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Multi-layered territorial governance in South East Asia and the protection of religious rights under the constitution

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Abstract (Eng): This article deals with a series of core constitutional issues associated with South East Asian states related to their colonial legacy. The discussion addresses the connection between the recognition and protection of religious rights and the forms of territorial governance adopted as part of three quite distinct constitutions. After briefly considering typologies of devolved government, the study takes as its subject the constitutional provisions relating to sub-national government in the neighbouring South East Asian nations of Malaysia, Indonesia and Thailand. From a comparative perspective the article examines how the respective experience of colonisation and colonial activity in the region contributed to the formation of what is termed a 'multi-layered' constitutional system. Following on from this, the constitutional protection of religious rights and freedoms is viewed through three quite different lenses. The first example, concerning apostacy and religious rights, involves the friction between the Federal Constitution of Malaysia as an Islamic state partly dependent on Syriah law with its common law based legal system. The second example, considers how a form of devolved government, ceding control for domestic governance and religious worship, was introduced in Indonesia to secure a political settlement notwithstanding a previous commitment to a deliberately centralised constitution which recognises religious and citizen rights. The insurgency in the provinces in the extreme South of Thailand is taken as the final example. This conflict raises the question of whether some form of devolution modifying the constitution based on a centralised system of governance might offer a means of accommodating the aspirations of the Muslim population forming a majority in this southern region.

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Introduction

This article considers three distinct approaches to the configuration of sub-national government in SE Asia from a standpoint of comparative constitutional law. The objective is to explore how the constitutional framework for territorial governance and any related laws might be regarded as potential forms of conflict resolution. This rests on the assumption that the legal framework impacts on the protection of rights (in this case mainly religious rights) affecting citizens. In establishing the context for our discussion it will be argued that what might be termed the 'multi-layered' character of all of these SE Asian constitutional and legal systems is essential in order to understand the context in each of our case studies. The region is largely made up of territories that used to be kingdoms in their own right, many of these were eventually subdued by a metropolitan, centralising power, whether based on colonial domination, as in Indonesia,[1] or a predatory expanding kingdom, as in the case of Thailand[2].

Pivotal to this analysis is an awareness that South East Asia (Malaysia, Indonesia, Thailand) have accumulated over generations multi-layered constitutional and legal systems. Each one reflecting an autochthonous history, culture and tradition stretching back centuries before modern nationhood. For the purposes of this discussion the layers here are broadly simplified as comprising cultural and religious origins[3], colonial rule and contemporary constitutional system (which often originated directly from the colonial experience). It will be further argued that as with some geological stratifications the most recent layerings do not simply erase the pre-existing autochthonous elements but that the customary and traditional features remain, sometimes integrated as part of the contemporary constitutional and legal system and sometimes becoming exposed as a result of the unfolding of events. The interaction between recent trends and established cultural and religious norms plays out differently in each case and has led to deep rooted conflicts between religions and ethnic groups.

Constitutional Fundamentals

Each national history has a role in shaping the distinctiveness of sub-national societies and ultimately the state is required to reconcile the full implications of these aspirations through the adaption of its constitutional architecture[4]. This study considers the reasons for adopting particular types of constitutional configuration to address issues of territorial governance. Viewed from a constitutional angle the struggle for recognition and empowerment relating to sub-national government, be it a form of federalism, devolution or regional government, will usually result in a new constitution or demands for changes to the fundamentals of the existing constitution, or the need for specific constitutional amendment. It is axiomatic that guarantees at constitutional level provide the obvious legal means for entrenchment of the constitution.

Before proceeding further it is important to briefly distinguish the terms federalism and devolution as they are used in this essay. In federal systems there is typically a formal division of sovereignty between a separately elected central or federal level of government

[1] A. Harding 'Territorial Autonomy and Conflict Resolution: Three Case-Studies from Southeast Asia' *Sing L Rev* 41, 2024, p. 312.
[2] T. Winichakul *Siam Mapped: A History of the Geo-Body of a Nation*, (University of Hawai'I Press, 1994).
[3] Hindu culture, Sanskrit literature, Adat law, Islamic traditions etc.
[4] S. Tierney *Constitutional Law and National Pluralism* (Oxford University Press, 2004), p. 8.

and individual states. Both legislative competence and policy implementation for specified functions are shared out between the levels of government. The precise combination will vary from system to system but in nearly every case management of the national economy, foreign affairs and defence will fall under the remit of central government[5]. Devolution as it operates in Indonesia or the UK is also based upon a sub-national layer of elected government with core competences such as national economy, foreign affairs and defence remaining with the centre. Resulting from its British colonial legacy Malaysia has a partly asymmetrical form of federalism which affords Sabah and Sarawak favoured status relating to special grants, borrowing and revenue raising[6]. However, federal constitutional systems are more often symmetrical in the sense that they apply across the entire nation while devolution without radically changing the constitution can target specific territories or regions. For instance, in Indonesia applying only to Aceh and Papua (in the UK applying only to Scotland, Wales and NI. Further differences between the two approaches may include: revenue raising capacity, the co-ordination of policy-making and the constitutional and or legal enforcement of control by the federal or central government authorities. As will be apparent in the final section of this article, the form of devolution in place in Northern Ireland has a supra-national dimension incorporating the involvement of the Irish Republic as an independent sovereign state. From the examples of Canada (Quebec), UK (Scotland, Wales and Northern Ireland), Indonesia (Aceh) it is evident that a crucial common denominator in adopting a customised form of either federalism or devolution is that a version of decentralisation is adopted as a tactic to settle internal conflict and/or to prevent secession and the break-up of the nation state. This consideration is especially relevant in cases where the territories in question may have dubious viability as independent states. The constitutional approach to territorial governance is contrasted here with these case studies, as only Malaysia adopted an albeit idiosyncratic federal constitution from its inception, Indonesia was established as a unitary state but has been subject to decentralisation and some devolution, while Thailand remains a highly centralised unitary state, but there has been violent insurgency and particularly as a follow up to the ground breaking 1997 constitution there have been repeated calls for greater regional autonomy and even secession in the extreme south of Thailand bordering Malaysia.

(1) THE FEDERATION OF MALAYSIA AND THE RECOGNITION OF CONFLICTING RELIGIOUS RIGHTS

Malaysia is a nation currently of approximately 35 million inhabitants that has existed as a single unified state since 1963. Glancing back briefly to the history of the territories of the Malay peninsula, it included the Buddhist kingdom of Ligor controlling Kedah. In the fifteenth century the Malacca Sultanate was established. Islam may have been practiced from the 9th century but it began to blossom from the fourteenth century 'In medieval times Islamic law, alighting in Aceh in Northern Sumatra through the agency of Sufism and Arab trade, found fertile tropical soil there, in Malaya, and throughout Indonesia and

[5] There are of course many versions of federalism. For example, the USA model where all 50 states have a framework based on governor, state legislature and state supreme court mirroring federal institutions differs markedly from Germany, Austria, Australia and of course the system in place in Malaysia considered in this article.
[6] A. Harding *The Constitution of Malaysia: A Contextual Analysis* (2nd ed, Hart Publishing, 2022), p. 142.

parts of Thailand and Philippines.'[7] The first ruler of Malacca, Parameswara, converted from Hinduism to Islam, adopting the name of Iskandar Shah. The Portuguese were the first colonial nation in the region from 1511 which included an initial presence in Indonesia. The Malacca Empire developed a code of international shipping law and a civil and commercial code: its law was heavily Islamic but with extensive Hindu and *adat* influences so that the traditional Malay constitutions were customary in nature and largely unwritten[8]. This does not mean that they were primitive or absolutist. To the contrary, they were extremely rich and complex to the point of obscurity[9].

The Legacy of British Colonial Rule

British colonial intervention which began in 1786 with the lease of Penang to the British East India Company launched a new chapter and a successive layer in the history of what has become the modern state of Malaya. Thirty years later the Anglo Dutch Treaty of 1824 by which the British took over Malacca paved the way for further involvement during the nineteenth century. The British encouraged Chinese immigration to boost the economy. In turn, the dynamic Chinese community contributed to increased prosperity. The Kapitan Cina was recognised as the headman of the Chinese community. Initially, there was as little interference by the British as possible with indigenous traditions, but later there was clear assertion of authority. Indirect rule through a resident (officially an advisor but in fact an indirect ruler). The Ruler officially exercised power. A state-wide system operated through state councils which increasingly had their powers restricted by the colonial office in London. The important point to stress is that by the early twentieth century English common law originating from the Charter of Justice for Penang issued in 1807 was, as a matter of policy, the general law, imposed on all communities irrespective of their expectations[10].

