

# AUTOCATALYTIC MODELS OF COUNTER-TERRORISM IN EAST AND SOUTHEAST ASIA: AN INTERNATIONAL COMPARATIVE ANALYSIS OF CHINA, INDONESIA, AND THAILAND

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## ABSTRACT

*This Article argues that counter-terrorism policies and formal law in many states in the East and Southeast Asian region are feeding the current spike in terror activity rather than reducing it. Regional government's unrelated policy objectives and failure to implement or comply with norms conducive to fair treatment of "at risk" communities and their failure to adopt a prospective approach to countering terrorism is making the problem worse. This Article employs a comparative methodology of key states in the region, including China and its marginalization and forcible assimilation of minority Uighur populations; Indonesia and its radicalized majority population under a sympathetic or tolerant leadership; and Thailand, a country locked in internal strife with domestic elements seeking self-determination. It will first discuss contemporary models of counter-terrorism, then detail relevant measures adopted in the subject states followed by an analysis concluding that, though differing in specific initiatives, these states share a functional commonality motivated by objectives unrelated to counter-terrorism leading to a resultant commonality of increased terror activity. Moreover, these arguments are equally relevant to other countries in the region such as the Philippines and Malaysia.*

## INTRODUCTION

Terrorism is a real threat in the East and Southeast Asian region (the Region). After the 9/11 attacks in the United States, it was

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feared that a second front<sup>1</sup> would develop in the Region because of the connections with many known terrorists from Western Asia,<sup>2</sup> the presence of training camps,<sup>3</sup> and the radicalized Islamic rhetoric and paramilitary groups operating there.<sup>4</sup> Initially, these fears proved to be largely exaggerated as most terrorist groups indigenous to the Region showed little appetite for international jihadism, rather concentrating on national or regional issues,<sup>5</sup> and actually rebuffing terrorist groups such as al-Qaeda.<sup>6</sup> More recently, however, trends toward greater radicalization and a growing terrorist threat in the Region have emerged. These trends are apparent in increases in significant terrorist attacks in the Region, increase in the growing number of recruits fighting in foreign the-

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1. See generally ROHAN GUNARATNA, *INSIDE AL QAEDA: GLOBAL NETWORKS OF TERROR* 167–220 (2002); MARIA RESSA, *SEEDS OF TERROR: AN EYEWITNESS ACCOUNT OF AL-QAEDA'S NEWEST CENTER OF OPERATIONS IN SOUTHEAST ASIA* (2003); Barry Desker & Kumar Ramakrishna, *Forging an Indirect Strategy in Southeast Asia*, 25 *WASH. Q.* 161 (2002); KEN CONBOY, *THE SECOND FRONT: INSIDE ASIA'S MOST DANGEROUS TERRORIST NETWORK* (2006).

2. See *The Elusive Enemy*, *ECONOMIST* (Aug. 1, 2002), <http://www.economist.com/node/1259532> (“Abubakar Janjalani, [founder of Abu Sayyaf, a militant group in Southeast Asia,] trained with Osama bin Laden in Afghanistan. Two of the September 11th hijackers spent time in Malaysia. Ramzi Yousef, the mastermind of the first bombing of the World Trade Centre, in 1993, used the Philippines as a base.”) [<https://perma.cc/GD8K-6K29>].

3. Including several camps in southern Thailand, the southern Philippines, Indonesia, and Malaysia. See MAX GROSS, *A MUSLIM ARCHIPELAGO: ISLAM AND POLITICS IN SOUTHEAST ASIA* 105–06 (William Spracher ed., 2015).

4. One such organization includes Jemaah Islamiyah, a Muslim extremist group with presence in Thailand, Singapore, Malaysia, and the Philippines. Jemaah Islamiyah has also pledged allegiance to Daesh through its spiritual leader Abu Bakar Ba'asyir. See Avantika Chilkoti, *Indonesia on Alert Over Lure of Isis*, *FIN. TIMES* (July 16, 2015), <http://www.ft.com/cms/s/0/5db8e554-2ada-11e5-8613-e7aedbb7bdb7.html#axzz40d5Bsjyw> [<https://perma.cc/VW66-XNCK>]; see also *Jemaah Islamiyah (JI)*, COUNTER EXTREMISM PROJECT, <https://www.counterextremism.com/threat/jemaah-islamiyah-ji> (last visited Apr. 16, 2018) [<https://perma.cc/H3JR-NC66>].

5. For example, the communist New People's Army in the Philippines aims to establish a socialist system. See PETER CHALK ET AL., *THE EVOLVING TERRORIST THREAT TO SOUTHEAST ASIA* 57 (2009). In Thailand, the Malay-Muslim conflict in the south revolves around issues of self-determination. See *id.* at 1, 5–7. In Indonesia, it was observed that extremist groups are a result of internal conditions such as inflation, poverty, unemployment, and a weak government. See *id.* at 67.

