

COURTING RELIGION: THE JUDGE BETWEEN CAESAR AND GOD IN ASIAN COURTS

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Religion is almost universally guaranteed as a fundamental liberty and human right, although the scope of religious freedom and understandings of religious identity within secular democracies are informed by the specific model of constitutional secularism practiced. States often evidence an ambivalent attitude towards religion, treating it as Law's Other, that is, a competing normative system which has regulative force on social behaviour and influences conceptions of citizenship and affective loyalties. This article examines the interpretive method of two secular Asian courts, which are meant to be bastions of impartiality, in negotiating questions of religious identity and religious freedom. It analyses the judicial weighting and balancing of relevant competing factors and considers the varied understanding of what secularity requires and whether the concerns of religious minorities are adequately safeguarded within secular polities where religion remains an important social force.

I. INTRODUCTION

Freedom of Religion is an integral component of the corpus of core human rights, one rooted in peace treaties dating back to the 17th Century¹ and finding expression in numerous constitutions and human rights instruments, such as article 18 of the 1948 *Universal Declaration of Human Rights* (“UDHR”).² Religious liberty may be considered the first liberty, the basis of a free society which protects the right of its members to seek answers to fundamental or first order human questions, such as,

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¹ Most famously the 1648 Treaty of Westphalia provided that each prince had the right to determine the religion of his own state (*cuius regio, eius religio*). For example, Article XXVII states that all those of the Confession of Ausburg (Lutherans) should have “the free Exercise of their Religion, as well in publick Churches at the appointed Hours, as in private in their own Houses.” Full text of the treaty available online: <http://avalon.law.yale.edu/17th_century/westphal.asp> (visited 15 May 2009). See generally Malcolm D. Evans, *Religious Liberty and International Law in Europe* (Cambridge: Cambridge University Press, 1997); Leo Gross, “The Peace of Westphalia, 1648-1948” (1948) 42 A.J.I.L. 20.

² Article 18 reads: “Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance. GA Res. 217A(III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71. Saudi Arabia abstained owing to problems with articles 16 and 18: Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (New York: Random House, 2002) at 163; Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting & Intent* (Philadelphia: University of Pennsylvania Press, 1999) at 258-268.

“who am I” and “where am I going.” It protects the intrinsic value of a free conscience,³ as well as other instrumental values such as religious pluralism⁴ and the pacific co-existence of faith communities within a broader multi-religious society. One might note that while the juridical status of religious freedom as a constitutional or human right is established, the content of this right continues to provoke controversy.⁵

Religious freedom is typically apprehended as having an internal dimension (*forum internum*) and an external one (*forum externum*). The *forum internum* relates to freedom of conscience and is absolute while the *forum externum* relates to the freedom to manifest religious practice which is qualified. A secular civil power has the authority and responsibility to prevent peoples from engaging in terrorist acts in the name of religion if it threatens the public good of maintaining public order.⁶ The Constitution does not create a ‘suicide club’⁷ and the state must justifiably and consistently with the maintenance of religious liberty restrain those religious beliefs which may regard the existence of organised society as an evil, in order to maintain civil government and the continued existence of the community.⁸ Article 29(2) of the *UDHR* recognises that the exercise of freedoms is subject to legal limitations but articulates a normative basis for limiting limits on rights by requiring that these limits serve the purpose of respecting “the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.”

³ Samuel Gregg said “Religious liberty seeks to guarantee that all are free to consider whether or not there is an ultimate transcendent being whose existence provides a compelling explanation of life” noting that this also entails “that non-believers cannot be forced to worship anyone or anything.”: see Samuel Gregg, “Rendering unto Caesar: New Challenges for Church and State” (Paper presented at the Auditorium, Australian Stock Exchange, 2004) in Sydney, Centre for Independent Studies (Australia) Occasional Papers (2004).

⁴ John Locke, *A Letter Concerning Toleration*, text available online: University of Virginia Library Electronic Text Center <<http://etext.lib.virginia.edu/etcbin/toccer-new?id=LocTole.xml&images=images/modeng&data=/texts/english/modeng/parsed&tag=public&part=all>> (visited 15 May 2009).

⁵ *E.g.*, in relation to apostasy issues where courts have denied that religious freedom includes the right to change faith. For example, the Malaysian High Court (Kuala Lumpur) in *Lina Joy v. Majlis Agama Islam Wilayah* [2004] 2 M.L.J. 119 did not consider that the article 11 guarantee of religious freedom contained the right to conscience: at paras 20-21. So too, the High Court (Kota Baru) in *Daud bin Mamat v. Majlis Agama Islam* [2001] 2 M.L.J. 390 considered that exiting a religion “is certainly not a religion” and in the absence of an express right to renounce religion, the religious freedom clause did not contain a right for Muslims to change their religions. See generally Thio Li-ann, “Apostasy and Religious Freedom: Constitutional Issues Arising from the Lina Joy Litigation” [2006] 2 M.L.J. i; [2006] 2 M.L.J.A. 1 for an analysis of the High Court decision. For a reply, Shamrahayu A. Aziz, “Apostasy and Religious Freedom: A Response to Thio Li-ann” [2007] 2 M.L.J. i; [2007] 2 M.L.J.A. 1. See also Thio Li-ann, “Jurisdictional Imbroglia: Civil and Religious Courts, Turf Wars and Article 121(1A) of the Federal Constitution” in Andrew Harding & H.P. Lee, eds., *Constitutional Landmarks in Malaysia* (Singapore: LexisNexis, 2007) at 197-226; and Farid Shuaib, “Constitutional Restatement of Parallel Jurisdiction between Civil Courts and Syariah Courts in Malaysia: Twenty Years on (1988-2008)” [2008] 5 M.L.J. xxxiii; [2008] 5 M.L.J.A. 33.

⁶ See generally Paul M. Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice* (New York: Cambridge University Press, 2005); Johan D. Van der Vyver & John Witte Jr., eds., *Religious Human Rights in Global Perspective: Legal Perspectives* (Boston: Martinus Nijhoff, 1996).

⁷ H.L.A. Hart, *The Concept of Law* (New York: Oxford University Press, 1961) at 188.

⁸ *Adelaide Company of Jehovah's Witnesses Inc. v. Commonwealth* (1943) 67 C.L.R. 116 at 124-126 (H.C.A.), *per* Latham C.J.

Religious freedom guarantees are typically accompanied by rights limitations similar to article 29(2) of the *UDHR*. Within secular democracies, the scope of religious freedom thus implicates the question of the role of the state in relation to religious belief. Secularism⁹ is itself a protean term, capable of having hostile anti-theistic (anti-religion) or more accommodative agnostic connotations (anti-theocratic).¹⁰

Constitutions may establish provisions influencing how close or distant a faith community is in relation to the state, in terms of official state recognition of the special status of a religion and pecuniary or non-pecuniary forms of state support. There is a range of state-religion models, such as a more accommodationist or co-operationist model, between the two extremes of a theocracy and a strict separationist regime,¹¹ which affects the contours of religious freedom in any given polity. In theocratic regimes, religion and politics are fused; in strict separationist regimes, a doctrinaire secularism antagonistic to religion demands religion's retreat wherever the state wishes to advance. This sort of militant secularism does not uphold state neutrality towards religion but rather, state bias against religion. As affirmed by the European Court of Human Rights, the Swiss Federal Court held that 'neutrality' does not entail "that all religious or metaphysical aspects" be excluded from state activities, underscoring that an irreligious or anti-religious attitude "does not qualify as neutral."¹² The key point is that there are two broad conceptions of secularism with differing degrees of receptivity towards religious belief: first, a 'thick' version where 'secularism' is a comprehensive substantive humanist or materialist ideology, which is exclusivistic and intolerant of religious belief in seeking political dominance; second, a 'thin' version where 'secularism' is cast as a framework for ordering the co-existence of mutually irreconcilable beliefs, whether of religious or irreligious origins.¹³

It is apt to point out two factors that will shape any vision of 'constitutional secularism',¹⁴ which is not a self-evident term. First, states often manifest ambivalence towards Religion as being simultaneously a constructive force and a potentially destructive and destabilising one. This is rooted in the fact that in speaking to a sphere of transcendence as an alternative source of authority beyond the surly bonds of positive law, Religion provides the adherent with a transcendent reason to question state

⁹ This may be understood as a political ideology relating to the appropriate relationship between religion and state.

¹⁰ Iain T. Benson, "Notes towards a (Re)definition of the 'Secular'" (2000) 33 U.B.C. L. Rev. 519; John Finnis, "On the Practical Meaning of Secularism" (1998) 73 Notre Dame L. Rev. 491; Thio Li-ann, "Secularism, Singapore, the Singapore Way" *The Straits Times* (Singapore) (30 October 2007) 25.

¹¹ W. Cole Durham, "Perspectives on Religious Liberty: A Comparative Framework" in Johan D. van der Vyver & John Witte Jr., eds., *Religious Human Rights in Global Perspective*, 1st ed. (Boston: Martinus Nijhoff, 1996) 1.

¹² *Dahlab v. Switzerland* Application No. 42393/98, E.C.H.R. 2001-V (15 February 2001), translation available online: <<http://www.strasbourgconference.org/caselaw/DahlabvSwissDecision.pdf>>.

¹³ William M. McClay, "Two Concepts of Secularism" (2001) 13:1 *Journal of Policy History* 47; Archbishop of Canterbury, "Rome Lecture: Secularism, Faith and Freedom" (23 Nov 2006), text available online: <<http://www.archbishopofcanterbury.org/654>> (visited 15 May 2009). See speech of NMP Thio Li-ann in Sing., *Parliamentary Debates*, vol. 86 ("Debate on President's Address") (26 June 2009), extracted in "No bright line between religion and politics" *The Straits Times* (Singapore) (26 May 2009) A18.

¹⁴ András Sajó, "Preliminaries to a concept of constitutional secularism" (2008) 6:3 *Int. J. Const. L.* 605. See Lorenzo Zucca, "The Crisis of the Secular State: A Reply to Professor Sajó", (2009) SSRN Paper available online: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1343099#>.

power. Religion and Secular law are thus sites of mutual contestation, where state and religious authority compete, evincing the need for jurisdictional delimitation. This motivates the desire of the state to domesticate 'Religion', treating it as Law's distinct Other,¹⁵ that is, a competing normative system which has regulative force on social behavior and influences conceptions of citizenship and affective loyalties. Second, the malevolence or benevolence with which a state regards Religion will significantly shape the scope of religious freedom and its effective exercise and enjoyment, and the degree to which Religion is accepted as having a legitimate role in public life and public culture, which may be distinguished from the sphere of 'politics' and political power.¹⁶

When religious freedom rights clash against the rights of others and state interests, it falls to impartial judges to adjudicate upon the legitimacy of a restriction. In so doing, they are bound to protect both constitutional rights and principles informing the constitutional order, such as secularism and multi-culturalism. Caught between Caesar and God, judges have adopted disparate responses, ranging from deferring to government evaluations that state interests necessitate restrictions on religious freedom rights, to rigorously ascertaining whether a restriction on a right is proportionate and responsible, through a pragmatic balancing process. The case law provides a window into the general rights theory of a court, whether a rights-claim is treated as a determinative 'trump' or a defeasible interest. In addition, it lends a valuable perspective to the particular vision of 'secularism' a constitutional order espouses or is evolving, which is something that must be apprehended by close reference to the social, historical and political context rather than through abstract pontification. For example, does a Constitution permit or authorise the 'establishment' or 'endorsement' of a specific religion? How is 'religion' defined and by whom? When does state interference with religious beliefs and activities become impermissible? When does religious activity threaten the public order, particularly in multi-religious Asian polities where race is often conflated with religion?¹⁷

This article examines the interpretive method towards religious questions of two apex secular Asian courts, the Philippines Supreme Court and the Singapore Court of Appeal, in relation to cases dealing with similar fact situations. In a nutshell, the cases implicated whether the religious freedom of Jehovah's Witnesses was legitimately restricted by requiring them, whether as teachers or students, to participate in flag ceremonies in public schools. From their perspective, these constituted acts of idolatry. Courts are meant to be bastions of impartiality in negotiating questions of definition, religious identity and religious freedom, which involve deciding where

¹⁵ On Law and Religion, see "Constitutional Law and Religion" in Dennis Paterson, ed., *A Companion to the Philosophy of Law and Legal Theory* (Cambridge, Mass.: Blackwell, 1996) 113; Harold J. Berman, "Law and Logos" (1994) 44 *DePaul L. Rev.* 143; John Witte Jr., *God's Joust, God's Justice: Law and Religion in Western Tradition* (Emory University Studies in Law and Religion, 2008); Stephen Feldman, *Law and Religion: A Critical Anthology* (New York: New York University Press, 2000); Rex J. Adhar, *Law and Religion (Issues in Law and Society)* (Burlington, Vt.: Ashgate, 2000).