Malaysia as a Westminster style federal system?

In its post-colonial form Malaysia was established as a state of considerable diversity which has an asymmetrical federal constitution. As well as Malays the nation includes substantial ethnic and religious minorities: Chinese 30%, Indian 8%, indigenous people make up another 7% of the population. These ethnic groups are spread over all the states. In fact, the origins of this atypical type of federalism were established in the nineteenth century with the treaty of federation 1895 between Selangor, Negri Sembilan, Penang and Perak. The Malay constitution was partly based on preserving traditional Kingship. For example, within each state the Sultan performed a mainly ceremonial role[11] but as rule s/he has enjoyed wide powers of appointment and exercised some judicial functions as a final court of appeal. The version of federalism adopted in Malaysia vests most powers (financial, foreign policy and defence) in the national government. However, in light of the

[7] See K. Tan (Malaysia) *The Oxford International Encyclopedia of Legal History*, (Oxford University Press, 2007), Vol III, p. 137ff.
[8] A. Harding 'Comparative Law and Legal Transplantation in South East Asia: Making Sense of the "Nomic Din"' in D Nelken and J Feest (eds) Adapting Legal Cultures (Hart Publishing, 2001), 205ff.
[9] Harding (2022), p. 6.
[10] See for example, A. Harding 'The Diffusion of Common Law in the Straits Settlements: "The Six Widows' Case" and the Rout of Custom' *Rechtgeschichte Legal History*, Rg32, 2024, 124-58.
[11] The traditional state of Malaya was dominated by chiefs with very little in the way of centralised rules. Undang Undang Melaka plus the Ninety-nine law of Perak have been recognised as examples of traditional texts. They laid down many ceremonial rules, for example, what costumes, jewellery and weapons were to be worn. Derhaka as a concept meant that the Raja was inviolate and demanded obedience.

case study that follows, it is important to note that the federal structure was not adopted as a means of accommodating ethnic and/or religious difference[12].

The Merdeka Constitution, like the constitutions of many other newly constituted states of the period that had previously been governed by Britain, was envisaged as a parliamentary democracy modelled on a Westminster style constitution[13]. While having some important affinities with the Westminster parliamentary system[14] the Malaysian version was partly fashioned as a way of preserving the prevailing system of monarchy[15]. At central government level the Constitution introduces a two chamber Westminster style of parliament comprising a lower house, the Dewan Rakyat of 222 members. This is directly elected using a simple majority system[16] and the PM is appointed and the government is formed from the directly elected house[17]. On the other hand, the Upper House, known as the Dewan Negara, consists of only 70 members and it partly reflects the federal character of the constitution. This is because 26 members are indirectly elected by the State Legislative Assemblies (two from each assembly) with the remaining 44 members appointed by the King (Yang diPertuan Agong) on the advice of the government. An obvious distinction with the Malaysian arrangements compared to the UK is that supremacy lies with the constitution rather than with the will of Parliament. At the same time, pivotal constitutional conventions characteristic of the Westminster model were incorporated, particularly the requirement that the appointment and survival of the government depends on the maintenance of a parliamentary majority following an election. In view of local conditions this constitutional framework has not replicated a comparable tension in political terms between government and opposition. In fact, from the outset as one commentator stresses: '…the party system that emerged remained tethered to the underlying socioeconomic structures. In Brief Malay civil servants and peasants gathered in the UMNO, expressly to protect their "special rights" against Chinese interlopers'[18]. In line with provisions under the constitution elections have been held regularly but with the electoral system loaded in favour of UMNO opposition parties while gaining entry to the Malaysian parliament have been unable to secure the majorities necessary to gain control and form the government[19].

In common with the United Kingdom Malaysia adopted a form of constitutional monarchy. Recognition of a traditional form of monarchy associated with the individual states was incorporated as part of the Constitution[20]. A major problem to resolve was how to reconcile previously diverse territorial entities with the creation of the role of the King (Yang di-Pertuan Agong) as the Supreme Head of the Federation as Head of State (the King is, in effect, head of state, performing constitutional functions such as confirming the appointment of head of government but in general acting on the advice of ministers acc-

[12] A. Harding *Territorial Governance in Southeast Asia*, (Hart Publishing 2025), 69. See also Stanley De Smith *The New Commonwealth and its Constitutions* (Stevens 1964).
[13] Harding (2002), 74ff.
[14] A. Harding, ' " The Westminster Model " Constitution Overseas: Transplantation, Adaption and Development in Commonwealth States' (2004) *Oxford University Commonwealth Law* Journal, 143,
[15] Harding (2022), p5.
[16] Harding, 2022, p. 78.
[17] W. Case *Politics in South East Asia*, (Routledge, 2002), 120ff.
[18] Case p. 103.
[19] Case p. 121.
[20] Malaysian Constitution, Article 32.

ording to the key Westminster convention incorporated into the constitution)[21]. Traditionally, there has been a profound cultural linkage between the states and their rulers, particularly in relation to recognised religious practice. 9 out of the 13 states had a traditional ruler as a Head of State while 4 states had a governor (Yang di-Pertua Negeri). Under the constitution this issue was resolved by granting a 5 year tenure to the King as Supreme Head of the Malaysian federation/state. The allocation of the post as King is based on rotation between the rulers of the states. As previously noted, Malaysia has a relatively strong national government, with the states only granted a limited measure of autonomy, reflecting the powers formerly in the hands of the Sultan/Ruler, but there is some asymmetry in the definition of the rulers of the states and the powers granted to them (for example Sabah and Sarawak with a ruler rather than governor have more powers over their states, but they all function as constitutional monarchs acting on the advice of the executive). From the establishment of the independent state Malays and UMNO although politically dominant were not in a position to ride roughshod over the other groups in society. Despite the electoral predominance of the Malay majority, non-Malays had a significant vote, possessed economic power (citizens of Chinese origin in particular) and needed to be consulted as part of the routine political process[22].

Viewed from the perspective of limited governance, the incorporation of the rule of law founded upon judicial independence was included as an important feature of the Malaysian constitution. The Merdeka Constitution elevated the judiciary to its present constitutional role as an independent branch of the state[23]. Although its origins go much further back, the judicial system is organised on the basis of the British common-law tradition and this was set in place with the passage of the Civil Law Act 1956[24]. High standards of competence and independence were widely recognised with supporting constitutional provisions relating to judicial appointments and limitations on dismissal[25]. The courts have a constitutional jurisdiction but only the Federal Court of Malaysia can resolve issues between the federation and the states or between individual states. Initially, as with other Commonwealth members adopting common law systems, the Judicial Committee of the Privy Council was retained, providing a link with the Commonwealth and its emerging constitutions[26]. This appellate route was ended in 1985 followed by a spell of judicial activism. Indeed, commentators stressed the important role of the courts and of the legal profession in upholding the rule of law and constitutionalism[27]. Important cases included challenges to government ranging from the imposition of emergency powers to the notorious UMNO election case which escalated into an ongoing constitutional crisis between governors and the judges and legal profession. This episode illustrates a genuine tension between government and the courts relevant to our study and it

[21] Harding (2022), 98.
[22] J. Funston 'Malaysia: Development State Challenged', in J. Funston (ed.) *Government and Politics in South East Asia*, (Institute of South East Asian Studies, 2001) p. 166.
[23] Harding (2022), p. 191.
[24] See section 3 which applies English law throughout the Malaysian federation.
[25] Harding (2022), p. 193.
[26] A. Harding *Law, Government and the Constitution in Asia*, (Oxford University Press, 1996), p. 33.
[27] H.P. Lee 'Competing Conceptions of Rule of Law in Malaysia' in R. Peerenboom (ed) *Asian Discourses of Rule of Law*, (Routledge, 2004), p. 235.

lled at the judiciary. In turn, this prompted a co-ordinated fightback by the legal profession[28].

Religious Rights in Malaysia: Trends Towards an Islamic State?

