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From Secularism into Modified Pluralism:  
Comprehensive Application of John  
Rawls's Justice as Fairness Theory in  
Defining State and Religion Relationship

Sigit Ardianto  
LL.M. candidate for Comparative Legal Thought Program,  
Benjamin N. Cardozo School of Law

# From Secularism into Modified Pluralism: Comprehensive Application of John Rawls's Justice as Fairness Theory in Defining State and Religion Relationship<sup>1</sup>

Sigit Ardianto<sup>2</sup>

## I. Preface

The task of defining the most effective state and religion relationship has been a daunting one. Courts and jurists in different parts of the world have been engaged in this chore for centuries. Bernhard Schlink identified that it is an intricate issue that also involves the process to which the state owes its emergence.<sup>3</sup> Quoting the German Jurist, E.W. Böckenförde, he divides the process into three stages.<sup>4</sup> The first stage is the unity of state and religion involving the scuffle over power between the Emperor and the Pope in the 9<sup>th</sup> and 10<sup>th</sup> centuries in controlling Christian western nations.

In these medieval times initially the Emperor grasped the position as *res publica christitiana*, which claims all areas of life, without differentiating those of secular and political sphere. The church eventually released itself from the hegemony of the Emperor and attained its own jurisdiction over religious life. Gradually the domination reversed, and the Pope established church supremacy over worldly power, symbolized by the submission of the Emperor to present himself in Canossa.

Religiously motivated civil wars between the Protestants and Catholics in the 16<sup>th</sup> and 17<sup>th</sup> centuries nevertheless posed a challenge to the union of political and religious powers. It is

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<sup>1</sup> This paper is prepared for the Fifth Cornell Inter-University Graduate Student Conference, March 27-28, 2009.

<sup>2</sup> Author is a Master of Laws (LL.M.) candidate for Comparative Legal Thought Program, Benjamin N. Cardozo School of Law, New York.

<sup>3</sup> BERNHARD SCHLINK, BETWEEN SECULARIZATION AND MULTICULTURALISM, in THE LAW OF RELIGIOUS IDENTITY: MODEL FOR POST-COMMUNISM, 81 (András Sajó & Shlomo Avineri eds., 1999).

<sup>4</sup> See E.W. E.W. BÖCKENFÖRDE, DIE ENTSTEHUNG DES STATES ALS VORGANG DER SAKULARISATION, in SAKULARISATION UND UTOPIE, EBRACHER STUDIEN, FREIHEIT. STUDIEN ZUR RECHTSPHILOSOPHIE, STAATSTHEORIE, 92 (1992).

agreed at the time that religion based conflict had to become a political struggle. Schlink phrases this in another way by saying that, “politics had to be placed above the demands of the warring religious factions; it had to be emancipated from these demands.” This basis initiates the second stage of secularization.

From a religion based divergence, came the greatest theory of state independence as a social institution from religion. It is Thomas Hobbes which is the first philosopher to establish a modern conception of state institution as a means to itself and religion and religious organization another.<sup>5</sup> Peace among nations, or religious factions for that matter, and an end to the *bellum omnium contra omnes*, as Hobbes suggested, could only be achieved under a sovereign, neutral to religious elements, commanding a state as an institution. Recognition of this impartial sovereign is the fundamental instrument in establishing and maintaining peace.

The third and presumably final stage of secularization was attributed largely to the French Revolution. In this monumental civil upheaval, the state dissolved the struggles and tensions between church and religion. It leaves religion to the private chambers of its followers. Bernhard Schlink explained this as follows:

The state ceased to make religion and church an issue; religion became private. This was an element and expression of the release of the bourgeois society of trade and acquisition after the period of mercantilism had ended, the state left the economy, like religion, to its own laws and retreated from ensuring social well-being to ensuring security an order.<sup>6</sup>

It had been suggested that Thomas Jefferson imported the idea of the wall of separation between church and state from the French. Pierre Birnbaum noted that Jefferson, the primary author of the

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<sup>5</sup> See THOMAS HOBBS, *LEVIATHAN*, 1695.

<sup>6</sup> BERNHARD SCHLINK, *supra* note 3, at 120.

United States Constitution, was in Paris in 1786 and was still there in 1789 when the Bill of Rights-including the First Amendment-was added to the United States Constitution and thus, Jefferson was “confronted to the French Enlightenment and its rationalist universalism hostile to religion and witness the Revolution and her attempt to excluded the Church from the public realm.”<sup>7</sup> In the US Constitution, the separation translates to the “non-establishment” part of the first amendment clause, “congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.” Both of these events hence marked the completion of the secularization process in the western world and established a distinguished secular state-religion relationship.

Nevertheless, with the coming of new eras along with their own social developments, secularism gradually exposed its drawbacks. In its extremity as exemplified by the French’s *laïcité*, secularism may lead to hostility towards religion as epitomized by the ban of religious symbols in public spaces.<sup>8</sup> The fight for use of headscarf by the Muslim continuous to be today’s issue.

In Indonesia, the country where the first African American President once stayed for four years, the idea of secularism has never been well taken. As a country with the largest Muslim population in the world –accounting for 86.1% of the total Indonesian population of more than 220 million- while also being the third largest democratic country in the world, formulating the state and religion relationship in Indonesia is a major problem. Although clearly rejecting secularism<sup>9</sup>, it does not necessarily mean that theocracy is an appealing option for the Indonesians, especially the moderate ones. A recent case of the Ahmadiyya Joint Decree banning

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<sup>7</sup> Pierre Birnbaum, On the secularization of the public square: Jews in France and in the United States, 4 (Oct. 26, 2008) (unpublished manuscript, on file with The Cardozo Law Review).

<sup>8</sup> *Id.*, at 4.

<sup>9</sup> Ruling of the Indonesian Constitutional Court No. 19/PUU-VI/2008 24 (2008).

the spread of the Ahmadiyya belief raises state-religion relationship discussions to the public as it poses certain uneasiness among state officials in dealing with minorities.<sup>10</sup> They refused to adopt the Pakistani's approach of completely disbanding Ahmadiyya and labeling it as heretic, yet respected negative majority opinion over Ahmadiyya beliefs.<sup>11</sup>

In the Constitutionalism and Secularism Conference held on October 26 and 27, 2008 in Benjamin N. Cardozo School of law, New York, it is suggested that secularism is to be replaced with pluralism. Harvard University had initiated a project of promoting Pluralism in the United States. Its proponent, Diana L. Eck, proposed that, pluralism necessitates an "active engagement with plurality" and "the cultivation of public space where we all encounter one another."<sup>12</sup> A more theoretical elaboration of Pluralism is presented by Michel Rosenfeld which divides pluralism in three stages from minimal pluralism where the divisibility into self and other is recognized into comprehensive pluralism which, "insist on equalization of all conceptions of the good found within the polity."<sup>13</sup>

Nevertheless, even understanding of comprehensive pluralism fails to anticipate the potentiality of more aggressive demands from major religions when they enjoyed the comforts of domination of public space which also requires lesser room for smaller religious groups. This paper aims to investigate the state-religion relationship conundrum and the shift from secularism to pluralism and examine modification of pluralism through comprehensive adoption of John Rawls's justice as fairness theory. The focus of this paper will be placed on the state-religion

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<sup>10</sup> Joint Decree of the Minister of Religious Affairs (Nr. 3 Year 2008), the Minister of Internal Affairs (Nr. 199 Year 2008), and the Attorney General (Nr. KEP-033/A/JA/6/2008) regarding Warning and Order to the Followers, Members, and/or Management Member of Ahmadiyya Community Indonesia (ACI) (hereinafter the Ahmadiyya Joint Decree).

<sup>11</sup> Sigit Ardianto, *Religious Freedom is Not Without Limit*, Jakarta Post, 25 December 2008, <http://www.thejakartapost.com/news/2008/11/25/religious-freedom-not-without-limits.html>.

<sup>12</sup> Diana L. Eck, *The Challenge of Pluralism*, Nieman Reports "God in Newsroom" Issue Vol. XLVII, No. 2 (Summer 1993).

<sup>13</sup> See MICHEL ROSENFELD, *CONSTITUTIONAL TREATMENT OF RELIGION*, in *THE LAW OF RELIGIOUS IDENTITY: MODELS FOR POST-COMMUNISM*, 44 (András Sajó and Shlomo Avineri eds.)

relationship in the United States and Indonesia whilst also observing the practice in other countries.