¹⁶ See Thio Li-ann, "Religion in the Public Square: Wall of Division or Public Square" in Bryan S. Turner, ed., *Religious Pluralism and Civil Society: A Comparative Analysis* (Oxford: Bardwell Press, 2008) 73 at 83-97.

¹⁷ Neelan Tiruchelvam, "The Crisis of Constitutionalism: South Asian Perspectives" in Douglas Greenberg et al., eds., *Constitutionalism and Democracy: Transitions in the Contemporary World* (New York: Oxford University Press, 1993) 361 at 363.

state restrictions on religious liberty are permissible. This article analyses the judicial weighting and balancing of relevant competing factors and considers the varied understanding of what secularity¹⁸ requires. It considers whether the concerns of religious minorities are adequately or optimally safeguarded within secular polities where religion remains an important social force and basis for self and group identity. At the heart of the enquiry is the perennial question of the role of the state in relation to religious belief, whether the sacred and secular should exist in exclusive jurisdictions¹⁹ or inter-relate and if the latter, how and with respect to which aspect of human activity. Part II contextualises the enquiry by examining the models of constitutional secularism operating within the Philippines and Singapore context, both of which do not have established or official religions, highlighting their distinctive approaches towards issues of establishment. Part III examines how the courts have addressed the issue of defining religious faith and its requirements in these two Asian jurisdictions. Part IV evaluates the adjudicatory approach in balancing religious liberty against the interests of a secular state in regulating religious expression while Part V offers concluding observations.

II. STATE-RELIGION RELATIONS

In terms of religious composition, neither the Philippines nor Singapore are homogeneous but have multi-religious societies. Neither country has an established or official religion though their legal systems do provide for some degree of legal pluralism, *e.g.*, in the form of religious or *syariah* courts which administer Muslim personal laws.

In the Philippines, Roman Catholics comprise some 80-85% of the population, which numbers about 89 million. The largest religious minorities are the Muslims, who comprise some 5 to 9% of the population, primarily living in the south, *i.e.* Muslim Mindanao which has experienced decades of ethnic separatism.²⁰

Singapore has a more varied religious composition, with some 86% of the population professing a religious affiliation. Buddhists are the largest religious group

¹⁸ Secularity relates to a condition separate from religion.

¹⁹ Teitel notes that the architectural metaphor of a “wall of separation” between state and religion has given way to that of the “public square.” A wall “expresses a dualism” and focuses on questions of inclusion and exclusion, whereas the public square metaphor embodies a shift to “architecture with a narrative. It is a move toward representation. Unlike a wall’s simple two-sidedness, a square circumscribes an area. In architecture, a public square defines a common area, one with the potential for shared use by the community.”: Ruti G. Teitel, “Postmodernist Architectures in the Law of Religion” (1993) B.Y.U.L. Rev. 97 at 102-103.

²⁰ U.S., Department of State, “2007 Report on International Religious Freedom—Philippines” (14 September 2007), online: <<http://www.unhcr.org/refworld/docid/46ee6778c.html>>. The desire to have the Islamic Quran as the basic law of the land clashes with the status of the Philippines Constitution as the supreme law of the land, flowing from its direct promulgation by the sovereign Filipino people. See Soliman M. Santos, Jr., *The Moro Islamic Challenge: Constitutional Rethinking for the Mindanao Peace Process* (Diliman, Quezon City: University of the Philippines Press, 2001) at 18, where he notes that Islamists view the modern Western secular principle of church-state separation as the root cause for the lack of morality and decline in spirituality in many Western / Western-oriented governments and societies.

in Singapore (31.9%) followed by the Taoists (21.9%), Muslims (15%), Christians (12.9%) and Hindus (3.3%).²¹

A. The Philippines Constitutional Model of State-Religion Relations

The 1987 Constitution of the Republic of the Philippines does not recognise an official religion, although its preamble does affirm a sphere of transcendence insofar as the sovereign Filipino People²² implore “the aid of Almighty God.”²³

Article II Section 6 provides: “The separation of Church and State shall be inviolable”.²⁴ While the Catholic Church continues to wield significant influence over Filipino public life, it has no official constitutional status.²⁵ The influence of the U.S. First Amendment, borrowed “almost verbatim”,²⁶ is evident in the adoption of an anti-establishment and ‘free exercise’ clause in Article III Section 5, which provides that “No law shall be made respecting an establishment of religion, or prohibiting the free exercise thereof. The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed. No religious test shall be required for the exercise of civil or political rights.” The singular rationale of these two clauses, as explained by the Supreme Court in *Estrada v. Escritor*, was to secure religious liberty.²⁷

²¹ UN Committee on the Rights of the Child, Initial State Report—Convention on the Rights of the Child, CRC/C/51/Add.8 (17 March 2003) at para. 26.

²² Article II, Section 1 of the 1987 Constitution provides that “The Philippines is a democratic and republican State. Sovereignty resides in the people and all government authority emanates from them.” Full text of Constitution available online: <<http://www.chanrobles.com/philsupremelaw1.htm>>.

²³ In 1937, the Supreme Court in *Gregorio Aglipay v. Juan Ruiz* G.R. No. L-45459 noted that in referencing God in the constitutional preamble, the Filipino people “manifested reliance upon Him who guides the destinies of men and nations.” Text available online: <http://www.lawphil.net/judjuris/juri1937/mar1937/gr_l-45459_1937.html>.

²⁴ Historically, as the Supreme Court noted in *United States v. Smith* 39 Phil. 533 (1919), the exchange of sovereignty from Spain to the United States “caused a complete separation of Church and State.” Quoted in Jorge Rioflorida Coquia, *Church and State Law and Relations*, 4th ed. (Manila, Philippines: Rex Book Publishing, 2007) at 79.

²⁵ See Marie Neri, “Catholic church not endorsing any candidate: Cruz” *Sun.Star Manila* (The Philippines) (1 May 2004), online: <http://www.sunstar.com.ph/static/man/2004/05/01/news/catholic.church.not_endorsing.any.candidate.cruz.html>. See *Verlarde v. Society for Social Justice* G.R. No. 159357 (28 April 2004), online: <<http://sc.judiciary.gov.ph/jurisprudence/2004/apr2004/159357.htm>>, where the petition of some lawyers questioning whether endorsements of political candidates by religious leaders was constitutional was rejected for lack of a factual basis.

²⁶ Raul Pangalangan, “The Philippines: The Persistence of Rights Discourse vis-à-vis Substantive Social Claims” in Randall Preenboom, Carole Peterson & Albert H.Y. Chen, eds., *Human Rights in Asia: A Comparative Legal Study of Twelve Asian Jurisdictions, France and the United States* (New York: Routledge, 2005) 346 at 354. In *Alejandro Estrada v. Soledad S. Escritor* A.M. No. P-02-1651 (4 Aug 2003), online: <http://www.lawphil.net/judjuris/juri2003/aug2003/am_p-02-1651_2003.html> [*Estrada v. Escritor*], Puno J. referred to the “the American origin of our religion clauses”, which was extensively discussed.

²⁷ Puno J. in *Estrada v. Escritor*, *ibid.*:

The purpose of the religion clauses—both in the restriction it imposes on the power of the government to interfere with the free exercise of religion and the limitation on the power of government to establish, aid, and support religion—is the protection and promotion of religious liberty... Both clauses were adopted to prevent government imposition of religious orthodoxy; the great evil against which they are directed is government-induced homogeneity. The Free Exercise Clause directly

The separation of Church and State is qualified by various provisions. Article VI Section 29(1) provides that public moneys cannot be spent to support any religious system or minister other than those assigned to various government bodies like the armed forces and government orphanages. With parental consent, religion may be taught to children in public elementary and high schools under Article XIV Section 3(3) which the government is not obliged to underwrite. In addition, some degree of legal pluralism is recognised insofar as Article X provides for personal, family and property relations to be subject to the legislative power of the autonomous regions of Muslim Mindanao and the Cordilleras. Congress may enact organic acts for these autonomous regions that shall, *inter alia* “provide for special courts with personal, family, and property law jurisdiction consistent with the provisions of this Constitution and national laws.”²⁸ Under the auspices of the President, the Office of Muslim Affairs was created in 1987 to serve as the main institutional focus for the concerns of Muslim Filipinos.²⁹

B. *The Singapore Constitutional Model of State and Religion*

Religion has a prominent place in the *Singapore Constitution* although it departed from Malaysian practice upon Independence in omitting any reference to an official religion.³⁰ Article 12 precludes discrimination on grounds “only of religion”. Even in times of emergency, the authorisation to enact laws which contravene constitutional

articulates the common objective of the two clauses and the Establishment Clause specifically addresses a form of interference with religious liberty with which the Framers were most familiar and for which government historically had demonstrated a propensity. In other words, free exercise is the end, proscribing establishment is a necessary means to this end to protect the rights of those who might dissent from whatever religion is established... the Establishment Clause mandates separation of church and state to protect each from the other, in service of the larger goal of preserving religious liberty. The effect of the separation is to limit the opportunities for any religious group to capture the state apparatus to the disadvantage of those of other faiths, or of no faith at all because history has shown that religious fervor conjoined with state power is likely to tolerate far less religious disagreement and disobedience from those who hold different beliefs than an enlightened secular state.

He discusses two interpretations of the Jeffersonian doctrine of “wall of separation” between church and state, the strict separationist version (to protect the state from the church) and the “benevolent neutrality” version where “the wall is meant to protect the church from the state.”

²⁸ For more information on the Filipino system of syariah courts, see Bensaudi I. Arabani, *Philippine Sharia's Courts Procedure* (Manila, Philippines: Rex Book Publishing, 2000) See also “Legal Profiles: Philippines”, online: <<http://www.law.emory.edu/ifl/legal/philippines.htm>>.

²⁹ Executive Order No. 122-A as amended by Executive Order No. 295. The mandate of the Office on Muslim Affairs is “to preserve and develop the culture, traditions, institutions and well-being of Muslim Filipinos, in conformity with the country’s laws.” Its website is at <http://www.oma.gov.ph/site/>.