6. For instance, the Indonesian nationalistic Gerakan Aceh Merdeka rejected al-Qaeda's intention to establish presence in Indonesia via proxy. See ANDREW T. H. TAN, *SECURITY STRATEGIES IN THE ASIA-PACIFIC: THE UNITED STATES' "SECOND FRONT" IN SOUTHEAST ASIA* 83 (2011).

aters,<sup>7</sup> mass pledges of loyalty to ISIS,<sup>8</sup> and the far closer ties ISIS has been able to establish in the Region<sup>9</sup> than al-Qaeda was ever able to accomplish.<sup>10</sup> In 2017, a new theater of conflict erupted into a domestic war on terrorism in the Mindanao region of the Philippines. This has resulted in a declaration of martial law<sup>11</sup> and movement of troops to Mindanao with significant loss of life<sup>12</sup> and all the trappings of a war on terrorism. It has also led to a larger presence of ISIS fighters in the Region.<sup>13</sup>

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7. While the participation of foreign fighters in distant battlefields is not novel, this is the first time that volunteers from the Region comprised a significant number in Syria, see Edward Delman, *ISIS in the World's Largest Muslim Country*, ATLANTIC (Jan. 3, 2016), <http://www.theatlantic.com/international/archive/2016/01/isis-indonesia-foreign-fighters/422403/> [<https://perma.cc/2A6E-2HB8>], particularly compared to their near inexistence in the Iraq campaign as inferred from the detainee data at Guantanamo and foreign fighters captured in Iraq. See Clinton Watts, *Beyond Iraq and Afghanistan: What Foreign Fighter Data Reveals about the Future of Terrorism*, SMALL WARS J. (2008), <http://smallwarjournal.com/blog/journal/docs-temp/49-watts.pdf> [<https://perma.cc/SNC6-3UYX>].

8. Other than Jemaah Islamiyah, other groups in the Region that have pledged allegiance to Daesh include the Bangsamoro Islamic Freedom Fighters, Abu Sayyaf, the Ansar al-Khliafah in the Philippines, and the East Indonesia Mujahideen in Indonesia. See *All the Groups Worldwide That Have Pledged Their Allegiance to ISIS*, INDEP., <http://indy100.independent.co.uk/article/all-the-groups-worldwide-that-have-pledged-their-allegiance-to-isis—WypUO47Kg> (last visited Apr. 16, 2018) [<https://perma.cc/97HN-3JRZ>].

9. See generally THOMAS KORUTH SAMUEL, *RADICALIZATION IN SOUTHEAST ASIA: A SELECTED CASE STUDY OF DAESH IN INDONESIA, MALAYSIA AND THE PHILIPPINES* (2016), [https://www.unodc.org/documents/southeastasiaandpacific/Publications/2016/Radicalisation\\_SEA\\_2016.pdf](https://www.unodc.org/documents/southeastasiaandpacific/Publications/2016/Radicalisation_SEA_2016.pdf) (detailing gains made by ISIS in Indonesia, Malaysia, and the Philippines) [<https://perma.cc/6VTX-NR8M>].

10. TAN, *supra* note 6.

11. See Filane Mikee Cervantes, *Congress Grants 1-Year Martial Law Extension in Mindanao*, PNA (Dec. 13, 2017), <http://www.pna.gov.ph/articles/1018821> (the latest extension on December 13, 2017 means that martial law will remain in effect through December 31, 2018) [<https://perma.cc/FD82-93WG>].

12. See Dempsey Reyes, *Govt Death Toll in Marawi Hits 105*, MANILA TIMES, (July 23, 2017), <http://www.manilatimes.net/govt-death-toll-marawi-hits-105/340071/> (reporting deaths, as of July 2017, of 105 military personnel and 45 civilians) [<https://perma.cc/69EE-JXEG>].

13. See, e.g., Neil Jerome Morales, *Philippines Says Islamist Fighters on Back Foot in Besieged City*, REUTERS (June 8, 2017), <http://www.reuters.com/article/us-philippines-militants-idUSKBN18Z0KP> (quoting officials stating that among the ISIS-aligned militants involved in the siege “there were about forty foreigners from Indonesia and Malaysia but also fighters from India, Saudi Arabia, Morocco, and Chechnya”) [<https://perma.cc/28YT-F5DP>]; *Philippines Says Foreign Fighters Part of Islamic State Invasion*, ABC NEWS (May 26, 2017), <http://www.abc.net.au/news/2017-05-26/philippines-says-foreign-fighters-part-of-marawi-city-fight/8564216> (quoting Solicitor General Jose Calida who described the conflict as having “transmogrified into invasion by foreign terrorists, who heeded the call of [IS] to go to the Philippines if they find difficulty in going to Iraq and Syria”) [<https://perma.cc/5CT5-XSTY>]; Jaime Laude & John Unson, *100 Foreign Islamic Militants Slipped Into Mindanao*, PHIL. STAR (July 2, 2017), <http://www.philstar.com/headlines/2017/07/02/1715568/100-foreign-islamic-militants-slipped-mindanao> (quoting a source who reported

