong Kong L.J. 152 at 154.

¹⁰⁰ White Paper on *Shared Values* (Singapore: 2 January 1991), Cmd, 1 of 1991 at para. 50.

I must conclude that “ethno-racial essentialism” is perhaps only a secondary concern for Dr. Ramraj. Dr. Ramraj is mainly concerned, it seems, with the liberty-constraining laws and policies of Malaysia and Singapore, and only after that, with the impact of such laws and policies on race. What then is accommodative liberalism?

VII. ACCOMMODATIVE LIBERALISM

According to Dr. Ramraj, accommodative liberalism differs both from “ethno-racial essentialism” and “atomistic” liberalism. He tries to distance accommodative liberalism from other variants of liberalism, especially what he calls “orthodox liberalism” since he wants to show that:

... liberalism, in at least some of its forms, might not be as alien or threatening to diverse Southeast Asian societies as it is sometimes thought to be, for it is not about unbridled liberty but rather the fair accommodation of difference.¹⁰¹

But what is “fair” to Ramraj? Or more precisely, what does he think is “unfair” about the current multi-culturalist approaches adopted in Malaysia and Singapore? “Fairness” lies, according to him, in Kymlicka’s distinction between “internal (*i.e. intra*-group) restrictions” on individual autonomy and “external protections” imposed by society at large on *inter*-group relations. “Fairness” is promoted when we bear both these “internal” and “external” features in mind when seeking to reconcile individual and group preferences.

A clear example would be that of apostasy where a legal prohibition of apostasy would be an example of an “external protection”, whereas mere moral and social censure by members of the same group without the backing of the coercive force of the law would amount only to an “internal restriction”.¹⁰² Accommodative liberalism seeks to be fair both on the internal and external fronts, and (in seeking to do so) prizes three features:

- (1) *Protecting Groups without Resort to Essentialism*: “accommodative liberalism accepts the importance of ethnic communities including their desire to protect themselves against external forces, while rejecting the essentialist approach which creates a necessary link between the individual and the group”.¹⁰³
- (2) *Guaranteeing Exit Rights*: “securing the legal rights of individuals to leave the group” which “by allowing some latitude for individuals to question traditional practices” also “makes suspect any absolute inference about an individual based on a presumed affiliation with a group”.¹⁰⁴
- (3) *Offering Group Concessions*: “affords ethnic minority groups some tools for preserving their traditional ways of life by permitting the state to provide some form of cultural support”.¹⁰⁵

¹⁰¹ Ramraj, *supra* note 1 at 478.

¹⁰² *Ibid.* at 477.

¹⁰³ *Ibid.* at 479.

¹⁰⁴ *Ibid.* This is likely to be the most fundamental component for Ramraj. Liberals either believe in “revisability” because they believe in moral self-authorship, or they cease to become liberals at all.

¹⁰⁵ *Ibid.* at 480.

These three basic features lie at the heart of Dr. Ramraj's attempt to answer this question: "How far should liberalism go to accommodate minority groups and allow them to retain and protect their *illiberal* practices and traditions?"¹⁰⁶ To these three features, he adds a (controversial) fourth feature:

- (4) *Maintaining Political Neutrality*: Ramraj offers the following example taken from Kymlicka: "... the government ensures an adequate range of options by providing tax credits to individuals who make culture-supporting contributions in accordance with their personal perfectionist ideals..."¹⁰⁷

According to Ramraj, Kymlicka's example shows that "the state can support cultural institutions in a non-evaluative, neutral way".¹⁰⁸

I mentioned earlier that (3) above is a basic strategic requirement for Dr. Ramraj's argument. Accommodative liberalism must be shown to take groups seriously (even if groups tend to impose restrictions on individual identity and choice, and are therefore illiberal in this way). (1) and (2), however, are each problematic for Malaysian and Singaporean multi-cultural constitutionalism in the same way. Insofar as exit rights are an important part of non-essentialism (*i.e.* not taking the criteria for belonging to a group as a "given", or as "fixed" or "immutable"), the Malaysian *Constitution's* definition of "Malay" in Article 160(2) therein involves what Ramraj would call an "essentialist" definition of "Malay". The Singapore *Constitution*, while arguably unproblematic in its reference to the Malay community in Article 152(2), in the Muslim religion provision in Article 153, or in Article 39A in the Singapore *Constitution* (Group Representation Constituencies) is, on the other hand, ignored. Ramraj focuses instead on the "salience" of ethno-racial essentialist policies and practices in Singapore.

