Roadmaps or roadblocks to reconciling religious law and human rights: Lessons from the ASEAN States

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Abstract: Claims for State recognition of religious law are increasingly made and equally resisted across the globe. Combined with the rise in identity politics and the heightened significance of religious affiliation, these claims can pose significant challenges to human rights protection. Yet, the relationship between religious law and human rights is a complex and multifaceted one and one that cautions against a zero-sum response to these claims. This chapter examines briefly the contours of this relationship and the role of the State in mediating it. It maps out the tentative conceptual framework that is beginning to emerge within the global human rights bodies for reconciling religious law and human rights. At present, this framework is articulated with a high degree of generality. There is a need to move beyond this and assess the challenges, opportunities and risks associated with operationalizing it on the ground. The experience of ASEAN States can provide invaluable insights in this regard. Characterised by a remarkable level of religious and political diversity as well as a range of constitutional arrangements regulating religious law, the insights provided by the experience of these States will have resonance not only within the region but also beyond it.

I. Introduction

The rise of identity politics and the heightened significance of religious beliefs can pose significant challenges for the promotion and protection of human rights. Religious beliefs can lead to contestations about human rights norms both between and within distinct communities. Identity politics, such as those based on religious affiliation, can exert a considerable influence in moulding the political and legal context in which human rights are interpreted and applied. The normative and legal pluralism that religious beliefs and identity politics can engender can impact the protection of rights at all levels; national, regional and global. Against this backdrop and at a time when claims for State recognition of religious laws are increasingly made and equally resisted across the globe, there is a need to explore the potential impact of recognition of such claims on human rights.

Drawing on the practice of the members of the Association of Southeast Asian Nations (ASEAN),[2] this chapter explores the relationship between State recognition of religious law and compliance with international human rights law. It begins by mapping out in general terms the complex and multifaceted relationship that exists between religious law and international human rights law. It then proceeds to focus on the prospects for reconciling these two bodies of law. In doing so, it draws on the tentative conceptual framework for reconciling religious law and international human rights law that is beginning to emerge from

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[2] Namely, Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Viet Nam.

the practice of UN human rights bodies.[3] Currently, this framework is articulated with a high level of generality. There is a need to move beyond this to identify factors that will determine the viability of the framework and how it is operationalized on the ground. The ASEAN States provide an important body of experience to draw upon in this regard given the religious diversity and different patterns of relations between State, religion and human rights that characterise the region. In collating this experience, the chapter draws extensively on the official documentation produced as part of the UN human rights monitoring processes[4] and the important body of research undertaken by the Human Rights Resource Centre on religious freedom within the individual ASEAN States albeit the latter's focus is on religious freedom rather than State recognition of religious law.[5] What emerges from the present analysis is that the experience of ASEAN States can provide valuable insights into the risks, opportunities and challenges associated with operationalizing the tentative UN conceptual framework and with State recognition of religious law more generally. The lessons to be learned from the experience of the ASEAN States are ones that are relevant not only within the region but also for other regions where States are beginning to grapple with similar issues.[6]

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[3]That is, those bodies that exist within the UN Human Rights Treaty Body System and the UN Charter-based System. The UN Human Rights Treaty Body System is concerned with the implementation of the core UN international human rights treaties. These are the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR); the International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR); the International Convention on the Elimination of All Forms of Racial Discrimination (adopted 7 March 1966, entered into force 4 January 1969) 660 UNTS 195; the Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13; the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85; the Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3; the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 3; the Convention on the Rights of Persons with Disabilities (adopted on 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3. The UN Charter-based System is derived from the UN Charter and includes the work of the UN Human Rights Council and the system of Special Procedures.

[4] For example, State reports produced as part of the UN Human Rights Treaty Body System for the Treaty Monitoring Bodies (TMBs), the Concluding Observations and Recommendations of the TMBs, National Reports submitted as part of the Universal Periodic Review (UPR) process, the compilation of information contained in various UN official reports as part of the UPR process, and the Reports of the Working Group on the Universal Periodic Review on individual States.

[5] *Keeping the Faith: A Study of Freedom of Thought, Conscience and Religion in ASEAN* (2015) (hereinafter, *Keeping the Faith*). This report provides invaluable data on religion within the various ASEAN States including the religious composition of its populations, relevant constitutional provisions, legislative provisions, case law on religious freedom and the broader context and impact of recent developments not only on religious freedom but also peace and security within the States and across the region. Like many other primary or secondary sources on religion in the region, there is limited discussion of the status of religious laws and their impact on human rights. The focus instead tends to be on religious freedom, hermeneutics or the broader implications of regulating religion: see, for example, International Humanist Ethical Union (2016), *Freedom of Thought Report*, available at http://freethoughtreport.com/; Musawah (2011) *CEDAW and Muslim Family Laws: In Search of Common Ground*, Malaysia: Musawah; Tey Tsun Hang, 'Excluding Religion from Politics and Enforcing Religious Harmony – Singapore-Style,' Singapore Journal of Legal Studies 118 (2008).

[6] In the United Kingdom, two examples will illustrate the point. One is the de facto operation of Sharia courts in the UK which has attracted considerable controversy and is the subject of a government review. See, for example, S. Botzas, 'Sharia Courts: The Inside Story,' The Independent, 5 December 2015, pp. 1, 8-10. The second concerns intra-religious pluralism and is illustrated by events at a Sikh temple when members of Sikh

II. The relationship between religious law and international human rights law and the role of the State in mediating that relationship

It is useful to begin by examining the relationship between religious law and international human rights law. It is not uncommon to find the relationship portrayed as an inherently incompatible or hostile one.[7] This perhaps is not surprising given the well-documented human rights harm that can be caused by some religious laws. This can include the discriminatory treatment of women, children, Lesbian, Gay, Bisexual, Transgender and Intersex individuals, severe constraints on individual autonomy not least in terms of changing one's religion or adhering to the religion of one's choice, and the imposition of punishments such as floggings, amputations and stoning that defy the international prohibition on torture, inhuman and degrading treatment or punishment.[8] This harm is often a by-product of traditional views of gender relations, family structures or punishments for transgressing community mores. However, it can also reflect more deep-seated beliefs that are not always easy to reconcile with the fundamental principles of international human rights law,[9] notably, that rights derive from one's humanity rather than from divine prescription. Taken as a whole, these considerations might suggest an inherent hostility between international human rights law and religious law.

Youth UK tried to disrupt an inter-faith marriage at the temple. Significantly, a representative from Sikh UK did not criticise these actions but referred to the need to prevent the 'dilution' of identity albeit he did not oppose inter-religious marriages per se: Interview, 'Sunday' programme, BBC Radio, 18th September 2016.

[7] See, for example, the discussion in Lisa Hajjar, *Religion, State Power, and Domestic Violence in Muslim Societies: A Framework for Comparative Analysis*, 29 L. & Soc., Inquiry 1, 16–19 (2004); Amira Mashhour, *Islamic Law and Gender Equality – Could There Be a Common Ground? A Study of Divorce and Polygamy in Sharia Law and Contemporary Legislation in Tunisia and Egypt*, 27 Hum. Rts. Q. 562 (2005).

[8] Within an ASEAN context, see, for example, *Keeping the Faith*, 58, 62-68, 75-76 (concerning aspects of Brunei's Penal Code as well its treatment of women and members of the LGBT community generally; see also, *Report of the Working Group on the Universal Periodic Review: Brunei Darussalam*, 7 July 2014, UN Doc A/HRC/27/11), the *Summary Prepared by the Office of the UNHCHR in accordance with paragraph 15(c) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21: Singapore*, 6 November 2015, UN Doc A/HRC/WG.6/24/SGP/3, paras 4, 33-37, 48, 50 (concerning discrimination on grounds of sexual orientation and gender); *Compilation prepared by the Office of the UNHCHR in accordance with paragraph 15(b) of the annex to Human Rights Council Resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21: Lao People's Democratic Republic, 12 November 2014, UN Doc A/HRC/WG.6/21/LAO/2*, para. 19 (concerning gender discrimination in relation to early marriages and inheritance); *Report of the Working Group on the Universal Periodic Review: Malaysia*, 5 October 2009, UN Doc A/HRC/11/30, paras. 46-48, 34, 89 (concerning LGBT rights, rights of women and children and religious minorities). In relation to experiences outside the region, see, for example, Perry S. Smith, *Silent Witness: Discrimination Against Women in the Pakistani Law of Evidence*, Tul. J. Int'l & Comp. L. 21, 30–39, 48–49 (2003); Mark J. Calaguas, Cristina M. Drost & Edward R. Fluet, *Legal Pluralism and Women's Rights: A Study in Postcolonial Tanzania*, 16 Colum. J. Gender & L. 471, 472, 518, 520, 522, 527–28, 538 (2007); Sue Farran, *Is Legal Pluralism an Obstacle to Human Rights? Considerations from the South Pacific*, 52 J. Legal Pluralism & Unofficial L. 77, 87, 97–99 (2006); *The Human Rights of Middle Eastern and Muslim Women: A Project for the 21st Century*, 26 Hum. Rts. Q. 106, 110 (2004); *Curtis Francis Doebbler v. Sudan*, African Comm'n on Hum. & Peoples' Rights, Comm'n No. 236/2000 (2003).

[9] See, for example, Jerome J. Shestack, The Jurisprudence of Human Rights, in *Human Rights in International Law: Legal and Policy Issues* (Theodor Meron, ed., 1984).

While acknowledging the considerable potential for conflict between religious law and international human rights law, it is open to question whether the relationship should be viewed in such one-dimensional terms. To do so simply encourages a zero-sum approach to the relationship and the risk of a total rejection of or deference to religious law. Above all, it would risk abandoning those whose rights and daily lives are impacted by religious law. Rather than viewing the relationship between religious law and international human rights law in such a singular and uncompromising manner, it may be helpful to start by recognising the dynamic nature of the former[10] and the potential inherent in the latter to accommodate national and regional variations without compromising its fundamental tenets. [11] This, at the very least, opens up the possibility of developing a framework for reconciling these two bodies of law; one that may have the potential to deliver tangible human rights benefits on the ground. While this approach may seem overly optimistic, recent developments in international human rights practice lend some credence to it. Prior to examining these developments, however, one has to consider the role of the State in the relationship.