Some scholarship, perhaps mainstream consensus, continue to downplay the concept of a second front<sup>14</sup> despite repeated attacks (and multiple attack events) in many regional countries such as Thailand,<sup>15</sup> the Philippines,<sup>16</sup> and Indonesia.<sup>17</sup> But these assumptions are grounded on antiquated data inconsistent with the elastic, vibrant, and creative character of international terrorist entrepreneurs whose *modus operandi* continue to shift with the changing conditions on the ground. These views may be the product of Asian protectionism on the one hand, or Western-centric assumptions on the other. With the scores of deadly and sometimes well-coordinated multiple attack events in the Region in recent years compared with the relatively minimal (though better publicized) attacks in the West, this region of Asia is emerging as the alternative terrorist venue of choice—after the Middle East. Of greater significance are the larger cohesive communities at risk of radicalization in this Region compared to disparate terrorist cells operating in Europe and North America. Denying the second front's significance is metaphorically like sticking fingers in a dyke that is constantly sprouting new leaks.

The resilience of ISIS (and other terrorist groups) is due, in part, to its adaptability. In a sense, it employs a complementarity<sup>18</sup> approach characterized by avoidance of fixed battlements, battle changing protocol, and target selection that morphs to attack the weakest spots in the community, like light bending around an object with mass. Failures in one venue tend to spark attacks in weaker venues or regions. Thus, predictably, gains made in the

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that some 100 foreign Islamic militants, mostly Indonesians, slipped into the country to join the fight in Mindanao) [<https://perma.cc/9L2N-RMYM>].

14. See generally ARABINDA ACHARYA, *WHITHER SOUTHEAST ASIA TERRORISM?* 23–60 (Rohan Gunaratna ed., 2015).

15. For example, the Erawan bombing in 2015. See *Bangkok Bomb: What Do We Know?*, BBC (Aug. 20, 2015), <http://www.bbc.com/news/world-asia-33969671> [<https://perma.cc/G38K-9HZP>].

16. See *Philippines Failed to Stop Terrorist Attacks in 2016 Amid Duterte's War on Drugs: US Govt*, STRAITS TIMES (July 21, 2017), <http://www.straitstimes.com/asia/se-asia/philippines-failed-to-stop-terrorist-attacks-in-2016-amid-dutertes-war-on-drugs-us-govt> [<https://perma.cc/MT27-L796>].

17. See *Jakarta Bombing: Attackers, Civilians Killed in Blasts Claimed by Islamic State, Police Say*, ABC NEWS (June 22, 2016), <http://www.abc.net.au/news/2016-01-14/jakarta-bombing-suspected-terrorists-civilians-dead-after-attack/7089218> [<https://perma.cc/ZLW9-C79N>]; Mark Rivett-Carnac, *These Are the Last Six Major Terrorist Attacks in Indonesia*, TIME (Jan. 14, 2016), <http://time.com/4180220/indonesia-terrorist-attacks-history-jakarta/> [<https://perma.cc/R5F5-CYXM>].

18. A physics theory first proposed in 1928 by the Danish physicist Niels Bohr. See *Complementarity Principle*, ENCYC. BRITANNICA, <https://www.britannica.com/science/complementarity-principle> (last visited Apr. 16, 2018) [<https://perma.cc/5SQE-3F8R>].

war on terrorism in Syria, inter alia, will drive greater terrorist activity in other prone regions such as East and Southeast Asia. Even the strategic command structure has the flexibility to change to make more elusive targets, as demonstrated in the so-called bottom-up operational philosophy or “one-man Jihad” approach adopted amongst international terrorist organizations.<sup>19</sup> This flexibility means greater emphasis must be made toward mitigating terror recruitment, which is dependent upon limiting the process of radicalization of at-risk groups.