³⁰ Article 3 of the Federal Constitution of Malaysia declares: “Islam is the religion of the Federation; but other religions may be practised in peace and harmony in any part of the Federation.” Article 12(2) authorises the federal and state government “to establish or maintain or assist in establishing or maintaining Islamic institutions or provide or assist in providing instruction in the religion of Islam and incur such expenditure as may be necessary for the purpose.” The issue of whether ‘Islam’ is merely ceremonial or a source of public values has been the source of much political and judicial contention. See Joseph M. Fernando, “The Position of Islam in the Constitution of Malaysia” (2006) 37:2 *Journal of Southeast Asian Studies* 249; Thio Li-ann & Jaclyn L.C. Neo, “Religious Dress in Schools: The Serban Controversy in Malaysia” (2006) 55 *I.C.L.Q.* 871. For an extensive analysis of Singapore state-religion relations, see Thio Li-ann, “Control, Co-Optation and Co-Operation: Managing Religious Harmony in Singapore’s Multi-Ethnic, Quasi-Secular State” (2006) 33 *Hastings Const. L.Q.* 197; Lai Ah Eng, ed.,

provisions does not extend to “the provisions of this Constitution relating to religion, citizenship or language.”³¹

Article 15 of the *Singapore Constitution* provides that “Every person has the right to profess and practise his religion and to propagate it.” This Singapore version of the ‘free exercise’ clause expressly allows religious propagation, in contradistinction to article 11 of the Malaysian Federal Constitution, from which it was derived, with modifications.³² Article 15(2) recognises the communal dimension of religious freedom in recognising the right of religious groups to maintain institutions, manage their own religious affairs and to own property. Religious freedom is subject to “any general law relating to public order, public health or morality.”³³ While the government welcomes the co-operative partnership of religious groups in social welfare or charitable activities, it is wary of the dangers of mixing ‘religion’ and ‘politics’, for fear of ethnic communalism, and has enacted restrictive laws such as the *Maintenance of Religious Harmony Act*.³⁴

The *Singapore Constitution* contains no explicit reference to a principle of secularism,³⁵ or indeed, normative principles such as the rule of law or separation of powers,³⁶ though these have been judicially affirmed. The 1966 Constitutional Commission report did describe Singapore as a “democratic secular state.”³⁷ This brand of secularism is a pragmatic one. While not anti-theistic, it is anti-theocratic in that political

Religious Diversity in Singapore (Singapore: ISEAS Publishing, 2008); Joseph Tamney, “Religion and State in Singapore” [1988] *Journal of Church and State* 109.

³¹ Article 150(5)(b)(iii) of the *Constitution of the Republic of Singapore* (1999 Rev. Ed.) [*Singapore Constitution*].

³² The Malaysian article 11(4) allows the states to enact laws to “control or restrict the propagation of any religious doctrine or belief among persons professing the religion of Islam.” Text of the constitution available online: <<http://confinder.richmond.edu/admin/docs/malaysia.pdf>> (accessed 10 May 2009). In 1963, Singapore’s first Prime Minister made a ministerial statement before Singapore entered the Malaysian federation that his government would continue the policy of religious tolerance and allow the freedom of all religions in Singapore; he declared his government did not intend “to introduce legislation to control or restrict the propagation of any religious doctrine or belief...”: Statement by Prime Minister Lee Kuan Yew, “Religious Freedom in Singapore After Malaysia”, in Sing., *Parliamentary Debates*, vol. 21, col. 261 at 261 (29 July 1963).

³³ *Singapore Constitution*, art. 15(4).

³⁴ Cap. 167A, 2001 Rev. Ed. Sing. See V.S. Winslow, “The Separation of Religion and Politics: The Maintenance of Religious Harmony Act” (1990) 32 *Mal. L. Rev.* 327; Vineeta Sinha, “Theorising ‘Talk’ about ‘Religious Pluralism’ and ‘Religious Harmony’ in Singapore” (2005) 20:1 *Journal of Contemporary Religion* 25; Tey Tsun Hang, “Excluding Religion from Politics and Enforcing Religious Harmony—Singapore-Style” [2008] 1 *Sing. J.L.S.* 118; Jothie Rajah, “Policing Religion: Discursive Excursions into Singapore’s Maintenance of Religious of Harmony Act” in Penelope Nicholson & Sarah Biddulph, eds., *Examining Practice, Interrogating Theory: Comparative Legal Studies in Asia* (Boston: Martinus Nijhoff, 2008) 267. No restraining orders have ever been issued under this Act: Sing., *Parliamentary Debates*, vol. 82, col. 1319 (“Maintenance of Religious Harmony Act (Number of Restraining Orders Issued)”) (12 February 2007).

³⁵ From the outset, a conscious decision was taken not to have an established religion. “Let us face up to this problem of multi-culture, multi-religions and multi-languages. Alone in South East Asia, we are a State without an established church.”: “No dominance by religious group over others—Lee” *The Straits Times* (Singapore) (5 January 1967) 6.

³⁶ *Chng Suan Tze v. Minister of Home Affairs* [1988] S.L.R. 132 at 156B (C.A.); *Cheong Seok Leng v. Public Prosecutor* [1988] S.L.R. 565 at 575D (H.C.).

³⁷ Appendix D, Chapter I of the Wee Constitutional Commission Report at para. 38, reproduced in Kevin YL Tan & Thio Li-ann, *Constitutional Law in Malaysia and Singapore*, 2d ed. (Singapore: Butterworths Asia, 1997).

power is appreciated as being derived democratically from the people rather than through divine fiat.³⁸

Ministerial statements have described Singapore secularism thus: “Singapore’s government is secular, but it is certainly not atheistic. It is neutral. This is an important principle because all the major religions of the world are represented here.”³⁹ Neutrality in this context means an appreciation of religion as a ‘constructive social force’⁴⁰ (as well as a potentially destructive one)⁴¹ and an even-handedness in government dealings with religious groups to avoid charges of preferential treatment. The government is thus to remain agnostic about the veracity of religious truth claims and bears the responsibility of maintaining the rule of law as a framework for the peaceful co-existence of disparate religious groups.⁴² State neutrality also entails a vindication of the principle of free conscience of individuals. The Court of Appeal in *Nappali Peter Williams v. Institute of Technical Education*⁴³ has described the Singapore system as one practicing a form of “accommodative secularism” which considers that “the protection of freedom of religion under our Constitution is premised on removing restrictions to one’s choice of religious belief.”

Article 152 of the *Singapore Constitution* does enjoin the government to care for the interests of racial and religious minorities, particularly Malays (who are predominantly Muslim) owing to their indigenous status. Indeed, Article 153 obliges the Legislature to adopt legislation to regulate Muslim religious affairs and to constitute

³⁸ *Maintenance of Religious Harmony White Paper*, Cmd. 21 of 1989 at para 5. So too, Singapore courts have rejected ‘divine law’ based arguments as a basis for invalidating secular laws regulating military service: *Pte Chai Tshun Chieh v. Chief Military Prosecutor*, Military Court of Appeal No. 1 of 1998 (13 May 1998).

³⁹ “Government is secular: not atheistic: BG Yeo” *The Straits Times* (Singapore) (8 October 1992) 2.

⁴⁰ *Shared Values White Paper*, Cmd. 1 of 1991 at para. 45.

⁴¹ For example, the involvement of religious groups in political affairs is frowned upon: “If religious groups start to campaign to change certain government policies, or use the pulpit to mobilise their followers to pressure the government, or push aggressively to gain ground at the expense of other groups, this must lead to trouble. Keeping religion and politics separate is a key rule of political engagement.” However, the government is cognisant that ‘secular’ groups in pushing controversial political agendas can also pose a threat to social harmony: “Every group, whether religious or secular, has to live and let live, to exercise restraint and show mutual respect and tolerance. If any group pushes its agenda aggressively, there will be strong reactions from the other groups.” In addition, the government acknowledges that “Religious individuals have the same rights as any citizen to express their views on issues in the public space, as guided by their teachings and personal conscience.”: Sing., Ministry of Home Affairs, “Comments by DPM and Minister for Home Affairs Wong Kan Seng in response to media queries related to AWARE” (15 May 2009), online: <http://www.mha.gov.sg/news_details.aspx?nid=MTQ0MA%3D%3D-H1alkdI4Ksw%3D>.

⁴² “For multi-racial and multi-religious societies, where there are several communities with different religious beliefs and values, each community will hold its moral values deeply. Without observance of the rule of law, the individual can and will act according to his conscience as guided by his moral beliefs even when it breaks the law. Each will do his own thing, no doubt sincerely, passionately. The result will be strife and conflict. To avoid this there has to be respect for the law by all on accordance with common ground rules of engagement and conflict resolution, and to secure as large common secular space which belongs to all citizens regardless of race, language or religion. In Singapore’s multi-racial and multi-religious society, these considerations have meant that maintaining racial and religious harmony has become an important tenet for us when approaching the rule of law.” Deputy Prime Minister S. Jayakumar, “The Meaning and Importance of the Rule of Law”, Keynote Address at the IBA Rule of Law Symposium (19 October 2007), online: <http://notesapp.internet.gov.sg/_48256DF20015A167.nsf/LookupContentDocsByKey/GOVI-785D9X?OpenDocument> at paras. 18-19.

⁴³ [1999] 2 S.L.R. 569 at para. 28G (C.A.) [*Nappalli*].

a Council to advise the President in matters relating to Islam. This was the basis of the *Administration of Muslim Law Act* (“*AMLA*”) which deals with personal Muslim laws, permits a limited degree of legal pluralism⁴⁴ and creates *syariah* or religious courts which are subordinate courts and subject to some degree of supervision⁴⁵ by the civil courts.⁴⁶

The High Court noted that there is no constitutional bar to linkages between state and religious institutions as “the Singapore Constitution does not prohibit the ‘establishment’ of any religion”, which relates to providing financial or non-pecuniary support for a religion, as the Singapore government does in relation to Islam.⁴⁷ However, this does entail some degree of state involvement in religious matters; for example, the Singapore President appoints the *syariah* court President on the advice of the Cabinet.⁴⁸ The government also has a role in appointing up to 7 members of the *Majlis Ugama Islam* or MUIS (Islamic Religious Council), a statutory body charged under section 3 of the *AMLA* with administering related matters including collecting funds for mosque building, *halal* certification, *haj* pilgrimages and religious schools. MUIS also is in charge of collecting *zakat* (charitable tithes) to meet the social welfare needs of the poorer members of the community.⁴⁹ The state is thereby not proscribed from lending financial or non-financial support to a constitutionally identified religious group, though it is not legally obliged to.

⁴⁴ The *Administration of Muslim Law Act* (Cap. 3, 1999 Rev. Ed. Sing.) [*AMLA*] also permits polygamy, contrary to the general norm of monogamy enshrined in the *Women’s Charter* (Cap. 353, 1997 Rev. Ed. Sing.). These gender inegalitarian norms had to be subject to insulation from the application of the *Convention for the Elimination of All Forms of Discrimination against Women* (1979) which Singapore acceded to in 1995. Singapore attached a reservation: “In the context of Singapore’s multi-racial and multi-religious society and the need to respect the freedom of minorities to practise their religious and personal laws, the Republic of Singapore reserves the right not to apply the provisions of articles 2 and 16 where compliance with these provisions would be contrary to their religious or personal laws.” Available online: <http://www.bayefsky.com/html/singapore_t2_cedaw.php>. See generally Thio Li-ann, “‘She’s a woman, but she acts very fast’: Women, Religion and Law in Singapore” in Carolyn Evans & Amanda Whiting, eds., *Mixed Blessings: Law, Religions, and Women’s Rights in the Asia-Pacific Region* (Leiden: Brill, 2006) 241; Thio Li-ann, “The Impact of Internationalisation on Domestic Governance: The Transformative Potential of CEDAW” (1997) 1 S.J.I.C.L. 248.