## **II. How the Church-State Relations is being defined in the United States in Comparison to Other Countries**

Although secularism had generally prevailed to be the definition adopted (at least theoretically) by the United States, the never-ending constitutional complaints on religious freedom and non-establishment issues seemed to pose challenges towards courts and academician in figuring out how Church-State relationship is to be formulated. This Chapter will try to provide theoretical and descriptive point of view of the US Church-State relationship in comparison with other countries.

### **A. Models of States from the Perspective of Church-State Relation**

It has been a common feature for states to be classified based on its church-state relations, amongst other categorization. Others view similar associations from the viewpoint of religion and politics interactions. Though variations of the relationships between the two are infinite, the possible modes of relations are finite.<sup>14</sup> This applies to the US as well. The US model of state in this perspective for example, is determined by the mandate of its Constitution to prevent State from endorsing a single or any religion and therefore separating the two. The Iranian constitution on the other hand, proclaims the state to be a religion (i.e., Islam) based, or in the words of its Constitution, an Islamic Republic.<sup>15</sup> Other countries including Great Britain and Pakistan with its

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<sup>14</sup> KRYSZYNA DANIEL & W. COLE DURHAM, JR., RELIGIOUS IDENTITY AS A COMPONENT OF NATIONAL IDENTITY: IMPLICATIONS FOR EMERGING CHURCH-STATE RELATIONS IN THE FORMER SOCIALIST BLOC, in THE LAW OF RELIGIOUS IDENTITY: MODEL FOR POST-COMMUNISM, 117, 120 (András Sajó & Shlomo Avineri eds., 1999).

<sup>15</sup> Qanuni Assassi Jumhuri'i Isla'mai Iran [The Constitution of the Islamic Republic of Iran] 1358 (1980), art. 1.

one national religion, tried to position themselves in the realm of church-state relation whilst still striving to define their model in that realm.

### **A.1. Theocracy: the unity of Church and State**

Theocracy is a word originating from the Greek word *theokratia*, derived from the words *theos* meaning “god(s)” and *kratein* meaning “to rule”. Thus the etymological meaning of theocracy is “rule by god(s)”. Modern interpretation of theocracy regards a government of a state having divine guidance claim, whether it claimed to be immediate, or by officials who are regarded as divinely guided. Some countries have traditionally been regarded as ascribing to the theocratic model. They include Israel and Norway. Nevertheless, no other country has obtained prominence as theocracy model in recent studies on church-state relations more than Iran. The preamble of its constitution states that it “sets forth the cultural, social, political and economic institutions of the people of Iran, based on Islamic principles and rules, and reflecting the fundamental desires of the Islamic people.”<sup>16</sup> It also lay down Iran’s governmental form as, an Islamic Republic founded upon a “religious guardianship”, endorsed by the people of Iran on the basis of their long-standing belief in the sovereignty of truth and Qur'anic justice. This firm adherence to Islam singles out other religious beliefs’ likelihood in formulating the government’s system. It is apparent that religious authority and political institutions in Iran are fused.

Religious freedom in an Iranian model of theocratic state is expressly limited. For example, in addition to stating the Twelve Ja’fari Islamic School as the official state religion, the Iranian Constitution also limits other religions acknowledged by the government: the other Islamic schools, including the Hanafi, Shafi'i, Maliki, Hanbali, and Zaydi, and Zoroastrian, Jewish, and Christians. Therefore, Hindus and Buddhists, naming only two large religions in the

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<sup>16</sup> *Id.*

world, have no place in theocratic Iran.<sup>17</sup> Westerners have repeatedly expressed their discontent with Iran's polity. In spite of having certain religion as a dominant religion, the western world nevertheless insists that, "the institutional relations between church and state should serve free exercise values."<sup>18</sup>

## **A.2. Secularism: the Separation of Church and State**

The Encyclopedia of Religious Freedom defines secularism as the separation of the state from religious institutions like the church and the religious neutrality of the church.<sup>19</sup> It is generally thought of as the assertion that governmental practices or institutions should exist separately, from religion or religious beliefs.<sup>20</sup> It could be said that almost all democratic countries that rejects theocracy, yet protects religious freedom, could seek comfort in the secularism classification. The United States had shown itself to be a balanced example of country subscribing to secularism which made an implicit declaration of wall of separation –key to secularism- in the First Amendment. The clause, "congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof," more popularly known as the non-establishment clause and the free exercise clause has been a focal discourse in the secularist interpretation of Church-State relations. This construal has gradually been improved by the United States Supreme Court (USSC) through numerous decisions on freedom of exercise cases, notably *Sherbert v. Verner*<sup>21</sup> and *Employment Division v. Smith*<sup>22</sup>, which establishes that state must show a compelling interest in restricting religion-related activities but permitting

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<sup>17</sup> *Id.*, art. 12 and 13.

<sup>18</sup> NORMAN DORSEN, ET AL., *COMPARATIVE CONSTITUTIONALISM: CASES AND MATERIALS*, 975 (2003).

<sup>19</sup> CATHARINE COOKSON, ED., *ENCYCLOPEDIA OF RELIGIOUS FREEDOM*, 433. 2003.

<sup>20</sup> See BARRY A. KOSMIN, *CONTEMPORARY SECULARITY AND SECULARISM*, IN *SECULARISM & SECULARITY: CONTEMPORARY INTERNATIONAL PERSPECTIVES* (Barry A. Kosmin and Ariela Keysar. Eds. 2007).

<sup>21</sup> *Sherbert v. Verner*, 374 U.S. 398 (1963).

<sup>22</sup> *Employment Division v. Smith*, 494 U.S. 872 (1990).

governmental actions that were neutral regarding religion, to holdings related to affording accommodation without violating the non establishment principle in *Board of Education of Kiryas Joel Village School District v. Grumet*.<sup>23</sup>

France on the other hand, maintained a somewhat hostile treatment towards religion and developed an extreme version of secularism, *laïcité*. The term *laïcité* originates from the Greek term *laikós* meaning "of the people" or "layman". It was construed in France as the absence of religious involvement in government affairs as well as absence of government involvement in religious affairs. The French made its most prevalent mark in church-state relationship when it issued the banning of "conspicuous signs" of religious affiliation in public schools. Apart from its own interpretation in France's *laïcité*, secularism can be interpreted in at least three ways, (i) neutrality, (ii) strict separation, and (iii) accommodation.

### **A.2.1 Neutrality**

The free exercise and establishment clauses of the United States Constitution are the perfect example of the neutrality perspective of secularism. Philip Kurland defines government's neutrality in dealing with religion by interpreting the free exercise and establishment clauses as a single precept, i.e., that, ". . . government cannot utilize religion as a standard for action or inaction because these clauses, read together as they should be, prohibit classification in terms of religion either to confer a benefit or to impose a burden."<sup>24</sup> Kurland's approach of neutrality is known as the formal neutrality.

Douglas Laylock rejects formal neutrality since it fails to solve the issues of facially neutral laws and its religion interest-motivated exemptions. For example, the national Prohibition

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<sup>23</sup> *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687 (1994).

<sup>24</sup> Philip Kurland, *Of Church and State and the Supreme Court*, 29 U.Chi.L.Rev. 1, 96 (1961)

Act forbade the use of alcohol except for sacramental wine. This act would not be neutral since it favors consumption alcohol using religion as the standard. Nevertheless, the absence of this exemption will make it a crime to celebrate the Eucharist or the Seder, and hence it, “could not be reconciled with any concept of religious liberty worthy of the name”, as guaranteed by the free exercise clause. Such formal neutrality prevailed in the notorious *Employment Division v. Smith* case.

Instead, Laylock proposed another sphere of neutrality which he called substantive neutrality. It is defined as, “the religion clauses require government to minimize the extent to which it either encourages or discourages belief or disbelief, practice or non-practice, observance or nonobservance.”<sup>25</sup> What he meant by minimizing governments involvement is that, “religion is to be left as wholly to private choice as anything can be. . . . It should proceed as unaffected by government as possible.”<sup>26</sup> For example, (substantive) neutrality analysis will determine which policy will minimize both encouragement and discouragement over religion. The approach will single out religious exemptions that has, “infinitesimal tendency to encourage religious activity,” so that it will not so much induce people to adopt these religion. This approach will eliminate the negative impacts of absence of any type of religion oriented exemption as in formal neutrality, i.e., having religious individual (i) abandon their religion, or (ii) defy the law, and go to jail.