Yet, official response to the rising threat is marred by unrelated political, territorial, and economic policy objectives which tend to exacerbate radicalization while parading as counter-terrorism initiatives. This is accomplished either by exaggerating the threat as grounds for imposing ever greater oppressive measures on groups already prone to extremism (leading to still greater extremism) or, at the opposite pole, publicly diminishing the vitality of the threat and thereby subtly encouraging increased extremism through impunity or neglect. It is also manifest in the official and unofficial treatment of religious minorities within each of the subject states and their domestic anti-terrorism laws. Under existing scenarios, government response continues to lead to a greater terrorist threat. Adopted measures tend to be autocatalytic, one that catalyzes itself into a positive feedback cycle; thus, the more countermeasures are employed, the greater the terrorist threat becomes, which in turn, justifies more extreme countermeasures.<sup>20</sup> The pos-

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19. Al-Qaeda member Mustafa bin Abd al-Qadir Setmariam Nasar, also known as Abu Mus'ab As-Suri (Al Suri), stated in a paper in 2004:

[O]ur method should therefore be to guide the Muslim who wants to participate and resist, *to operate where he is*, or where he is able to be present in a natural way. We should advise him to pursue his everyday life in a natural way, and *to pursue jihad and Resistance in secrecy and alone, or with a small cell of trustworthy people who form an independent brigade for Resistance and for the individual jihad.*

ABU MUS'AB AS-SURI, THE CALL FOR A GLOBAL ISLAMIC RESISTANCE 30 (2004) (emphasis added), available at <https://archive.org/details/TheGlobalIslamicResistanceCall> [<https://perma.cc/W5F7-RWLE>]

20. See, e.g., HUMAN RIGHTS WATCH, “IT WAS LIKE SUDDENLY MY SON NO LONGER EXISTED”: ENFORCED DISAPPEARANCES IN THAILAND’S SOUTHERN BORDER PROVINCES 12–14 (2007) (describing how increased activity by Thai security personnel caused a growth in resentment among locals, which in turn resulted in greater extremism); Tom Lasseter & Jonathan S. Landay, *Analysis: Iraqi Insurgency Growing Larger, More Effective*, MCCATCHYDC (Jan. 21, 2005), <http://www.mcclatchydc.com/news/special-reports/iraq-intelligence/article24443278.html> (quoting a local Iraqi resident explaining how aggressive U.S. moves in the region create more recruits for the Iraqi insurgency) [<https://perma.cc/25CR-3ZDS>]; Kim Sengupta, *Occupation Made World Less Safe*, GLOB. POL’Y F. (May 26, 2004), <https://www.globalpolicy.org/component/content/article/154/26691.html> (describing a report by the International Institute for Strategic Studies think-tank, which found that the U.S.

itive incentive for policymakers is often disparate, according to the priorities of the individual state, and unrelated to assuaging terrorist activity which may include preventing or placating the threat, real or perceived, of national fragmentation in autonomous, semi-autonomous, or de facto autonomous regions; establishing popular political support amongst extremist groups to cement political power; or downplaying the threat to encourage greater economic trade or tourism. Thus, policy strategies tend to fuel radicalization rather than extinguish it.

Nor has formal law provided the necessary remedies in many Asian states. Some domestic counter-terrorism laws are vague and default to administrative authority tied to domestic policy decisions, others create onerous evidential burdens, and still others have the effect of creating a second-class role for those at greatest risk of radicalization, challenging their sense of identity and amplifying feelings of insecurity. This includes law limiting, patently or latently, religious freedoms and political autonomy in at-risk states. Perhaps more importantly, policy strategy has a distinct impact on how formal law is applied and any effective counter-terrorism initiative in Asia requires a perfect storm of formal law and policy strategy working in concert to stop the process of radicalization.

This Article argues that counter-terrorism policies and formal law in many states in the Region are feeding the current spike in terror activity rather than reducing it. Regional governments' unrelated policy objectives and failure to implement or comply with norms conducive to fair treatment of "at risk" communities and their failure to adopt a prospective approach to countering terrorism is making the problem worse. This Article employs a comparative methodology of key states in the Region including China and its marginalization and forcible assimilation of minority Uighur populations; Indonesia and its radicalized majority population under a sympathetic or tolerant leadership; and Thailand, a country locked in internal strife with domestic elements seeking self-determination. It first discusses contemporary models of counter-terrorism, then details relevant measures adopted in the subject states followed by an analysis concluding that, though differing in specific initiatives, these states share a functional commonality motivated by objectives unrelated to counter-terrorism leading to a resultant commonality of increased terror activity.

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and British occupation of Iraq resulted in accelerated recruitment by al-Qaeda in the region) [<https://perma.cc/83FR-U8VW>].

Moreover, these arguments are equally relevant to other countries in the Region such as the Philippines and Malaysia.

In a cautionary note it is observed that, while other branded terrorism activity exists in the Region,<sup>21</sup> this Article focuses on international Islamic jihadist movements but further recognizes that Islam as a religious faith is not to be identified with same.