⁴⁵ In *Mohd Ismail bin Ibrahim v. Mohd Taha bin Ibrahim* [2004] 4 S.L.R. 756 (H.C.), the civil High Court ensured that the religious court observed section 114 of the *AMLA* relating to testamentary disposition. In so doing, a secular court in ensuring a will was valid under Muslim law regulated the boundaries of sacred law, effectively informing the MUIS *fatwa* committee (which gives religious rulings) that they had misconstrued Islamic law under *AMLA*, “an essential statutory adjunct of Muslim law in Singapore” (at para. 63), as opposed to Islamic law *simpliciter*. Rubin J. also affirmed that the rule against bias applied to MUIS *fatwa* committee members as “It is an important principle of Western as well as Muslim jurisprudence that a person cannot be a judge in his own cause” (at para. 55). Religious courts as creatures of statute with limited jurisdiction thus cannot apply divine law in an unbounded fashion but only to the extent statutorily authorized, as supervised by civil courts. See Hairani Saban Hardjoe, “Hukum Faraid and the Application of *AMLA* as ‘The Statutory Adjunct of Muslim Law in Singapore’” *Law Gazette* (Singapore) (October 2006).

⁴⁶ “The fine balance of civil and *syariah* law in Singapore” *The Straits Times* (Singapore) (17 February 2008).

⁴⁷ Yong C.J. in *Colin Chan v. PP* [1994] 3 S.L.R. 662 at 681G (H.C.) [*Colin Chan*].

⁴⁸ Section 7(1)(a) of the *AMLA*, *supra* note 44.

⁴⁹ Section 3(d) of the *AMLA*, *supra* note 44: “to administer the collection of *zakat* and *fitrah* and other charitable contributions for the support and promotion of the Muslim religion or for the benefit of Muslims in accordance with this Act.”

In contrast, the separation of religion and state in the Philippines is stricter, as is evident from *Islamic Da'Wah Council of the Philippines Inc v. Office of Muslim Affairs*.⁵⁰ The Supreme Court held that a government agency's involvement in *halal* certification was unconstitutional. It noted that "classifying a food product as *halal* is a religious function because the standards used are drawn from the Qur'an and Islamic beliefs." Executive Order 46 in giving the Office of Muslim Affairs "the exclusive power to classify food products as *halal*" encroached upon the religious freedom of Muslim organisations to "interpret for Filipino Muslims what food products are fit for Muslim consumption". In addition, "by arrogating to itself the task of issuing *halal* certifications, the State has in effect forced Muslims to accept its own interpretation of the Qur'an and Sunnah on *halal* food." In other words, the performance by a government agency of a religious function contravened the separation of Church and State principle. The Court rejected an argument that the state was validly exercising its police powers in protecting Filipinos' "right to health and to instill health consciousness in them" and agreed with the petitioner's contention that "It is unconstitutional for the government to formulate policies and guidelines on the *halal* certification scheme because said scheme is a function only religious organisations, entity or scholars can lawfully and validly perform for the Muslims". In the Singapore context, MUIS is the leading official Islamic body but also a statutory government agency which performs *halal* certification.

Clearly, some of the statutory functions of MUIS would contravene the Philippines doctrine of 'the separation of church and state,' evincing the pragmatic rather than dogmatic Singapore model of secularism. Indeed, civil courts in Singapore have a role in enforcing secular laws which protect sacred Muslim dietary laws and thereby safeguard the concerns of religious minorities. For example, the High Court in *Angliss Singapore Pte. Ltd. v. PP*⁵¹ upheld a conviction under section 88 of the AMLA which makes it an offence of strict liability for a Muslim or non-Muslim seller of *halal* food to do so without MUIS certification and approval. In this case, the food, "Dewfresh" chicken nuggets, was *halal* but exhibited the wrong label, lacking MUIS approval. In noting absolute liability and the fact that there was no intent to provoke racial discord, Justice Rajah observed that "Parliament has deemed it fit that the religious sensitivity or welfare of the general public should warrant a high standard of care by all those engaged in the particular activities governed by statutes imposing strict liability" and that "Parliament views *halal* certification as an issue of vital importance."⁵² In so doing, the government discharges its article 152(2) responsibility to "recognize the special position of the Malays, who are the indigenous people of Singapore" and "to protect, safeguard, support, foster and promote their political, educational, religious, economic, social and cultural interests and the Malay language."

⁵⁰ G.R. No. 153888 (July 9, 2003), judgment available online: <<http://sc.judiciary.gov.ph/jurisprudence/2003/jul2003/153888.htm>>. Given the principle of separation of Church and State extant in the Philippines, the state must ensure the OMA does not intrude into purely religious matters lest it violate the non-establishment clause and the "free exercise of religion" provision found in Article III, Section 5 of the 1987 Constitution.

⁵¹ [2006] 4 S.L.R. 653.

⁵² *Ibid.* at paras. 29, 31.

III. JUDGES DEFINING FAITH

He who defines, controls. In this sense, interpretation in aid of establishing the parameters of a legal definition is a form of control in its constitutive or exclusionary effect, in determining the range of potential actors who may claim an entitlement, exercise certain options or be held to account for certain obligations. A definition tells us what is and is not protected, which promotes determinacy in the allocation of rights and duties and the legal consequences flowing from these relational structures.

Where the constitutional adjudication of religious freedom rights are concerned, definitional questions are important as they implicate threshold issues. For example, whether the state is imposing a 'religious' belief on individuals or whether an actor's beliefs or practices may be classified as 'religious', so as to invoke the shield of constitutional protection in the face of state restrictions. While legal instruments or ministerial pronouncements may identify recognised religions⁵³ or reject a purported religious community as a 'cult'⁵⁴ or 'sect',⁵⁵ more often than not this is a question judges have had to engage.

Defining religion is a complex business⁵⁶ as "even theologians, philosophers and moralists cannot agree on a comprehensive definition."⁵⁷ In this respect, a definition

⁵³ For example, Indonesia's first President Soekarno issued Presidential Decree No. 1/Pn.Ps/1965 on the Prevention of Blasphemy and Abuse of Religions which listed six religions to be embraced by Indonesians: Islam, Protestantism, Catholicism, Hinduism, Buddhism, and Confucianism. On the problem of excluding unrecognised religions, see Alfitri, "Religious Liberty in Indonesia and the Rights of 'Deviant' Sects" (2008) 3:1 Asian Journal of Comparative Law, available online: <<http://www.bepress.com/asjcl/vol3/iss1/art3>>. See also Heriyanto Yang, "The history and legal position of Confucianism in post-independence Indonesia" (2005) 10:1 Marburg Journal of Religion, online: <<http://www.uni-marburg.de/fb03/ivk/mjr/pdfs/2005/articles/yang2005.pdf>>.

⁵⁴ In Singapore, 'cult' is a pejorative and potentially defamatory term and has a sinister connotation, whose teachings or practices are considered by the ordinary man to be abhorrent or harmful to society. Mere deviance of beliefs from orthodox religions is insufficient to give rise to alarm as "Singapore is a secular state with diverse religions" and "a very high degree of religious tolerance.": *Chen Cheng v. Central Christian Church* [1999] 1 S.L.R. 94 at paras. 25-28 (C.A.).

⁵⁵ The China government banned the Falungong in 1999, calling it a cult which brainwashed its followers. Canadian human rights commissions have found that Falungong falls within statutory definitions of religions or creeds, as in *Ontario Human Rights Commission v. Daiming Huang* (2006) H.R.T.O.1 (Human Rights Tribunal of Ontario). The Commission in adopting an extensive definition of religion found that Falungong satisfied both the subjective elements of being "deeply and sincerely held personal belief[s]" about spirituality as well as objective criteria of being "a professed system and confession of faith" not requiring the belief in God or gods: Anne S.Y. Cheung, "In Search of a Theory of Cult and Freedom of Religion in China: The Case of Falun Gong" (2004) 13 Pac. Rim. L. & Pol'y J. 1; Ronald C. Keith & Zhiqiu Lin, "The 'Falun Gong Problem': Politics and the Struggle for the Rule of Law in China" (2003) 175 *The China Quarterly* 623. On the status of the Church of Scientology within Germany, see Gerhard Robbers, "Religious Freedom in Germany" (2001) B.Y.U.L. Rev. 643 at 662-663; Stephen A. Kent, "The French and German versus American Debate over 'New Religions', Scientology and Human Rights" (2001) 6:1 Marburg Journal of Religion, available online: <<http://www.uni-marburg.de/fb03/ivk/mjr/pdfs/2001/articles/kent2001.pdf>>. For a response, see Leisa Goodman, "A Letter from the Church of Scientology" (2001) 6:2 Marburg Journal of Religion, online: <<http://www.uni-marburg.de/fb03/ivk/mjr/pdfs/2001/articles/goodman2001.pdf>>.

⁵⁶ Gunn identifies 3 principal theories about religion. First, the idea of religion in its theological or metaphysical sense; second, religion as people psychologically experience it; and third, religion as a cultural or social force: T. Jeremy Gunn, "The Complexity of Religion and the Definition of 'Religion' in International Law" (2003) 16 Harvard Human Rights Journal 189 at 193-194.

⁵⁷ Puno J. in *Estrada v. Escritor*, *supra* note 26.

of ‘religion’ must be broad enough to include legitimate claims, and narrow enough to avoid accepting all claims. The complex nature of the issue resides in the fact that any sustained treatment of a religious question implies a theology. While various approaches towards defining religion (and thereby, non-religion) have been espoused, the definition of this category remains unsettled and problematic. An essentialist approach, such as one that assumes that ‘religion’ must be theistic, searches for unifying elements across religions,⁵⁸ while a polythetic approach does not require that all religions share specific elements, *e.g.*, the word “game” is polythetic in that it covers a wide variety of activities which may not share common features but nevertheless share a family resemblance.⁵⁹

A. Exclusionary Factors: Self-Denial

Established or ‘old’ religions are recognised by dint of their long history and significant number of adherents. However, ‘new’ religions⁶⁰ also compete for recognition and formal status, to enable the claiming of legal personality, tax exempt status or exemptions from general laws.

The Singapore High Court in *Ng Chye Huay v. PP*⁶¹ in relation to members of Falungong charged with unlawful assembly offences summarily rejected appeals to invoke the protection of the article 15 religious freedom guarantee as “the Falungong declare that they are not a religion, but merely practitioners of a specific form of *qigong*.” Thus, if a group does not self-identify as a religious one, they do not constitute a religious group for constitutional purposes.

B. Objective Traits and the Parameters of Religion: Between Culture, Ethics and Philosophy?

The Philippines Supreme Court adopted a theistic definition of religion as a “profession of faith to an active power that binds and elevates man to his Creator” in *Aglipay v. Ruiz*.⁶² A similar definition was adopted by the Singapore Court of Appeal in *Nappalli*⁶³ to the effect that references to “religion” in article 15 and other parts of the Constitution “is not about a system of belief in one’s own country but about a citizen’s faith in a personal God, sometimes described as a belief in a supernatural being.”⁶⁴ This is over-restrictive, given that Singapore is a multi-religious society with faiths beyond the Abrahamic religions which are polytheistic (Hinduism) or non-theistic (Buddhism, Jainism). In many other jurisdictions, the parameters of the

⁵⁸ See *e.g.*, *In Re South Place Ethical Society* [1980] 1 W.L.R. 1565 (Eng. H.C.) where Dillion J. defined religion as man’s relations with God and ethics as man’s relations with man.