VIII. WHAT ACCOMMODATIVE LIBERALISM MIGHT MEAN FOR MULTI-CULTURAL CONSTITUTIONALISM

I have argued that, notwithstanding "essentialist" traits in the Malaysian *Constitution's* definition of "Malay", there is an important difference between arbitrarily conceived group traits (*e.g.* the Nazi Reich Citizenship Law)¹⁰⁹ and historically informed, socially resonant group traits. I have argued that harm could be done to the group if these traits are shifted by judicial strict scrutiny, and that the existence of these traits may thereby be "illiberal" is not a convincing argument in light of the

¹⁰⁶ *Ibid.* at 477.

¹⁰⁷ Will Kymlicka, *Contemporary Political Philosophy*, 2nd ed. (Oxford: Oxford University Press, 2002) at 247.

¹⁰⁸ Ramraj, *supra* note 1 at 476.

¹⁰⁹ Notably, the Reich Citizenship Law was based on religious choice and was in that sense non-essentialist. That it was nonetheless supremely evil in its purpose and effects, and arbitrary is not something any-one could question. As Kershaw notes: "Three quarter Jews were counted as Jewish. Half-Jews (with two Jewish and two 'Aryan' grandparents) were reckoned as Jewish only if practising the Jewish faith, married to a Jew, the child of a marriage with a Jewish partner, or the illegitimate child of a Jew and an 'Aryan'... So it had been necessary to resort to religious belief to determine who was racially a Jew": Ian Kershaw, *Hitler, 1889-1936: Hubris* (New York: Norton, 1998) at 568-72.

history of multi-cultural constitutionalism in Malaysia and Singapore.¹¹⁰ In fact, the complaint about the illiberalism of essentialist definitions of groups seems to amount to a disguised version of an orthodox liberal approach which Dr. Ramraj is at pains to deny.

Professor Herbert Wechsler posited formal legal neutrality in the following way in one of the best known articles in American race law: “. . . if the freedom of association is denied by segregation, integration forces an association upon those for whom it is unpleasant or repugnant”.¹¹¹

Wechsler’s argument was that the U.S. Supreme Court school desegregation case of *Brown v. Board of Education* upheld the associational rights of blacks at the expense of the loss of freedom of association of whites.¹¹² What is sought, he argued, are neutral principles on which to base desegregation decisions. We have to ask how different Wechsler’s “interest-convergence dilemma”, as Professor Derrick Bell calls it,¹¹³ is from Dr. Ramraj’s argument that imposing occupancy ceilings based on minority-integrationist policies in public housing blocks evinces the salience of ethno-racial essentialism, and that such policies should be abolished in Singapore.¹¹⁴

One difference, it might be argued, is that Ramraj’s concern is more expansive than Wechsler’s and encompasses what Ramraj perceives as the illiberalism of forcing a person of a racial group to be a member of that racial group, and not for example just “forcing one group on another”, as in the example of desegregation.

Let me provide an illustration. Imagine an argument that the black (African American) community in the United States should have the right to switch places with the white community *en masse*, say on odd days of the week (what is facially fair). Members of the African-American community will therefore have (what I here call) “exit rights” on given days, but the white community will have its Wechslerian “associative rights” protected. Recall that the case for “associative rights” is prompted by Wechsler’s concern, that:

Given a situation where the state must practically choose between denying the association to those individuals who wish it or imposing it on those who would avoid it, is there a basis in neutral principles for holding that the Constitution demands that the claims for association should prevail?¹¹⁵

What then could be the problem here? The immediate sense we have that something is not quite right in our example above is due to one simple reason—that exit rights may be considered harmful to others, both to whites and blacks, *even if* exit rights for members of the black community were to be granted, in our example above, in such a way as to preserve “associative justice” for members of the white

¹¹⁰ My argument here is not that whatever history gives us is therefore inherently rational, but that one cannot seek an absolute viewpoint beyond history. One can, on the other hand, make (better or worse) moral choices within one’s history, but such historically informed choices are not, because of their attentiveness to history arbitrary; not unless one adopts the absolutist viewpoint above. See, for example, the discussion in Hilary Putnam, *Reason, Truth and History* (Cambridge: Cambridge University Press, 1981) at 167.

¹¹¹ Herbert Wechsler, “Toward Neutral Principles of Constitutional Law” (1959) 73 Harv. L. Rev. 1 at 22.

¹¹² 347 U.S. 483 (1954).