To the extent that there can be any relationship between religious law and international human rights law, it is one that must be mediated by the State. International human rights law still adheres very much to a State-centred approach[12] and, for the most part, imposes direct legal obligations only on States.[13] To the extent that it can impact religious law, it does so primarily via the State and specifically through the concept of State responsibility. It is well-established in international law that a State can be held responsible for any human rights harm caused by religious law in certain instances.[14] One is where the State recognises religious laws or religious courts within its legal system.[15] This will occur, for example, when the State makes the validity of national law conditional on its compatibility with religious

[10] See also, in a similar vein, Calaguas, n 8, at 534; Robin Perry, *Balancing Rights or Building Rights? Reconciling the Right to Use Customary Systems of Law with Competing Human Rights in Pursuit of Indigenous Sovereignty*, 24 Harv. Hum. Rts. J. 71, 77-79 (2011).

[11] On the context sensitive interpretation of human rights treaties, see, for example, Committee on the Elimination of Racial Discrimination, *General Recommendation No. 32*, 24 September 2009, UN Doc CERD/C/GC/32, para. 5. On its application in a specific case, see, for example, the recognition by the CEDAW committee that the pluralistic nature of Singaporean society and its history call for sensitivity to the cultural and religious values of different communities: UN Doc. A/56/38(SUPP) (2001).

[12] Notwithstanding some recent developments concerning the responsibility of non-state actors for human rights harm. See, for example, John Ruggie, *Protect, Respect, and Remedy: A Framework for Business and Human Rights: Rep. of the Special Rep. of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, UN Doc. A/HRC*/8/5 (Apr. 7, 2008).

[13] Although a very small number of international human rights treaties now allow regional intergovernmental organizations to become parties. See, for example, Convention on the Rights of Persons with Disabilities, art. 44, Dec. 13, 2006, 2515 U.N.T.S. 3. The European Union ratified the Convention on Dec. 23, 2010. *See* http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg no=IV-15&chapter=4&lang=en.

[14] *See* International Law Commission, *Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries* arts 4, 5 (2001), *available at* http://legal.un.org/ilc/texts/instruments/english/commentaries/9 6 2001.pdf.International Law Commission, Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries arts 4, 5, 9 (2001), *available at* http://legal.un.org/ilc/texts/instruments/english/commentaries/9.6.2001.pdf. Articles 4 and 5 are regarded as codifying customary international law and binding on all States.

[15] State responsibility in these circumstances may be due to (a) the adoption of religious laws by organs of the State or by entities exercising elements of governmental authority while exercising that authority, or (2) the status of the religious courts as organs of the state or as exercising elements of governmental authority.

law,[16] transposes religious law into statute law,[17] grants autonomy to members of religious communities to regulate personal status matters in line with their religious laws[18] or permits the operation of religious courts within its jurisdiction.[19] The second is where the State fails to discharge its duty to protect human rights against interferences by non-state entities such as religious bodies operating *de facto* within its territory.[20] Once State responsibility is established, the State can be held accountable for any human rights harm caused by religious law and can be required to undertake a range of measures to remedy the violation. These measures can require the State to abolish or reform certain religious laws or the operation of religious courts. In some instances, it may even require the State to recognise religious laws especially where they intersect with the customary laws of indigenous peoples.[21] It demonstrates how the concept of State responsibility operates as a gateway for an interesting dynamic to emerge between international human rights law and religious law.

Admittedly, the State may try to restrict this gateway by adopting certain strategies. One is to enter a reservation to a human rights treaty to limit its effect. To be valid, the reservation must be compatible with the object and purpose of the treaty.[22] Several States, including Brunei, Singapore and Malaysia, have entered reservations to international human rights treaties to the effect that the treaty or certain provisions of the treaty will apply only to the extent that they are compatible with religious law. This strategy is a controversial one and States are subject to sustained international pressure to withdraw these reservations.[23] A second strategy is to claim that the individual concerned waived her human rights, for example, by submitting voluntarily to the jurisdiction of religious courts notwithstanding that

[16] See, for example, Sharia Guarantee Clauses. On such clauses, see, Clark B Lombardi, 'Designing Islamic constitutions: Past trends and options for a democratic future' (2013) 11 International Journal of Constitutional Law 615.
[17] See, for example, Brunei's Penal Code 2013: *Keeping the Faith*, 58-68.
[18] See, for example, the position in the Philippines and Singapore: *Keeping the Faith*, 398, 387-8, 420.
[19] See, for example, the position in the Philippines, Singapore, Brunei, Indonesia, Malaysia: *Keeping the Faith*, 387-8, 420, 57, 141, 290.
[20] Under general international law, State responsibility can arise due to the due diligence principle. Aside from this principle, IHRL imposes obligations on the State not only to respect human rights but also to protect these rights against interferences by private individuals and organisations: see, for example, the approach adopted by the U.N. Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination Against Women*, U.N. Doc. CEDAW/C/GC/28 (2010). The difficulty is that the extent of the state's positive obligations to protect human rights is far from clear. According to the international jurisprudence, the scope of these positive obligations is determined in the light of all the circumstances of the case and, in no case, can they result in the imposition of an impossible or disproportionate burden on the state: See, for example, *Osman v. United Kingdom*, 29 Eur. H.R. Rep. 245, para. 116 (2000); *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, Inter-Am. Ct. H.R. ¶ 155 (Mar. 29, 2006).
[21] See further, Helen Quane, 'International Human Rights Law as a Catalyst for the Recognition and Evolution of Non-State Law' in Michael A. Helfand (Ed.), *Negotiating State and Non-State Law: The Challenges of Global and Local Legal Pluralism* (Cambridge University Press, 2015).
[22] See, Vienna Convention on the Law of Treaties art. 19(c), 1155 U.N.T.S. 331 (adopted May 22, 1969, entered into force Jan. 27, 1980).
[23] See, for example, the objections to the reservations entered by Brunei to the Convention on the Elimination of All Forms of Discrimination Against Women by Austria, Belgium, Canada, Czech Republic, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Spain, Sweden, United Kingdom: see, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&clang=_en#EndDec.

these courts may apply rules that discriminate on grounds of gender, sexual orientation or religious belief. Admittedly, this strategy can only be deployed where there is a choice of court, otherwise the possibility of waiver does not arise. The question of whether it is even possible to waive one's human rights has arisen within the European human rights system where the jurisprudence suggests that it is possible to waive the *exercise* of a human right but not the right itself since by their very nature human rights are inalienable. Even then, the waiver is subject to certain conditions, namely, it must (a) be 'permissible',[24] (b) not be contrary to any important public interest,[25] (c) be established in an 'unequivocal manner' with the onus on the state to establish its existence,[26] and (d) be consented to by the individual in a very real and genuine sense.[27] It follows that the State cannot be complacent even where the individual seemingly waives the exercise of her human rights as the waiver may not be a permissible one and the State may still be accountable for any ensuing human rights harm.

A third strategy to restrict the 'gateway' is for the State to justify the restriction on the human right, effectively denying any human rights violation, and thereby limiting the impact of international human rights law on religious law. Most human rights are qualified rights and, as such, they can be restricted provided the State can demonstrate that the restriction (a) is prescribed by law, (b) pursues a legitimate objective, (c) is necessary to achieve that objective, and (d) is not discriminatory.[28] Further, one has to bear in mind that a restriction is only discriminatory if the State treats persons in analogous positions differently without objective and reasonable justification or when it fails 'to treat differently persons whose positions are significantly different' without objective and reasonable justification.[29] The State is often accorded a certain margin of appreciation in assessing whether a restriction is justified, at least at the regional level.[30] It follows that while there are some absolutes in international human rights law, there is also considerable potential for it to accommodate competing rights and interests and to adapt to local conditions. This must be factored in to any consideration of its relationship with religious law.

What emerges from this very brief overview is that there is some basis for a relationship between international human rights law and religious law albeit it is an indirect one with the State acting as intermediary. Irrespective of its willingness to do so, the concept of State responsibility casts the State in the role of mediating the relationship between the two bodies of law. Depending on the range of obligations undertaken by the State, international human

[24] See, for example, *Thompson v. United Kingdom*, 40 Eur. H.R. Rep. 11, para. 43 (2005).
[25] See, for example, *Ozerov v. Russia*, App. No. 64962/01, para. 57 (Eur. Ct. H.R., May 18, 2010).
[26] See, for example, *Colozza v. Italy*, 7 Eur. H.R. Rep. 516, para. 28 (1985).
[27] See, for example, *Deweer v. Belgium*, 2 Eur. H.R. Rep. 439, paras. 49–51, 54 (1980); *Pfeifer and Plankl v. Austria*, 14 Eur. H.R. Rep. 692, para. 39 (1992).
[28] See, for example, *Case of YATAMA v Nicaragua* Inter-American Court of Human Rights (23 June 2005) para. 206.
[29] See, for example, UN Human Rights Committee, *General Comment No. 18* in *Note by the Secretariat, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies*, UN Doc. HRI/GEN/1/Rev.7 (2004).
[30] This is the case particularly under the European Convention on Human Rights where the European Court of Human Rights takes the view that 'by reason of their direct and continuous contact with the vital forces of their countries, the national authorities are in principle better placed than an international court to evaluate local needs and conditions:' *Frette v France*, Application No. 36515/97, Judgment, 26 February 2002, para. 41.

rights law may require the State to recognize, restrict, abolish or instigate reform of particular religious laws. The extent to which it actually does so will depend on several factors. One is the scope of its international human rights obligations. The greater the number of human rights obligations undertaken by the State, the greater the prospects for the relationship between international human rights law and religious law taking hold. One of the interesting by-products of the UN Universal Periodic Review (UPR) process in recent years is the considerable expansion in the number of ratifications of human rights treaties by States.[31] If this continues, it suggests that the potential for international human rights law to influence religious law will increase rather than decrease in the coming years. Of course, much will depend on whether a State is prepared to comply with its international obligations in good faith. The State may simply ignore its obligations and refuse to engage with the international human rights bodies. If it does, the impact of international human rights law on religious law will be minimal. While it is important to appreciate the shortcomings of international human rights law in this respect, one should not discount completely its potential efficacy even if tangible results are not delivered in the short term but only materialise in the mid to long term.[32] When analysing the relationship between international human rights law and religious law, it is useful to recognise this time component and to acknowledge that what we are witnessing are the very early stages in the development of this relationship.