⁵⁹ Gunn, *supra* note 56 at 194.

⁶⁰ See the work of the Centre for the Study of New Religions (“CESNUR”), for example, online: <<http://www.cesnur.org/default.htm>>, and Douglas E. Cowan & David G. Bromley, *Cults and New Religions: A Brief History* (Malden, M.A.: Wiley-Blackwell, 2007).

⁶¹ [2006] 1 S.L.R. 157 at para. 34.

⁶² G.R. No. L-45459 (1937), online: <http://www.lawphil.net/judjuris/juri1937/mar1937/gr_1-45459_1937.html>.

⁶³ *Supra* note 43.

⁶⁴ *Ibid.* at para. 26.

category 'religion' for constitutional or legal purposes have widened to encompass non-theistic worldviews, where courts have rejected the requirement that a religion be monotheistic or even polytheistic.

The Indian Supreme Court for example has noted that religions are "not necessarily theistic" as there are well-known religions like Buddhism or Jainism "which do not believe in God or in any Intelligent First Cause." Those who profess a religion regard it as a belief system or doctrine which is "conducive to their spiritual well-being". However, religions are not synonymous merely with a system of ethics as religions have outward expressions and might prescribe religious ceremonies or modes of worship as "integral parts of religion", extending to even "matters of food and dress."⁶⁵ In tracing American jurisprudence on this matter, Puno J. in the Philippines Supreme Court decision of *Estrada v. Escritor*⁶⁶ noted the shift from theistic⁶⁷ to broader definitions of religion as encompassing "the right to maintain theories of life and of death,"⁶⁸ non-theistic creeds such as Taoism and Buddhism and even secular humanism;⁶⁹ later, it was extended, in the context of determining the status of what constituted a conscientious objector, to a personal moral code. In giving content to a statutory reference to a belief in a Supreme Being, Justice Clark in *United States v. Seeger*⁷⁰ considered this encompassed "whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to the orthodox belief in God." Thus, a belief system parallel to a belief in God occupying a central place in the believer's life suffices to meet the criteria of religion under the U.S. First Amendment. In addition, it must "involve a moral code transcending individual belief" which must be held with a "demonstrable sincerity" and must be accompanied by "some associational ties."⁷¹ In this conception, atheism, which is based on *a priori* assumptions of a godless universe, qualifies as a religion.⁷²

⁶⁵ *Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt* A.I.R. 1954 S.C. 1005 (16 April 1954), online: <<http://www.cscsarchive.org/dataarchive/otherfiles/C0010106/file>>, per Mukherjea B.K. J.

⁶⁶ *Supra* note 26.

⁶⁷ The U.S. Supreme Court in *Davis v. Beason*, 133 U.S. 333 at 342 (1890) defined religion as "one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will." It noted that the intent behind the First Amendment was:

to allow everyone under the jurisdiction of the United States to entertain such notions respecting his relations to his Maker and the duties they impose as may be approved by his judgment and conscience, and to exhibit his sentiments in such form of worship as he may think proper, not injurious to the equal rights of others, and to prohibit legislation for the support of any religious tenets, or the modes of worship of any sect.

⁶⁸ *United States v. Ballard*, 322 U.S. 78 at 86 (1944).

⁶⁹ *Torcaso v. Watkins*, 367 U.S. 488 (1961). See also the Australian High Court decision of *Church of New Faith v. Commissioner for Pay-Roll Tax (Vic.)* (1984) 49 A.L.R. 65, where a test for religious belief would include not just belief in a supernatural Being but belief in supernatural Things or Principles: Mason A.C.K. and Brennan J.

⁷⁰ 380 U.S. 163 (1965).

⁷¹ *Estrada v. Escritor*, *supra* note 26, per Puno J., discussing U.S. First Amendment jurisprudence.

⁷² *Kaufman v. McCaughtry*, 2004 WL 257133, *4 (W. D. Wis., 9 February 2004); Derek H. Davis, "Is Atheism a Religion? Recent Judicial Perspectives on the Constitutional Meaning of 'Religion'" (2005) 47 *Journal of Church and State* 707. Indeed, a new virulent form of evangelical atheism in the form of its contemporary prophets, Richard Dawkins, Daniel Dennett, Sam Harris *et al.* is evident in popular culture. For an efficient dismantling of the deficiencies of this new 'religion', see Alis-tair McGrath & Joanna Colicutt McGrath, *The Dawkins Delusion: Atheist Fundamentalism and the Denial of the Divine* (Great Britain: SPCK Publishing, 2007); David Bentley Hart, *Atheist Delusions:*

This significantly fudges, if not collapses, the boundaries between ethics/philosophy and religion.

In relation to the issue of whether a particular practice, such as wearing certain items of clothing, is religious in nature⁷³ and one which warrants constitutional protection, courts have resorted to assessing whether that practice is integral or essential to a religious belief or merely optional,⁷⁴ or adopted a test of proportionality⁷⁵ in evaluating the legitimacy of a law or policy restricting an accepted religious practice.

C. Judges Judging the Requirements of Religious Belief

One of the goals of a public education system is to inculcate in students the virtues of citizenship or patriotism. A common method is to require students to participate in certain activities, such as flag-raising ceremonies, singing national anthems or taking a pledge. While these may seem like innocuous 'secular' activities to some, to certain religious sects like the Jehovah's Witnesses, this is tantamount to an idolatrous act, contrary to the tenets of their faith or belief system, and a curtailment of their religious liberty. This fact situation has come before the apex courts in Singapore and the Philippines and the difference in judicial approach towards the question of what a religious belief requires is stark.

In *Nappalli*,⁷⁶ the appellant, a teacher with the Institute of Technical Education ("ITE")⁷⁷ was dismissed from his job for refusing to take the National Pledge⁷⁸ (requiring the raising of the right fist) or sing the National Anthem during school assembly contrary to an ITE circular. Nappalli, a Jehovah's Witness, believed that

The Christian Revolution and its Fashionable Enemies (New Haven & London: Yale University Press, 2009); John Gray, "The Atheist Delusion" *The Guardian* (U.K.) (15 March 2008), text available online: <<http://www.guardian.co.uk/books/2008/mar/15/society>>.

⁷³ If wearing an item of clothing is deemed 'cultural' rather than religiously mandated, it does not attract constitutional protection: see *Halimatussaadiah bte Hj Kamaruddin v. Public Service Commission Malaysia* [1994] 3 M.L.J. 61 (Supreme Court) in relation to the desire of a female civil servant to wear the *purdah* (body-length veil with eye slit).

⁷⁴ *Fatimah binti Siti v. Meor Atiqularahman* [2005] 2 M.L.J. 25, judgment of 11 Dec 2004 (C.A. Putrajaya). See Thio Li-ann, "Judges and Religious Questions: Adjudicating Claims to Wear Religious Dress in Public Schools" (2007) 2 *Journal of Religion and Human Rights* 119 at 130-132.

⁷⁵ *Meor Atiqularahman v. Fatimah binti Siti* [2006] 4 M.L.J. 605 (Federal Court). In evaluating whether a school policy banning the wearing of the *serban* (male Muslim turban) was constitutional, Federal Court Judge Abdul Mohammad adopted a proportionate balancing approach in asking whether wearing the *serban* was mandated by Islam, whether the school ban was total or partial, whether there were alternative schools allowing the wearing of the *serban* the appellants could attend, and the circumstances under which the ban was made. The learned judge noted that Malaysia "is not the same as a Malay State prior to the coming of the British. She is multi-racial, multi-cultural, multi-lingual and multi-religious," highlighting the dangerous trend of racial and religious polarisation amongst Muslim students and the need to give "some respect and credit" to educationalists in the formulation of regulations "applicable in their schools for the general good of all the students, the society and later the nation." Text of the judgment online: <http://www.malaysianbar.org.my/selected_judgements/the_serban_case_full_judgment_delivered_by_datuk_abdul_hamid_mohamad_fcj.html>. See also Thio, "Judges and Religious Questions", *ibid.* at 137-142.

⁷⁶ *Supra* note 43.

⁷⁷ This is a creature of statute: *Institute of Technical Education Act* (Cap. 141A, 1993 Rev. Ed. Sing.).

⁷⁸ "We the citizens of Singapore pledge ourselves as one united people, regardless of race, language or religion, to build a democratic society based on justice and equality so as to achieve happiness, prosperity and progress for our nation."

these acts constituted acts of worship which “should be reserved exclusively for God and not for country.”⁷⁹ Two constitutional arguments were raised.

First, to Nappalli, taking part in the school pledge and anthem ceremony was tantamount to being coerced to participate in a religious ceremony contrary to article 16(3) of the *Singapore Constitution*. This provides that “no person shall be required to... take part in any ceremony or act of worship of a religion other than his own.” This right operates in the context of citizens’ educational rights and read contextually, article 16 is designed to “protect the position of those under 18 years of age, in respect of their choice of religion.”⁸⁰

The Court of Appeal affirmed the decision of the High Court that the Pledge and Anthem ceremony was not a religious ceremony and so article 16(3) could not have been breached. It examined the purpose of article 16(3) and found at its heart a principle of free conscience insofar as it would proscribe any educational policy which sought “to establish a religion other than the religion of one’s choice.”⁸¹ Thus, the object of article 16 was to ensure against undue restraints on the free exercise of religion. Following the Australian High Court approach in *Kruger v. Commonwealth of Australia*,⁸² the Court found that the ITE policy did not secure an unconstitutional object as its prescribed purpose as “part of a student’s educational exposure”, was to promote allegiance to the nation. Thus, the ITE’s policy did not violate article 16, as would be the case if students under 18 are compelled to attend bible knowledge classes where their parents are not of the Christian faith.⁸³

Second, the appellant alleged that his rights to profess and practice his religion under article 15 were violated and that he was in the position of a conscientious objector. What is particularly noteworthy is how the Court of Appeal concluded that participation in a pledge and anthem school ceremony had no religious character. The Court rejected the reasoning of the Canadian case of *Donald v. The Board of Education for the City of Hamilton*,⁸⁴ where damages were awarded to children expelled from school for refusing to participate in the anthem ceremony, on two grounds.⁸⁵

The first ground was that the relevant statute allowed students who had religious objections to be exempted from participating in saluting the flag or singing the national anthem. Secondly, the Canadian national anthem, being a hymn, had religious content. Yong C.J. cryptically stated “the secular tenet of our art 15 is reflected in the secular tone of the pledge and national anthem”,⁸⁶ whose content attributed respect to country which was devoid of religious significance.

Yong C.J. restricted the definition of ‘religion’ to a citizen’s faith in a personal God in contrast with the pledge and anthem ceremony which related not to a religion but “a system of belief in one’s own country.”⁸⁷ Yong C.J. considered “wholly

⁷⁹ *Nappalli*, *supra* note 43 at para. 3.

⁸⁰ Article 16(4) of the *Singapore Constitution* provides that the religion of a person under 18 years of age for purposes of Clause (3) “shall be decided by his parent or guardian.”

⁸¹ *Nappalli*, *supra* note 43 at para. 24.

⁸² (1997) 190 C.L.R. 1; (1997) 146 A.L.R., cited in *Nappalli*, *supra* note 43 at paras. 23-24.

⁸³ *Nappalli*, *supra* note 43 at para. 24.

⁸⁴ [1945] O.R. 518.

⁸⁵ *Nappalli*, *supra* note 43 at para. 25.

⁸⁶ *Ibid.* at para. 25. This statement is ambiguous. Is Yong C.J. saying that article 15 operates within a secular state as evidenced by a secular pledge and anthem?