### **A.2.2 Strict Separation**

The opinion of the Iowa Court in *Knowlton vs. Baumhover* provides a good point for strict separation of church and religion. “If there is any one thing which is well settled in the policies and purposes of the American people as a whole, it is the fixed and unalterable

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<sup>25</sup> Douglas Laylock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DePaul L.Rev. 993, 999 (1990).

<sup>26</sup> Laylock, *id.* at 1002.

determination that there shall be an absolute and unequivocal separation of church and state . . . and above all that it [taxation of the property] shall not be made an instrumentality of proselytizing influence in favor of any religious organization, sect, creed, or belief.”<sup>27</sup>

Leo Pfeffer acknowledges the negative impacts of the involvement of government in religious matters. He points out these detriments in the case against public school responsibility as follows:<sup>28</sup>

- (1) Assumption of responsibility for religious education is barred by the constitutional principle of the separation of church and state.
- (2) Religion is a private matter.<sup>29</sup>
- (3) The intrusion of religion on the public school system has always had and inevitably will have a divisive rather than an irenic effect on intergroup relations.
- (4) There is no adequate proof that the public schools are not now doing an adequate job in character training and the inculcation of morals.

It could be observed that the case against public school responsibility of religious education would be applicable also to say, religious seminars for public employees.

### **A.2.3 Accommodation**

Strict separation and neutrality may very well be compatible with each other. Nevertheless, still in the non-establishment clause sphere, Michael McConnell rejects both because they still lack protection towards religious liberty. He provides another understanding towards the establishment clause. Mc Connell’s thesis is that, “between the accommodations

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<sup>27</sup> Knowlton vs. Baumhover, 182 Iowa 691 (1918).

<sup>28</sup> Pfeffer, Church and State and Freedom, 353-354, (rev. ed. 1967)

<sup>29</sup> Compare with Alan Schwartz, No Imposition of Religion: The Establishment Clause Value, 77 Yale L.J. 692 (1968). According to Schwartz, religion does not exclusively deals with private matter only. It also serves public affairs in sustaining the moral sense that democratic government requires from its citizens.

compelled by the free exercise clause and the benefits to religion prohibited by the Establishment Clause there exists a class of permissible government action toward religion, which have as their purpose and effect the facilitation of religious liberty.”<sup>30</sup>

He rejects neutrality by comparing religion activities and other activities such as sport and further states that, “any constitutional constraint must arise because the special treatment of religion would have a deleterious effect on religious liberty-not because other activities or systems of thought are of equal constitutional dignity.”<sup>31</sup> This rejection however, is effective only to formal neutrality and would not repudiate substantial neutrality.

On strict separation, McConnell quotes development on this sphere and argues that even the most separationist Justices reject the no-aid view<sup>32</sup> and further states that, “Excluding religious institutions and individuals from government benefits to which they would be entitled under neutral and secular criteria, merely because they are religious, advances secularism, not liberty.” From the way he states his objection to strict separation, it seems that there is a tendency to lean towards rejecting the establishment clause as making the nation secular and instead regarding it as pluralistic.”<sup>33</sup>

He proposes an alternative view which is that, “religion is a welcome element in the mix of beliefs and associations present in the community. Under this view, the emphasis is placed on freedom of choice and diversity among religious opinion.”<sup>34</sup> Accommodation should therefore be permissible on account of fostering religious freedom. He then argues that, “religion is under

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<sup>30</sup> Michael W. McConnell, Accommodation of Religion, 1985 Sup. Ct. Rev. 3.

<sup>31</sup> *Id.*, at 8.

<sup>32</sup> *McDaniel v. Paty*, 435 U.S. 618 (1978) (Brennan J., concurring); and see *Mueller v. Allen*, 463 U.S. 388, 393 (1983).

<sup>33</sup> Mc Connell, *supra* note 30, at 10.

<sup>34</sup> *Id.*, at 16.

no special disability in public life; indeed, it is at least as protected and encouraged as any other form of belief and association.”<sup>35</sup>

Under Mc Connell’s proposition, accommodation can actually reduce the risk of the emergence of an oppressive religious faction. By encouraging a multiplicity of sects, the competition among religious groups will keep any one from getting too strong just like how competition in the economic market works to prevent the attainment of a monopolistic power.

### **III. Non-Establishment Principle as the Decisive Difference between the US Constitution and the Indonesian Constitution Relation**

The absence of any reference to Islam in the Indonesian constitution, the Principle Laws of 1945 also known as the 1945 Constitution, indicates that Indonesia is open to all religions other than Islam, as the US is open to non-Christians. This is emphasized by Article 29 (2) of the 1945 Constitution which states that, “[t]he state guarantees each and every citizen the freedom of religion and of worship in accordance with his religion and belief.” The Reform Era<sup>36</sup> amendment to the 1945 Constitution added another religious freedom clause from the individual’s point of view, “[e]ach person is free to worship and to practice the religion of his choice . . . .”<sup>37</sup> The amendment goes even further by protecting a person’s, “. . . right to be free in his convictions, to assert his thoughts and tenets, in accordance with his conscience,”<sup>38</sup> and

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<sup>35</sup> *Id.*, at 16.

<sup>36</sup> Reform Era here is the term ascribed to the era beginning in 1998 following the fall of Soeharto, the 32-year reigning army general.

<sup>37</sup> Undang-undang Dasar Republik Indonesia 1945 [Constitution of the Republic of Indonesia 1945], art. 28E (1) (all sources in Indonesian language cited and relied upon in this paper are translated by the author).

<sup>38</sup> *Id.*, art. 28E (2).

guaranteeing that, “the right to . . . adhere to a religion . . . [is] a fundamental right that shall not be curtailed under any circumstance.”<sup>39</sup>

The principle difference between the Indonesian and the United States constitution is its viewpoint on liberty. The religious freedom clause in the 1945 Constitution infers the effort of the Government to define and guarantee religious liberty which clearly emphasizes the right of the individuals socially contracting to form the state. The First Amendment of the United States Constitution on the other hand, was drafted with the idea that religious freedom is best protected by restricting the assertion of governmental power, not by defining individual rights.<sup>40</sup> The difference of approach hence would likely explain why the 1945 Constitution does not have a non-establishment-like clause such as United States Constitution’s, “congress shall make no law respecting an establishment of religion”. The 1945 Constitution was never meant to bar government’s intervention to religious affairs.

As a consequence of the absence of the non-establishment clause Indonesia has not held a firm position on which stage of secularism it stands. Many Indonesian leaders certainly refuses to be classified a secular country at all even though many parts of the 1945 Constitution suggest otherwise.<sup>41</sup> On the contrary, because of absence of a non-establishment clause, the government has never shown reluctance in accommodating, and to some extent, interfering with religious affairs. For example, it has had Department of Religious Affairs since January 3<sup>rd</sup>, 1946, just five months after Indonesia’s independence.<sup>42</sup> The Department of Religious Affairs is not to be

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<sup>39</sup> *Id.*, art. 28I (1).

<sup>40</sup> See, KRYSZYNA DANIEL & W. COLE DURHAM, JR., *supra* note 14. Krystyna had pointed out however, that problem of this viewpoint is visible in modern states where, government has grown so large and exerts such intense gravitational influence on all of social life that one can no longer be assured that inaction is an automatic guarantor of neutrality.

<sup>41</sup> <http://bimasislam.depag.go.id/?mod=article&op=detail&klik=1&id=141>. Yet this is more because of the negative stigma of the term “secularism” itself. But what they would mean is secularism in terms of strict separation or *laïcité*.

<sup>42</sup> <http://www.depag.go.id/index.php?a=artikel&id2=sejarahdepag>.

mistaken to manage Islamic affairs only. Its subdivisions include Directorate General of Society Guidance of Christian, Catholic, Hindu, Buddha, and of Course, Islam. Indonesia also has a court of religion established in 29 December 1989.<sup>43</sup> On this instance however, even though the official name of the court is Court of Religion (*Peradilan Agama*), it only deals with matters related to Islam. Article 49 of the Law No. 7 Year 1989 on Court of Religion as amended by Law No. 3 Year 2006 stipulates that the duty and authority of the Court of Religion is, “to examine, decide, and settle cases in the first instance among Muslims.”