III. A tentative conceptual framework for reconciling religious law and international human rights law

A review of international practice demonstrates not only the very real tensions that can exist between international human rights law and religious law but also what appears to be a tentative conceptual framework for developing a more constructive relationship between them. This is apparent from a review of international practice within the UN Human Rights Treaty Body system although it can also be seen within the UN Charter-based System and several regional human rights systems. There are several key strands to this framework. The starting point is that State recognition of religious law is not an integral or necessary component of the right to freedom of religion or the right to respect for one's religious or ethnic identity.[33] At the same time, it seems that there is no *automatic* bar on States recognising religious law.[34] This is consistent with the principle that international human

[31] See, for example, Navanethem Pillay, Report by the U.N. High Commissioner for Human Rights, *Strengthening the United Nations Human Rights Treaty Body System* (2012), http://www2.ohchr.org/english/bodies/HRTD/docs/HCReportTBStrengthening.pdf. According to this report, the six core international human rights treaties in force in 2000 had attracted 927 ratifications. By 2012, this total had increased by more than 50 percent to 1,586 ratifications.

[32] See, for example, Philip Alston, *Beyond "Them" and "Us": Putting Treaty Body Reform into Perspective,in* The Future of U.N. Human Rights Treaty Monitoring (Philip Alston & James Crawford eds., 2000).

[33] See, for example, the Human Rights Committee (HRC), *'General Comment No 23'* (8 April 1994) UN Doc. CCPR/C/21/Rev.1/Add.5, para 6.2; HRC, 'General Comment No 22' (30 July 1993) UN Doc. CCPR/C/21/Rev.1/Add.4.

[34] See, for example, the UPR of Brunei where some States challenged the recognition of certain religious laws within the Penal Code 2013 but not the fact that Brunei could recognise religious law per se.

rights law does not dictate how a State organizes its domestic legal system.[35] Its task is simply to ensure that whatever system is adopted is compatible with the State's international human rights obligations.

At a practical level, this means that the UN Human Rights Treaty Monitoring Bodies (TMBs) focus less on the existence of religious courts and more on ensuring that these courts operate in a manner that respects human rights. In relation to religious law, the TMBs tend to focus on specific laws that cause human rights harm rather than the recognition of religious law per se.[36] For example, they consistently call on States to eliminate laws permitting polygamy on the ground that they violate the principle of equality in marriage and family relations under international human rights law.[37] It is important to stress, however, that they do not require the wholesale abolition of religious law or religious courts. The TMBs adopt a more calibrated approach, distinguishing between those laws and courts that are incompatible with human rights and those that are compatible or, at least, can be *rendered compatible* with international human rights law.

The second element of the conceptual framework is the belief that religious law has the capacity to evolve in line with international standards.[38] Attempts to portray religious law as unchanging and incapable of reform are consistently challenged and rejected.[39] Attention focuses instead on encouraging a more flexible interpretation of these laws and a sharing of best practice. For example, TMBs have called on States to 'study reforms in other countries with similar legal traditions with a view to reviewing and reforming personal laws' so that they conform to their treaty obligations.[40] Reference has also been made, for example, to the

[35] See, further, Helen Quane, 'Legal Pluralism and International Human Rights Law: Inherently Incompatible, Mutually Reinforcing or Something in Between? 33 Oxford Journal of Legal Studies 675, 696 (2013).
[36] See, for example, Committee on the Elimination of Discrimination against Women (CEDAW Committee), *General recommendation on article 16 of the Convention on the Elimination of All Forms of Discrimination against Women (Economic consequences of marriage, family relations and their dissolution)*, 30 October 2013, UN doc CEDAW/C/GC/29, paras. 27, 33, 53; the recommendation of the Committee Against Torture to Dijbouti concerning the abolition of corporal punishment: UN Doc CAT/C/DJI/CO/1 (2011); the recommendation of the Committee on the Rights of the Child to Nigeria to abolish corporal punishment: UN Doc CRC/C/NGA/CO/3-4 (2010). This approach is also echoed at the regional level. See, for example, *Curtis Francis Doebbler v Sudan* African Commission on Human and Peoples' Rights, Comm no 236/2000 (2003); *Case of the Saramaka People v Suriname* Inter-American Court of Human Rights (28 November 2007) para 86.
[37] See, for example, the recommendations of CEDAW Committee to Kenya, Oman, Uganda, Myanmar, Ghana, South Africa, Tajikstan, and Madagascar: UN Docs CEDAW/C/Ken/CO/6 (2007); CEDAW/C/OMN/CO/1 (2011); CEDAW/C/UGA/CO/7 (2010); CEDAW/C/MMR/CO/3 (2008); CEDAW/C/GHA/CO/5 (2006); CEDAW/C/ZAF/CO/4 (2011); CEDAW/C/TJK/CO/3 (2007); CEDAW/C/MDG/CO/5 (2008); the recommendation of the Human Rights Committee to Gabon: UN Doc CCPR/CO/70/GAB (2000). See also, 'General Comment No 28' (29 March 2000) UN Doc CCPR/C/21/Rev.1/Add.10, para 24; and, more generally, CEDAW, 'General Recommendation 21' in 'Note by the Secretariat, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies' (2004) UN Doc HRI/GEN/1/Rev.7.
[38] See, e.g., CEDAW Committee's Recommendations to Morocco, Singapore, and Kuwait: UN Docs. A/52/38/Rev.1 (Supp.) para. 71 (1997); CEDAW/C/SGP/CO/4 (2011); CEDAW/C/KWT/CO/3–4 (2011). Although the European Court of Human Rights at times appears to subscribe to a view of religious law as 'static law' specifically in relation to Sharia law: see, *Refah Partisi (The Welfare Party) v Turkey* (2002) 35 EHRR 3, para. 70.
[39] See, for example, CEDAW Committee's Recommendations to Israel and Niger: U.N. Docs. CEDAW/C/ISR/CO/3 (2005); CEDAW/C/NER/CO/2 (2007).
[40] See, CEDAW Committee's Recommendations to Singapore: U.N. Doc. A/56/38(Supp.) para. 74 (2001).

existence of a 'comparative jurisprudence seeking to interpret Islamic law in harmony with international human rights standards'[41] and to a State's 'gradual, greater flexibility in the interpretation of Sharia.'[42] All these recommendations and observations demonstrate a firm belief in the capacity of religious law to develop in line with international human rights standards.

These recommendations and observations also demonstrate the potential significance of developments at the *national* level. The way in which religious laws are interpreted and applied in one State may be drawn upon by other States for guidance on how to reconcile recognition of religious law with international human rights law. These developments at the national level merit further study given their capacity to contribute to an *international* consensus on how best to reconcile religious law and international human rights law. They can help international human rights law to move beyond debates about cultural relativism and assist with the more effective protection of human rights on the ground where religious laws continue to exert a considerable influence on the day to day lives of a sizeable portion of the world's population.[43]

The third element of the conceptual framework is the need for States to harmonize statutory and religious law with international human rights law.[44] TMBs have called on States to undertake a 'comprehensive review process'[45] of all laws, including religious laws, to ensure that they comply with their international human rights obligations.[46] Where there is a conflict

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See also its Recommendations to Kuwait, Oman, Malaysia, Sri Lanka, Jordan, and Djibouti: U.N. Docs. CEDAW/C/KWT/CO/3–4 (2011); CEDAW/C/OMN/CO/1 (2011); CEDAW/C/MYS/CO/2 (2006); A/57/38 (Supp.) (2002); CEDAW/C/JOR/CO/5 (2012); CEDAW/C/DJI/CO/1–3 (2011).

[41] See, for example, CEDAW Committee's Recommendations to Maldives: U.N. Doc. A/56/38 (Supp.) para. 141 (2001).

[42] See, for example, CEDAW Committee's Recommendations to United Arab Emirates and Singapore: U.N. Docs. CEDAW/C/ARE/CO/1 (2010); A/56/38 (Supp.) para. 74 (2001); CEDAW/C/SGP/CO/4 (2011).

[43] See, for example, International Council on Human Rights Policy, *When Legal Worlds Overlap: Human Rights, State and Non-State Law* (2009) 43-59 (ICHRP Report).

[44] See, for example, CEDAW Committee's Recommendations to Niger, Kenya, Myanmar, Ghana, Madagascar, Zambia, Tanzania, Uganda, and Malaysia: U.N. Docs CEDAW/C/NER/CO/2 (2007); CEDAW/C/KEN/CO/6 (2007); CEDAW/C/MMR/CO/3 (2008); CEDAW/C/GHA/CO/5 (2006); CEDAW/C/MDG/CO/5 (2008); CEDAW/C/ZMB/CO/5–6 (2011); CEDAW/C/TZA/CO/6 (2009); CEDAW/C/UGA/CO/7 (2010); CEDAW/C/MYS/CO/2 (2006).

[45] See, for example, CEDAW Committee's Recommendations to Chad: U.N. Doc. CEDAW/C/TCD/CO/1–4 (2011). See also its Recommendations to Niger, Botswana, and Zimbabwe: U.N. Docs. CEDAW/C/NER/CO/2 (2007); CEDAW/C/BOT/CO/3 (2010); CEDAW/C/ZWE/CO/2–5 (2012).