⁸⁷ *Ibid.* at para. 26.

misplaced” broader approaches towards defining religion which accepted “that any belief or thought potentially holds religious value.”⁸⁸ Not every “conviction or belief” including those ironically held with “religious fervour” qualified as a religious belief.⁸⁹

The Court of Appeal cited the lower court’s (Supreme Court of Indiana) decision of *Thomas v. Review Board of the Indian Employment Security Division*⁹⁰ for the proposition that when a Jehovah’s Witness working at a factory which began to produce weapons quit his job for religious reasons and claimed unemployment compensation, this was not an undue burden on the free exercise of religion. This is because the Jehovah’s Witness had voluntarily quit for a “personal philosophical choice rather than a religious choice” which “does not rise to the level of a first amendment claim”,⁹¹ warranting the payment of benefits. Yong C.J. assumed an outsider’s perspective in concluding that the pledge and anthem ceremony “does not demand worship of the flag as a symbol” and “if a person held that understanding, that perception was a philosophical choice.” That is, the outsider’s perspective is conclusive as to the non-religious quality of a viewpoint. Thus, the pledge and anthem ceremony flowed from a system of non-religious belief about the state which “commands no supernatural existence in a citizen’s personal belief system.”⁹² The “irresistible conclusion for this court” was that Nappalli did not hold a constitutionally protected valid religious belief as the Court considered secular beliefs about the state, manifested in pledge and anthem school ceremonies, fell beyond the ambit of ‘religion’ and thus without the protection of article 15. Yong C.J. considered that Nappalli in interpreting the pledge and anthem ceremony as a religious ceremony was engaging upon “a distortion of secular fact into religious belief.”⁹³ Yong C.J. went on to lambast what he termed the appellant’s “excruciatingly absurd interpretation” which he considered contrary to “what was envisaged by the authors of the Constitution.”⁹⁴ This was a bare assertion,⁹⁵ as no evidence was offered to fill out the original intent of these authors. Yong C.J. considered Nappalli’s interpretation would rob the *Singapore Constitution* of “operative effect” and asserted rhetorically: “How can the same Constitution guarantee religious freedom if, by asking citizens to pledge their allegiance to country, it is coercing participation in a religious ceremony?”⁹⁶ In other words, how can the *Singapore Constitution* require coercive action which goes against the grain of a freedom it guarantees, *i.e.* how can the *Singapore Constitution* contradict itself?

Four comments are apposite. First, the *Singapore Constitution* nowhere explicitly asks citizens to pledge allegiance to the country; it was the authority of the Ministry

⁸⁸ *Ibid.* at para. 27.

⁸⁹ *Ibid.* at para. 28.

⁹⁰ (1981) 450 U.S. 707, full text of judgment available online: <http://www.law.cornell.edu/supct/html/historics/USSC_CR_0450_0707_ZS.html> [*Thomas*].

⁹¹ 391 N. E.2d 1127 at 1131 (1979).

⁹² *Nappalli*, *supra* note 43 at para. 26.

⁹³ *Ibid.* at para. 28.

⁹⁴ *Ibid.* at para. 29.

⁹⁵ Notably, the High Court Judge merely asserted that taking the National Pledge and singing the National Anthem is “obviously not a religious ceremony.” *Peter Williams Nappalli v. Institute of Technical Education* Suit No. 1055 of 1995 (22 October 1998) at para. 52 [*Nappalli* (H.C.)].

⁹⁶ *Nappalli*, *supra* note 43 at para. 29.

of Education (“MOE”) which was behind the practice in Singapore schools to take the National Pledge and sing the Anthem during school assembly. In 1988, the MOE introduced the new mode of taking the Pledge with a right clenched fist placed over the left chest.⁹⁷ Conceivably, the exercise of government discretion in requiring the taking of the Pledge and Anthem can be unconstitutional if it violates a fundamental liberty clause, as the *Singapore Constitution* is supreme.⁹⁸

Second, the same Constitution can both protect something and authorise limits to it, as where the violation of various fundamental liberties by special legislation dealing with subversive activities is authorised under article 149.⁹⁹

Third, a general educational policy requiring students to pledge allegiance to their country through a pledge and anthem ceremony may not violate the religious freedom of all students, only some students. If so, the question would then be whether there is a sufficiently compelling state interest in not exempting these students from the operation of the general law, or whether the interests underlying religious freedom warrant the recognition of conscientious objector status. If one considers the question of what a religion requires or proscribes from an insider-adherent’s perspective, the appellant’s interpretation is eminently accessible, reasonable to him, if not to outsiders.

Fourth, the judicial approach assumes that the pledge and anthem ceremony does not violate article 16 because it does not impose a religion on a disbeliever; this is an ‘anti-establishment’ reading of article 16. It could be approached from a ‘free exercise’ perspective where the question would be, from the Jehovah’s Witness’ vantage point, is free conscience violated? And if so, is there a compelling state interest to justify the abridgement of religious freedom?

What is also noteworthy is that the Singapore Court of Appeal took no notice of the U.S. Supreme Court decision in *Thomas*¹⁰⁰ which overruled the Indiana Supreme Court decision which Yong C.J. referenced. The Supreme Court decision is relevant in thinking through the proper judicial approach towards defining religion and identifying religiously mandated beliefs and action. Burger C.J. in delivering the opinion of the court was cognisant of the observation of the Indiana Supreme Court that Thomas was struggling with his beliefs and inarticulate in expressing them. However, the court should “not undertake to dissect beliefs”. Neither should significant weight be given to the fact that other similarly employed Jehovah’s Witnesses had no scruples about producing weapons, as “interfaith differences” between “followers of a particular creed” were not uncommon. Judges were “ill-equipped to resolve such differences” in relation to the Free Exercise clause which was “not limited to beliefs which are shared by all of the members of a religious sect.”¹⁰¹ Burger C.J. underscored: “Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of

⁹⁷ *Ibid.* at para. 2.

⁹⁸ Article 4 of the *Singapore Constitution*.

⁹⁹ Article 149(1) of the *Singapore Constitution* allows any legislation designed to prevent subversion to contain provisions which are inconsistent with various fundamental liberties (articles 9, 11, 12, 13 or 14) or beyond the legislative power of Parliament, not “valid notwithstanding.”

¹⁰⁰ Judgment available online: <http://www.law.cornell.edu/supct/html/historics/USSC_CR_0450_0707_ZO.html#450_US_707n7ref>.

¹⁰¹ *Thomas*, *supra* note 90 at 715-716.

scriptural interpretation.”¹⁰² The U.S. Supreme Court found that Thomas had left his job because of an “honest conviction” that his religion forbade such work. Burger C.J. in the U.S. Supreme Court noted, “religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.” This approach gives greater weight to the rights of the individual in relation to religious freedom, while the Singapore Court was oriented towards protecting the state interest underlying the educational policy, without exception.

In contrast, the Philippines Supreme Court was more circumspect, in relation to the judicial propriety of declaring the tenets of a religious belief in *Ebralinag v. Division Superintendent of Schools of Cebu*.¹⁰³ Here, students were expelled from public school by the Cebu school authorities for refusing to take part in the flag ceremony which involved saluting the flag, singing the Philippine national anthem or reciting the patriotic pledge as required by law, as this was considered idolatrous according to Jehovah Witnesses’ teaching.¹⁰⁴ These petitioners considered that the action of local authorities exceeded constitutional limitations on the state’s power and invaded the intellect and spirit which the Constitution sought to protect.

Cruz J. in *Ebralinag* referenced the 1959 *Gerona* precedent¹⁰⁵ where certain Jehovah’s Witness students were banned from attending school for refusing to participate in the flag ceremony as this was contrary to the tenets of their religious faith.¹⁰⁶ In *Gerona v. Secretary of Education*¹⁰⁷ the Supreme Court rejected the view of the Jehovah’s Witnesses that the Philippines flag was an idol representing the state, a graven image such that to salute it contravened the beliefs of Jehovah Witnesses. Rather, the flag was considered a symbol of the Republic of the Philippines, an “emblem” of “national sovereignty, of national unity and cohesion and of freedom and liberty” which was “utterly devoid of any religious significance”, under the system of separation of church and state. Thus, saluting the flag did not involve any

¹⁰² *Ibid.* at 716.

¹⁰³ (1993) 219 S.C.R.A. 256; G.R. No. 95770 (1 March 1993), full text of judgment available online: <http://www.lawphil.net/judjuris/juri1993/apr1993/gr_95770_1993.html> [*Ebralinag*].

¹⁰⁴ Republic Act No. 1265 of 11 July 1955 and Department Order No. 8 of 21 July 1955 of the Department of Education, Culture and Sports made the flag ceremony compulsory in all educational institutions. Under para. 5 of Section 28, Title VI, Chapter 9 of the Administrative Code of 1987 (Executive Order no. 292) it was provided that “Any teacher or student or pupil who refuses to join or participate in the flag ceremony may be dismissed after due investigation.” This reaffirms the ruling in *Gerona v. Secretary of Education et al.* 106 Phil. 2 (1959), where the expulsion of students was upheld. Interestingly, in the Singapore *Napalli* case, the Ministry of Education rule requiring teachers to take the Pledge and sing the anthem during school assembly was affirmed to be a “long-established and well-known” rule that *Napalli* was aware of but its legal basis was not specifically identified: *Napalli* (H.C.), *supra* note 95 at paras. 14-15.

¹⁰⁵ *Gerona v. Secretary of Education*, G.R. No. L-13954 (12 August 1959), available online: <http://www.lawphil.net/judjuris/juri1959/aug1959/gr_1-13954_1959.html> [*Gerona*]. It found the U.S. Supreme Court decision of *Minersville School District v. Gobitis*, 310 U.S. 586 (1940) (where two Jehovah Witness students were expelled for not saluting the flag) more in keeping with the Philippines Constitution than *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943) (which overturned *Gobitis*).

¹⁰⁶ Montemayor J. in *Gerona, ibid.*, described the beliefs of Jehovah’s Witnesses as including “a literal version of Exodus, Chapter 20, verses 4 and 5, which say: “Thou shalt not make unto thee any graven image, or any likeness of anything that is in heaven above, or that is in the earth beneath, or that is in the water under the earth; thou shalt not bow down thyself to them, nor serve them.” They consider that the flag is an “image within this command. For this reason they refuse to salute it.”

¹⁰⁷ 106 Phil. 2 (1959).

religious ceremony but was “an act and profession of love and allegiance and pledge of loyalty to the fatherland which the flag stands for”,¹⁰⁸ which was not inconsistent with religious freedom.

The Supreme Court in *Gerona* assumed that determining whether a ritual was a religious ceremony “must rest with the courts” rather than be left to a religious group or its followers, which would give rise to a multiplicity of interpretations, with confusion ensuing. Montemayor J., delivering the Court’s opinion, said that it found “absolutely nothing” objectionable “even from the point of view of religious belief.” Cruz J. pointed out that the Court in *Gerona* had erroneously assumed that the state had the right “to determine what was religious and what was not and to dictate to the individual what he could and could not worship.” In declaring the flag to be a symbol of the nation rather than a religious image, the Court implied no one had the right to worship it, or not to worship it. Cruz J. underscored that an individual had the right, as a “personal decision” to decide what to worship, be this “a spirit or a person or a beast or a tree (or a flag)”, which the state could not interfere with, provided the externalised expression of this worship did not “offend the public interest.”