The government even interferes in important aspects of religion, especially Islam. Every year the government via the Department of Religious Affairs makes an official resolution on when *Ied Mubarak*, the most important religious day in Islam, falls.<sup>44</sup> All this shows that although separating the state from church, or mosque for that matter, the Indonesian government seems to accommodate religion. Nevertheless, its accommodation is not an evenhanded one. The existence of the Court of Religion which only deals with Islamic matters is a strong example. Other than Islam, it has always been apparent that the government only respects “main religions” as defined by Prevention of Abuse and/or Desecration of Religion Act Nr. 1/PNPS/1965 (hereinafter PADRA).

According to PADRA, deviating interpretation of a main religion in Indonesia or activities that resembles a religious activities of such religions (but deviating from it) are prohibited:<sup>45</sup>

"Every person is prohibited from deliberately in public, advancing, advising, or procuring public support for the interpretation of main religions in Indonesia or conducting activities

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<sup>43</sup> Court of Religion Act, Nr. 7 Year 1989, Art.

<sup>44</sup> There is always differences in determining when Ied Mubarak which is the first day after, and celebrates the end of, the fasting month of Ramadhan. The difference particularly happened between two of the largest organized Muslim community in Indonesia, the Nahdlatul Ulama and Muhammadiyah.

<sup>45</sup> Prevention of Abuse and/or Desecration of Religion Act Nr. 1/PNPS/1965 (PADRA), Art. 1.

that portray religious activities similar to the activities of those (main) religions, which interpretation and activities deviate from the basic teachings of such religion."

Excerpts of this clause were added by PADRA to the Indonesian Criminal Code giving a maximum of five years sentence to those violating it.<sup>46</sup>

The term 'main religions' is limited in PADRA's elucidation only to Islam, Christian (Protestant), Catholic, Hindu, Buddha, and Confucianism. The elucidation of PADRA is quick to clarify that it, ". . . doesn't mean that other religions, for example: Jew, Zoroaster, Shinto, Taoism, is prohibited in Indonesia."<sup>47</sup> It is clear that PADRA is a promulgated example of the Indonesia government's favoritism.<sup>48</sup>

Due to the absence of the non-establishment clause, the Indonesian government sees "no constitutional constraints on providing economic or other means to facilitate (even) religious groups in the actualization of their religious freedom rights."<sup>49</sup> As shown by PADRA, the government's inception of the Department of Religious Affairs, the Court of Religion, and its interference in determining the day of Ied Mubarak, it is virtually visible that in Indonesia, "the state is willing to affirmatively cooperate with religious groups in helping them to carry out their missions as they perceive it."<sup>50</sup>

This classification seemed fit with the Indonesian Constitutional Court's very concise interpretation of the State and religion. In the only case that talks about state and religion relations, the Court held that, "Indonesia is not a state that is based on a certain religion, but it is also not a secular country that does not pay attention to religion and leaves religious affairs

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<sup>46</sup> Indonesian Criminal Code, Art. 156a.

<sup>47</sup> PADRA, Elucidation of Art. 1.

<sup>48</sup> Although not yet having its own directorate general in the Department of Religious Affairs, Confucianism had gradually obtained more and more recognition from the government, exemplified by the grant of a national holiday commemorating the Chinese New Year only after the Reform Era.

<sup>49</sup> KRYSZYNA DANIEL & W. COLE DURHAM, JR., *supra* note 14, at 120.

<sup>50</sup> *Id.*, at 125.

entirely to the individual and society. Indonesia is a country based on the belief in the One and Only God that protect every religion followers to perform the teachings of their religion.”<sup>51</sup>

Indonesia’s accommodation therefore, is not the same as it applies in the United States which treats all religions equally, although at least it formally professed and tried to be. But it is still different from that of Iran or Pakistan which favors only one religion. Indonesia’s accommodation is a unique one. It accommodates selectively, but its given preference is limited, not to one, but many religions. It could be said then that Indonesia had a kind of “preferential accommodation” approach in its church-state relations.

#### **IV. Arguing a Modified Pluralism as a Better Model for Pluralistic Countries**

This following Section IV. A. will unveil the threat of secularism towards religion and religious life and offer Pluralism in exchange. Section IV. C will analyze the Ahmadiyya case in Indonesia to expose pluralism’s single most important defect. Section IV.C will try to propose a modification to remedy this defect by proposing the institution of John Rawls’ theory of justice into pluralism.

##### **A. Critiques of Secularism and the Road to Pluralism**

Although seemed to be the most adopted model in general, secularism in its extremity has its drawbacks. The French model is an example. Its hostility towards religion is epitomized by the ban of religious symbols in public spaces which causes protest from scarf wearing Muslims. Birnbaum quoting Michael Walzer and Will Kymlicka said that they are, “looking at the [F]rench example as almost a totalitarian one in which identities are repressed.”<sup>52</sup> By quoting the

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<sup>51</sup> Ruling of the Indonesian Constitutional Court, *supra* note 9.

<sup>52</sup> Birnbaum, *supra* note 7, at 2.

famous Protestant theologian, Reinhold Niebuhr, Birnbaum also state that France seems to have the most “naked public square” and further stated that it is exactly the one that the US must avoided.<sup>53</sup> Nevertheless, the United States is not far off from this position.

The USSC, keeping its own interpretation of the wall of separation, ruled against prayers at public events such as school graduation ceremonies.<sup>54</sup> In its evolution secularism concept of separation has developed more and more antipathy towards religion, and “at some point, aggressive separationism becomes hostility towards religion.”<sup>55</sup> While most American Jews still applauded *Lee v. Weisman*, prominent philosophers like David Novak said, “on Torah grounds, Jews ought to encourage non-Jews to pray in public in order to show how much they believe the world, including the political order, is dependent upon God . . . . We Jews should be opposed to *de facto* public atheism.”<sup>56</sup> From the perspective of religious communities, atheism or in its softer version, secular humanism has been a feared foreseeable result of secularism. As a result of this fear, many negative epithets have been given to secularism. This includes the phrase “corrosive secularism” which was a label given by the USSC for the *Lee v. Weisman* holding.<sup>57</sup>

In the long debate on secularism on the Constitutionalism and Secularism conference in Benjamin N. Cardozo School of Law, 27 – 28 October 2008, fear of hostility of secularism towards religion as exemplified by France seemed to be something which is shared by the academicians. Indonesia in particular would resent any policies or regulations that would lead to secular humanism, let alone atheism. Indonesia has historically been a religious civilization, even

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<sup>53</sup> Birnbaum, *id.*

<sup>54</sup> *Lee v. Weisman*, 505 U.S. 577 (1992).

<sup>55</sup> W. Cole Durham, Perspectives on Religious Liberty: A Comparative Framework in Religious Human Rights in Global Perspective: Legal Perspectives (Johan D. van der Vyver and John Witte, Jr. eds, 1996) as cited in NORMAN DORSEN, ET AL., *supra* note 18, at 976.

<sup>56</sup> Birnbaum, *supra* note 7, at 2.

<sup>57</sup> *Mitchell v. Helms*, 530 U.S. 793 (2000).

long before Islam reigns predominantly as a major religion.<sup>58</sup> The 1945 Constitution acknowledged this in the clause, “[t]he State is based on the belief in the One and Only God.”<sup>59</sup> Hence, there is a certain doubt that secularism would be the best perspective in interpreting state and religion relations for Indonesia.

Generally speaking, from the examples of Pakistan which inhibits the “left” spectrum of non-theocratic church-state relations and France which reaches the “right” extremities of secularism in being hostile towards religion, the United States, Indonesia, and other plural democratic countries therefore should seek other perspectives on church-state relations that allow religions to flourish together. Michel Rosenfeld, whose views on pluralism extend not only in church-state relationship, but also legal interpretation and jurisprudence, had suggested that exactly for such issues, secularism should be replaced with pluralism.<sup>60</sup>

Pluralism is a term widely used by many branches of social science, including within the discipline of law. It is used in the sphere of environmental law<sup>61</sup>, jurisprudence and legal interpretation<sup>62</sup>, politics<sup>63</sup>, and constitutional law, particularly in relation to religion-state interactions. Our study will use the latter’s conception pluralism.

In general, pluralism demands that the state should not be completely alienated from religion. On the contrary, pluralism demands cultivation of public spaces for religious communities. This process is what is now commonly referred to as “deprivatization of religion”. If we understand the recent “deprivatization” of religion as the intervention of religion into the

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<sup>58</sup> <http://www.depag.go.id/index.php?a=artikel&id2=sejarahdepag>.