¹¹³ Derrick Bell, “*Brown v. Board of Education* and the Interest-Convergence Dilemma”, (1980) 93 Harv. L. Rev. 518.

¹¹⁴ Ramraj, *supra* note 1 at 479.

¹¹⁵ Wechsler, *supra* note 111 at 23.

community (*i.e.* not to integrate, but simply to “become” a member of the “other” community). One might say that I have failed to grasp Dr. Ramraj’s argument here. He is not saying that anybody must exercise such exit rights, only that people should generally be given this right to revise their group identity should they choose to exercise such a right. My point is that *individual* members of that group (or any other group) may nonetheless perceive that as a violation of the integrity of the group as a whole.¹¹⁶

Imagine a second, less fanciful illustration by modifying the first. A particular minority occupying a neighbourhood may be resisted if this would cause a diminution in value to other properties in the neighbourhood in a society where racism may be an everyday reality. Even if the minority group does succeed in occupying the neighbourhood of another group *en masse*, what that first group could be left with is nonetheless a neighbourhood whose value would have been diminished in consequence. Now imagine the first group to be the African-American community in America and the second group the white community.¹¹⁷ The second “lesson” here is that granting exit rights, which encourages assimilation may not itself be sufficient to improve even the situation of the individual group member granted such rights. And even where assimilation into the mainstream is successful, it would not necessarily improve the lot of any other member of such a person’s group either. As Justice Thurgood Marshall once told an audience at Howard University (people tell him):

“You should go around the country and show yourself to Negroes; and give them inspiration.” For what? Negro kids are not fools. They know when you tell them there is a possibility that someday you’ll have the chance to be the o-n-l-y Negro on the Supreme Court, those odds aren’t too good.¹¹⁸

¹¹⁶ Logically speaking, why should the (originally) white community complain? At least there will be a sizeable “white community” that would remain, even when the original white community is temporarily the “black” community. Some scholars in the United States view this as a function of perceptions of “ownership” in one’s racial identity. See, for example, Derrick Bell, Tracy Higgins and Sung-Hee Suh, “Racial Reflections: Dialogues in the Direction of Liberation”, (1990) 37 UCLA L. Rev. 1037, extracts reprinted in Richard Delgado and Jean Stefancic, *Critical White Studies—Looking Behind the Mirror* (Philadelphia: Temple University Press, 1997) at 108. But the truth in that insight is not confined only to whites. Not all blacks should be taken to wish to depart from being a member of the black community either, and it is likely that the preponderant majority would not and cannot be legally presumed to wish to do so: Alex M. Johnson, Jr., “Bid Whist, Tonk, and *United States v. Fordice*: Why Integrationism Fails African-Americans Again”, (1993) 81 California Law Review 1401 (drawing a distinction between “nationalists”, “integrationists” and “assimilationists” amongst members of the African-American community).

¹¹⁷ Scholars in the United States characterise this as the “white flight” problem. See (for example) Derrick Bell, *And We Are Not Saved—The Elusive Quest for Racial Justice* (New York: Basic Books, 1987) at 114–5. Compare an integrationist policy, which requires a “mix” of the various groups by way of the imposition of occupancy ceiling levels. Because of the exercise of central authority which prevents differences in the “mix” between one neighbourhood and another, differences in value that would otherwise ensue could be sought to be avoided through such an illiberal (because coercive) occupancy policy. No one is suggesting that there is no cost at all to the minority occupants themselves. The smaller number of potential minority purchasers could result in lesser market demand and consequently a lower value for homes that must be sold only to minority purchasers. Viewed pragmatically, however, that is seen as a small price to pay in exchange for integration. In contrast, integration may well not occur where, as in the experience of the United States, “white flight” could occur instead.

¹¹⁸ Speech of Justice Thurgood Marshall (18 November 1978), reprinted in *The Barrister*, 15 January 1979, 1, and quoted in Bell, *ibid.* at 63.

No doubt, the aim must be to make those odds better, and there have been advances,¹¹⁹ but the point remains that the general aim in such circumstances must be to elevate the group as a whole, and not to view the needs of various groups in terms only of the spectacular achievements of notable individuals. In contrast, what we may be left with simply, if we follow Dr. Ramraj's prescription, is the hubris of moral self-authorship that comes with individual achievement. But at what expense?