A constant consideration has been the accommodation of the substantial minority communities, mainly of Chinese and Indian origin. There has been and still is limited inter-ethnic socialisation and integration. The case study discussed here illustrates how this aspect emerges as a challenging legal and constitutional issue with the increased profile of Islam and the emergence of fundamentalist forms of Islam in some states. The states under the Ruler as Head of State, rather than the federal government are given responsibility under the constitution for issues relating to Islam. There are four recognised religions in Malaysia. Muslims are obliged to use the Syariah courts which means that there are two parallel legal systems in the country. It is pointed out that 'The last two decades has seen a plethora of legislation intended to harmonise Islamic law across 13 state jurisdictions and one Federal jurisdiction, and improve the position of the Syariah Courts with respect to the civil courts.'[29] By constitutional definition all Malays are Muslim. While at the same time the constitution is also designed to guarantee religious freedom more widely[30]. Within Malaysia there are strict limits on the propagation of Islamic religious doctrine. In particular, as is apparent from Shamala's case, the issue of apostasy raises a number of problems. The role and status of Syariah law is of fundamental importance. Non-Muslims do not have legal standing in the Syariah courts. Muslims are not allowed to leave the faith (apostasy) without going through a special process. As already noted, the rules of syariah law are overseen not at constitutional level but by the Sultans of the states under the terms of the agreement which gave rise to the constitution. The result is that the Sultans remain the ultimate authority of Islamic law in their respective states and the practice of Islam and degrees of orthodoxy varies from state to state[31].

Shamala's Case: Apostacy as a constitutional conundrum?

A Malaysian couple underwent a Hindu marriage in a Hindu Temple registered as a secular marriage. In 2002 the husband of this marriage converted to Islam without telling his wife. He then secretly converted the children. The conversions were registered with the state religious affairs department. Shamala, the wife, moved with the children to another state and filed an *inter partes* application for custody with the secular High Court.[32] The husband meanwhile made an *ex parte* application to the Selangor Syariah court for custody. His wife Shamala and the secular civil court were not informed of the application to the Syariah Court. A custody battle duly commenced between the High Court which had granted interim custody orders in favour of Shamala, and the Syariah Court which awarded custody to the husband (who at this stage refused to return the children). In September 2003 Faisal J in the High Court declared that it had jurisdiction over the case, despite the conversion to Islam. The conversion constituted a ground of divorce for

[28] Described as 'the Lawyers walk for justice'. See Harding (2022), 202ff.
[29] Harding (2022), p. 222.
[30] Article 3 and 11 of the Malaysian Constitution.
[31] A Whiting 'Desecularising Malaysian Law?' in P. Nicolson and S. Biddulph (eds) *Examining Practice, Interrogating Theory: Comparative Legal Studies in Asia*, Martinus Nijhoff, 2008, p. 232ff.
[32] Shamala Sathyaseelan [2004] 2 MLJ 242 (Malaysian case reference); A Whiting 'Desecularising Malaysian Law?' in P. Nicolson and S. Biddulph (eds) *Examining Practice, Interrogating Theory: Comparative Legal Studies in Asia*, Martinus Nijhoff, 2008, p. 232ff.

Shamala. Crucially, there was no Syariah jurisdiction over this civil union, nor was there any jurisdiction over non-Muslims. The court held further that the Syariah court decision was not binding on Shamala, as a non-Muslim, and that the warrant for her arrest for not appearing before the Syariah court was unconstitutional.

The next hearing took place in April 2004. Shamala sought to establish that the unilateral conversion was null and void. The Malaysian legislation stipulated 'parent' or 'guardian' in the singular, allowing the father to argue that one parent alone could exercise the right and that he had done so before the Syariah Court. In contrast, Shamala sought an interpretation consistent with the amended form of the Guardianship of Infants Act 1961 which would have recognised equal rights for each parent in relating to the upbringing of the children. However, in this 2004 judgment the 'singular' provision relating to the conversion was interpreted in line with a Syariah statute which was in defiance of the religious guarantees under the Malaysian Constitution. [Therefore one might expect the constitution to prevail as indicated by the original judgment]. However, it was also held that the Syariah courts were the only courts which could determine the validity of the conversion. On this reading, as Professor Whiting points out, Shamala was left without a remedy. The Syariah court was held to have exclusive jurisdiction to decide the issue. But, this Islamic court had no personal jurisdiction over her as a Hindu. The only possible remedy for Shamala rested with Parliament (enacting a legal change for her personally).

When the matter of family law was next considered by the High Court, the judge found that there was a statutory presumption that children below the age of 7 belonged with the mother, subject to taking account the best interests of the child. In this case the children were now Muslim. The judge therefore had to take account of Islamic law which hardly ever allowed custody to be given to non-Muslim women. In view of the history of this particular marriage he awarded guardianship to both parents, but with daily care and control granted to the mother. The qualification was that she would lose custody, if there were reasonable grounds to believe that she as a non-Muslim had influenced the religious beliefs of these children. The Malaysian Federal Court has since defined the relationship between civil court and Syariah courts as analogous to that between an administrative tribunal and the courts, this is in the sense that the courts can review a decision only for jurisdictional error not for an error in the application of Islamic law[33].

Summing up so far

This individual case exposes an emerging conflict between Islamic law and national law under the constitution. The federal constitution was adopted in Malaysia, in part, to preserve traditional hereditary monarchy/sultanates represented at national and state level, but the trend towards an Islamic Constitution has introduced growing tensions between two different types of law. In turn, this led to far reaching consequences affecting the individual rights of those falling between these two jurisdictions. As part of a multi-layered system Shamala's case illustrates the complexity of having conflicting systems of law and highlights the conflict between two parallel and sometimes incompatible jurisdictions[34].

(2) Indonesia: Aceh Special Regional Autonomy: A Challenge to Unity

[33] Harding (2022), 230.
[34] Harding (2022), 229ff.

In contrast to Malaysia Indonesia when it emerged as a republic in 1945 acquired a constitution which, in its original form, recognised very little regional autonomy despite the fact that it had emerged as an extremely diverse modern state now with 286 million inhabitants spread over a vast area[35]. It will already be apparent that South East Asia is characterised by what might be termed multi-layered societies in terms of their ethnicity and religion which comes to be reflected in their constitutions, legal system and systems of governance. Indonesia includes many Ethnic groups: Javanese (42%), Sundanese (15.4%), Malay (3.5%), Madurese (3.4%), (Bataks 3%) plus 50 more. Also, there are several religious affiliations: 87% Muslim, 9.9% Christian, 1.7% Hindu plus Buddhism and Confucianism. Indonesia has been recognised for the degree of its legal pluralism reflecting its immense geographical spread and extreme diversity, with Adat comprising the practice of traditional customary rights at the level of villages[36].

In this second case study it will be observed that after the collapse of the repressive Soeharto dictatorship political pressure prompted changes in the constitution recognising a broad trend away from centralisation and the introduction of a special form of devolved government for Aceh (and Papua)[37] but we will also discover that the trend towards decentralisation has grave drawbacks relating to rights protection as well as some advantages associated with increased autonomy.

The Colonial Legacy: Separate Legal Universes

As with Malaysia the region's colonial origins stretch back many centuries. The Portuguese were present in this part of SE Asia since 1511. The Muslim principalities in the region enjoyed their so-called 'golden age' in the Sixteenth century[38]. This was an era that combined the increase of Islam with the beginning of colonialism. On the one hand, there were conquests conducted by the emerging indigenous Muslim states. The resulting development in Indonesia of Islamic legal cultures and traditions took place in parallel with the first colonial conquests and the beginning of the gradual process by which European legal traditions were introduced[39]. The precursor of modern Indonesia was the Dutch East Indies which flourished as a colony[40]. It was initially particularly important for the spice trade but then for coffee, tea, cacao, tobacco and rubber. This colonisation occurred in phases, with each establishing different layers. Although the French invasion of Holland in 1795 temporarily interrupted the administration of the Dutch East Indies.

[35] A. Smith 'Indonesia: transforming the Leviathan' in J. Funston (ed) *Government and Politics in South East Asia* (Institute of South East Asian Studies, 2001), 74ff.
[36] C. Thorburn 'Adat law, conflict and reconciliation: the Kei Islands, Southeast Maluku' in T. Lindsey *Indonesia: Law and Society*, (2nd edn, Federation Press, 2008), 121. Adat works as an indigenous knowledge system whose primary function is the preservation of harmony. Man, community, nature and the supernatural are seen as indistinguishable parts of a unitary whole. The function of Adat is to identify and enforce proper behaviour in one's relations, both with other people and with natural phenomena.
[37] A. Harding *Territorial Governance in Southeast Asia*, (Hart Publishing 2025), chapter 9 Regional Autonomy I, Aceh and Papua, 158ff.
[38] See T. Hannigan 'Brief History of Indonesia: Sultans, Spices, and Tsunamis: the Incredible Story of Southeast Asia's Largest Nation' (Tuttle Publishing, 2015).
[39] T. Lindsey and M. Achmad Santosa 'The trajectory of law reform in Indonesia: A short overview of legal systems and change in Indonesia' in T Lindsey (ed) *Indonesia Law and Society* (2nd edn, Federation Press, 2008), 4ff.
[40] F. Borch 'Setting the Stage: The Dutch in the East Indies from 1595 to 1942' in F. Borch (ed) *Military Trials of War Criminals in the Netherlands East Indies 1946-1949* (Oxford University Press, 2017).