<sup>59</sup> Constitution of the Republic of Indonesia 1945, art. 29 (1).

<sup>60</sup> Michel Rosenfeld, presentation at the Constitutionalism and Secularism Conference (Oct. 26, 27, 2008) (transcript available in the Benjamin N. Cardozo School of Law Library).

<sup>61</sup> See GEORGE HOBERG, *PLURALISM BY DESIGN: ENVIRONMENTAL POLICY AND THE AMERICAN REGULATORY STATE*, 1992.

<sup>62</sup> See Michel Rosenfeld, *Dworkin and the One Law Principle: A Pluralist Critique*, in *REVUE INTERNATIONALE DE PHILOSOPHIE*, 2004.

<sup>63</sup> See Michel Rosenfeld, *A Pluralist Theory of Political Rights in the Time of Stress* (Cardozo Legal Studies Research Paper No.116, 2005).

“undifferentiated” arena of civil society then we can achieve “a conception of modern public religion.”<sup>64</sup> Under this conception the state should create forms of development of civil religion to avoid social conflicts and promote national coordination, especially in countries with serious religious or ideological divisions.

Pluralism does not utterly abandon the whole idea of secularism in that it maintains a certain distance between state and religion. Yet it avoids the state’s disaffection towards religion. Pluralism is developed under the platform wherein religious authority remains separated from political authority without requiring complete opposition of the two. The state here shall allow religions to “go public” in a way that essentially confirms their ability to adapt to the secularization and differentiation of modern life. Whether religions have the ability and/or chose to go public is contingent on a number of factors including religious principles, historical circumstances and cultural traditions.<sup>65</sup>

What type of pluralism, one asks, that will serve the purpose of a complacent religion-state relation? John Borneman identifies the problems that may arise from misconception of pluralism in his remarks on the area surrounding Jerusalem:

The Levant, in particular, from the Axial Age to the present, has been a site of constant movement of people and confrontation, resulting in shifting but always pluralist configurations of culture, religion, and politics. The cultural diversity of the Levant is a longstanding empirical fact. It has not always been experienced as a problem, and that is the point: diversity becomes so only when it is framed in certain ways. There is perhaps

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<sup>64</sup> Krisin Frabbe, “*Repairing*” *Classical Theories of Secularization: Two Approaches*, <http://ocw.mit.edu/NR/rdonlyres/552E33A6-0B50-4FE0-98A4-E4D136633158/0/paper1.pdf>.

<sup>65</sup> *Id.*

something about the particular way in which the experience of pluralism is framed that makes it a problem.<sup>66</sup>

The approach taken by Harvard School of Law's Pluralism Project led by Diana L. Eck is a worthy effort in dealing with this issue. Eck uses a negation method applied to other similar understanding, while at the same time, making a clear definition of pluralism. Eck first asserts that Pluralism and plurality are not synonymous, as some understood them. She insists that pluralism is not merely a social fact of plurality or a society with diversity or colorful elements.<sup>67</sup> She takes the example of the Elmhurst area of Queens, where people from 11 countries lived on a single floor of an apartment building on Justice Avenue each certain that they were the only immigrants there, hence creating isolation and fear. The plurality and diversity here, is not pluralism.

Pluralism requires an "active engagement with plurality."<sup>68</sup> As opposed to France's *laïcité*, pluralism in Eck's proposition necessitates, "the cultivation of public space where we all encounter one another."<sup>69</sup> This cultivation should then be formally upgraded into an interfaith council which will respond to the unspoken "r word" in multicultural discussion, religion. This entails dialogue as the basis of pluralism.

The second requirement of pluralism is a demand for state to promote more than tolerance. The term religious tolerance itself has been a mantra in any pluralism debate. Yet Eck refuses the traditional approach of tolerance. It is in fact deceptive in that it may prevent

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<sup>66</sup> John Borneman, Transparency and Women's Intelligibility: What is at stake in veiling?, 1 (Oct. 26, 2008) (unpublished manuscript, on file with The Cardozo Law Review).

<sup>67</sup> Diana L. Eck, The Challenge of Pluralism, Nieman Reports "God in Newsroom" Issue Vol. XLVII, No. 2 (Summer 1993), available at [http://www.pluralism.org/research/articles/cop.php?from=articles\\_index](http://www.pluralism.org/research/articles/cop.php?from=articles_index).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*; The definition of public space is in itself a lengthy discussion on freedom of speech issues for which, First Amendment cases starting from Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 752 (1995) should be consulted.

hostility, but it often stands in the way of fostering interaction among the religious groups for it does not require the understanding of each on the other's belief, even the most pageant.<sup>70</sup> In line with Eck, it appears that tolerance, although solving frictions, nurtures ignorance and stereotyping. Getting to know one another amongst these groups, i.e., the active seeking of understanding across lines of difference is therefore, a central part of pluralism.

The last request of pluralism is that it does not necessarily require state to demand religious followers to reduce their theological beliefs and adopt the view that all perspectives are equally viable, hence embracing relativism. At the offset, it merely creates room for real commitment of faith in relationship to one another.<sup>71</sup>

Using a more theoretical approach, Michel Rosenfeld divides pluralism in three stages.<sup>72</sup> The first stage of pluralism is minimal pluralism where the divisibility into self and other is recognized. Except for the most theocratic or totalitarian government, all polities would meet the minimal pluralism standard. Minimal pluralism has also no merits in establishing a specific pluralism interpretation of church-state relation. Under Eck's classification, minimal pluralism would only mount to plurality. The second stage gives us more merits. It is called limited pluralism which is where toleration of other (i.e. non dominant) religions existed. It requires recognition of the existence right of other beliefs without requiring equal level to all conceptions of the good. The final stage of pluralism is comprehensive pluralism which, "insist on equalization of all conceptions of the good found within the polity."<sup>73</sup> Arguably, more developed democracies such as the United States would claim that it complies with comprehensive pluralism, yet it remains to be seen how true this claim would be as we still see domination of

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<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> MICHEL ROSENFELD, *supra* note 13, at 44.

<sup>73</sup> *Id.*

Christianity in public spaces and government festivities, e.g., the recent Presidential inauguration.

## **B. Indonesia as a Case Study for Studying Pluralism and its Defects**

The pluralism model certainly appeals to Indonesia as a plural democratic countries. Yet, recognizing Indonesia's long history as a plural and religious nation at the same time, one might ask whether a certain extent of pluralism subsisted in Indonesia. Being a nation that consciously recognizes itself as a miscellany of cultures, Indonesia incorporates a motto, "*Bhineka Tunggal Ika*," Sanskrit language meaning unity in diversity. It could be said as the equivalent of the rarely spoken motto engraved in the coin all American carries, *E Pluribus Unum*. It appears that at least symbolically, minimal pluralism is a given state in Indonesia since its very independence. Nevertheless, to determine whether in reality Indonesia adheres to pluralism, we should limit our examination to post Reform Era. One preceding argument is that since prior to such Era, the totalitarian government had retained hegemony in virtually every interpretation of Indonesian life, including the religious segment.

The Reform Era in Indonesia meant the end of totalitarianism and the beginning of democracy. The strengthening of civil society, which is one of the most ubiquitous outcomes of democracy, yields the intensification of religion's group activities and outreach in public forums which was previously in strict supervision in Soeharto's administration. Indonesia had experienced what we have referred to as "deprivatization of religion". This return of religions to the public forum leads to the increase of interactions between religious groups. Having a collective awareness of potential non-constructive frictions in these interactions, in many cities in Indonesia, interfaith councils were formed. They were actively involved in dealing with not

only interfaith disputes, but also other social or environmental issues such as collaborative initiatives for orphanage fund raising, planting trees, etc. It is therefore fair to say that using Eck's criteria, Indonesia after the Reform Era has naturally adhered to pluralism.

The problem is whether Eck's account of pluralism is sufficient as the definitive formula in solving religion-state issue in a heterogeneous community such as Indonesia? What can be criticized about Eck's approach is that it focused too much on the elements required to transform plurality into pluralism whilst avoiding relativism. It fails to anticipate the potentiality of more aggressive demands from major religions when they enjoyed the comforts of domination of public space which also requires lesser room for smaller religious groups.