In a world where different groups are *generally* perceived to (still) do differently in life, possess unequal strength, or where some groups could simply be in the minority, segregated from the mainstream, or marginalised in some other way, race-based policies may be required to structure preferences in favour of particular groups in order to rectify or prevent substantive injustice. To do that, the beneficiaries of such policies must be identifiable, and their numbers must remain relatively stable, at least for planning purposes alone. Protecting disadvantaged groups may thus require resort to more-or-less essentialist definitions of race and violations of the associative rights of other groups. Individual members of minority groups cannot be singled out for mention as having broken the barriers, while simply leaving the need to consider the group as a whole behind. Solutions requiring State intervention must be group-based. This, in essence, is the substance of Professor Derrick Bell's objection to Wechslerian associative rights analysis. Bell says:

To doubt that racial segregation is harmful to blacks, and to suggest that what blacks really sought was the right to associate with whites, is to believe in a world that does not exist now and could not possibly have existed then.¹²⁰

One last item remains. Not only may exit rights, the prohibition of essentialist definitions, and considerations of associative justice be violated in the service of substantive justice concerns, but such concerns should trump the doctrine of political neutrality. The clearest examples here are Malaysia's affirmative action policies under Article 153 of the Malaysian *Constitution* and Singapore's Article 39A constitutional electoral provision on Group Representation Constituencies. Robert Nozick explained, in a classic definition of the political neutrality doctrine, that a state or government that claims its citizens' allegiance, in a way that others do not must be neutral between its citizens,¹²¹ while Professor Joseph Raz explains that: "Government action should be neutral regarding ideals of the good life".¹²²

In contrast, Article 153 of the Malaysian *Constitution* contains the words "Notwithstanding anything in this Constitution"¹²³, which would include Article 8 (equality) of the Malaysian *Constitution*. Article 153(5) says, on the other hand, that Article 153 does not derogate from the provisions of Article 136 (impartial treatment of federal employees irrespective of race). Thus, while Article 153 trumps the equality clause in respect of the special position granted to the Malays (and native

¹¹⁹ See Professor Crenshaw's view that the availability of liberal rights have at least helped the African-American community to articulate its views; Kimberlé Crenshaw, "Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law", (1988) 101 Harv. L. Rev. 1331 at 1368. Compare Derrick Bell, *Afrolantica Legacies* (Chicago: Third World Press, 1998), 47 *et seq.*

¹²⁰ Bell, "*Brown v. Board of Education*", *supra* note 113.

¹²¹ Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974) at 33.

¹²² This amounts therefore to a "doctrine of restraint for it advocates neutrality between valid and invalid ideals of the good"; Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon, 1986) at 110.

¹²³ In Articles 153(2), 153(8) and 153(8A).

peoples of Sabah and Sarawak), quotas for trading licences and permits, and quotas for education places, the impartial treatment of federal employees irrespective of race is secured from the scope and effects of Article 153. This complex structure of preferences employs the notion of a common and separate domain in its management of Malaysian multi-culturalism. A common domain is created where political rights such as the right to equality trumps outside the areas delineated by Article 153 to ensure the special position of the Malays and native peoples of the Borneo States. On the other hand, the right against racial discrimination of existing federal employees is protected within the scope of Article 153.¹²⁴ But in so far as exceptions are made to Article 8 (equality), this would still violate Ramraj's injunction against political partiality.

In comparison, Singapore's more attenuated "special position" clause, within which "special" provision for the Malay language is merely subsumed, and Singapore's secular *Constitution*, means that the "common space" for all Singaporeans is comparatively larger than is the case for Malaysians.¹²⁵ However, unlike the Government matching contributions to self-help groups in Singapore on a dollar-for-dollar basis, which does evince "support for cultural institutions in a non-evaluative, value neutral way", the Group Representation Constituencies clause in Article 39(A) trumps Article 12 (equality) of the Singapore *Constitution*. In doing so, it creates a notable exception within that Singaporean common space. In fact, it conflicts with political neutrality to the extent that the Malays, Indians and other minorities could not otherwise secure the same level of political representation. While this eats into the voting choices of the majority group, and therefore evinces a structured (rule-based) political preference in favour of Singapore's minorities, the question of minority political representation is considered itself a sufficient justification. Where a minority community may reject such unequal treatment, even where it is in their favour, it becomes arguably all the more important for the State to "take the blame" for the coercive measure.

Taking political representation as a public good, the "allocation" by the State of political representation in a non-value-neutral way is a violation of liberal political neutrality, particularly if fairness is expressed in majoritarian terms only (*i.e.* "one

¹²⁴ Writing in 1964, Professor Harry Groves explained the (original) intent of this clause as follows: "Therefore, while the Constitution permits discrimination in favour of Malays in initial employment by Government, it does not sanction discrimination once employed"; H.E. Groves, *The Constitution of Malaysia* (Singapore: Malaysia Publications Ltd, 1964), at 204.