## I. MODELS OF COUNTER-TERRORISM

The toolkit employed by states consists of domestic counter-terrorism law, executive policy, military, and law enforcement programs. Alone, mainstream military and law enforcement models adopted to combat international terrorism<sup>22</sup> have largely proven fruitless as terrorist groups grow in power and their ranks continue to swell with radicalized populations who see no alternative to extremism. Conversely, an underused but well-grounded approach to countering terrorism recognized by the majority of the world's countries<sup>23</sup> is the alleviation of the underlying conditions that cause radicalization which results in terrorism.<sup>24</sup> Political, economic, cultural, and social justice issues must be peacefully resolved to prevent international terrorist entrepreneurs from mobilizing "at risk" communities to extremism and enlarging the ranks of terrorist organizations. In the aftermath of failed policies in the so-called War on Terror and the debacle of the U.S.-led invasion of Iraq, approaches solely grounded in military or law enforcement have proven to only increase terrorism and have served as a rallying point for recruitment.<sup>25</sup> Thus, a causal approach prospectively seeks to prevent radicalization of populations beforehand, rather than merely retrospectively eliminating already radicalized

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21. Such as Myanmar's Buddhist terrorists. See Usaid Siddiqui, *Myanmar's Buddhist Terrorism Problem*, AL JAZEERA (Feb. 18, 2015), <http://america.aljazeera.com/opinions/2015/2/myanmars-buddhist-terrorism-problem.html> [<https://perma.cc/7NYZ-JLPD>].

22. In some cases, adopted pursuant to U.N. Security Council Resolution 1373, which directed states to take measures to combat the spread of terrorism and prevent terrorist acts. S.C. Res. 1373 (Sept. 28, 2001).

23. See G.A. Res 60/288 (Sept. 20, 2006).

24. For a discussion of this approach, see Mark D. Kielsgard, *A Human Rights Approach to Counter-Terrorism*, 36 CAL. WESTERN INT'L L.J. 249 (2006).

25. Richard Clark stated in 2004: "[Al-Qaeda is now a] many-headed hydra that is just as deadly and far harder to slay." UNDERSTANDING AND RESPONDING TO THE TERRORISM PHENOMENON: A MULTI-DIMENSIONAL PERSPECTIVE 30 (Ozgur Nikbay & Suleyman Hancerli eds., 2007).

groups with military and law enforcement responses which results in cyclical fueling of terrorist recruitment.<sup>26</sup>

On one level, the causal approach is grounded in international human rights norms<sup>27</sup> and conscientious state compliance, particularly in deference to widely agreed-to rights of equal protection and freedom from discrimination,<sup>28</sup> culture,<sup>29</sup> religious freedom,<sup>30</sup> political participation,<sup>31</sup> public assembly,<sup>32</sup> and to self-determination.<sup>33</sup> On a more basic level, the causal approach hypothesizes that stable, prosperous communities with a decent standard of living and trust in protection from and by their governments will not develop the precursor radicalization to join terrorist groups. They have too much to lose. Feelings of personal security are essential to prevent extremism from emerging.<sup>34</sup>

The “Social Identity theory,” a mainstream social psychology theory, postulates that human beings crave group identity as an essential component of psychological well-being.<sup>35</sup> The “Uncertainty Identity theory” further elaborates that groups will resort to extremism if they feel insecure in their group identity or if it is challenged, eroded, or called into question.<sup>36</sup> Perceived unfair treatment towards one’s group identity deteriorates group security and leads to radicalization if the group is perceived as under attack or being unfairly treated by other groups,<sup>37</sup> particularly if it is tolerated or conducted at the behest of the official government author-

26. For example, from 2003 to 2005 the number of insurgents in Iraq increased from 5,000 to 40,000 active fighters, with an additional 160,000 “part-time fighters and supporters who provide food, shelter, funds and intelligence.” Lasseter & Landay, *supra* note 20.

27. See generally Kielsgard, *supra* note 24.

28. International Covenant on Civil and Political Rights, art. 26, Dec. 16, 1966, 999 U.N.T.S. 171.

29. *Id.* art. 27.

30. *Id.* art. 18.

31. *Id.* art. 25.

32. *Id.* art. 21.

33. *Id.* art. 1.

34. See MICHAEL CLARKE, GRIFFITH ASIA INSTITUTE, REGIONAL OUTLOOK PAPER NO. 11, CHINA’S “WAR ON TERROR” IN XINJIANG: HUMAN SECURITY AND THE CAUSES OF VIOLENT UIGHUR SEPARATISM 3 (2007).

35. Henri Tajfel & John Turner, *An Integrative Theory of Intergroup Conflict*, in THE SOCIAL PSYCHOLOGY OF INTERGROUP RELATIONS 33–47 (William G. Austin & Stephen Worchel eds., 1979).