[46] See, for example, the recommendations concerning the right to gender equality in marriage and family relations and the right of women to equality with men before the law that were made by the CEDAW Committee to Kenya, Niger, Papua New Guinea, Liberia, Cameroon, Zambia, Tanzania, Uganda, Chad, and Myanmar: UN Docs CEDAW/C/Ken/CO/6 (2007); CEDAW/C/NER/CO/2 (2007); CEDAW/C/PNG/CO/3 (2010); CEDAW/C/LBR/CO/6 (2009); CEDAW/C/CMR/CO/3 (2009); CEDAW/C/ZMB/CO/5-6 (2011); CEDAW/C/TZA/CO/6 (2009); CEDAW/C/UGA/CO/7 (2010); CEDAW/C/TCD/CO/1-4 (2011); CEDAW/C/MMR/CO/3 (2008); the recommendation of the HRC to Gabon: UN Doc. CCPR/CO/70/GAB (2000). See also the recommendations concerning the need to ensure respect for the principle of the best interests of the child that were made by the Committee on the Rights of the Child to Malawi, Zambia, Mozambique, Gabon, Botswana, Lesotho, Gambia, Bolivia, Sri Lanka, Madagascar, Kiribati, Palau, and Nigeria: UN Docs CRC/C/15/ADD.174 (2002); CRC/C/15/ADD.206 (2003); CRC/C/15/ADD.172 (2002); CRC/C/15/ADD.171 (2002); CRC/C/15/ADD.242 (2004); CRC/C/15/ADD.147 (2001); CRC/C/15/ADD.165

between formal legal provisions that are rights compliant and religious law, States have been called upon to give priority to the formal provisions[47] and to make religious leaders and the wider community aware of this position.[48] Consideration must also be given to the position of minorities within the State. The general principle is that minorities should be governed by secular law rather than religious law where the latter conforms only to the religious beliefs of the majority of the population. Where religious courts exist to interpret and apply religious law, States have been called upon regulate them to ensure that they comply with international human rights standards[49]. States have been asked to 'take steps' to ensure that religious laws are interpreted and applied consistently with fundamental human rights.[50] Procedurally, the Human Rights Committee has asserted that religious courts can only hand down binding decisions recognised by the State where (a) the proceedings are limited to minor civil and criminal matters, (b) meet the basic requirements of a fair trial, (c) their judgments are validated by State courts in light of the guarantees set out in international human rights law and (d) can be challenged by the parties concerned in a procedure meeting fair trial requirements.[51] General international practice suggests that the procedure of religious courts should be 'brought into line with statutory courts,' that a choice of court should be introduced where none exists[52] and that individuals should be made aware that they can request the transfer of a case to a state court.[53] A key feature of all these recommendations is not simply that religious laws and courts should be compatible with international human rights standards but that States should be *proactive* in ensuring this compatibility.

A further element of the framework is that the TMBs acknowledge the need for the population to support any reform of existing laws (religious or secular) concerning human

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(2001); CRC/C/BOL/CO/4 (2009); CRC/C/LKA/CO/3-4 (2010); CRC/C/15/ADD.218 (2003); CRC/C/KIR/CO/1 (2006); CRC/C/15/ADD.149 (2001); CRC/C/NGA/CO/3-4 (2010).

[47] See, the recommendations of the CRC to New Zealand and Equatorial Guinea: UN Docs CRC/C/NZL/CO/3-4 (2011); CRC/C/15/ADD.144 (2001); CRC/C/15/ADD.245 (2004); the recommendation of CEDAW to Zambia, Mozambique, Chad and Tanzania: UN Docs CEDAW/C/ZMB/CO/5-6 (2011); CEDAW/C/MOZ/CO/2 (2007); CEDAW/C/TCD/CO/1-4 (2011); CEDAW/C/TZA/CO/6 (2009); the recommendation of the HRC to Zambia: UN Doc CCPR/C/ZMB/CO/3 (2007).

[48] See, the recommendations of CEDAW Committee to Chad and Congo: UN Docs CEDAW/C/TCD/CO/1-4 (2011); CEDAW/C/COG/CO/6 (2012).

[49] See, the recommendation of the Independent Expert on Minorities to Ethiopia: UN Doc A/HRC/4/9/Add.3 (2007); the recommendation of the HRC to Botswana: UN Doc CCPR/C/BWA/CO/1 (2008); the recommendation of CERD to Mozambique: UN Doc A/62/18 (2007).

[50] See, for example, the recommendation of the Committee on Economic, Social and Cultural Rights (CESCR) to Israel: UN Doc E/C.12/1/ADD.90 (2003); the recommendation of the CRC to Libya: CRC/C/15/ADD.209 (2003); the recommendation of the HRC to Gambia and Albania: UN Docs CCPR/CO/75/GMB (2004); CCPR/CO/82/ALB (2004); the recommendation of CERD to South Africa: UN Doc CERD/C/ZAF/CO/3 (2006).

[51] See, HRC, '*General Comment No 32'*, para 24.

[52] See, the CEDAW Committee's Recommendations to Singapore: U.N. Doc. CEDAW/C/SGP/CO/4 (2011). Singapore has amended its law to enable the Family Court to have concurrent jurisdiction in selected areas notwithstanding the application of Sharia law in personal matters: *Keeping the Faith*, 424. However, concerns persist: see, *Compilation prepared by the Office of the UNHCHR in accordance with paragraph 15(b) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to council resolution 16/21: Singapore*, 20 November 2015, UN Doc A/HRC/WG.6/24/SGP/2, p. 7.

[53] See, for example, CEDAW Committee's Recommendations to Botswana: U.N. Doc. CEDAW/C/BOT/CO/3 (2010). See also, its Recommendations to Vanuatu: U.N. Doc. CEDAW/C/VUT/CO/3 (2007).

rights.[54] This does not mean that the State can stand by and wait until this support materializes. Instead, the State is given the role of generating support for law reform, for example, through 'partnerships and collaboration with religious and community leaders, lawyers and judges, civil society organizations and women's ngos.'[55] In several instances, States have been called upon to engage with religious and traditional authorities in a 'frank' 'public' and 'constructive dialogue' about how religious laws can be rendered compatible with human rights.[56] More generally, States have been called upon to increase efforts to sensitize stakeholders about the importance of law reform in this area,[57] to conduct awareness training about rights[58] and to 'train and sensitive' administrators of religious courts about human rights.[59] In effect, the State is cast in the role of agent or driver of change.

What also emerges from the international practice is that the law reform process must be fully inclusive, with the effective participation of religious leaders, civil society representatives, and women's organizations.[60] Beyond this, the modalities are left to the State and communities concerned to develop religious law in a manner compatible with international human rights law. This allows local variations to be factored into the process of reform without compromising the fundamental tenets of international human rights law.[61] Further, by focussing on an inclusive and participatory approach to law reform, it can increase the prospect of a credible and viable process of reform. The participation of all relevant stakeholders in the process, for example, should ensure that claims based on religion are fully tested while co-opting religious leaders into the reform process[62] offers the prospects of greater understanding and the more effective implementation of international human rights law on the ground.

To summarise, international practice suggests that a tentative conceptual framework for reconciling religious law and international human rights law is beginning to emerge. It is one

[54] See, for example, CEDAW Committee's Recommendations to Morocco: U.N. Doc. A/52/38/Rev.1 (Supp.) para. 71 (1997).
[55] See, CEDAW Committee's Recommendations to Syria: U.N. Doc. CEDAW/C/SYR/CO/1 (2007). See, Also, its Recommendations to Malaysia, Morocco, Jordan, Myanmar, Tunisia, and Egypt: U.N. Docs. CEDAW/C/MYS/CO/2 (2006); A/52/38/Rev.1 (Supp.) para. 71 (1997); CEDAW/C/JOR/CO/4 (2007); CEDAW/C/MMR/CO/3 (2008); CEDAW/C/TUN/CO/6 (2010); CEDAW/C/EGY/CO/7 (2010).
[56] See, for example, CEDAW Committee recommendations to Mauritius: UN Doc CEDAW/C/MAR/CO/5 (2006); the recommendation of the Special Rapporteur on Violence against Women to Ghana: UN Doc A/HRC/7/6/Add.3 (2008).
[57] See, for example, CEDAW Committee recommendations to Niger: UN Doc CEDAW/C/NER/CO/2 (2007).
[58] See, for example, the recommendations of the UN Special Rapporteur on Violence Against Women to Saudi Arabia: UN Doc A/HRC/11/6/Add.3 (2009); the recommendations of the CRC Committee to Bolivia and Sierra Leone: UN Docs CRC/C/BOL/CO/4 (2009); CRC/C/15/ADD.119 (2000).
[59] See, for example, CEDAW Committee recommendations to Zambia and Vanuatu: UN Docs CEDAW/C/ZMB/CO/5-6 (2011); CEDAW/C/VUT/CO/3 (2007); the recommendation of the Independent Expert on Sudan: UN Doc A/HRC/18/40 (2011).
[60] See, for example, CEDAW Committee's Recommendations to Singapore, Papua New Guinea, and Sri Lanka: U.N. Docs. CEDAW/C/SGP/CO/4 (2011); CEDAW/C/PNG/CO/3 (2010); CEDAW/C/LKA/CO/7 (2011).
[61] See also, CEDAW Committee, *General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination Against Women*, U.N. Doc. CEDAW/C/GC/28 (2010) para. 23.
[62] See, for example, the recommendations of the Committee on the Rights of the Child to Egypt and Nigeria: UN Docs CRC/C/15/ADD.145 (2001); CRC/C/NGA/CO/3-4 (2010).

that avoids the superficially attractive alternatives of rejecting or deferring to religious law in its entirety. At its core is the belief that while religious law can cause human rights harm, it has an inherent capacity to evolve and adapt to the fundamental requirements of international human rights law. The overarching objective is to ensure that the relationship between religious law and international human rights law is a mutually reinforcing one. To achieve this objective, a genuinely participatory and inclusive law reform process is envisaged with the State cast in the role of driver of change. While international human rights law sets out the objective to be achieved and, in broad terms, how it should be done, it does not seek to micro-manage the process. In principle, it is an approach that may offer the prospect not only of rendering religious law compatible with international human rights law but of harnessing religious law in the push for the more effective protection of human rights on the ground.