Thus, by requiring the petitioners in *Ebralinag* to participate in the flag ceremony, the State “has declared *ex cathedra* that they are not violating the Bible by saluting the flag”. In effectively interpreting the Jehovah’s Witness’ bible for them, the state had made “an unwarranted intrusion into their religious beliefs.” By dint of this reasoning if applied in the Singapore context, Yong C.J. was engaging in theological questions in *Nappalli* by declaring, from an outsider’s perspective, that the pledge lacked religious significance and was not an imposition on religious freedom. The judicial assertion of the view that the flag is not a religious but a neutral, secular symbol expressed the view of the majority which stifles the expression of the belief that saluting the flag might be to some an abridgement of their religious beliefs. Only a religious adherent or “their acknowledged superiors” could derive meaning from sacred text; the State had no competence in this matter. Thus, a secularism model which appreciates that deriving meaning from a divine text is an act of theology, off-limits to the state, is a principle of limited government which nurtures constitutionalism in delimiting the reach of general law.

In sum, the more reticent approach of the Philippines Supreme Court towards the issue of identifying the religious (or non-religious) character of an act, which may simultaneously be considered to be ‘religious’ (insider perspective) and ‘irreligious’ (outsider perspective) is to be preferred. The Supreme Court derived the religious significance of an act, in this case, a flag ceremony, from the perception of the religionist, rather than treating the state’s perception as determinative as the Singapore Court of Appeal did. Judicial modesty is prudent, to disengage judges from theological questions. However, even if an act is characterised as religious, this does not mean religious practice is unfettered or absolute. It falls to the judge to adjudicate the issue of whether a qualification of a liberty is justified, against competing rights and goods.

¹⁰⁸ *Balbuna et al. v. Secretary of Education et al.*, 110 Phil. 150 (1960), which affirmed *Gerona*, *supra* note 105.

IV. JUDGES AND THE SCOPE OF RELIGIOUS FREEDOM: ADJUDICATING THE RIGHTS OF CITIZENS AND CAESAR'S PRIORITIES

Defining 'religion' is only the beginning of the difficult task of adjudicating religious freedom cases, as the court must then determine the constitutional permissibility of state restrictions on rights.

In adjudicating a policy which restricts a constitutional right, the courts are engaged in a balancing process, weighing a right against competing interests which in this context includes constitutional principles of secularism, public order and safety, pluralism and democracy, the rights and freedoms of others and issues pertaining to equality. The Court has to identify the interests of citizens who profess a faith, in discharging their religious obligations to God, which may to them have non-temporal consequences as well as the state's interest in regulating religious expression (as opposed to belief). Having identified these interests, judges then have to assign weights to these interests, through applied presumptions which reflect priorities, to 'balance' these competing interests and preferably, to optimise their enjoyment and realisation.¹⁰⁹ This section explores the balancing process undertaken by Singapore and Philippines courts in relation to religious freedom guarantees, in order to ascertain whether primacy is given to a rights-oriented adjudicatory approach or whether a valorisation of state priorities is evident.

A. *Singapore: Balancing or the Pre-Emptive Prioritisation of State Interests as Trumps?*

Not all rights are entrenched as constitutional rights, which cannot be amended out of existence by ordinary legislation. However, the value of a constitutional liberty may be rendered illusory where an interpretive technique construes restrictive qualifications broadly, such that the exception becomes the norm.

In interpreting the Part IV Fundamental Liberties chapter, Karthigesu J.A. in *Taw Cheng Kong v. PP*¹¹⁰ argued that the Court first had to examine the reason for elevating a right "on a constitutional pedestal" before determining the scope of that right, reading the entire Constitution contextually to avoid distorting or enhancing a "particular right to the perversion of the others."¹¹¹ Furthermore, rights and their derogation clauses should be construed generously and strictly respectively, to ensure individuals receive the "full measure" of liberties.¹¹² This implicitly recognises the asymmetries of power between the state and the individual and the judicial role as guardian of fundamental liberties, rather than champion of state interests or bureaucratic expediency.

The method of adjudication in *Nappalli* was presented as one requiring a "careful balance" between the state interest in the education system and the religious beliefs

¹⁰⁹ See Thio Li-ann, "Protecting Rights" in Thio Li-ann & Kevin YL Tan, eds., *The Evolution of a Revolution: 40 Years of the Singapore Constitution* (New York: Routledge-Cavendish, 2009) 193, esp. at 215-228.

¹¹⁰ *Taw Cheng Kong v. PP* [1998] 1 S.L.R. 943 (H.C.) [*Taw Cheng Kong*].

¹¹¹ *Ibid.* at 955F-G.

¹¹² *Ong Ah Chuan v. PP* [1981] 1 M.L.J. 64 (P.C.).

of the plaintiffs.¹¹³ This is consonant with the accepted idea that fundamental liberties clauses, accompanied by derogation provisions, constitute a ‘constitutional bargain.’¹¹⁴ However, while affirming the special nature of constitutional rights, which could not be contracted out of,¹¹⁵ there was no exposition by either the High Court or Court of Appeal on the importance of religious freedom. The Court of Appeal noted that when article 15 was read as a whole, it was evident that the provision demonstrated that the “paramount concern of the Constitution is a statement of citizen’s rights framed in a wider social context of maintaining unity as a nation.”¹¹⁶ This contextualises and qualifies the right and hints at the primacy attributed to national unity as a constitutional value.

In construing the national pledge and anthem ceremony as a secular activity, the appeal to article 15(1) was aborted, as it did not apply. Thus, no full-blooded constitutional balancing process was embarked upon by the Court of Appeal.¹¹⁷

In contrast, the High Court did examine in some detail the rationale for the state’s interest in regulating education. It considered whether Nappalli’s refusal to comply with the MOE rule requiring teachers to take the National Pledge or sing the National Anthem during school morning assembly, which was also an implied term of the ITE employment contract,¹¹⁸ was a threat to the public interest.

It was within the scope of the plaintiff’s contract of employment as a teacher to serve as a good role model and lead students in the Pledge and Anthem, as a method for promoting citizenship, a legitimate educational objective.¹¹⁹ The MOE rule was considered not to contravene administrative legality by being *Wednesbury* unreasonable.¹²⁰ The validity at public law of the MOE rule was raised in tandem with it being an implied contractual term, at private law. The High Court had argued that the plaintiff’s constitutional rights, including article 15, had to be viewed in light of his employment contract which he entered into willingly with full knowledge that ITE teachers were required to lead students in taking the pledge and singing the anthem at national assembly.¹²¹ Arguments were made to the effect that it may be that an employment contract might limit the constitutional rights of an employee,¹²² though the Court of Appeal considered that constitutional rights could not be contracted out of. A person voluntarily entering into a contract which might prevent him from carrying out his religious beliefs (working on the Sabbath, for example) could not

¹¹³ *Nappalli* (H.C.), *supra* note 95 at para. 53, *per* Tan Lee Meng J.

¹¹⁴ *Lee Kuan Yew v. Jeyaretnam* [1990] 3 M.L.J. 322 at 333C-D, *per* Lai Kew Chai J., who noted that the article 14 free speech clause, which was expressly limited by the law of defamation, was “much like the underlying concepts and constitutional bargain which are expressed by Art 10 of the European Convention on Human Rights.”

¹¹⁵ *Nappalli*, *supra* note 43 at para. 19. Karthigesu J.A. in *Taw Cheng Kong*, *supra* note 110 at 965D-E (H.C.) noted that constitutional rights were “inalienable” rather than “stick and carrot privileges”.

¹¹⁶ *Nappalli*, *ibid.* at para. 26.

¹¹⁷ Although the Court of Appeal did hint there was no need to demonstrate “actual harm” flowing from Nappalli’s refusal to salute the flag, in finding Nappalli failed to carry out his contractual obligations: *Nappalli*, *ibid.* at 576A-B.

¹¹⁸ *Nappalli* (H.C.), *supra* note 95 at para. 46, *per* Tan Lee Meng J.

¹¹⁹ *Ibid.* at paras. 12-13.

¹²⁰ *Ibid.* at para. 15.

¹²¹ *Ibid.* at para. 35.

¹²² *Ibid.* at para. 38, discussing *Gunaratne v. People’s Bank* [1987] L.R.C. 383 (Sri Lanka, Supreme Court).

be said to have his right to profess, practice and propagate his religious belief under article 15 affected,¹²³ as what was preserved was freedom of contract. As Nappalli willingly entered into his employment contract with ITE with full knowledge of the pledge and anthem requirement, he could not claim to have a constitutional right to refuse to comply with this requirement.¹²⁴

Interestingly, appeal was made to constitutional law precedent to underscore the importance, in the “special circumstance” of Singapore, that educational institutions be able to insist that teachers comply with this implied contractual term by leading their students in taking the pledge and anthem. The importance and reasonableness of the MOE rule as a means for promoting national unity amongst Singapore’s multi-racial and multi-cultural population was emphasised by reference to *Chan Hiang Leng Colin v. PP*, a religious liberty case where religious publications were banned in the name of public order. Here, Yong C.J. declared as the non-textual “paramount mandate” of the *Singapore Constitution* the “sovereignty, integrity and unity of Singapore” such that any liberty, including religious beliefs and practices “which tend to run counter to these objectives must be restrained.”¹²⁵ This effectively treats public order considerations as a determinative trump, such that constitutional rights become defeasible interests when the mantra of ‘sovereignty, integrity and unity’ is invoked.

Although the High Court did not consider that article 15 was violated here (or that it was qualified by the plaintiff’s contract of employment), preferring to contractualise or otherwise de-constitutionalise the dispute, it is worth observing that even if Nappalli’s article 15(1) rights were found to be impugned, the broad construction of article 15(4) would justify its curtailment. Thus, Tan Lee Meng J. asserted that the MOE was surely “entitled to take reasonable steps to ensure future generations of Singaporeans understand the importance of preserving the sovereignty, integrity and unity of Singapore.”¹²⁶ As the pledge and anthem ceremony were deemed to fall within the category of preserving national unity, even if this requirement did restrain religious freedom, it would be considered a legitimate restriction. This glosses over the issue of whether there was an actual or substantive threat to article 15(4) public goods, and the likelihood of its occurrence. Something merely has to “tend to”¹²⁷ adversely implicate unity to warrant the protection of the trump of ‘sovereignty, integrity and unity.’ This is more a categorisation rather than genuine balancing approach and affords little protection for fundamental liberties, despite the judicial affirmation of the importance of construing liberties liberally,¹²⁸ as it is the limits to rights which are generously construed, in judicial deference to statist values. If public order is construed very broadly, and indeed inter-changeably with national security, it reflects a culture which is more fearful of the anarchic possibilities of

¹²³ *Nappalli* (H.C.), *supra* note 95 at para. 37.

¹²⁴ *Ibid.*

¹²⁵ *Supra* note 47. For a critique, see Thio Li-ann, “The Secular Trumps the Sacred: Constitutional Issues Arising out of *Colin Chan v. PP*” (1995) *Sing. L. Rev.* 26.

¹²⁶ *Nappalli* (H.C.), *supra* note 95 at para. 46.

¹²⁷ *Colin Chan*, *supra* note 47 at 684F.