36. See generally Michael A. Hogg, *Self-Uncertainty, Social Identity, and the Solace of Extremism*, in EXTREMISM AND THE PSYCHOLOGY OF UNCERTAINTY (Michael A. Hogg & Danielle L. Blaylock eds., 2012).

37. See generally Kees van den Bos & Annemarie Loseman, *Radical Worldview Defense in Reaction to Personal Uncertainty*, in EXTREMISM AND THE PSYCHOLOGY OF UNCERTAINTY (Michael A. Hogg & Danielle L. Blaylock eds., 2012).

ity. Once a sub-group within a state, minority or majority, has formed a sufficient group identity and perceives itself as treated unfairly or otherwise under a threat, it inures to the “Conformity Effect,”<sup>38</sup> made up of “dispositional factors”<sup>39</sup> and “situational factors,”<sup>40</sup> polarizing the community to radicalization with some embracing violence and others assuming the status of bystander.<sup>41</sup> According to Professor Paul A. Roth, “the ‘situation’ in which one finds oneself . . . [is] a highly reliable predictor of behavior”<sup>42</sup> and “changes in normative expectations change behaviour.”<sup>43</sup> Thus, if a well-defined minority group finds itself in a situation where it is treated with great inequities such that it threatens the security of the group’s identity, then generally members of the group will become radicalized to different degrees and terrorist level violence is predictable. Moreover, if a majority group with a clearly defined group identity has normative expectations suggesting violence, then they too will predictably resort to these means against groups they perceive as a threat.

Though easily stated, the causal approach is highly complex and circumstance-dependent as each target state has different policy objectives that are not always consistent with de-radicalization and differing legal and cultural environments. The nexus between law and politics plays out differently, particularly in the three states in this Article, and requires a customized approach for each. This complexity not only postures effective, even-handed, inclusive, and non-discriminatory law-making, but also requires effective implementation, enforcement, judicial interpretation, executive decision-making, and political leadership that targets de-radicalization. It is significantly more difficult and complicated than kneejerk military approaches, “rounding up the usual suspects,” or passing facially neutral formal law that nonetheless habituates to discriminatory practices.

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38. Paul A. Roth, *Social Psychology and Genocide*, in *THE OXFORD HANDBOOK OF GENOCIDE STUDIES* 199–209 (Donald Bloxham & A. Dirk Moses eds., 2010).

39. *Id.* at 199–210.

40. *Id.*

41. *Id.* at 208.

42. *Id.* at 199.

43. *Id.* This has been tested empirically in many studies such as the Milgram experiment and the Stanford Prison experiment. See generally PHILLIP G. ZIMBRO, *THE LUCIFER EFFECT: UNDERSTANDING HOW GOOD PEOPLE TURN EVIL* (2008); LEE ROSS & RICHARD E. NISBETT, *THE PERSON AND THE SITUATION: PERSPECTIVES OF SOCIAL PSYCHOLOGY* (2011).

## II. COMPARATIVE MODELS

The three states of China, Indonesia, and Thailand are chosen as they represent the full spectrum of how Islam as a religion is received,<sup>44</sup> and because of their contrasting state policy objectives. China is the only state that can be characterized as openly hostile to religion, which has manifested into a struggle for independence and free exercise of religious identity. Indonesia (and Malaysia) while amicable to Sunni Islam, being the religious majority,<sup>45</sup> suffers from religious intolerance of other faiths, which amplifies other socioeconomic grievances<sup>46</sup> and has resulted in recent separatist violence.<sup>47</sup> Thailand (and the Philippines), while facially neutral, have a dominant religious group preventing greater representation of Muslim interests in their politics.<sup>48</sup> The struggle is thus limited to one striving for greater political autonomy, with an Islamic rhetoric as a means of mobilization. Notably, regardless of apparent state acceptance of Islam, an extremist Islamic rhetoric in these countries frequently latches onto the struggle either as its core component or an ancillary rallying force. This gives further credence to the connection between uncertainty and ideological extremism with the development of theocratic-based prototype identity models subject to attack or discrimination.

### A. *China*

#### 1. Domestic Law Framework

China, as a *sui generis* post-Marxist state, is largely secular, and though there are hundreds of millions of Chinese religious adher-

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44. East Asian states including Japan and South Korea are excluded from this study given the lack of an active Muslim violent uprising.

45. *Sunni and Shia Muslims*, PEW RESEARCH CTR. (Jan. 27, 2011), <http://www.pewforum.org/2011/01/27/future-of-the-global-muslim-population-sunni-and-shia/> [<https://perma.cc/8X75-8H5P>].