IV. Testing the conceptual framework: Insights from the ASEAN States

While the conceptual framework may provide one way of addressing the human rights harm caused by some religious laws, it may be viewed as unduly optimistic, if not naive, especially by those experiencing such harm at first hand. The separation of church and State may seem to offer an altogether more credible alternative for the effective protection of human rights. However, experience has shown that the doctrine of separation of church and State also has the capacity to cause human rights harm even if only as an unintended consequence.[63] It is questionable whether any formal constitutional arrangement in itself can provide complete protection against the human rights harm that can be caused by some religious laws. This is particularly true when one reflects on the extent to which religious laws apply *de facto* as well as *de jure* within so many jurisdictions. A blanket refusal to engage in any manner or form with these laws on the basis that they are inherently incompatible with human rights risks abandoning those who sustain human rights harm due to the application of these laws. Irrespective of whether those concerned subject themselves voluntarily to regulation by religious laws or are compelled to do so either by the State or community pressure, to refuse to engage with these laws risks depriving these individuals of human rights protection and allows the State to evade its obligations to respect and protect the rights of everyone within its jurisdiction. Viewed against this backdrop, the conceptual framework can be useful in mapping out the parameters and objectives of any State engagement with religious law. For the moment, it is formulated at a relatively high level of generality. It needs to be tested in the light of relevant State practice. This section undertakes a preliminary assessment in the light of the practice of the ASEAN States. It begins by mapping out in general terms some

[63] Depending on the manner in which it is interpreted, the doctrine can enable a religious community to exist as a separate entity within the State, governed for all intents and purposes by religious laws, not all of which would be rights compatible. See, for example, Nomi Maya Stolzenberg, 'Is there such a thing as non-state law? Lessons from Kiryas Joel' in Michael A. Helfand (ed.), *Negotiating State and Non-State Law: The Challenge of Global and Local Legal Pluralism* (2015, Cambridge University Press), concerning the Satmar community, a branch of the Hasidic movement in Judaism, which established the village of Kiryas Joel in New York State. See also, the discussion in 'In Religious Arbitration, Scripture is the Rule of Law', The New York Times, 3 November 2015.

key features of this State practice prior to identifying some of the insights it provides in terms of the opportunities, risks and challenges associated with operationalizing the conceptual framework.

The first observation that can be made about the ASEAN States is that they are characterised by a remarkable level of diversity in terms of religious belief and related constitutional arrangements. In terms of religious diversity, one finds that Buddhists comprise the largest religious community in Thailand,[64] Cambodia,[65] Myanmar,[66] Laos[67] and Singapore,[68] while Muslims comprise the largest religious community in Brunei,[69] Indonesia[70] and Malaysia,[71] with Roman Catholics the largest in the Philippines.[72] This diversity exists not only between States but also within States with every ASEAN State being home to several distinct religious communities of varying sizes.[73] In addition to this, one has to factor in the diversity that exists *within* religious communities especially on matters of doctrine.[74] Aside from the diversity of religious beliefs, there is also considerable diversity in terms of constitutional arrangements on religion.[75] While all the ASEAN States have constitutions that afford some level of protection to religious freedom,[76] there are some important differences concerning State/religion relations. Almost a third of ASEAN States have a State religion. In Cambodia the State religion is Buddhism while in Brunei and Malaysia it is Islam. Although there is no State religion in Myanmar or Thailand, there is some recognition of the 'special position of

[64] In 2010, the religious composition of its population was 93.6% Buddhist, 4.9% Muslim, 1.2% Christian, 0.2% Others: see, *Keeping the Faith*, 483.
[65] In 2014, the religious composition of its population was 96% Buddhist, 3.5% Muslim, 0.5% Bahai, Jewish, Vietnamese Cao Dai and Christian: see, *Keeping the Faith*, 101.
[66] In 2014, the religious composition of its population was 89% Buddhist, 4% Christian, 4% Muslim, 1% Animist, 2% Other: see, *Keeping the Faith*, 321.
[67] In 2005, the religious composition of its population was 66.8% Buddhist, 30.9% Other (Animist), 1.5% Christian, 0.03% Muslim, 0.02% Bahai: see, *Keeping the Faith*, 197.
[68] In 2015, the religious composition of its population was 42.5% Buddhist, 14.6% Christian, 14.9% Muslim, 8.5% Taoism, 14% Hindu, and the remainder from other faiths: see, *National Report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: Singapore*, 28 October 2015, UN Doc A/HRC/WG.6/24/SGP/1, para. 3.
[69] In 2011, the religious composition of its population was 78.8% Muslims, 8.7% Christians, 7.8% Buddhists and 4.7% Other: see, *Keeping the Faith*, 56.
[70] In 2014, the religious composition of its population was 87.18% Muslim, 9.87% Christian, 1.69% Hindus, 0.72% Buddhists, 0.05% Confucian, and 0.13% Other: see, *Keeping the Faith*, 139.
[71] In 2010, the religious composition of its population was 61.3% Muslim, 19.8% Buddhist, 9.2% Christian, 6.3% Hindu, 1.3% Confucianism and other traditional Chinese religions, 1% unknown, 0.7% no religion, 0.4% Other religion: see, *Keeping the Faith*, 235.
[72] In 2010, the religious composition of its population was 80.6% Roman Catholic, 5.65% Islam, 2.7% Evangelicals, 2.4% Iglesia ni Cristo, 1.7% Protestant and Non-Catholic Churches, 1% Iglesia Filipina Independiente, 0.7% Seventh Day Adventist, 0.7% Bible Baptist Church, 0.5% United Church of Christ in the Philippines, 0.4% Jehovah's Witness, 0.08% None, 4.2% Others/Non-reported: see, *Keeping the Faith*, 363. In the remaining ASEAN State, Viet Nam, the religious composition of its population in 2009 was 81.69% non-religious, 7.93% Buddhism, 6.62% Roman Catholic, 1.67% Hoa Hao, 1.01% Cao Dai, 0.22% Others: *Keeping the Faith*, 525.
[73] See, ns. 64-72.
[74] For example, in Thailand, there are two sects of Buddhism, Theravada and Majayana while in Cambodia, Muslims follow four branches of Islam: the Shafi'i branch, the Salafi (Wahhabi) branch, the Iman-San branch and the Kadiani branch: see, *Keeping the Faith*, 485 and 105 respectively.
[75] See the discussion of these constitutional arrangements in *Keeping the Faith*, Dr. Jaclyn L. Neo, *Synthesis Report*.
[76] See, further, ibid.

Buddhism'[77] or the fact that the State 'shall patronize and protect Buddhism and other religions'[78] in their Constitutions. The Philippines is alone among the ASEAN States in recognising the doctrine of separation of church and State in its Constitution.[79] While the principle of secularism is a core principle of governance in Singapore there is no constitutional recognition of the doctrine.[80] Of the remaining ASEAN States, the Indonesian Constitution neither declares it to be a secular State nor a State based on a particular religion.[81] It simply asserts that the 'State shall be based upon the belief in the One and Only God' and that religion is the first of five pillars of the State known as *Pancasila*.[82] In relation to Laos and Vietnam, their Constitutions map out the nature and level of protection afforded to religious freedom but do not confer any official status on any religion(s) within their jurisdictions.[83] Notwithstanding the remarkable diversity that exists in the ASEAN States both in terms of religious beliefs and constitutional arrangements, one significant area of common ground is that the overwhelming majority of these States afford some recognition to religious law.[84]

This state of affairs merits reflection as it demonstrates that recognition of religious law is neither dependent on nor a consequence of any particular constitutional arrangement. The existence or non-existence of a State religion, for example, is not a deciding factor. This is borne out by the fact that while Brunei, Cambodia and Malaysia recognise religious law,[85] so too do States such as Indonesia, Myanmar, Singapore and Thailand which do not have a State religion.[86] Further, there is not always a direct correlation between the type of religious law recognised and the religious beliefs of the majority of the population in a State. While the religious law recognised in Brunei, Malaysia, Indonesia and Cambodia reflects the religious beliefs of the majority of its population, Thailand, Singapore and the Philippines all afford some level of recognition to the religious laws of minorities while Myanmar grants some recognition to the religious laws of numerous religious communities.[87] At times, recognition even seems to be at odds with the constitutional arrangements in a particular State. This is true of the Philippines where one might have thought that the separation of Church and State would have precluded it recognising Sharia law in the Autonomous Region of Muslim Mindanao.[88] Ultimately, it seems that recognition of religious law in these States is not dependent on the existence of particular constitutional arrangements but on a more diffuse

[77] See, Section 361 of the Constitution of Myanmar: *Keeping the Faith*, 321.
[78] Although this refers to the position that prevailed under the previous Constitution: *Keeping the Faith*, 483.
[79] See, *Keeping the Faith*, 363.
[80] See, *National Report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: Singapore*, 28 October 2015, UN Doc A/HRC/WG.6/24/SGP/1, para 6.
[81] See, *Keeping the Faith*, 140.
[82] Ibid.
[83] See, *Keeping the Faith*, 197-208 and 527-9.
[84] Brunei, Cambodia, Indonesia, Malaysia, Myanmar, the Philippines, Singapore, and Thailand: *Keeping the Faith*, 57-68, 141, 387-9, 327, 342-3, 420, 499, 265, 277-9.
[85] See, *Keeping the Faith*, 58-74, 123-124, 237, 273, 265, 277-279; *National Report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: Malaysia*, 6 August 2013, UN Doc A/HRC/WG.6/17/MYS/1, paras. 131-136.
[86] See, *Keeping the Faith*, 141, 327, 342,420, 423, 499.
[87] See, *Keeping the Faith*, 342-3.
[88] See, *Keeping the Faith*, 398, 387-9.

range of factors such as the particular history of the State,[89] past colonial experience,[90] 'power-political considerations,'[91] 'increased piety' of a ruler,[92] the maintenance of societal harmony[93] and/or the prevention or resolution of inter-communal conflict.[94]

The second general observation to be made about the ASEAN States is that the recognition granted to religious law varies considerably in scope.[95] The most extensive level of recognition can be seen in Brunei where Sharia law applies not only to personal status matters such as marriage, divorce and inheritance but also to the criminal sphere where religious 'deviance,' blasphemy, apostasy, and sexual 'deviance' are all forbidden.[96] Some of these offences, which attract punishments such as stoning and whipping, apply not only to Muslims but also to non-Muslims.[97] In other States, the recognition of religious law is subject to greater limitations in terms of the matters it can regulate, the part of the State in which it can apply and/or to those to whom it can apply. In Malaysia, for example, Sharia law applies to Muslims[98] predominantly in civil law matters[99] although it is also given indirect effect in the criminal sphere through the prohibition on extra-marital sex, drinking and gambling.[100] For the most part, recognition of religious law in ASEAN States tends to be limited to civil law matters and to adherents of the particular religion in question. This can be seen, for example, in Singapore[101] and Myanmar.[102] On occasion, recognition is limited to particular geographical regions within a State, such as in Thailand and the Philippines, as