¹²⁸ *Nappalli* (H.C.), *supra* note 95 at para. 53.

absolute freedom by individuals, rather than the possibilities of the abuses of public power to oppress individuals.¹²⁹

B. *Philippines: A More Holistic and Proportionate Balancing Approach?*

The Philippines Supreme Court in *Ebralinag* displayed a more rights conscious and rights oriented approach in noting that to the present generation of Filipinos who “cut their teeth on the Bill of Rights” which guaranteed religious freedom and freedom of speech,¹³⁰ the idea of losing one’s job or being expelled from school for refusing to salute a flag was “alien” to their “conscience.” It affirmed the primacy of religious freedom as a right entitled to the “highest priority” and “amplest protection among human rights”, by underscoring its special nature of implicating “the relationship of man to his Creator.”¹³¹ Perhaps this heightened status of religious freedom is one of the reasons why the Court was willing to recognise the rights of conscientious religious objectors, in contrast to the statist approach more associated with the Singapore courts, which can be impatient of individual rights and unwilling to grant exemptions to general law the legislature refuses to afford.

The Philippines approach appreciates that constitutional rights, including the expression of religious freedom rights, are not absolute but nonetheless, the constitutional right is “the rule, not the exception.”¹³² Rights are not one of many interests to be traded-off on the utilitarian calculus, but have special weight, even if not determinative. In affirming the importance of constitutional rights, a more stringent test must be satisfied, compared to Singapore, before rights may be legitimately abridged. The danger to public goods must be both grave and the threat of a certain likelihood, as opposed to mere tendency. The test is that of a “clear and present danger of a substantive evil which the state has a right to protect”.¹³³ The threat may be to community interests such as public safety, public morals, public health or any other legitimate public interest, that the State has a right (and duty) to prevent,¹³⁴ and indeed, the rights and freedoms of others.

A judge may manifest excessive deference to state interests through applying a minimalist standard of review in the form of a lax degree of scrutiny of the reasons offered for limiting rights and how much evidence must be provided to show, *e.g.*, a threat to public order. In *Ebralinag*, the Supreme Court re-examined and rejected

¹²⁹ *Colin Chan*, *supra* note 47 at 668B-D, E-G. Note that the term “prejudicial to national security” seems to be used interchangeably with “public order” and “public interest”, which is alarming as the former refers to trigger factors justifying the adoption of anti-subversion legislation under Part XII of the *Singapore Constitution*, which authorises extensive limits to fundamental liberties. These are extraordinary measures, while to ‘public order’ belong ordinary legal measures.

¹³⁰ Article III, Section 5 of the 1987 Constitution.

¹³¹ Quoting Fernando C.J.’s opinion in *German v. Barangan* (1985) 135 S.C.R.A. 514 at 530-531.

¹³² *Ebralinag v. The Division Superintendent of Schools of Cebu* G.R. No. 95770 (29 Dec 1995), a Resolution on Motion for Reconsideration (1995) 251 S.C.R.A. 569, available online: <http://www.lawphil.net/judjuris/juri1995/dec1995/gr_95770_1995.html> [*Ebralinag* (Motion for Reconsideration)], *per* Kapalan J.

¹³³ *Ibid.*

¹³⁴ Grino-Aquino J. in *Ebralinag*, *supra* note 103, citing Teehankee C.J.’s dissenting opinion in *German v. Barangan*, *supra* note 131 at 517.

the assumptions underlying precedent and state policy, adopting a holistic approach in the adjudicatory process in considering a range of competing interests.

1. *Taking Constitutional Rights Seriously*

From the perspective of the petitioners, their constitutional rights, such as freedom of religion and freedom of speech, were acknowledged and taken seriously in evaluating the impact of expulsion from school of the students. The Court considered that expelling Jehovah Witness students from school would violate other constitutional rights such as their right to accessible education under Section 1, Art XIV. In relation to religious liberty, drawing from case law where exemptions were allowed where “general laws conflict with scruples of conscience”, the assumption was that exemptions should be granted in the absence of a “compelling state interest.”¹³⁵ That is, restrictions on rights had to be strongly justified, reflecting their prioritised status. Mendoza J. found “no compelling reason” to coerce flag salute, as opposed to other obligations such as paying taxes, without which the state’s existence may be endangered and from which no religious exemptions should be granted.¹³⁶

In addition, as Cruz J. noted, saluting a flag was symbolic speech and free speech included “the right to be silent.” To impose the flag salute on the petitioners “is to deny them the right not to speak when their religion bids them to be silent”. He noted that this “coercion of conscience” was out of place in a free society. This analysis was situated against the normative backdrop of a democratic society, which accommodated a diversity of ideas, “even the bizarre and eccentric.” While majority will prevails, the state cannot “regiment thought” by proscribing the assertion of unpopular views which enjoy constitutional protection. As Jackson J. noted in *West Virginia State Board of Education v. Barnette*, the counter-majoritarian purpose of a Bill of Rights was “to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities.”¹³⁷ As Kaplan J. noted in the Resolution on Motion for Reconsideration, to insist that a religious minority conform to majority standards “is seductive to the bureaucratic mindset as a shortcut to patriotism.”¹³⁸

2. *The Rights and Freedoms of Others and the Need for Clear and Present Danger*

From the perspective of the rights of others, an issue in the balancing process in *Ebralinag* was whether the behaviour of the petitioner students in not participating in the flag ceremony was disruptive to others. Respecting the religious beliefs of Jehovah Witness students, however “bizarre” to others, did not entail a right to disrupt patriotic exercises. However, it was pointed out that they stood quietly by in respecting the rights of students who chose to participate in the ceremony. Their non-participation “hardly constitutes a form of religious expression so offensive and

¹³⁵ *Victoriano v. Elizalde Rope Workers Union* (1974) 59 S.C.R.A. 54 at 72-75.

¹³⁶ *Ebralinag* (Motion for Reconsideration), *supra* note 132.

¹³⁷ 319 U.S. 624 (1943).

¹³⁸ *Ebralinag* (Motion for Reconsideration), *supra* note 132.

noxious as to prompt legitimate State intervention”¹³⁹ and the Court could not see “how such conduct may possibly disturb the peace” or otherwise pose a “grave and present danger of a serious evil” to public safety, public morals, public health or any other legitimate public interest that the state has the right and duty to prevent.¹⁴⁰

3. *Evaluating the Legitimate Objective of the State in Flag-Salute Ceremonies for Nurturing Patriotism*

Kapunan J. observed in the Resolution on Motion for Reconsideration¹⁴¹ that the government’s legitimate interest in “molding the young into patriotic and civic spirited citizens is not ‘totally free from a balancing process’ when it intrudes into other fundamental rights,” *e.g.*, free exercise of religion, educational rights and the parental right to bring children up according to their religious beliefs.

In *Gerona v. Secretary of Education*,¹⁴² which *Ebralinag* overturned, the Supreme Court considered that in requiring and regulating the flag salute ceremony through a non-discriminatory state regulation as a facet of public education, the state was discharging its constitutional duty to regulate all educational institutions and teach the duties of citizenship, promoting patriotism. Were exemptions to be granted to Jehovah Witness students, this would “disrupt school discipline” and “demoralize” the majority of other students.

The idea that coerced flag saluting ceremonies worked to promote patriotism came under heavy fire in *Ebralinag*. The Supreme Court rejected the fear canvassed in *Gerona* that the flag ceremony would become a thing of the past, accompanied by waning patriotism. Indeed, it reversed its position in declaring that forcing “through the iron hand of the law” a religious minority to participate in a ceremony which violated their religious beliefs would not conduce to cultivating love for country. Indeed, all Jehovah Witness students wanted was not exemption from public school, where they would continue like others to be exposed to the Filipino Constitution and democratic form of life and to be taught certain values,¹⁴³ but just exemption from the flag ceremony. The Court noted the specific scope of the exemption from the general rule and found it would not “shake up our part of the globe” producing a nation “untaught” in “love of country.”¹⁴⁴

Indeed, Mendoza J. considered that schools were places for “nurturing” ideals and values through persuasion, not compulsion, as “thought control” negates the values the education system seeks to promote.¹⁴⁵ Illegitimate means could not be employed to achieve legitimate, even noble ends, such as coercing flag-salutes to promote

¹³⁹ *Ibid.*

¹⁴⁰ *German v. Barangan*, *supra* note 131 at 517.

¹⁴¹ *Ebralinag* (Motion for Reconsideration), *supra* note 132.

¹⁴² *Supra* note 107.

¹⁴³ Art. XIV, Section 3(1), 1987 Constitution provides that “All educational institutions shall include the study of the Constitution as part of the curricula.” Section 3(2) provides that schools shall:

inculcate patriotism and nationalism, foster love of humanity, respect for human rights, appreciation of the role of national heroes in the historical development of the country, teach the rights and duties of citizenship, strengthen ethical and spiritual values, develop moral character and personal discipline, encourage critical and creative thinking, broaden scientific and technological knowledge, and promote vocational efficiency.

¹⁴⁴ Grino-Aquino J. in *Ebralinag*, *supra* note 103.

¹⁴⁵ *Ebralinag* (Motion for Reconsideration), *supra* note 132.

national loyalty. Judicial requirements of reasonableness and proportionality thus restrain state power which restricts the exercise and enjoyment of constitutional rights.

V. CONCLUDING OBSERVATIONS

James Madison in his 1785 Memorial and Remonstrance against religious taxes observed¹⁴⁶ that the individual has the freedom and duty “to render the Creator such homage and such only, as he believes to be acceptable to him. This duty is precedent both in order of time and degree of obligation, to the claims of Civil Society. Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Government of the Universe.” This theory of two jurisdictions limits the province of civil government. Constitutional religious freedom and legal systems allowing for some degree of legal pluralism provide a sphere of autonomy and free conscience which marks the limits of state power. This is to enable the individual to discharge his religious obligations to his God/gods, while remaining subject to the operation of general secular law and civil obligations owed to Caesar.

Judges, situated between Caesar and God, are charged with delineating the line between the sacred and the secular. This involves determining the meaning of constitutional values of secular democracy and the scope of constitutional rights of religious liberty, including the right of a believer to live according to his religious convictions. In the case of *halal* certification, the Philippines’ stricter conception of the separation of religion and state required that government bodies not be engaged in performing a religious function. However, in the Singapore context, where the *Singapore Constitution* does not contain a non-establishment clause, a less dogmatic and more pragmatic political ideology of secularism does not bar a government statutory body, MUIS, from this function. In the latter case, the division between religion and state is more fluid.

In matters relating to rights, specifically religious freedom rights, judges must determine the scope of their enjoyment and exercise by the believer against competing considerations, to assess whether exemptions or qualifications to general rules should be recognised, which entails considerations of reasonableness and proportionality. To the judge frequently falls the threshold issue of defining religion or a religious requirement, which is difficult given the unsettled quality of definitional criteria. In this respect, there is difficulty keeping the state in the form of the judge out of theology. If a religion is uninvolved, a religious freedom right cannot be invoked and the judicial task of balancing constitutional rights against competing rights and public goods does not proceed. Even where it does, the judicial delimitation of the ‘sacred’ and ‘secular’ spheres will rest on an underlying political philosophy. This translates into assigning presumptive weight to either national unity or liberty interests, adopting lax or onerous tests designed to justify limits on rights, and granting or withholding religious exemptions to general law within democracies pursuant to an ethos of accommodating religious minorities. Thus, in the more rights-oriented

¹⁴⁶ James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785), text available online: <http://religiousfreedom.lib.virginia.edu/sacred/madison_m&r_1785.html> (accessed 5 May 2009).

Philippines setting, more weight was given to free religious conscience and practice than before Singapore courts, which espouse a more communitarian or statist orientation and in so doing, broadly construe 'public order' as a limit on rights.

This sheds light on the particular brand of constitutional secularism extant in any society, whether it shores up the peace architecture for the pacific co-existence of disparate religious and philosophical groups and whether it is able to curb the totalitarian impulses of modern states, by carving zones of freedom to allow individuals to make due rendition to both Caesar and God.