46. David Pilling, *Southeast Asia's Religious Tolerance is Deceptive*, FIN. TIMES (Jan. 21, 2015), <http://www.ft.com/intl/cms/s/0/6128d792-9fea-11e4-aa89-00144feab7de.html#axzz44HGdA7md> [<https://perma.cc/YV4Q-F35W>]. Admittedly, Indonesia has a more glaring terrorist problem than Malaysia.

47. See *infra* § II(B).

48. Thailand, in particular, was listed in 2012 as one of twenty countries with the highest levels of religious hostilities. See Angelina E. Theodorou, *Key Findings about Growing Religious Hostilities around the World*, PEW RESEARCH CTR. (Jan. 17, 2014), <http://www.pewresearch.org/fact-tank/2014/01/17/key-findings-about-growing-religious-hostilities-around-the-world/> [<https://perma.cc/T79F-5GNM>].

ents,<sup>49</sup> they make up a minority of the population.<sup>50</sup> The Chinese Constitution provides for the free exercise of religious faith.<sup>51</sup> However, it has no corollary non-establishment clause resulting in the requirement of organized religions to register with the state which then has the authority to approve or disapprove of registrations,<sup>52</sup> as conditioned upon a set of guidelines. According to the Order of the State Council of the People's Republic of China No. 426 on "Religious Affairs,"<sup>53</sup> there are five principles regarding religion in China:

- (1) CCP [Chinese Communist Party] party members and PRC [People's Republic of China] government officials should stick to Marxism-Leninism and adhere to atheism;
- (2) All PRC citizens have the right to believe or not believe in organized religion;
- (3) All legal religions have equal status and their purposes should all promote national unity;
- (4) All religious organizations and activities should be domestically organized under state regulation, and any form of foreign influence in religious activities is strictly forbidden, and;
- (5) Religions should be separate from education and politics. Under no circumstance should anyone use religious causes to influence education and politics.<sup>54</sup>

Thus, all religions in China are heavily sanctioned and precluded from influencing "education and politics" lest they pose a challenge to state unity and authority.

49. A 2012 research by Pew Research Center found that China was home to "hundreds of millions of Buddhists alone, a figure far higher than the government's estimates." See Eleanor Albert, *Religion in China*, COUNCIL ON FOREIGN REL. (June 10, 2015), <http://www.cfr.org/china/religion-china/p16272> [<https://perma.cc/VE55-QRKA>].

50. A poll in 2007 found that among 4,500 adults surveyed, 31.4% reported religious. *Id.*

51. XIANFA [CONSTITUTION], art. 36 (2004) (China) ("Citizens of the People's Republic of China enjoy freedom of religious belief.").

52. This is carried out by the 1994 "Document No. 145," or Regulations for Administration of Sites for Religious Activities. Before a venue could be used for religious purposes, it must adhere to regulations formulated by the State Council Religious Affairs Bureau. See HONGYI LAI, CHINA'S GOVERNANCE MODEL: FLEXIBILITY AND DURABILITY OF PRAGMATIC AUTHORITARIANISM 152 (2016).

53. Zhongjiao Shiwu Tiaoli, (宗教事务条例) [Religious Affairs Act] (promulgated by the State Council of the People's Republic of China, Order No. 426, June 14, 2017, effective Feb. 1, 2018), available at <http://www.sara.gov.cn/old/ztzz/xxdzjswtl/tlqw/573504.htm> [<https://perma.cc/ZJ3K-3FFG>].

54. RAYMOND LEE, AL JAZEERA CTR. FOR STUDIES, MUSLIMS IN CHINA AND THEIR RELATIONS WITH THE STATE 4 (Aug. 26, 2015), <http://studies.aljazeera.net/mritems/Documents/2015/8/26/2015826105410922580China.pdf> [<https://perma.cc/6DLN-69CW>].

There are five approved religions in China: Buddhism, Daoism, Islam, Protestantism, and Catholicism.<sup>55</sup> Muslims, in particular, accounted for 1.7% of China's population of 1.3 billion people in 2010.<sup>56</sup> While Uighurs, who constantly face austere measures, are of particular interest to this case study, they are by no means the largest Muslim group. In 2010, Uighurs in China numbered 10,069,346 with the Hui people numbering 10,586,087.<sup>57</sup> The Hui people, however, have a closer link with China.<sup>58</sup> Their ancestors immigrated to China between the seventh and thirteenth centuries, hence their Islamic faith indigenized along with their cultural assimilation.<sup>59</sup> Essentially, since the Hui people consider themselves Chinese, China does not consider them a threat and imposes fewer religious restrictions on them.<sup>60</sup> But for reasons enumerated below, the assimilation of Uighurs has proven to be much more difficult than that of the Hui people, with a history of distrust from both sides of the camp.