In light of the constitutional focus of this paper and the nature of Indonesia's current legal system, it is important to recognise how this diverse colony in terms of its religion, ethnicity and nationality, with its tradition of Adat customary law and mainly Islamic population was governed internally. In the mid nineteenth century the Regerings Reglement of 1854 was introduced as a form of colonial constitution. This approach would be regarded as extremely discriminatory and racist today. From the 1850s it became a settled principle of Dutch colonial legal policy that each racial group should have its own law, applied only to members of that group. This had the effect of creating what amounted to separate legal universes determined by ethnicity (rather than religion). Also displaying certain similarities in their discriminatory impact to the apartheid laws in South Africa[41]. It meant that for Europeans, or persons assimilated to that status, Dutch law applied to a privileged exclusively Dutch Upper Social class. Only this class were eligible for top jobs. For foreign orientals (Arabs, Japanese or Chinese) a separate category also with limited rights. For the so called natives on the basis of what was essentially an ethnic distinction this predominant group in terms of population were made subject to Adat which is a form of customary law)[42]. Dutch education was available to locals in their own schools and universities. But, in sum, the effect of colonisation was to create separate legal universes for different ethnic and also religious groups. The Dutch colony had a form of apartheid which is also related in some respects to the Indian caste system[43].

Independence: (Pancasila) Founding Principles of the Indonesian Constitution

As part of a systematic and aggressive exploitation the local population in the developed centres were mainly employed as a resource to serve their colonial masters[44]. Over time this inferior status led to discontentment within the indigenous population. The Dutch encountered resistance in colonial wars in the nineteenth century and further struggles well into the twentieth century. In tracing the origins of the modern state: 'A strong anti-colonial nationalist movement constructed a core set of symbols and ideas around which the nation and state of Indonesia was eventually created, including Bahasa Indonesia as the national language.'[45] In the mid twentieth century the country was invaded by Japan in 1942 replacing Dutch rule with a repressive spell of occupation. The Dutch returned briefly in 1945 but was no longer in a position to re-assert political authority despite an armed struggle lasting several years. Unity across a single state was the watchword for those leading the struggle against colonial rule and establishing the modern state. In order to achieve independence over such a vast nation it was of pivotal importance in creating the modern state of Indonesia to achieve national unity. Indeed, the leaders of the movement were strongly opposed to a form of independence based on separate states as had been proposed by the Dutch. As in neighbouring Malaysia such an agreement might have formed the basis for establishing a federation of some kind. However, it is important to

[41] H. Klug *The Constitution of South Africa: A Contextual Analysis*, (2nd edn, Hart Publishing 2025), p. 6ff.
[42] N. Maulidya, B. Turisno, S. Badriyah 'History of Legal System and Sources of Law in Force in Indonesia', *International Journal of Law and Political Studies*, 10.32996/ijps.2023/5/2.4.
[43] A. Thiruvengadam *The Constitution of India: A Contextual Analysis* (Hart Publishing 2017), 164ff.
[44] Lindsey and Achmad Santosa (2008), 6.
[45] J. Bertrand 'Indonesia: Special Autonomy for Aceh and Papua' *Forum of Federations, Center for constitutional transitions*, Occasional Paper Series, Number 31 (2019).

stress that modern Indonesia was not founded as an exclusively Islamic state but as a unitary state governed by founding principles.

The Pancasila (5 Foundational Principles)

(1) Ketuhanan Yang Maha Esa (Belief in Almighty God);[46]

(2) Kemanusiaan Yang Adi, dan Beradab (Just and Civilised Humanity)

(3) Persatuan Indonesia (The Unity of Indonesia)

(4) Demokrasi (Guided by Deliberations amongst Representatives)

(5) Keadilan Sosial (Social Justice)

These principles have formed the basis for the Indonesian State but the residues of colonial rule were not eliminated.

The point to stress here is that rather than introducing a new legal system based on Islam, or Adat customary law, Dutch law continued to apply within Indonesia after independence. At the same time, the institutional mechanisms associated with law enforcement including prosecutors, courts and judges remained in place. A significant number of modern Indonesian laws (for example, the *Civil* and *Commercial Codes*), like the structure and operation of the modern Indonesian legal system, are essentially colonial fossils from the period of Dutch rule[47].

Internal Politics under Sukarno/Soeharto

Indonesia did not become a Syariah state under Sukarno (Nationalist leader and first President 1945-67) or Soeharto (President 1968-98) rather the Dutch derived legal and political model of 'Guided Democracy' predominated under the Pancasila 5 foundational principles. An initial period of extreme instability including community uprising was punctuated when Sukarno re-instated the constitution in 1959. Even if not enforced some Human Rights Provisions were included in the amended constitution (1959), incorporating the UN universal declaration of Human Rights[48]. The regime supported by the National Commission of Human Rights plus HR NGOs. For thirty years after that Indonesia experienced an era of authoritarian and highly personalised dictatorial rule under Soeharto. As Fenwick reminds us: 'The hallmarks of the [Soeharto] regime were heavily centralised authority, a comprehensive and highly effective system of corruption, and a degraded and compromised legal system'[49].

Although the subject populations resented its imposition initially, it is remarkable how much Indonesian legal culture adjusted to Dutch law and even embraced it over time. In Indonesia the continuance of Dutch law was favoured over the reconstruction of a legal system based on Islam or *Adat* because the latter two options raised serious problems of reaching consensus on doctrinal questions and contradicted the revolutionary desire to forge a unified modern nation[50]. The fact that these (European derived) laws were already

[46] It was because the Pancasila mandates such a role for the state in matters of religion that the ideological door has remained open for some Muslim groups to continue seeking a more prominent place for Islamic principles in government and law.

[47] T. Lindsey 'When Words Fail: Syariah Law in Indonesia – Revival Reform or Transplantation' in P. Nicolson and S. Biddulph (eds) *Examining Practice, Interrogating Theory: Comparative Legal Studies in Asia*, Martinus Nijhoff, 2008, 196.

[48] H. Juwana 'Human Rights in Indonesia) in R. Peerenboom, C. Petersen, A. Chen (eds) *Human Rights in Asia* (Routledge 2006), 364.

[49] S. Fenwick, 331.

[50] A. Harding 'Comparative Law and Legal Transplantation in South East Asia: Making Sense of the "Nomic Din"' in D. Nelken and J. Feest (eds) *Adapting Legal Cultures* (Hart Publishing, 2001), 202.

in operation was a practical reason for continuing to accept them. The collapse of authoritarian rule in 1998 resulted in a refreshed path to an Indonesian style of democratic state. However, the retention of Dutch law meant that Syariah as such had no formal status, except to the degree permitted by any of the Adat laws which has been a so-called 'relamic law in Indonesia' *(Hooker quoted by Lindsey)*. In other words, in Indonesia the reconciling and merging of Dutch legal institutions with local institutions was achieved without the overt recognition of Islamic law as an independent source of law. This approach contrasts with British-controlled Malaysia, Singapore and Brunei where Islam has always been officially recognised as a source of law in its own right[51].

Decentralisation versus centralisation

Post Soeharto there have been prominent centralising as well as decentralising tendencies which coincided with the trend towards a territorial devolution of powers. Indeed, the People's Consultative Assembly (Majelis Permusyawaratan Rakyat, MPR) were determined to preserve the fundamentals of the existing constitution, and with it, a commitment to a unitary state[52]. Significant reform of the judicial system followed in the Reformasi phase with law 35/1999. This law dismantled control of the judiciary by the bureaucracy by transferring administrative control from the ministry of justice to the Supreme Court. At the same time the introduction of administrative law serves as one example of an absolutely contrary trend away from autonomy as discussed below. In the ***Blasphemy Law Case*** the court distinguished the private right to hold a religion, which is a private right protected by the state, contrasted with the expression of religious belief which might impact on the public interest. It was reasoned that promoting or seeking support for a religion could be limited under a blasphemy law[53].