Take the example of the Ahmadiyya case in Indonesia which still spurred endless debate in Indonesia to this date. Indonesia has always been a country with extraordinary diversity with over 300 ethnic groups and over 500 different languages and dialects. The same diversity has been prevalent in the religious sphere. Islam as a predominant religion has traditionally had factions in itself, and naturally, this applies to Indonesia as well. Among the factions is Ahmadiyya, a "Muslim" community relatively small in Indonesia.<sup>74</sup>

Although small, unlike other religious groups Ahmadiyya has caused restlessness among Indonesian Muslim society since it began to spread. The main contention against Ahmadiyya is its claim of a prophet after Muhammad, which is Mirza Ghulam Ahmad, its founder. Decades of disgruntlement over Ahmadiyya's presence, including one involving a formal declaration (*fatwa*) of Indonesian Muslim Clergy Council (*Majelis Ulama Indonesia*) in 1980 and 2005 that

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<sup>74</sup> Ahmadiyya itself is split in two factions. However, the term Ahmadiyya in this paper, -following the course of the Ahmadiyya Joint Decree itself and court decisions made on Ahmadiyya- will refer only to the larger group of Ahmadiyya, i.e., the Ahmadiyya Moslem Community which established its International Headquarters in London which unlike its counterpart, explicitly acknowledge the Prophethood of Mirza Ghulam Ahmad.

Ahmadiyya is a heresy of Islam and therefore is not recognized as part of Islam<sup>75</sup>, failed to abolish Ahmadiyya teachings and its community from Indonesia. In early 2008, the restlessness escalated into horizontal conflicts in many regions including Jakarta.

In response to this restlessness, on June 9<sup>th</sup>, 2008 the Indonesian government issued the Ahmadiyya Joint Decree which serves, “to warn and order the members and/or caretakers of ACI, insofar as proclaiming to be a Moslem, to stop the spread of interpretation and activities that deviate from the basic Religious teachings of Islam, namely the distribution of understanding that acknowledge the existence of the prophet after the Mohammed and all his teachings.”

If indeed there’s merit in the study of the Ahmadiyya case in Indonesia, it is that of showing us that pluralism may lead to domination of strong religion to the point of undermining or coercing the strongest normative system, i.e., the legal system itself. This concern had been identified by experts trying to put a naturally pluralist country like Indonesia under the pluralism map. András Sajó observed the predicament as follows:

Strong religion may take legal pluralism to the extreme, that is, to the point of denying pluralism, insisting on the primacy of one religion’s rules over and against all other normative systems. The believers and their organizations may disregard the secular dimensions of their conduct and profess a loyalty that is not to the state.<sup>76</sup>

Such loyalty for example, is the basis for the force that drives the Indonesian government in issuing the Ahmadiyya Joint Decree. The issuance of the Ahmadiyya Joint Decree shows how

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<sup>75</sup> Decree of the Indonesian Muslim Clergy Council Nr. 11/MUNAS VII/MUI/15/2005 dated 29 July 2005. The Indonesian Muslim Clergy Council is a council comprised of representatives of all major Islamic groups in Indonesia and regularly issues *fatwa* or religious opinion that to a certain degree is acknowledged and accepted by the majority of Indonesian Muslims.

<sup>76</sup> András Sajó, *Preliminaries to a Concept of Constitutional Secularism*, 6 Int'l J. Const. L. 606 (2008).

the government bowed to negative public opinion towards Ahmadiyya. This kind of perseverance, if embraced further by the government may result in the State's identification with one religion as in the case of Pakistan. This identification might turn out to be oppressive and discriminatory, endangering freedom of religion.<sup>77</sup> The issuance of the Ahmadiyya Joint Decree evinced that such fear appeared to be plausible. Hence, modification of pluralism at least in the broad sense offered by Eck becomes a necessity.

To avoid the divergence of pluralism into strong religion domination or state identification we need to use Professor Rosenfeld's classification of pluralism. Prior to the issuance of the Ahmadiyya Joint Decree, the 1945 Constitution could be regarded to have placed Indonesia within the sphere of at least limited pluralism. Formally, it also purported to attain a comprehensive pluralism with the introduction of further equality of treatment in Article 28 D (1) of the 1945 Constitution to complement the existing principle in Article 27. The article stipulates that, "[e]ach person has the right to recognition, security, protection and certainty under the law that shall be just and treat everybody as equal before the law." However, the Ahmadiyya Joint Decree appears to have reaped Ahmadiyya followers from their equal treatment rights. The decree disregarded their right to have their own religious interpretation towards Islam when it is faced with the interpretation of the majority.

The Ahmadiyya Joint Decree then had degraded Indonesia into minimal or at most limited pluralism when it failed to acknowledge equal treatment towards Ahmadiyya. The decree had also preclude Indonesia from modern constitutionalism which requires the treatment of, ". . . at least *prima facie*, all the different religious selves equally."<sup>78</sup>

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<sup>77</sup> NORMAN DORSEN, ET AL., *supra* note 18, at 976.

<sup>78</sup> MICHEL ROSENFELD, *supra* note 13, at 46.

On the other hand, the 1945 Constitution has repeated guarantee of equal treatment. The Indonesian Constitutional Court further asserts equal treatment in the realm of religion by stating that the government should never differentiate treatments to religious groups based on its size.<sup>79</sup> All these guarantees appeared to have not been interpreted similarly.

The Ahmadiyya Joint Decree, and perhaps how *Lee v. Weisman* case is decided and the potentialities arising from domination of Christian values in governmental celebrations in the United States, is an ample proof of why standard equality principle alone is not enough in that it is less persuasive as a foundation for preventing policy makers in making policies benefiting the dominant group. This difficulty has been pointed out by Rosenfeld in stating that, “when it comes to affording the greatest possible protection to freedom of worship, on the other hand, comprehensive pluralism cannot avoid leaving open a gap between principle and practice.”<sup>80</sup> He proposes that this problem is dealt by encouraging the greatest possible diversity, and avoid considerations on mere non-discrimination and preference.<sup>81</sup> But he also acknowledged that apparently there are no, “readily available means” to effectively prevent the invasion of values of a strong religion in the inter-religion public sphere as well as invasion of interpretation by a stronger group to a much smaller group within a religion as in the case of the Ahmadiyya Joint Decree.<sup>82</sup> Nevertheless he argued indisputably that although the problem subsisted, the versatility of comprehensive pluralism is the “best possible approximation to equal freedom of and from religion” since it can negotiate the inevitable tensions between constitutionalism and religion.<sup>83</sup> Nevertheless, in light of his offer that comprehensive pluralism leaves room for

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<sup>79</sup> Ruling of the Indonesian Constitutional Court, *Supra* note 9.

<sup>80</sup> MICHEL ROSENFELD, *supra* note 13, at 62.

<sup>81</sup> *Id.* at 62, 63. The term inter-communal and intra-communal is used in his work to describe the difference between values within a religion and amongst religions.

<sup>82</sup> See, *Id.* at 65.

<sup>83</sup> *Id.*

improvement<sup>84</sup>, another approach to pluralism should then be considered. It is one of utilizing John Rawls's theory.

## **C. Modified Pluralism for Indonesia and Other Plural Democratic Countries: Institution of John Rawls's Theory of Justice**

### **C.1. John Rawls's Theory of Justice**

Rawls' book, "A Theory of Justice", published in 1971 marks a golden era of political and legal thought in search of a defining justice conception. It renewed not only scholarly interest, but also popular interest in the concept of justice. There are many features in the book that could form analytical basis for the subject in this paper, yet it is his main theories which are justice as fairness and the use of original position as a hypothetical state that will be discussed.

Rawls developed his theory from a conviction that all men have certain inalienable rights founded on justice that could not be overridden by the welfare of society as whole. He argues that under this premise, "justice denies the loss of freedom for some is made right by greater good shared by others."<sup>85</sup> In other words, he desires for a distinguished principle that, "free rational persons concerned to further their own interests would accept in an initial position of equality as defining the fundamental terms of their association."<sup>86</sup> Determining an initial position is a prerequisite in finding a conception of justice for the basic structure of a society, which is formulating the method by which major social institutions, "distribute fundamental rights and duties and determine the division of advantages from social cooperation."<sup>87</sup>

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<sup>84</sup> *Id.*

<sup>85</sup> JOHN RAWLS, A THEORY OF JUSTICE, 3 (rev. ed. 1999).

<sup>86</sup> *Id.*, at 12.

<sup>87</sup> *Id.*, at 7.