[89] See, for example, Myanmar, *Keeping the Faith*, 327, 342.
[90] See, for example, Brunei, Indonesia, *Keeping the Faith*, 57, 141.
[91] See, for example, Brunei, *Keeping the Faith*, 89.
[92] See, for example, Brunei, *Keeping the Faith*, 89.
[93] See, for example, Report of the Working Group on the Universal Periodic Review: Singapore, 15 April 2016, UN Doc A/HRC/32/17, paras. 11, 7.
[94] See, for example, Thailand, *Keeping the Faith*, 499.
[95] Aside from the formal recognition of religious laws within ASEAN States, one also has to acknowledge the more informal role of religious law in the drafting, interpretation and implementation of general State law given its potential impact on human rights. In the Philippines, for example, one finds that decisions of the National Appellate Matrimonial Tribunal of the Catholic Church in the Philippines concerning the validity of marriages are given persuasive effect in civil courts ostensibly on the basis that this harmonises 'our civil law with the religious faith of our people:' see, *Keeping the Faith*, 382-2 (and seemingly without any enquiry into the manner in which the tribunals conducted the proceedings). In other instances, religious law influences the formulation of general State law but the law is presented as addressing issues of public order or public morality rather than pertaining to religion as such. This can be seen, for example, in Indonesia where regional laws regulating the wearing of the headscarf, the sale of alcohol and the criminalisation of 'Un-Islamic' behaviour are portrayed as addressing public order concerns, combating social ills and/or protecting public morality: see, *Keeping the Faith*, 151.
[96] See, *Keeping the Faith*, 58, 62-74.
[97] See, *Keeping the Faith*, 57, 62, 64, 74.
[98] *National Report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: Malaysia*, 6 August 2013, UN Doc A/HRC/WG.6/17/MYS/1, para. 132.
[99] For example, in areas such as succession, inheritance, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gift and partitions: see, *Keeping the Faith*, 265.
[100] See, *Keeping the Faith*, 265, 277-279.
[101] See, *Keeping the Faith*, 141, 170, 160 (Indonesia), 420, 423, 445-446 (Singapore).
[102] Where the laws of Buddhists, Muslims, Hindus and Christians concerning marriage, divorce and inheritance are recognised by its courts: see, *Keeping the Faith*, 327, 342.

well as being restricted to personal status matters.[103] This brief overview demonstrates the very wide variation that exists concerning the nature and level of recognition afforded to religious law in the ASEAN States. The question then arises as to what are the implications of these various forms of recognition from a rights perspective and, specifically, from the perspective of the ASEAN States international human rights obligations.

According to the doctrine of State responsibility, ASEAN States will be held responsible for any violation of their international obligations caused by their recognition of religious law. As all the ASEAN States have ratified at least three of the core UN human rights treaties, there is a gateway for establishing a relationship between religious law and international human rights law in the region. The diversity of religious belief, constitutional arrangements and patterns of recognition within the ASEAN suggest that the region has the potential to provide important insights into the viability of the conceptual framework currently emerging within the international human rights system. The discussion that follows is organised thematically. It begins by testing some of the assumptions underpinning the conceptual framework to see whether they are supported by State practice. Here, attention focuses on some of its core assumptions. The first is that there is a global consensus on the relevant normative human rights standards. The second is that religious law is not homogenous or set in stone but is capable of evolving in line with these standards. The third is that the State is an agent for change in ensuring the compatibility of religious and international human rights law. The paper proceeds to examine some of the opportunities associated with the conceptual framework notably in terms of the human rights benefits that can accrue when States engage positively with the framework. It then examines the challenges posed by the framework including those relating to intra-religious pluralism (or the absence thereof), the need for the State to respect the autonomy of religious communities especially in matters of doctrine while simultaneously instigating reform of religious laws that are not rights compliant, and the need for on-going and effective oversight of the interpretation and application of religious law. It concludes by examining the risks associated with the conceptual framework especially against a backdrop in which religion, national identity and nationalism can be closely interwoven and where developments in one State can have a 'demonstration' effect in other States or even on normative developments within the entire ASEAN regional human rights system.

1. Testing the assumptions underpinning the conceptual framework

The first assumption is that there is a global consensus on normative human rights standards. The practice of some, though by no means all, ASEAN States would challenge this assumption in two ways. The first relates to the conception of human rights as inalienable rights that inhere in all human beings by virtue of their humanity and without discrimination

[103] In Thailand, it applies in the four southern provinces of Pattani, Narathiwas, Yala and Satun: *Keeping the Faith*, 499. In the Philippines, it applies in the Autonomous Region of Muslim Mindanao, see, *Keeping the Faith*, 398, 387-9.

of any kind. This conception does not go unchallenged within the ASEAN region.[104] In recent years, Brunei has advanced a concept of human rights that is grounded firmly in religious doctrine. This is evident, for example, from Sultan Hassanal Bolkiah's statement that by adopting the Penal Code 2013 Brunei 'uphold(s) human rights with the Al-Quran as our foothold.'[105] It was also borne out by the State Mufti's comments that 'Islam has its own human rights' which unlike human rights claims 'stipulated by humans' would 'never change through the times' and that the only human rights that could be considered truly universal are those 'stated in Syariah law.'[106] While the extent to which Islamic law can support a theory of human rights has been the subject of some academic debate, there is also recognition that it would be a theory where rights are accorded not by virtue of one's humanity but in line with a strict classification dependent on criteria such as religion or gender.[107] For the present, Brunei is the only State within ASEAN that adheres to such an approach although one cannot exclude its possible influence on other ASEAN States (see further, below). Brunei's approach represents the first challenge to the assumption that there is a consensus on the normative human rights standards and it is a fundamental one as it calls into question the very concept of human rights embedded in the international human rights framework.

The second challenge is not as extensive as the first as it is confined to *specific* normative standards. This is apparent from the contestations that have taken place, for example, about LGBT rights especially during the Universal Periodic Review (UPR) process. [108] In these instances, calls for the recognition of LGBT rights have been rejected by several ASEAN States on various grounds such as public morality or the conservative nature of their respective societies. It demonstrates a certain tendency to define public morality in line with the religious beliefs of the population especially in matters of sexuality and the potential for State recognition of religious law to compound this by conferring legitimacy on these beliefs. While one cannot downplay the significance of this second challenge, one also has to acknowledge that the challenge does not emanate from all ASEAN States as Viet Nam and the Philippines were commended during the UPR process for their approach to LGBT rights.[109] Nevertheless, what emerges from this brief overview is that the assumption that there is a consensus on the relevant normative human rights standards is one that does not hold up to close scrutiny.

At the same time, the conceptual framework may contain within it the seeds of a strategy for reaching the necessary level of consensus. In its approach to the sharing of good practice and in stipulating the requisite features of a rights-compliant law reform process, for example, the conceptual framework seems to encourage a *dialogue* on the relevant normative standards

[104] Viet Nam adheres to a Socialist concept of human rights and Brunei adheres to a religious concept of human rights; see, *Keeping the Faith*, 529.
[105] *Keeping the Faith*, 58.
[106] Ibid.
[107] See, Jerome J. Shestack, *The Jurisprudence of Human Rights, in* Human Rights in International Law: Legal and Policy Issues (Theodor Meron, ed., 1984); Heiner Bielefeldt, 'Muslim Voices in the Human Rights Debate' 17 Hum.Rts.Q. 587 (1995).
[108] For a discussion, see further, Helen Quane, 'The Significance of an Evolving Relationship: ASEAN States and the Global Human Rights Mechanisms,' 15 Human Rights Law Review 283, 292-295 (2015).
[109] Ibid.

albeit one that is subject always to the caveat that there can be no erosion of the fundamental tenets of these normative standards. Admittedly, the prospects for implementing such a strategy remain uncertain. While global human rights mechanisms, especially the UPR process, have delivered modest human rights benefits in recent years and can operate as a source of external scrutiny and pressure for change, ultimately change must be effected by action at the national level. This demonstrates the centrality of other aspects of the conceptual framework (notably the role of the State and national stakeholders) as well as the need to view the framework in a holistic manner requiring sustained action across its various components simultaneously.

The second assumption underpinning the conceptual framework is that religious law is not homogenous or set in stone but capable of evolving in line with international human rights standards. There are aspects of ASEAN State practice that challenge this assumption but there are also aspects that support it. The position of Brunei has already been outlined and it suggests that religious law is unchanging. On occasion, Malaysia also has challenged the capacity of religious law to change although its recent establishment of a committee to review laws relating to women's rights under Islamic family law would suggest that the latter is capable of evolution.[110] A second aspect of relevant State practice relates to the variations that exist within and between States that recognise religious law. For example, Sharia law regulates certain civil law matters such as marriage, divorce and inheritance in the Philippines, Singapore, Thailand and Laos, while in Brunei and Malaysia it applies not only in the civil law but also the criminal law spheres. Further, there can be variations even within the same State as can be seen in Malaysia where some of its constituent States permit apostasy while others do not.[111] These variations are significant as they suggest that religious law is not a homogenous body of law that applies uniformly irrespective of local or national conditions.[112] A third aspect of ASEAN State practice relates to reservations to human rights treaties on grounds of religious law. It is interesting to note that not all States that recognise religious law have felt the need to enter such reservations. Indonesia is a case in point [113]albeit this does not mean that all its laws are rights compliant. Even where a reservation has been entered, it is significant that some have been withdrawn, at least in part, although it has to be acknowledged that some of the most important reservations still remain in place.[114] At the very least, the partial removal of these reservations suggests that religious law is capable of evolving over time. More generally, this is borne out by the general practice of some ASEAN States such as Indonesia which asserted that its involvement with the OIC Independent Permanent Human Rights Commission would 'accentuate the compatibility of

[110] *Report of the Working Group on the Universal Periodic Review: Malaysia*, 5 October 2009, UN Doc A/HRC/11/30, para. 29.
[111] See, *Keeping the Faith*, 243-5, 264.
[112] See also, the approach of a Muslim-majority States, such as Indonesia, which show that apostasy and polygamy laws are not inherently required where Sharia law is recognised by the State: *Keeping the Faith*, 147, 160.
[113] See, *Keeping the Faith*, 144.
[114] See further, Helen Quane, 'The Significance of an Evolving Relationship: ASEAN States and the Global Human Rights Mechanisms' 15 Human Rights Law Review 283, 300-303 (2015).