Not only was the Supreme Court's power of judicial review increased, but the influence of Dutch law was evident in recognising the existence of torts committed by government. Moreover, there has been the introduction of a separate national administrative law jurisdiction. The law on Administrative Justice which was passed in 1991 was not a comprehensive provision, but it introduced the judicial review of administrative action. This reform is potentially a very important step in containing the abuse of power[54]. Further still, the new draft law released in 2007 was designed to consolidate the previous reforms by introducing 20 principles of good administration and setting out the requirements for administrative decisions[55].

Nevertheless the underlying question remained, namely, how could the demands of separatism be reconciled with the strong commitment to unity which underpinned the original independence movement? Notwithstanding its unitary character under its constitution, Indonesia has a system of territorial governance comprising provinces, regencies (kabupaten), municipalities, districts and villages[56]. The Regional Government Laws of 2004

[51] T. Lindsey 'When Words Fail: Syariah Law in Indonesia – Revival Reform or Transplantation' in P. Nicolson and S. Biddulph (eds) *Examining Practice, Interrogating Theory: Comparative Legal Studies in Asia*, (Martinus Nijhoff, 2008), 198.
[52] Bertrand (2019), 7.
[53] S. Butt and T. Lindsey, The Constitution of Indonesia: A Contextual Analysis (Hart Publishing, 2012), 236ff.
[54] Fenwick, S. 'Judicial Review and Administrative Law in Indonesia' in Ginsberg, T and Chen, A *Administrative Law and Governance in Asia: Comparative Perspectives*, (Routledge, 2009), p. 334.
[55] Ibid p. 337.
[56] Bertrand (2019), p. 8.

and 2008 taken in conjunction with the amendment of Article 18 of the 1945 Constitution have transformed the structure[57]. Firstly a principle of 'de-concentration' was established by which each level of government was made responsible for the implementation of policy directives from central government. This measure was not as radical as it might appear as the Ministry of the Interior appointed the heads of regions and municipalities. In consequence, central government policy was mainly rubber stamped. Second, there was a grant of autonomy to the 292 regencies and municipalities rather than to the 26 provinces. This was controversial as the new law tended to bypass the provinces and thereby undermined the authority of provincial governors.

The period of sustained repression under Soeharto was followed by the removal of many of the restrictions which, in effect, prevented the expression of local tradition (including varying degrees of Islamicization) which is often conservative and favours a return to Islamic fundamentals or to Adat[58]. It has given rise to tensions of different levels of intensity between political Islamic movements and the central government as the relaxation of these limits resulted in the enactment of many regulations at local level intended to replace the legal norms from European civil law with Islamic law and other local conservative traditions, often mixing the latter two together. 'The new 'PerDa syariah' now total around 160 and exist in at least 24 of Indonesia's 33 provinces. The revised policy allowed greater scope for asymmetry in the way the powers between the centre and the sub-national units were applied. At the same time 'Under the new centralization laws from 2004, central government retains authority over six key functional areas, including international politics, justice, monetary and fiscal, defence, national security, and religion.'[59]

The legal protection of rights under the constitution needs to be viewed against the emergence of separatist movements from minority groups: the most prominent were the Free Aceh Movement seeking independence and the Free Papua movement[60]. In response, the government introduced emergency laws and a state of emergency was declared. Since then numerous HR violations have been reported[61]. Aceh comprising 5.3 million inhabitants has remained a largely under developed and rural region on the Western tip of Indonesia. It has great diversity in terms of ethnic and language groups, with Acehnese widely spoken. Further, it has maintained its own distinct fundamentalist form of Islam, first adopted by the sultanate from the late sixteenth century. In Aceh (and a few other regions) Islamic traditional law has exerted its strongest influence on local cultures in Indonesia[62]. The claims for greater autonomy within Aceh extended beyond the practice of religion. Despite having little industry Aceh is rich in natural resources, including res-

[57] Butt and Lindsay (2012) p. 158ff.
[58] Adat Law is associated with established local tradition and is mobilized to resist the dispossession of local communities by the state. Adat forms the basis for the entitlement to land. CC court has ruled that Adat forest land is no longer part of the state forest but belongs to the relevant Adat community. See A Bedner and Y Arizona 'Adat in Indonesian Law: A Promise for the Future or a Dead End?' *The Asia Pacific Journal of Anthropology*, Vol 20, 2019, Issue 5, 416-434.
[59] H. Basri and A. Siti Nabiha 'Accountability of Local Government: The Case of Aceh Province, Indonesia' *Asia Pacific Journal of Accounting and Finance*, Vol 3(1) December 2014, 3.
[60] A. Harding *Territorial Governance in Southeast Asia*, (Hart Publishing, 2025), chapter 9.
[61] See e.g. 'Silencing voices, suppressing criticism: The Decline in Indonesia's Civil Liberties, Amnesty Report on Indonesia, 2022.
[62] T. Lindsey 'When Words Fail: Syariah Law in Indonesia – Revival Reform or Transplantation' in P Nicolson and S Biddulph (eds) *Examining Practice, Interrogating Theory: Comparative Legal Studies in Asia*, Martinus Nijhoff, 2008, 206.

erves of oil and gas. The free Aceh political movement coincided with the offshore discovery of gas and oil and resulted in a sustained insurgency 1989-99. Local aspirations in Aceh[63] went beyond increased autonomy with a Free Aceh movement Gerakan Aceh Merdeka (GAM) emerging in the latter part of the twentieth century. The degree of support for the separatists fluctuated, but GAM demanded a referendum and expressed an ultimate aim of achieving secession for Aceh. Progress towards greater autonomy was established under the post Soeharto reformasi amendments to the constitution heralding 'de-concentration'. These special autonomy laws transferred unprecedented levels of power and resources from central government to the regions and municipalities and conferred greater freedom to manage internal affairs. For example, Aceh's provincial government had been allowed in 2002 to retain 80% share of tax revenues from forestry, mining and fisheries; 50% on oil; 40% on gas but subsequently these amounts were progressively reduced.

In the armed conflict dating back decades 10,000 plus individuals were killed, and there were widespread accusations of human rights abuses by the Indonesian military. Agreement was reached for cessation of hostilities in 2002 but no general agreement reached. A settlement was reached years later through negotiations under the Crisis Management Initiative, a form of mediation seeking practical solutions, presided over by former Finnish President Martii Ahtisaari in Helsinki. The negotiations were given impetus by the extreme devastation caused by the Tsunami. Prior to the Tsunami Aceh was a closed military area but foreign troops and relief workers were allowed in to provide aid. The new political mood was prompted by the catastrophic 2004 Boxing Day Tsunami which claimed up to 170,000 lives and destroyed much of Banda Aceh, the capital of the Aceh province. The GAM and other interested parties entered negotiations and softened their line dropping the previous demand for independence. The Helsinki peace agreement resulted in the Law on the Government of Aceh (LGA) 2006 consisting of 210 articles[64]. Indeed, the fact that such an agreement was reached perhaps demonstrates the futility of prolonged armed insurrection based on confrontation with a clear winner and loser, but rather illustrates the importance of reaching a negotiated settlement, in this instance facilitated by Finnish intervention.

Devolution for Aceh

In practice, these new laws have been largely implemented. Further by devolving powers down to the special region of Aceh they have changed the relationship between central government and provincial government. As a special territory the form of devolution (sub-national government) in Aceh consists of an executive body headed by an elected provincial governor as head of the region with an elected legislature and the region is subdivided into 18 regencies and 5 cities. This means that Aceh has an executive and legislature with authority to pass local regulations relating to its devolved competences, approve local revenue and expenditure budgets and conduct investigations etc. The competences falling under the special province include natural resources and comprise a much more generous settlement in financial terms than anywhere else in Indonesia. 70% of oil and

[63] Free Papua Organisation (Organisasi Papua Merdeka, OPM). Some armed rebellion broke out but these movements were heavily repressed.
[64] Butt and Lindsey (2012), p. 182. (Law 11 of 2006).

gas revenues, and 80% from other natural resources remain in the hands of Aceh. Increased autonomy adds up to less central government interference.

As mentioned earlier, Aceh is one of the poorest regions but probably the richest in natural resources. Indonesia, however, has a very poor record of achieving wealth distribution and the system of local government has a reputation for corruption. (Particularly understood as siphoning off funds before they reach their destined purpose by politicians and officials). The limited accountability for the spending of resources at the level of sub-national government arises as an even greater challenge as more revenue is spent at provincial level[65]. Of particular relevance to the focus of this discussion, the Province of Aceh now has greater control over religion, customary law and education. The devolution package tallies with previously contested areas, and Aceh is the only province of Indonesia where the power to regulate religion has been devolved[66]. The full litany of Syariah law dealing with family (syakshiyah), commercial (mu amalah) and criminal law (jinayat) apply and these laws are supported with the institutional back up in the form of the Syariah courts.