¹²⁵ It is worth recalling that, during that period between 1963 and 1965 when Singapore had been a part of Malaysia, Article 161G of Chapter 2, Part XIII of the *Constitution* of Malaysia provided that "Nothing in Clause (2) of Article 8 [Equality] or Clause (1) of Article 12 [Rights in respect of education] shall prohibit or invalidate any provision of State law in Singapore for the advancement of Malays; but there shall be no reservation for Malays in accordance with Article 153 [Reservation of quotas in respect of services, permits, etc. for Malays] of positions in the public service to be filled by recruitment in Singapore, or of permits or licences for the operation of any trade or business in Singapore". Article 161G was added with effect from 16 September 1963 by the *Malaysia Act*, 1963 (No. 26) upon Singapore becoming a part of Malaysia, and was subsequently repealed upon Singapore's withdrawal from Malaysia by the (*Malaysian*) *Constitution (Amendment) Act*, 1966 (No. 59), with effect from 9 August 1965. See L.A. Sheridan and Harry E. Groves, *The Constitution of Malaysia* (Singapore: Malayan Law Journal, 1979) at 411. For the text of Article 161G, see L.A. Sheridan and Harry E. Groves, *The Constitution of Malaysia* (Dobbs Ferry, New York: Oceana Publications, 1967) at 230.

man, one vote"). Singapore has sought to do something about minority representation, but does that necessarily entail a lack of fairness? Singapore law is "fair" by being "neutral" in a different way altogether. Imagine that people in Singapore do not know whether they would be Malays, Indians, or members of any other minority or the majority, that they do not know what moral and political viewpoints they themselves hold, but that they know something of how multi-cultural societies tend to vote (*i.e.* for those "like" themselves).¹²⁶ Would it not be "fair" to include minority guarantees akin to Singapore's minority-protective electoral laws?¹²⁷

Ramraj says, to all this:

What differs dramatically today from previous efforts to liberalize the constitution is the growing awareness in liberal thought that a formalistic approach to state neutrality is not the only possible liberal answer and that the claims of traditional groups seeking to preserve their customs and practices need to be taken seriously.¹²⁸

I have argued that, whatever the truth of this, his account fails to do what it says it can (*i.e.* to take "traditional groups" seriously), and that a formalistic approach is not only "not the only possible liberal answer", but provides instead an impossible answer.

¹²⁶ I am alluding here only to the intuitively attractive connection drawn between justice and partial ignorance; John Rawls, *A Theory of Justice* (Oxford: Oxford University Press, 1972) at 136–7. For the purposes of this article, I am not, and do not I think need to advance any larger theoretical claim. But I am nonetheless compelled to say something here of complexities that cannot, at the same time, be addressed fully. Ramraj tells us that the debate between liberals and communitarians misunderstands liberals. Liberals, according to Ramraj, do account for community bonds, and it is a mistake to think that they do not. I have no quarrel with Ramraj on that score, for which see Mulhall & Swift, *supra* note 55 at 191–222. What I contest, however, is that liberals are actually serious in doing so. Taking Rawls as an example, and which is what also makes my allusion to his work problematic, his aim is to establish a universally appealing justification for political society which, while taking into account public political culture, fails however to take into account what does not fall within a highly restrictive definition of what it means to speak of a "democratic society". Plausible defences of liberalism, I believe, are typically rooted in a universalised ideal of what it means for the members of a society to share in a democratic tradition. For example, Mulhall and Swift, *ibid.*, in defending Rawls against the charge that Rawls' views are "[f]ar from representing an attempt to transcend cultural particularity and to reach a perspective from which one can construct a theory of justice that applies universally" (207), quote from Rawls' later work, where Rawls speaks of "a democratic society" (*i.e.* an actual democratic society) and "a tradition of democratic thought". Here lies, I think, a typical danger of adopting an over-generalised account of democratic society and tradition. Later (222), they say: "Far from seeking a culture-free vantage point, political liberalism seeks to articulate ideas implicit in the public political culture of constitutional democracies . . ." Mulhall and Swift concede that it is precisely here, however, that Rawlsian liberalism runs into trouble when dealing with social pluralism. Liberals tend to require us all to be (exactly) like them, or we should be unreasonable instead: Mulhall & Swift, *ibid.* at 232–8. Rawls' weakness here is what, I believe, also to be Ramraj's.