Islam with human rights and democracy.'[115] On balance, the practice of ASEAN States would lend some qualified support to the second assumption underpinning the conceptual framework.

The third assumption is that the State will act as an agent for change to promote the compatibility of religious law and international human rights law. While occasionally ASEAN States demonstrate a certain willingness to comply with some recommendations concerning religious law (see further, below), State practice suggests that they are not particularly enthusiastic about being cast exclusively in such a role. This is evident especially in the practice of Singapore where it is very explicit in its resistance to pushing rights at the expense of societal harmony.[116] Further, while the conceptual framework envisages co-opting religious leaders into a rights-compliant law reform process, the practice of the ASEAN States would tend to suggest that they prefer to co-opt religious leaders for State goals rather than human rights goals.[117]

2. Opportunities associated with the conceptual framework

The conceptual framework presents certain opportunities from a rights perspective. At a minimum, it provides an overarching framework within which to locate the various recommendations from international human rights bodies rather than viewing them as ad hoc and desegregated recommendations. The framework locates them within *a process* working towards not simply the protection of specific rights or specific groups of rights-holders but the broader goal of aligning religious law and international human rights law. In this way, it has the potential to have a more significant impact on the day to day lives of a considerable portion of the population and the effective enjoyment of the full range of their human rights. A more holistic approach can also facilitate a more thorough going rights assessment of State actions where the full implications of these actions may not be immediately apparent when viewed in isolation but can become more readily apparent when viewed within the broader context of the conceptual framework. At the very least, the framework can provide an impetus for making explicit the need to reconcile religious law and international human rights law and in recommending ways of doing so.

ASEAN State practice demonstrates a certain willingness to comply with some, though by no means all, of the recommendations of international human rights bodies. The recommendations in question can be grouped thematically. The first group relates to specific religious laws that are deemed to be incompatible from a rights perspective. A good illustration is religious law that permits child marriages. In these instances, the TMBs recommend increasing the age of marriage and in the case of Singapore it complied with this recommendation, thereby bringing one aspect of religious law into line with the requirements

[115] *Report of the Working Group on Universal Periodic Review: Indonesia*, 5 July 2012, UN Doc A/HRC/21/7, 16.
[116] See, Report of the Working Group on Universal Periodic Review: Singapore, 11 July 2011, UN Doc A/HRC/18/11, paras 7-14.
[117] Singapore, Laos, Myanmar and Viet Nam: *Keeping the Faith*, 546, 426-427, 351-2.

of international human rights law.[118] The second group of recommendations relates to awareness raising and capacity building. There has been some movement in this area. Indonesia, for example, has undertaken capacity building initiatives and gender sensitive training with a view to eliminating discrimination against women[119] Brunei has undertaken an Awareness Forum on CEDAW,[120] while Malaysia has conducted awareness training programmes on gender equality and children's rights with substantial involvement of NGOs and civil society.[121] A third group of recommendations builds on the previous ones. It includes recommendations to undertake a systematic review of existing laws, including religious laws, to make sure they are rights compliant, to undertake a study on comparative jurisprudence on how it may be possible to ensure compliance, and to harmonise religious and civil law. There are some examples of State compliance with these recommendations. Singapore, for example, has undertaken a study of comparative jurisprudence especially in relation to gender and family law in Islam,[122] and has used its Presidential Council for Religious Harmony to review Sharia law in line with human rights,[123] while Malaysia has established an inter-agency committee to review existing laws deemed discriminatory against women in Islamic family law,[124] has organised programmes of harmonisation of religious and civil law, and has established a Syariah community comprised of experts from different backgrounds and for talks between Muslim and non-Muslim scholars.[125] A fourth group of recommendations relate to the withdrawal of reservations to human rights treaties. These recommendations have elicited a mixed response from the ASEAN States. To date, Singapore and Malaysia have withdrawn some though not all of their reservations.[126] Pressure continues to be exerted on the ASEAN States, indeed all States, to withdraw their reservations.

While this review of aspects of ASEAN State practice indicates some modest human rights outcomes, care needs to be taken not to overstate its significance. As previously noted,

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[118] See, UN Doc. CEDAW/C/SGP/CO/4 Rev.1 (2012).
[119] Report of the Working Group on the Universal Periodic Review: Singapore, 11 July 2011, UN Doc A/HRC/18/11, para. 95.7.
[120] *National Report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: Brunei Darussalam*, 30 January 2014, A/HRC/WG.6/19/BRN/1, para. 95.
[121] *National Report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: Malaysia*, 6 August 2013, UN Doc A/HRC/WG.6/17/MYS/1, para. 78.
[122] Report of the Working Group on the Universal Periodic Review: Singapore, 11 July 2011, UN Doc A/HRC/18/11, para 48.
[123] On the evolving interpretation and application of Sharia law: see, *National Report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: Singapore*, 28 October 2015, UN Doc A/HRC/WG.6/24/SGP/1, paras. 55, 56, 66.
[124] *Report of the Working Group on the Universal Periodic Review: Malaysia*, 5 October 2009, UN Doc A/HRC/11/30, para. 57.
[125] *National Report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: Malaysia*, 6 August 2013, UN Doc A/HRC/WG.6/17/MYS/1, para. 136.
[126] See, *Compilation prepared by the Office of the UNHCHR in accordance with paragraph 15(b) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to council resolution 16/21: Singapore*, 20 November 2015, UN Doc A/HRC/WG.6/24/SGP/2, p. 3; *National Report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: Brunei Darussalam*, 30 January 2014, A/HRC/WG.6/19/BRN/1, para. 14; *Report of the Working Group on the Universal Periodic Review: Malaysia*, 4 December 2013, UN Doc A/HRC/25/10, para. 25; *Report of the Working Group on the Universal Periodic Review: Malaysia: Addendum*, 4 March 2014, UN Doc A/HRC/25/10/Add.1, para. 10.

Singapore has been categorical in asserting that it would not push human rights at the cost of societal harmony.[127] Therefore, while it has complied with some of the recommendations, compliance is always subject to the caveat that there are limits to what it is prepared to do in response to these recommendations. Nevertheless, these examples of compliance suggest that there may be modest opportunities or *openings* to advance rights protection. In assessing their true significance, it may be useful to bring to mind Philip Alston's call to view progress in the human rights sphere in the medium to long term.[128]

3. Challenges associated with operationalizing the conceptual framework

ASEAN State practice demonstrates some of the challenges faced in implementing the conceptual framework. These go beyond the general challenges encountered in the implementation of any human rights. They emanate from the *specific context* of religious law and global human rights standards. These challenges are distinct yet interconnected. The first challenge relates to intra-religious pluralism. Implicit in the conceptual framework is the idea that there is a plurality of views about matters of doctrine within a religious community and that this can facilitate the evolution of religious law in line with international human rights standards. One challenge is how to nurture this pluralism when a dominant group within a religious community wants to eliminate it and elicits the support of the State in doing so. This is particularly relevant in an ASEAN context. Restrictions on intra-religious pluralism exist in several ASEAN States such as Brunei,[129] Myanmar,[130] Malaysia[131] and Indonesia[132] where non-dominant sects may be labelled 'deviant,' denied membership of the religious community, prosecuted for their particular religious beliefs or have their right to manifest their religion restricted.[133] The treatment of the Ahmadiyyah who risk the death penalty for their religious beliefs in Brunei,[134] whose activities are restricted in Indonesia[135] (albeit the State has indicated a commitment to ensure that they are able to practise their faith)[136] or who are deemed to be non-Muslim in other States is one such example.[137] Increasing restrictions on intra-religious pluralism through apostasy laws, defamation of religion laws and similar measures will only serve to silence sections of the religious

[127] See, for example, *National Report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: Singapore*, 28 October 2015, UN Doc A/HRC/WG.6/24/SGP/1, para 5.
[128] See, n. 32 above.
[129] See, *Keeping the Faith*, 62, 66-68. For example, the Penal Code prohibits any questioning of the Hadith that are considered as 'authentic.'
[130] See, *Keeping the Faith*, 322, 336-7, in relation to new Buddhist sects that are not recognised by the State or the Buddhist Sangha
[131] See, *Keeping the Faith*, 280, 249; *Report of the Working Group on the Universal Periodic Review: Malaysia*, 5 October 2009, UN Doc A/HRC/11/30, paras. 34, 46, *Report of the Working Group on the Universal Periodic Review: Malaysia*, 4 December 2013, UN Doc A/HRC/25/10, paras. 66, 75.
[132] See, *Keeping the Faith*, 150-151, 172.
[133] See also, Viet Nam, where participation in the independent factions of Cao Dai, Hoa Hao, and Buddhism is actively discouraged or banned: *Keeping the Faith*, 541-2.
[134] See, *Keeping the Faith*, 67.
[135] See, *Keeping the Faith*, 150-1, 172; *Report of the Working Group on Universal Periodic Review: Indonesia*, 14 May 2008, UN Doc A/HRC/8/23, para. 51.
[136] *Report of the Working Group on Universal Periodic Review: Indonesia*, 5 July 2012, UN Doc A/HRC/21/7, para. 76.
[137] Others would include the Ismaili Muslims.

community and impede the level of intra-community debate needed to bring about a reconciliation of religious law and international human rights law.

A second challenge stems from the level of popular support that may exist for religious laws notwithstanding their human rights impact. This is borne out by the situation in several ASEAN States. There is broad support within Brunei for its approach to religious law and its rejection of religious pluralism and equal rights for Muslims and non-Muslims.[138] In Singapore, resistance to reform of certain religious laws is attributed to members of the religious community rather than the State itself. Against this backdrop, the conceptual framework suggests that the State should act as a driver for change to ensure the compatibility of religious law with international human rights law. Here, one encounters the second challenge. Even if a State is willing to do so, how can it act as a driver for change while simultaneously respecting the autonomy of religious communities especially in matters of doctrine? The need to respect the autonomy of religious communities to facilitate respect for freedom of religion of their members is well-established in international human rights law. Admittedly, at the level of general principle it may be possible to address this challenge. To the extent that the religious law is recognised by the State, it effectively becomes 'State' law albeit it may also exist concurrently as a form of religious 'non-State' law. As a form of State law, the State cannot evade its international obligations by relying on a provision of its own national law irrespective of the original source of that particular national law.[139] For a religious community, it suggests that recognition of its religious law may come at the cost of some loss of autonomy. This is the position at the level of general principle. In practice, one must acknowledge that arguments of religious freedom and religious autonomy will invariably be raised, in all likelihood with some success, to resist any attempts to challenge the dominant views within a religious community and to operate as a block on the State acting as a driver for change.