Placing legal limits on autonomy?

Surrendering central authority risks undermining the capacity of the federal authority to enforce constitutional norms throughout the nation. It will be apparent that this is a particularly challenging issue for Indonesia with its geographical spread and social diversity. In federal and devolved systems enforcing the boundaries between the central and devolved government is of crucial importance. Under many constitutional systems the constitutional court is responsible for determining the division of powers under the constitution. As part of the devolution arrangements in the UK there is a procedure where law officers are responsible for pre-legislative and post-legislative scrutiny to ensure that the laws enacted by the devolved legislatures remain within competence[67]. In addition, there is a process by which the devolved legislatures are consulted when there is overlap between central government law-making powers and the powers conferred upon the Scottish and Welsh Parliaments and the NI Assembly. This requirement is known as the Sewel Convention and it has been established (e.g. Miller 1) that it is not in fact a veto[68].

With potential conflict between levels of government in mind it is not surprising that the right to veto central laws as applied to Aceh emerged as key issue in negotiations. The GAM succeeded in inserting into an earlier draft Helsinki agreement a provision that laws, executive orders and regulations affecting the province would have to be "taken in consultation with and with the consent of the legislature of Aceh" or "implemented in consultation with and with the consent of the head of the Aceh administration"[69]. Such a provision might have granted Aceh a veto over national laws and regulations affecting the province. In fact, the LGA, in Article 8, waters-down this agreement, requiring merely the "consultation and advice" of the Aceh legislature in respect of laws, and the Governor of the province in respect of administrative measures; as in many other areas, details regardi-

[65] Butt and Lindsey (2012), p. 186.
[66] DPRA (Dewan Perwakilan Rakyat Aceh) Acehnese Perda deals directly with religion.
[67] For example, see the Scotland Act 1998.
[68] P Leyland *The Constitution of the UK: A Contextual Analysis*, (5th edn, Hart Publishing 2026), p. 226.
[69] *Memorandum of Understanding between the Government of the Republic of Indonesia and the Free Aceh Movement*, Helsinki, 15 August 2005, Article 1.1.2.

ng such consultations are to be established by presidential regulations[70]. The central government can also cancel any qanun (local regulation) simply on the ground that it contravenes the public interest, other qanun, or higher laws (LGA, Article 235(2)).'

Assessing the Consequences of Greater Territorial Autonomy

This special status for Aceh granting increased autonomy has defused armed conflict and it largely satisfies the wishes of radical Islam based on a re-assertion of traditional pre-existing religious values. This revised status of Aceh fails to address the full implications and especially the question of the subsequent constitutional and legal protection of religious rights and basic human rights more generally[71]. In consequence, with the adoption of the criminal Qanums there has been a return to corporal punishment for many crimes and the victimisation of the LGBT community by the police[72]. In recent years traditional views and practices have been allowed to re-emerge unchecked. The discrimination against women under the prevailing interpretation of Islam in Aceh has been an extremely controversial element[73]. There has been a trend towards the wider toleration of polygamy even if it is widely considered morally reprehensible. At the same time there is less toleration of mixed interreligious marriages which have become impossible to register[74].

But one should remember that the jurisdiction of the religious courts in Indonesia is generally limited by statute except for some aspects of religious tradition. In Aceh the Mahkamah Syah'iyah is much wider and the recognition and respect for human rights under the constitution has been affected by the adoption of the autonomy law[75].

Professor Lindsey stresses that: 'This [struggle over religious doctrine] is no idle exercise in semantics: the question has come to matter a great deal in contemporary Indonesia. Hundreds, perhaps even thousands, have died [in recent decades] in a range of violent conflicts linked to the question of whether Syariah (popularly understood in Indonesia as norms and rules derived from the Qur'an and Sunna, the scriptures of Islam) should be recognised as the legitimate law of the land for Muslims (who form around 90 per cent of the population), in preference to 'imported' laws derived from the should apply, and to what extent?'[76] In other words, this trend to fundamentalist Islam in Aceh (and elsewhere in Indonesia) may not be compatible with the constitutional commitment to a qualified form of religious freedom. It remains to be seen whether cases arise resulting in the national constitutional court limiting the possible interference with rights which are seemingly protected under the constitution.

(3) Thailand and Islam: Trouble down South

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[70] Aspinall, 2014.
[71] A. Harding *Territorial Governance in Southeast Asia*, (Hart Publishing, 2025), 165.
[72] https://www.hrw.org/news/2016/03/29/human-rights-watch-complaint-rights-lgbt-people-indonesias-aceh-province. See also MV Lee Badgett, A Hasenbush, W Ekapresetta Luhur 'LGBT Exclusion in Indonesia and Its Economic Effects' *The Williams Institution*, UCLA, School of Law, 2017, 5.
[73] Butt and Lindsey (2012), 182ff.
[74] S. Butt 'Polygamy and mixed marriage in Indonesia: Islam and the Marriage Law in the courts' in T. Lindsey *Indonesia: Law and Society*, 2nd edn, Federation Press, 2008, p. 282.
[75] M. Razi and K. Mokhtar 'The Challenges of Shariah Penal Code and Legal Pluralism in Aceh' *Journal Media Hukum*, Vol 27, No 2, December 2020, 193-216.
[76] T. Lindsey 'When Words Fail: Syariah Law in Indonesia – Revival Reform or Transplantation' in P Nicolson and S Biddulph (eds) *Examining Practice, Interrogating Theory: Comparative Legal Studies in Asia*, Martinus Nijhoff, 2008, 196.

Thailand, our final destination, provides a sharply contrasting case within the same region. Here too, in relation to the territorial governance of its Southern provinces, the issue of ethnicity, of religion and of greater regional autonomy, even secession, arises as a possible alternative to a policy which over recent years has been based on repression by force rather than any sustained attempt at achieving a negotiated settlement. To set this discussion in terms of its cultural layering, Thailand, known as Siam until 1939, has since medieval times been a predominantly Buddhist nation (about 95% of today's population). In this respect it is distinct from its predominantly Islamic neighbours, Malaysia and Indonesia, but as will soon be apparent, it has a significant minority Islamic population estimated at about 5% of the total, and a significant proportion of the Islamic population live in three provinces in the extreme South.

Siam (now Thailand) experienced an entirely different historical trajectory as a monarchy operating under its own system of traditional laws (three seals law) which have been steadily codified under European and Japanese influence and with the first of many constitutions adopted in 1932. The fact that the nation was never directly colonised (except by the Japanese during World War II) is an important distinction from neighbouring Malaysia and Indonesia. Viewed retrospectively, it is possible to observe a tension within Siam/Thailand throughout the nineteenth century caused by the imperial ambitions in the region of France and Great Britain. The very survival of Siamese/Thai nationhood was pitched against that of the European imperial nations. The spectre of colonialism confronted the Siamese Chakri dynasty with the signing of the Bowring Treaty and having to suffer its adverse terms. The response of Kings Rama IV (Mongkut 1851-1868) and Rama V (Chulalongkorn 1868-1910) resulted in the establishment of a centralised state and the emulation in many respects of the European imperial powers[77]. Although not colonised Siam was profoundly affected by the colonisation of the British in Malaysia and the French in Indo China (Vietnam and Cambodia). The buy off strategy[78] followed by Thai Kings Rama IV and V and their advisors was to cede territory to the British and French thus realigning Siam's borders. To establish direct control Siam was transformed in a geographical sense from a territory without clearly defined boundaries to a compact state with a definite frontier[79].

To achieve this goal it was not only necessary to identify a geographically defined state with clearly drawn boundaries, but for the survival of Siam and its monarchy, it was essential to demonstrate that the territory was under the control of the ruler[80]. Commissioners backed up by troops were sent to establish direct control and to administer frontier states. In 1902 a Siamese (Thai) naval warship was dispatched to the mouth of the Pattani river to compel Raja Abdul Kadir, the autonomous ruler of Pattani, and the Malay Muslims in

[77] T. Loos *Subject Siam: Family, Law and Colonial Modernity in Thailand* (Cornell University Press, 2006), chapter 1.
[78] "Buy off" in the sense of territory ceded as the price of non-intervention.
[79] T. Winichakul *Siam Mapped: A History of the Geo-Body of a Nation*, (University of Hawai'I Press, 1997), 142. For example, the crisis caused by the French blockade of Bangkok in 1893 might be regarded as a pivotal moment.
[80] P. Leyland 'The Origins of Thailand's Bureaucratic State and the Consolidation of Administrative Justice' in A Harding and M Pongsapan (eds) *Thai Legal History: From Traditional to Modern Law* (Cambridge University Press, 2021), 187ff.

r colonized but the colonial style provincial administration of Lanna in the nineteenth century, which morphed into the Bangkok based Ministry of the Interior in modern Thailand, has been compared to the colonial apparatus of administration established by the British in India and by the French in Indochina[81].