¹²⁷ Put simply, there are liberals who believe that all of what we call "justice" is simply about fairness (which appears to me to be Dr. Ramraj's view), and utilitarians who believe that fairness, properly called, is simply about achieving justice. However, most people accept that justice and fairness are to some extent independent things. Fair institutions can produce unjust decisions, just as unfair institutions can produce just decisions: Ronald Dworkin, *Law's Empire* (Cambridge Massachusetts: Harvard/Belknap Press) at 177.

¹²⁸ Ramraj, *supra* note 1 at 481.

IX. CONCLUSION

It has been a long journey. I showed the ubiquity of “Clause 19(1)(f)”, and how its progeny have featured large in Malaysia’s and Singapore’s constitutional and multi-cultural history. I recalled how controversy over Malaysia’s Article 153 rendered Malaysia apart with the withdrawal of Singapore, and of how Article 153 as it is understood today was the result of the Malaysian race riots of 1969. I have sought to describe what I call multi-cultural constitutionalism, where a common space for all communities is derogated from but complemented by securing autonomous cultural spheres for the various communities of Malaysia and Singapore. I contrasted this with objections of ethno-racial essentialism at two levels; namely in drawing the classifications in the first place, and in how the classifications are actually drawn. I argued that the approaches taken in Malaysia and in Singapore, different as they are, nonetheless reflect a genuine expression of the culturally-specific concerns of these nations and their peoples. I contrasted this with Dr. Ramraj’s accommodative brand of liberalism and argued that this is a model based on formal legal neutrality and deep underlying assumptions in favour of colour-blindness. I argued that his approach involves too dismissive an approach of the concerns of substantive justice which multi-cultural constitutionalism seeks to address, and to the terms and histories of the *Constitutions* of Singapore and Malaysia. Justice may require that differences between persons should receive differential treatment, and this Dr. Ramraj accepts.¹²⁹ My argument, however, is that such differences may not simply be rooted in individual choice, but could instead be group-based. I argue that illiberal multi-cultural constitutionalism takes such key substantive justice concerns seriously, from the socio-economic disparities in Malaysia to legitimate issues of concern in respect of minority political representation in Singapore. I criticised liberalism, even in the guise of accommodative liberalism, for its inability to account for such concerns without collapsing into the worship of individual moral self-authorship at the expense of societal group traits.

While there is no one best approach to multicultural constitutionalism, I urge the view that it is the most practicable, and the best approach in substantive moral-political terms in light of the shared and divergent histories of the various communities in Singapore and Malaysia. This is only the beginning of a debate that is long overdue on the true record of liberal political thought when it comes to fostering multi-culturalism. It took, what was to my mind, an unanticipated suggestion that liberal thought could do better to foster multi-culturalism, to prompt me to write this. Too much by way of minority concerns is today written strictly from rights-based perspectives. This ignores the fact that multi-culturalism has not been fostered by one-size-fits-all liberal axioms that may simply be applied to produce societies in which multi-cultural understanding and tolerance would flourish automatically. Sadly, I do not think that has been the case in some prime examples of otherwise successful liberal societies. While there was genuine social convulsion in the aftermath of September 11, Malaysians and Singaporeans have largely been spared that. If it is thought that the Malay-Muslim population in Malaysia are anyway the majority,

¹²⁹ *Ibid.* Compare also the concerns expressed in Patricia Hughes, “Recognizing Substantive Equality as a Foundational Constitutional Principle”, (1999) 22 Dal. L.J. 5 at 38–49, and G.E. Devenish, *A Commentary on the South African Bill of Rights* (Durban: Butterworths, 1999) at 43–9.

unlike the case elsewhere in thriving liberal societies, and therefore the relative equanimity with which Malaysia has faced the aftermath of September 11 is a “given”, we need only turn to the example of the difficulties faced in Pakistan, or the unrest in some countries of the Middle East during the recent Coalition campaign in Iraq. When Dr. Ramraj speaks of Southeast Asia, he omits mention of the long-tradition of multi-cultural constitutional practice in Malaysia and Singapore. He says not all liberalism is the same. Equally, I would say that not all “illiberalism”, as Dr. Ramraj calls it, is the same. In any event, it is one of the more notable ironies in his article that he accuses Singapore and Malaysia of possibly defining the identity of their peoples against what they are not, and not what they are. I am afraid to say this, but we are to him, simply illiberal because his thesis does not acknowledge who we are.