## C.2. Original Position

The initial position under Rawls's theory is the original position which corresponds to the situation where, "no one knows his place in society, in the distribution of natural assets and abilities, his intelligence, strength and the like." With all of their attributes removed, the people will be placed in a "veil of ignorance" by which no one will be able to devise principles in favor of his particular condition, hence resulting in a fair initial situation. John Rawls did not mean that original position is regarded as an actual historical voyage or sending people back to a condition of culture in its primitive state. It is to be understood as, "a purely hypothetical situation characterized so as to lead to a certain conception of justice."<sup>88</sup> The purpose of the original position itself is to formulate principles that will govern the basic structure of society as the object of the social contract.

Surely, in reality people, especially those with more social advantages and facilities than others would find it absurd to give up their current position in discovering the principles of justice and position themselves in the original position. This is even truer for those achieving these advantages through a long process and a hard struggle. Yet according to Rawls, the original position is required to eliminate the distortion in finding the conception of justice acceptable to free and rational persons concerned in furthering interests of their own in establishing an association via a social contract. Under their original position, it could be assured that a fundamental agreement on the principles of justice could be reached fairly, since the position eliminates the asymmetrical positions of everyone's relations to each other and as such they will not design a system particular to each of their own condition resulting in a fair agreement and

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<sup>88</sup> *Id.*

bargain. The original position hypothesis will be extremely useful in constructing the proper fundamentals of pluralism as we shall attest in the following chapter.

### **C.3. Justice as Fairness**

In the original position, each will have to take into account various attribution that they will attain upon entering into a social contract. In this sense, they would certainly object to any future condition that would deprive them from any benefits for the good of others, albeit the majority. As John Rawls puts it:

Since each desires to protect his interests, his capacity to advance his conception of the good, no one has a reason to acquiesce in an enduring loss for himself in order to bring about a greater net balance of satisfaction. In the absence of strong and lasting benevolent impulses, a rational man would not accept a basic structure merely because it maximized the algebraic sum of advantages irrespective of its permanent effects on his own basic rights and interests.<sup>89</sup>

Thus it seems that the principle of utilitarianism is incompatible with the conception of social cooperation among equals for mutual advantage. It is in fact served as a corrective function to the liberal-utilitarian principle of the greatest happiness of the greatest number. On his objections to utilitarianism Rawls states that liberal utilitarianism of Bentham marked a progressive, welfare-oriented departure from classical liberalism's preoccupation with individualistic rights. This results in utilitarianism being a defective theory in conceptualization of justice. The principal flaw is that it justifies taking away social goods of some individuals to entertain a larger aggregate of happiness for the greatest number. Hence, it emphasize on

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<sup>89</sup> *Id.*, at 14.

maximizing welfare of society as a whole, and not of each member of the society. Rawls identifies this as caused by the false analogy used by utilitarianism in treating the society in the same way as individual.<sup>90</sup> According to Rawls, utilitarianism assumes that, “just as an individual balances present and future gains against present and future losses, so a society may balance satisfactions and dissatisfactions between different individuals.”<sup>91</sup> By this Rawls questions the legitimacy of this analogy and condemns the sacrifice of certain individuals’ assignment of social goods for the greater benefit of others.

Rawls draws his inspiration of justice from Immanuel Kant’s moral idea of the freedom and equality of every human being. According to Kant, every human being is to be treated as an end in himself and not as means to the ends of others. It is liberal-egalitarian moral principle, which is violated by utilitarianism and which Rawls reinstates in his theory of social justice and, consequently, in the content or substance of those principles, Rawls tries to give centrality to the moral principle of the freedom and equality of every person.

Based on this conviction John Rawls formidably argues that each person in their original position would agree to two principles. The first principle is one that requires, “equality in the assignment of basic rights and duties.”<sup>92</sup> This choice is rational for person in the position where they have no prior advantage, yet could not ascertain if such is to be bestowed, it will be upon him. This leads to the second principle which holds that inequalities of social and economic could only be justified if they result in compensating benefits of everyone - not just the majority- and in particular for the least advantaged members of society.<sup>93</sup> These two principles translate to what John Rawls refers to as “justice as fairness”.

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<sup>90</sup> *Id.*, at 22-25.

<sup>91</sup> *Id.*, at 24.

<sup>92</sup> *Id.* at 14.

<sup>93</sup> *Id.*, at 15.

Justice as fairness consists of two distinguishable principles: First, each person is to have an equal right to the most extensive basic liberty compatible with similar liberty for others.<sup>94</sup> This is also known as the “equality principle”. Second, social and economic inequalities are to satisfy two conditions: (a) They are to be attached to positions and offices open to all under conditions of fair equality of opportunity; and (b), they are to be to the greatest benefit of the least advantaged members of society.”<sup>95</sup> The first of these two principles is known as the “liberty principle”, while the second half, reflecting the idea that inequality is only justified if it is to the advantage of those who are less well-off, is known as the “difference principle”.

Surely a theory that occupies the intellectual debate on such a fundamental value predominantly could not escape critics. Among these are the libertarian, Marxist, and communitarian criticism. The libertarian critic comes in the form of Rawls’s own colleague, Robert Nozick. Nozick classifies Rawls’s theory as an “end-state” conception of justice which declares the undermining of the liberty rights of the individuals as unfair or unjust to them, which appears in Rawls’s critique against utilitarianism. He then distinguishes this conception against an entitlement-based conception of justice where justice or injustice is viewed in the acquisition of the titles to property holdings.<sup>96</sup> Under this conception, the individual has absolute liberty rights, including the right to own property and exchange it in the market, regardless of the end of distribution it may lead to. Therefore, Nozick appears to refuse any rectification which would undermine this right, hence showing adherence to the whole free-market ideology.

On the other hand, a Marxist criticism is easier to identify. It basically refuses the private ownership system which largely is the basis from which a distributive theory such as that of Rawls’s is formed. The critique therefore, although on point, is not an apple to apple one. A

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<sup>94</sup> *Id.*, at 302.

<sup>95</sup> *Id.*

<sup>96</sup> See ROBERT NOZICK, ANARCHY, STATE AND UTOPIA (1974).

more profound critique is introduced by the communitarian theorist who criticized Rawls's liberal-egalitarian conception of justice for its emphasis on individual rights at the expense of the good of the community. Michael Sandel, condemns what he calls Rawls's notion of disembodied self or subject while proposing the notion of the situated self, which is the self or subject as a member of a community.<sup>97</sup> By this Sandel would prioritize the community's interest over individual and claims that Rawls's primacy of justice against the good is the reason for failure to acknowledge this. For Sandel, justice is only a remedial virtue that is needed in an individualistic society.

To answer all the critics comprehensively would be an elaborate effort and is not to be placed in this paper. Nevertheless, I would like to make a quick note on this. Nozick's approach could be argued on the fact that the distribution theory of Rawls is in no way meant to undermine title or ownership and eliminate competition on that basis. It is meant to ensure that distribution is made in a just manner, which under principles of justice as fairness does not necessarily require amendment to the existing ownership conception. As for Sandel's critique, Rawls's own discussion of utilitarianism should provide adequate answer. Marxist critic, could not be accepted unless it is agreed that assignment of private ownership is not a necessity in the establishment of a modern society which we do not see such agreement to attain success.

#### **C.4. Application of Justice as Fairness in Defining State-Religion Relationship**

For the purpose of reformulating state-religion relationship by applying justice as fairness principles, there are two key modification to the principles inevitably required to make it work. First, the term "social and economic inequalities" in the theory should be generalized to just "inequalities" therefore encompassing any form of unequal treatment, in avoiding narrow

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<sup>97</sup> See MICHAEL SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982).

interpretation of the term “social” which might be construed as not to account for treatments afforded in inter-religion issues. Secondly, the term equality or inequalities should be focused on the treatment instigated by the state towards religion, as opposed to general distribution.

The first principle in the theory requires that each person is to have an equal right to the most extensive basic liberty compatible with similar liberty for others. If we apply this to how religion is treated by the state, we will require thence, that all person, should have equal right to embrace and express any religion and that each religion and religious communities should be treated equally by the state. For example, the state should not in any way prevent its citizens to adopt Hinduism as its religion, even though it is a predominantly Christian or Muslim country. Accordingly, the state should permit erection of a Buddhist temple as it permits the establishment of churches and mosques. Under comprehensive pluralism as offered by Rosenfeld, this prerequisite is already fulfilled since comprehensive pluralism insists the equalization of all conceptions of the good found within the polity. Therefore, comprehensive pluralism has arguably conformed to the equality principle of Rawls’s theory. This brings us to examine the second principles.