Since 1932 Thailand adopted its first constitution creating a type of constitutional monarchy. This initial charter was the beginning of a recurring pattern of new constitutions followed by military coups and spells of autocratic rule. Thailand divides into provinces and has a layer of municipal governance. Some local government legislation was passed establishing municipalities in 1933 but the ground breaking 1997 constitution provided further impetus by endorsing the importance of decentralisation. The functioning of elected municipal government has been interrupted by the latest phase of military dictatorship[82]. In 2025 municipal elections were held throughout the 76 provinces (with the exception of Bangkok and Pattaya)[83]. A relatively centralised system of governance, part controlled by the military, has remained in place despite the 20 plus constitutions adopted since 1932[84].

Thailand's Southern Insurgency

In Thailand's deep south a violent conflict of varying intensity, with thousands killed and atrocities on both sides, has been simmering on since 2001, occasionally coming to the boil. In the Southern provinces of Yala, Narathiwat, Pattani, a region that shares a border of 600 km with Malaysia, approximately 80% of the combined population of 2.1 million are Muslims[85]. The majority in this region follow a form of Islam called Sufism and speak Malay but the region has never been annexed as part of colonial or modern Malaysia[86]. Although the practice of Islam has been recognised and there is municipal government but no special autonomy has been granted to these provinces[87]. Since January 2024 Thailand experienced a fresh wave of armed insurgency in the south. For example in April 2025 alone there were 57 insurgency attacks by the Barisian Revolusi Nasional (BSN) on Buddhist institutions. Temples and other buildings have been routinely picked out as representing the Thai state's occupation of what the group claim (with no historical foundation) to be Malay Muslim Territory[88].

'Thailand has long sought to manage its religious affairs through, a centralised, top down system that enforces the mainstream orthodoxies of belief and practice. This approach is epitomised by the administration of Buddhism by the Office of PM (non-mainstream suffers harassment).'[89]

[81] C. Baker and P. Phongpaichit *A History of Thailand* (Cambridge University Press, 2005), 54.
[82] A. Harding *Territorial Governance in Southeast Asia*, (Hart Publishing, 2025), 128ff.
[83] P. Chambers 'Thailand's 2025 Municipal Elections: Triumph of Tradition or Transition?' *Fulcrum* 4 June 2025.
[84] A. Harding and R. Leelapatana 'Possibilities for Decentralisation in Thailand: A View from Chiang Mai' *Thai Legal Studies* (2021) Vol 1 / 75-96. It is interesting to note that there have been recent proposals to introduce a significant degree decentralisation in Thailand.
[85] Insurgent groups (Pattani National Liberation Front (BNPP), Pattani United Liberation Organisation (PULO), National Revolutionary Front BRN).
[86] J. Wise *Thailand: History, Politics and the Rule of Law* (Marshall Cavendish, 2019), 175ff.
[87] D. McCargo *Tearing Apart the Land: Islam and Legitimacy in Southern Thailand* (Cornell University Press, 2008) see introduction.
[88] 'Thailand: New Insurgent Attacks on Civilians Despite Pledge' *Human Rights Watch*, May 29 2025. https://www.hrw.org/news/2025/05/29/thailand-new-insurgent-attacks-civilians-despite-pledge.
[89] D. McCargo *Mapping National Anxieties*, 2012.

In comparison to other nations in the region it has been noted that the Thai state has remained remarkably strong and it has effective reach into all provinces and districts, no matter how far they are from Bangkok[90]. After these provinces were recognised as part of Siam by the Anglo-Thai Treaty of 1909 there were attempts in the 1920s to establish a Thai national identity, most obviously by imposing a Thai national curriculum in schools. The strategy was to promote a particular form of Thai nationalism as the main response to Islam in order to curb the dissident tendencies in the South. Following WWII the policy of the military dictatorships that were in power was to resettle and attempt to integrate Buddhists from the North and North East of Thailand[91]. Encouraging substantial numbers of Buddhists to move to the south as part of this strategy introduced additional potential friction between communities[92]. Such a policy was controversial and would have met with even more resistance had there not also been some efforts to placate the local population by the limited recognition of Syariah law. The Thai state sought to make the official chief Imam into a form of government proxy. Islamic matters were dealt with by the Chularajamontri (an official from the Muslim Community appointed by the Thai King with authority to administer Islamic affairs). A Central Islamic Council of Thailand was also appointed by the King to advise on education (Islamic Schools). In these Southern provinces the Muslim population is mainly educated in Muslim schools and Syariah courts with their own judges deal with questions of family law, but there is no sign of any negotiated settlement to extend special status to the region.

The Recent Conflict 2000-2025

As in Aceh (above) and NI (below) the issues extended beyond religion and ethnicity. These three provinces have a legacy of economic deprivation, unemployment, oppression and injustice which is reflected in its internal politics[93]. Elections in the South have frequently demonstrated spectacular falls in support for the government indicating that the political approaches have been largely unsuccessful. The lack of any progress has almost certainly contributed to the radical politicisation of Islam. A sustained period of peaceful co-existence between the communities has been replaced by hostility in part caused insensitive handling of the security situation. For example, Wats (Buddhist Temples were used for military purposes as safe havens to billet troops and park tanks and military vehicles. This policy inflamed sensibilities as it has meant that the Sangha (Thai monkhood) come to be regarded as a manifestation of Thai state[94]. Mutual hostility is reflected in the partisanship voiced by the Thai elite. Faced with recurrent vicious sectarian attacks by insurgency groups members of the Royal family have called on Buddhists in the South not to be driven from their homes, but rather to defend themselves and learn how to shoot[95]. From the perspective of the Muslim majority alienation of the local population through ruthless acts of repression have stained the reputation of the army and of the Thai aut-

[90] A. Harding *Insurgency in the Southern Border Provinces* (Hart Publishing 2025), 141ff.
[91] P. Leyland 'Thailand's Troubled South: Examining the Case for Devolution from a Comparative Perspective' *Australian Journal of Asian Law* 11(1), 1-28.
[92] A. Harding and P. Leyland *The Constitution of Thailand: A Contextual Analysis*, (Hart Publishing, 2011), 145.
[93] Z. Abuza *Conspiracy of Silence: The Insurgency in Southern Thailand* (United States Institute of Peace Press, 2009), 29ff.
[94] Abuza (2009), 172.
[95] M Connors 'Another Country: Reflections on the Politics of Culture and the Muslim South' in J Funston *Thailand's Coup and Problematic Transition* (Silkworm Books, 2009), 112ff.

horities[96]. In particular, the notorious Tak Bai incident in October 2004 (Thai bloody Sunday) detained suspects were bound and forced to lie in the street and then packed into trucks in searing heat to be taken to a detention centre for interrogation. 78 of those subsequently transported in these appalling conditions died of suffocation[97]. A cover up was suspected as no effective action was ever taken against the military commanders or military leadership. Over this period new groups emerged with a radical Islamicist social agenda associated with fundamentalist organisations such as Tabliqhi Jamaat and Wahhabism (prepared for Jihad etc). Salafism and seeking to reach pure Islam not by winning hearts and minds, but by military intervention and the intimidation of the local population. The continuation of atrocities in the south suggest that so called insurgents receive support from local communities.

Commonality with Northern Ireland?