A third challenge relates to the recognition of religious courts and how they are integrated into the State justice system. In the Philippines, for example, the Sharia courts are partially autonomous but an appeal is permitted to the Supreme Court on which an expert in Sharia law (a Mufti or Islamic Jurisconsultant position) is a member.[140] In other instances, the religious courts are fully integrated within the justice system.[141] In both instances, one has to ask how the judges are appointed, what training is provided and what standards do they apply? Whether the State appoints and trains the judges directly or permits the community to do so, it cannot evade a central challenge. This is whether its role in the appointment and training of judges invariably entails it endorsing a particular sect within a religious

[138] *Keeping the Faith*, 79, 90.
[139] International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts (2001), Art. 3. This provision is regarded as codifying customary international law and is therefore binding on all States.
[140] On the court structure, see, *Keeping the Faith*, 388-389.
[141] Thailand: *Keeping the Faith*, 499. A certified Muslim cleric sits in a trial together with the judges of the State courts in cases concerning Sharia law.

community and, in doing so, undermines its capacity to act as a 'neutral arbiter'[142] in the exercise of religion. Further, the experience in some ASEAN States would suggest that it may enable conservative rather than pluralist interpretations of religion to prevail[143] and have significant implications for those who do not subscribe to the views of the majority within the religious community.[144]

A fourth challenge relates to the need for ongoing and effective oversight of the interpretation and application of religious law. Recognition of religious law is just one stage in the process, not the end stage. The State must remain vigilant to ensure that religious law is not only compliant with human rights when it is first recognised but remains so over time and in the light of changing circumstances on the ground.[145] It must also be alert to the risk posed by the rise of fundamentalist groups advocating restrictive interpretations of religious law which would violate human rights[146] and the possibility of these groups effectively hijacking existing structures of religious law to impose these interpretations more generally. Finally, one has to consider the structure and resources of the State itself in assessing its capacity to ensure effective oversight. In this regard, the experience of Indonesia is instructive. Decentralisation has led to the adoption of religious laws by decentralised entities notwithstanding the general prohibition on them doing so[147] yet the sheer number of these laws is such as to prevent effective oversight on the part of the State.[148] It demonstrates that effective oversight requires a high level of commitment in terms of resources as well as political will.

4. The risks associated with operationalizing the conceptual framework

The discussion so far has focussed on specific aspects of the conceptual framework and the challenges and opportunities associated with it. At this point, it may be useful to step back and assess any fundamental risks that it may pose. A core feature of the framework is that it permits the State to establish a plurality of legal systems within its territory to regulate certain matters on the basis of religious affiliation. The emphasis here is less on the *existence* of these legal systems and more on ensuring that they *operate* in a manner that is compatible with international human rights standards. In this respect, it differs fundamentally from the approach adopted under the European Convention on Human Rights. The European Court of

[142] See, eg, *Report of the Special Rapporteur on Freedom of Religion or Belief*, 22 December 2011, UN Doc A/HRC/19/60, para. 66.
[143] See, by analogy, experience with the Defamation of Religion Law in Indonesia whereby it can provide 'a mechanism through which officially recognized religious bodies are able to define the contents of religious orthodoxy:' *Keeping the Faith*, 150-151, 175-6, 171, 171, 172. Such laws can have an impact in terms of establishing and patrolling the perimeters of religion and inhibiting its dynamic development with potentially wide-ranging implications for human rights generally.
[144] See, Indonesia and Malaysia.
[145] There is some recognition of this by the ASEAN States. See, for example, *Report of the Working Group on Universal Periodic Review: Indonesia*, 14 May 2008, UN Doc A/HRC/8/23, para. 10.
[146] See, for example, CEDAW and Indonesia.
[147] The exception is Aceh which has a special status and which can adopt laws concerning religion: see, *Keeping the Faith*, 170.
[148] See, *Keeping the Faith*, 162, 169, 163.

Human Rights (ECtHR) has found that the *very existence* of a plurality of legal systems is incompatible with the Convention irrespective of the manner in which they operate.[149] Admittedly, on this point, the ECtHR is out of step not only with the global human rights mechanisms but the other regional human rights mechanisms.[150] While the ECtHR's approach may offer an alternative framework for dealing with religious law, it is not one that would find widespread support among international human rights bodies. The latter focus instead on ensuring that religious law operates in a manner compatible with global human rights standards, no doubt for reasons of pragmatism[151] as well as principle.[152]

Nevertheless, this core feature does present certain risks not least because of the interplay between religion, national identity and/or nationalist tendencies including in the ASEAN States.[153] Against this backdrop, one has to assess the significance of State recognition of religious laws and the fact that it is permitted under the conceptual framework. Specifically, one has to evaluate the potential of State recognition to heighten the significance of religious identity, reinforce inter-communal divisions, impede the development of a sense of civic citizenship and encourage ethno-nationalism. Aside from this, one has to consider the possibility that recognition of religious law in one State can influence practice in other States. This is what is known as the potential 'demonstration' effect of State practice. The adoption of Brunei's Penal Code 2013 is a case in point. Already, it has been referred to as a 'role model' by some Malaysian politicians who seem keen to introduce similar legislation in their own country[154] while Brunei's State Mufti has declared that it should be 'an example for the rest of Southeast Asia.'[155] This tendency could be further accentuated by the initiative of Brunei's Chief Islamic Judge in establishing a network of Sharia courts whose members include representatives of Sharia courts in Malaysia, Singapore, Thailand, Indonesia, and the Philippines.[156] This could lead to greater uniformity in the interpretation of Sharia law within the region. However, given Brunei's approach to Sharia law and the very concept of human rights, it risks being an interpretation that is difficult to reconcile with global human rights standards. Further, the potential demonstration effect of Brunei's practice may affect not only the implementation of human rights at the national level. It may also affect the prospects for reaching a consensus on normative standards at the regional level within the nascent ASEAN human rights system.

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[149] See, *Refah Partisi (The Welfare Party) and others v Turkey*, Applications nos. 41340/98, 41342/98, 41344/98, Chamber, Judgment, 31 July 2001, paras 70, 72, subsequently confirmed by the Grand Chamber.
[150] See, Quane, n. 35, 690-1.
[151] For example, it is estimated that a considerable proportion of the world's population are affected by the de facto or de jure operation of religious law: see, ICHRP Report, n. 43, 43-59; Perry, n.8, 72.
[152] For example, the principle that the State has discretion as to how it organises its own legal system subject only to the requirement that it complies with its international human rights obligations.
[153] Myanmar, Singapore, Malaysia, the Philippines, Thailand, Brunei, Indonesia and Viet Nam. See, *Keeping the Faith*, 348-352, 470, 75, 542-3, 548, 502-3, 290; *National Report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: Brunei Darussalam*, 30 January 2014, A/HRC/WG.6/19/BRN/1, para. 102.
[154] See, *Keeping the Faith*, 85.
[155] See, *Keeping the Faith*, 87.
[156] See, *Keeping the Faith*, 84-85.

Ultimately, one has to undertake a rigorous risk/benefit analysis of the conceptual framework for reconciling religious law and international human rights law that is beginning to emerge from the practice of UN human rights bodies. Can it deliver more in human rights outcomes than it risks? Is it a pragmatic response to the realities of human rights promotion and protection on the ground? Can it harness the pull of religious law in the push for the more effective protection of human rights on the ground? Can it facilitate a genuine dialogue between global and local standards to encourage a reconciliation of the two and enable international human rights law to move beyond debates about universality and cultural relativism? The conceptual framework is still at an early stage in its development. Clearly, its further development requires careful analysis of these and related questions. In responding to them, invaluable insights can be gained from experience within the ASEAN States.

V. Conclusion

The starting point for this chapter is the rise in identity politics and the heightened significance of religious beliefs which pose considerable challenges for the effective promotion and protection of human rights. This is a global trend but it is also one that is very much in evidence in Southeast Asia. It is significant not only in terms of the threats it poses to specific rights or rights-holders but also at a more general level in terms of its potential to roll back some of the recent human rights gains in the region. Arguably, a multi-faceted yet holistic approach is needed in responding to these threats. This chapter has sought to outline one possible component to this approach. It is one that responds specifically to the threats that can emanate from some religious laws when they are recognised and integrated within a State legal system. It is based on the conceptual framework for reconciling religious law and international human rights law that is discernible from the practice of UN human rights bodies. While this framework acknowledges that aspects of religious law can cause human rights harm, it also adheres to the belief that religious law has a capacity to evolve in a way that is compatible with international human rights standards and seeks to promote an inclusive and participatory dialogue between all the stakeholders with a view to determining how this can be done. It acknowledges that there are no simple or quick fix solutions to rendering religious law and international human rights law compatible. However, by mapping out the overarching objective and how it can be achieved, it may offer a pragmatic, principled and coherent approach to a phenomenon that is a feature of the everyday lives of so many people and one that has a significant impact on the exercise of their human rights.

At present, the framework is articulated at a very high level of generality. Drawing on the experience of the ASEAN States, this chapter has sought to test the assumptions underpinning the framework and identify opportunities, risks and challenges associated with operationalizing it. ASEAN State practice would tend to challenge some of the assumptions underpinning the framework such as the willingness of States to act as a 'driver for change' to ensure the compatibility of religious and international human rights law. It also identifies some of the challenges associated with applying the framework not least given the

restrictions on religious pluralism that exist in the region and the inherent tension between the State acting as a driver for change while simultaneously being required to respect the autonomy of religious communities especially in matters of doctrine under international human rights law. There are also risks associated with any framework that permits the existence of parallel religious and secular legal systems including its potential to reinforce inter-communal divisions and impede the development of a sense of civic citizenship. Clearly, this demonstrates the need for a careful risk/benefit analysis of the framework. However, in doing so, one also has to factor in its potential to deliver tangible benefits not only in relation to particular rights but in a more systemic manner by addressing the formal and informal structures that advance or undermine the protection of human rights within a State and by identifying potential openings for advancing the protection of human rights.