In using the original position theory to formulate justice, Rawls arrived at the liberty principle and the difference principle. The liberty principle requires that inequalities are justified if they are to be attached to positions and offices open to all under conditions of fair equality of opportunity. On the state-religion relationship sphere, this means that whenever the state accommodates a certain religion, other religions must also have equal access to such accommodation. For example, if there is a Christmas celebration in the city hall in New York, the Muslims should not be prevented from celebrating Ied Mubarak on the same spot as well. In Indonesia, as mentioned, there exist department of religion with subdivisions managing the

affairs of Muslims, Christians, Buddhist, and Hindus. Yet, in the event Indonesian followers of Confucianism, which are the next religious majority in Indonesia, demands subdivisions that arranges their affairs, so long as they are able to show sufficient amount of necessity as displayed by other religions, the government should not reject this. In the words of the Indonesian Constitutional Court, “the government’s treatment of its citizen should not be based on the majority or minority of religion followers . . .”<sup>98</sup> The USSC held similar position in *Board of Education of Kiryas Joel Village School District v. Grumet*. In an opinion written by Justice Souter, it is concluded that “government should not prefer one religion to another . . . .”

The last principle is the difference principle which justifies inequalities only if they result in compensating benefits of everyone, especially the least advantaged members of society.”<sup>99</sup> Under the realm of state-religion relationship, the “least advantaged members of society” are the religious minorities. As we have discussed previously, the difference principle could not conform to utilitarianism. The reason is simple: utilitarianism proposes the achievement of the greatest satisfaction of desires for the greatest recipient. To apply utilitarianism, it is therefore acceptable to have minor casualties or injustices if the end result is greater benefit or justice for the largest amount of people. Within the state-religion relationship, the Ahmadiyah Joint Decree is exactly in line with utilitarianism. It proposes to satisfy the desires of the so-called majority Muslims in Indonesia on the account of removal of religious freedom of Ahmadiyya.

Hence, based on this interpretation, John Rawls theory directly addresses our discussion in that under application of the difference principle, the method of dealing with minorities would be different, for the difference principle would like to avoid any form of disadvantages to minorities, regardless of whether teleologically it would benefit the greater mass. Instead, it

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<sup>98</sup> Ruling of the Indonesian Constitutional Court, *supra* note 9.

<sup>99</sup> *Id.*

proposes that any unequal treatment should compensate everyone, especially the religious minorities, such as the Ahmadiyya. Therefore, decrees such as the Ahmadiyya Joint Decree should never have existed if the difference principle is adopted.

To fully appreciate the application of the difference principle in defining church state relationship, a connection with the equality principle is to be revisited. The idea is that since endowed inequalities, i.e., advantages attained by followers of majority religions, are undeserved advantages, these inequalities are to be somehow compensated for. Thus the principle holds that in order to treat all persons equally and to give genuine equality of opportunity, society must give more attention to those who are less well-off. As for state-religion relationship, greater resources should be spent on increasing the prospect of the minority to attain proportionally equal position within society. For example, minorities should be facilitated in attaining proportionally equal representations in the government. Funding should be granted to promote proportionally equal, let's say, religious facilities.

It should also be understood clearly as mentioned above that the difference principle is a principle utilized in formulating a social cooperation among participants. As Rawls puts it, "the well being of each depends on the scheme of social cooperation without which no one could have a satisfactory life."<sup>100</sup> Under the difference principle, those better endowed, or more fortunate in their social circumstances, could expect others to collaborate with them when some workable arrangement is a necessary condition of the good of all. Hence, the majorities should not undermine their need to cooperate in social or economic endeavors with minorities. For this, the minorities need also to have a certain extent of fulfillment in their religious life, as is for the majority. The unequal distribution of social benefits in favor of the minority is hoped to encourage them in developing their beliefs to the fullest extent according to their own values,

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<sup>100</sup> JOHN RAWLS, *supra* note 85, at 103.

thereby also affording an intra-religion enhancement incentive, which is much more required by smaller religion compared to the strong-established ones. This will endorse their well-being and further enhance their performance in social cooperation which in the end will benefit the majority. Hence it could be maintained that the difference principle will be beneficial both to the minority and the majority. In this way, the majority should not object to, and on the contrary should support, for example, the grant of permit by the government for establishing facilities for minority religions, for they realize the mutual benefit it will promote.

A further merit of the application of the difference principle in state-religion relations sphere is that it will have a domino effect in fostering a more harmonized inter-religion relationship, simply by showing the majority or the strong's brace and compassion for the minority or the weak. Rawls acknowledges this as promoting the principle of fraternity, civic friendship, and social solidarity.<sup>101</sup>

Other than applying the justice as fairness theory directly, we could also approach the definition of state-religion relationship reversely, i.e., from the original position. Rawls acknowledged that justice as fairness is not a complete theory of contract. Nevertheless, he states that the original position can be developed into a nearly comprehensive ethical system which involves virtues other than justice. This includes defining rightness and truth as a system established from the original position, hence "rightness as fairness."<sup>102</sup> Therefore, from Rawls's conviction, we could depart from the original position for the purpose of formulating state-religion relationship virtues. As part of his elaboration of the original position, Rawls had even scantily described how it would work in reviewing religious matters. In the original position, it is

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<sup>101</sup> 105

<sup>102</sup> *Id.*, at 17.

required that people are to, “presume that even their spiritual aims may be opposed in the way that the aims of those of different religions may be opposed.”<sup>103</sup>

Under the original position, each will seek for state-religion relationship that will protect his religious convictions and his capacity to advance his religion. No one has a reason to concede any enduring loss for his rights to adhere to a certain religion and to express his religion for the sake of a greater net balance of satisfaction of the major religion followers. A rational person in an original position would not accept a state-religion structure merely because it maximized the algebraic sum of advantages for religious communities irrespective of its permanent effects on his own basic religious rights.

Instead, each person would choose the following principles in defining state-religion relationship: the first requires equality in the treatment of state towards religions and religious communities, while the second should guarantee that any inequality of treatments, for example in facilitation of certain religious conduct over another, are only just if they are accessible to all religions and result in compensating benefits of every religion and religious communities, and in particular, for the minority religions.

Thus we may observe that the first principle is another way of saying that there all religions should have equal footing in its interactions with the state.<sup>104</sup> The second principle, which we may refer to the liberty principle and difference principle in pluralism, is meant to complement equality amongst religions in pluralism. For example, there may be a certain interest within Islam to have all “heresy” be eradicated and hence comes the need to disband Ahmadiyya. Under the original position, a rational person would not agree for a state that does not prevent this from happening, since being behind a veil of ignorance, each would think first of his

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<sup>103</sup> *Id.*, at 14.

<sup>104</sup> This is also a reminiscent of Rosenfeld’s idea of comprehensive pluralism. See MICHEL ROSENFELD, *supra* note 13, at 62.

convictions if he was part of that so-called “heresy” and hence will not submit to this kind of majority domination. To clarify how this work, a current member of the Muslim majority in Indonesia would find this approach to be plausible, for example, if they live within Southfields London, one of the regions where the Ahmadiyya community is concentrated.

Hence it could be observed that taking off from the original position in defining state-religion relationship yields similar result as directly applying the justice as fairness theory into state-religion relationship. We may refer the application of Rawl’s theory in formulating state-religion relationship as “state-religion relationship as fairness”. Better yet, since we have conceded that the finest platform from which we may formulate state-religion relationship is pluralism, we could also designate this application as “pluralism as fairness”.

## **V. Conclusion**

We have resolved above that by applying John Rawls’s justice as fairness theory comprehensively in formulating state-religion relationship, a desirable outcome will prevail, both for the majority and the minority. Although less convincing than the previous benefit, another potential benefit of applying the difference principle is its persuasive power. As a commanding principle for the state, it will discourage the narrow-minded members of the major religious groups from urging the government to enact a policy that contains inequalities such as the Ahmadiyya Joint Decree.

These benefits of implementation of the justice as fairness principle in state-religion relations sphere might very well render it a necessary alternative. Hence it is hoped that realization of this proposition will spark at least a reevaluation of the conception of state-religion relations in Indonesia, the United States and hopefully other plural democratic countries to

consider the implementation of a complete Rawlsian understanding of justice by comprehensively instituting the justice as fairness theory within the concept of pluralism.