The conflict in the South of Thailand shows no sign of political resolution. Comparative analysis based on Northern Ireland, obviously from a diverse constitutional system with a distinct history and culture, is not cited here to provide a single formulaic answer but the nature of the problem demonstrates striking parallels related to the conflict in Northern Ireland and so does the response to the conflict by the Thai Bangkok authorities over many years[98]. Certain elements incorporated as part of the comprehensive Belfast Agreement of 1998 which facilitated the re-launch of a revised form of devolution could be relevant and even provide the building blocks for a lasting settlement based on increased autonomy for the local community[99]. In NI there is historical enmity and often a stark division between mainly Roman Catholic Nationalists and mainly protestant Unionists communities, coupled with a history of economic decline, unemployment, armed conflict and civil strife related to perceived injustice and discrimination. Over a sustained period of direct rule from the Westminster government which lasted 25 years armed troops were stationed alongside the police force, emergency powers allowed arrest without trial, troops fired on an ostensibly peaceful demonstration resulting the so called Bloody Sunday tragedy, spells of arbitrary internment were sanctioned under new laws, the entry of vehicles into urban areas was regulated to prevent repeated bombings[100]. The ratcheting up of the security presence failed to prevent the continuation of sectarian violence. Rather, measures such as an internment strategy of detainment without trial, Bloody Sunday and restrictions on political free speech[101] had the effect of inflaming hostility towards what was perceived as an alien authority, particularly from within the nationalist community. An eventual ceasefire and end to violence arose out of establishing the conditions for a negotiated settlement involving all the main parties and the government of the Irish Republic. The agreement enacted in the Northern Ireland Act 1998 included radical constitutional and legal changes, including the right to a referendum on a

[96] C. Satha-Anand 'Untying the Gordion Knot: The Difficulty in Solving Southern Violence' in J Funston *Thailand's Coup and Problematic Transition* (Silkworm Books, 2009), 100ff.
[97] See P. Phongpaichit and C Baker *Thaksin* (2nd edn, Silkworm Books, 2009), 242ff; D McCargo *Tearing Apart the Land: Islam and Legitimacy in Southern Thailand* (Cornell University Press, 2008), 107ff.
[98] P. Leyland 'Thailand's Troubled South: Examining the Case for Devolution from a Comparative Perspective' (2009) 11(1) *Australian Journal of Comparative Law* 1.
[99] P. Leyland *The Constitution of the United Kingdom: A Contextual Analysis* (5th edn, Hart Publishing 2026), 223ff.
[100] V. Bogdanor *Devolution in the United Kingdom* (Oxford University Press 1999), 97ff.
[101] See eg *R v Secretary of State for the Home Department, ex p Brind* [1991] 1 AC 696.

united Ireland if favoured by a majority of the population in the North[102]. As in Aceh with the Finnish PM the Belfast Agreement was facilitated by external mediation under the then US President whose charismatic interventions eased the way to a settlement.

Given the parallels with Aceh and with Northern Ireland, not just the long running active insurgency, but relating to communities with distinct religion, language and culture the introduction of a devolved system of government granting substantial autonomy to the territory arises as a possible option. On the assumption that the Thai government was prepared to enter meaningful negotiations with representatives of the local population, there would need to be a specially tailored agreement. Glancing back in history, the Thai southern provinces were ruled by dynasties that paid tribute to Siam's Kings and the territory was later forcibly annexed by Siam[103]. They were never part of Malaysia in its modern or colonial form and there is no sign that Malaysia harbours any territorial claims over this territory. However, in view of the close proximity to Malaysia and the shared traditions of religion and language with the local Thai population there might be scope for Malaysian involvement with involvement as guarantor of any settlement and a negotiated settlement might promote closer links in the region and a spirit of co-operation between Thailand and Malaysia. For instance, the Belfast Agreement resulted in the establishment of the North/South Ministerial Council representing the government of the Republic of Ireland and the government of Northern Ireland at ministerial level was established to develop co-operation on a cross border all-island basis[104]. Moreover, in NI the form of devolution is based upon 'consociational' power sharing[105]. This method of government formation means that, for example, the First Minister and Deputy First Minister, as representatives of the unionist and nationalist communities respectively, are co-equals and required to act jointly while, at the same time, the formation of the remainder of the government is also based on power sharing between the main parties. In NI certain types of legislation and decisions from the Assembly and executive which touch on contested areas require cross-community support[106]. The multi-faceted character of the agreement is integral to it functioning: 'The North/South Ministerial Council and the Northern Ireland Assembly were (and are still) mutually dependent; one cannot successfully function without the other.'[107] The object as set out in the Belfast Agreement was to develop consultation, co-operation and action within the island of Ireland on matters of mutual interest within the competence of the administrations.

Finally, the legacy for the wider community of this prolonged insurgency is arguably another important dimension to be addressed as part of any agreement or settlement. In

[102] Northern Ireland Act 1998, section 1.
[103] Harding (2025), 141.
[104] Northern Ireland Act 1998, section 52.
[105] Members of the Assembly register a designation of identity as nationalist, unionist or other. Elections then take place on a cross community basis under the d'Hondt formula with a distribution of posts from the offices of First Minister and Deputy First minister to further ministerial other appointments. A requirement of parallel consent prevents either unionists or nationalists from forcing through legislation/decisions which require cross community support. See B Dickson 'Devolution in Northern Ireland' in J Jowell and C O'Cineide (eds) *The Changing Constitution*, (9th edn, Oxford, Oxford University Press, 2020).
[106] Northern Ireland Act 1998 section 42(1). 'If 30 members petition the Assembly expressing their concern about a matter which is to be voted on by the Assembly, the vote on that matter shall require cross-community support.'
[107] C. McCrudden 'Northern Ireland and the British Constitution since the Belfast Agreement' in J. Jowell and D. Oliver (eds) *The Changing Constitution* (6th edn, Oxford, Oxford University Press, 2007), 241.

er to deal with past grievances and further discrimination any devolution agreement would almost certainly need to guarantee at an institutional level the protection of rights, particularly minority/religious rights[108]. The Belfast Agreement addressed the controversial question of Human Rights abuses with the long running Saville 'Bloody Sunday' Inquiry[109] and institutionalised rights protection very specifically by establishing the NI Human Rights Commission (NIHRC) and a NI Equality Commission[110]. The NIHRC is placed under a duty to keep under review the adequacy and effectiveness in NI of law and practice relating to the protection of human rights and to advise the Secretary of State and the Executive on measures for the protection of human rights[111]. At the same time, discrimination by public authorities is made unlawful and the NI Equality Commission is placed under a duty to promote equality of opportunity, investigate complaints and ensure compliance with equality schemes applicable to all public authorities[112]. The Equality Commission provides advice to public authorities in NI on equality issues and it monitors the composition of the workforce in terms of the ratio employed from the respective communities.

Conclusion

This discussion demonstrates that each of the nations visited has developed its own constitutional arrangements reflecting its multi-layered history and culture and these nations continue to face the task of accommodating minority religions, sects and ethnicities. Malaysia has a unique form of federal constitution which combined traditional monarchy with a Westminster style executive headed by PM and a common law legal system. Against this background Shamala's case highlighted how the retention of common law under its federal system conflicted with the jurisdiction of Syariah in a nation needing to accommodate a range of ethnicities and religions. The unitary character of Indonesia's constitution reflected the imperative of establishing national unity over a vast and populous nation but it has resulted in some 'deconcentration' and substantial devolution for Aceh granting the region greater autonomy. At the same time the increased autonomy relating to religious practice has raised serious questions relating to human rights protection under the Indonesian constitution within Aceh.

Lastly, Thailand's centralised system of law and administration has struggled to cope with the emergence of radical Islam in its deep south. To date it has resulted in confrontation rather than negotiations towards a more inclusive settlement. Notwithstanding the fact that many forms of political organisation are currently banned in Thailand, the latest Constitution of 2017 tellingly provides that: 'local administration shall be organised in accordance with the principle of self-government according to the will of the people in the locality, as per the procedure and form of local administrative organisations as provided

[108] See P Leyland 'Brexit, the Belfast Agreement and Citizen Rights in Northern Ireland' in V Barbé et C Koumpli (eds) *Brexit, droits et liberté* (Bruylant 2022), 299ff.
[109] Report of the Bloody Sunday Inquiry Rt Hon Lord Saville of Newdigate, 15 June 2010, https://www.gov.uk/government/publications/report-of-the-bloody-sunday-inquiry.
[110] The Belfast Agreement set out rights, safeguards and equality of opportunity provisions. See section 6. https://www.dfa.ie/media/dfa/alldfawebsitemedia/ourrolesandpolicies/northernireland/good-friday-agreement.pdf.
[111] Northern Ireland Act 1998, section 68 and 69.
[112] NIA 1998, schedule 9.

by law.'[113] While this article does not seek to draw in Thailand's wider constitutional and political challenges, it will be apparent that there are constitutional and legal approaches to reaching at least a partial solution to such problems. There have been sporadic negotiations to address Thailand's Southern problem, but as with previous constitutions and governments there is no sign of an openly negotiated settlement involving all the affected players, and perhaps the introduction of a customised form of devolution enjoying sufficient support from the local community.

[113] Section 250, Constitution of Thailand 2017. Relatively recent constitutions of 1997 or 2007 were introduced as forms of liberal democratic constitution.