While there are other at-risk religious groups in China, such as the Falun Gong or Tibetan Buddhist, this Article focuses on the Uighur populations consistent with its review of international Islamic jihadism. Other groups pose no threat to a second front in Asia nor are they particularly known to engage in international terrorist activity, though they may be labeled as terrorist groups by Beijing.<sup>61</sup>

## 2. China's New Counter-Terrorism Law

China passed its first anti-terrorism bill in 2015.<sup>62</sup> Previous initiatives were limited to the terrorist list first published in 2003, which

55. LAI, *supra* note 52.

56. LEE, *supra* note 54, at 2.

57. *Id.* at 3.

58. *Id.* at 6.

59. The Hui people use Chinese and hence practice their faith as such. Old Hui mosques also have strong Chinese architectural characteristics. *Id.*

60. *Id.*

61. See generally Levi Browde, *After 17 Years of Persecution, Falun Gong Survives*, DIPLOMAT (July 21, 2016), <http://thediplomat.com/2016/07/after-17-years-of-persecution-falun-gong-survives/> (describing how the Chinese Communist Party has been persecuting Falun Gong practitioners notwithstanding their peaceful nature of daily religious practices since 1999) [<https://perma.cc/GM5X-7UM6>]; AMNESTY INT'L, AMNESTY INTERNATIONAL REPORT 2016/17: THE STATE OF THE WORLD'S HUMAN RIGHTS 118–23 (2017) <https://www.amnesty.org/en/latest/research/2017/02/amnesty-international-annual-report-201617/> (detailing restrictions on religious groups in China, such as Tibetan Buddhists, Uighur Muslims and Falun Gong practitioners, by the Communist Party) [<https://perma.cc/7S9G-AZ5P>].

62. Zhonghua Renmin Gongheguo Fankongbuzhuyi Fa, (中华人民共和国反恐怖主义法) [Counter-Terrorism Law of the People's Republic of

laid out the criteria for designating a terrorist organization.<sup>63</sup> The new law introduced a rebranded definition of terrorism and figured in the comprehensive counter-terrorism policies such as the so-called “backdoor provisions” for the telecommunications sector<sup>64</sup> and reporting requirements,<sup>65</sup> and codified the “people’s war” strategy under which “[t]he relevant departments shall establish the joint cooperation mechanism, and rely on and mobilize villagers’ committees, neighborhood committees, enterprises and public institutions, and social organizations to jointly conduct counterterrorism work.”<sup>66</sup> Article 3 defines terrorism as follows:

[A]ny proposition or activity that, by means of violence, sabotage or threat, generates social panic, undermines public security, infringes upon personal and property rights, or menaces state authorities and international organizations, with the aim to realize political, ideological and other purposes.<sup>67</sup>

“Terrorist activities” are defined to include the following:

- (1) Organizing, planning, preparing for, or conducting the activities which cause or attempt to cause casualties, grave property loss, damage to public facilities, disruption of social order and other serious social harm.
- (2) Advocating terrorism, instigating terrorist activities, or illegally holding articles advocating terrorism, or forcing other persons to wear costume or symbols advocating terrorism in public places.
- (3) Organizing, leading or participating in terrorist organizations.
- (4) Providing information, funds, materials, labor services, technologies, places and other support, assistance and convenience to terrorist organizations, terrorists, the implementation of terrorist activities or training on terrorist activities.
- (5) Other terrorist activities.<sup>68</sup>

The overarching feature of the terrorism law is its elusive and overbroad terminology. Terrorists are defined as “individuals who conduct terrorist activities and members of terrorist organizations,”

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China] (promulgated by the Standing Comm. Nat’l People’s Cong., Dec. 27, 2015, effective Jan. 1, 2016), available at <http://www.lawinfochina.com/Display.aspx?lib=law&Cgid=261788> [hereinafter Counter-Terrorism Law of the PRC]; see also Joyce Huang, *Amid Controversy, China Passes Anti-Terrorism Law*, VOICE OF AM. (Dec. 28, 2015), <https://www.voanews.com/a/china-anti-terror-law/3121095.html> [<https://perma.cc/843M-GJ75>].

63. Zunyou Zhou, *How China Defines Terrorism*, DIPLOMAT (Feb. 13, 2015), <http://the.diplomat.com/2015/02/how-china-defines-terrorism/> [<https://perma.cc/9FGN-FTUE>].

64. See Counter-Terrorism Law of the PRC, *supra* note 62, art. 18.

65. *Id.* art. 19.

66. *Id.* art. 8.

67. *Id.* art. 3.

68. *Id.*

a tautological definition.<sup>69</sup> Additionally, “public security” can be construed as not only public security but also the stability of the regime,<sup>70</sup> which by virtue of its broad-spectrum character can lead to implementation of nearly any initiatives whether related to terrorist activity or not. The clause “any other purposes” also creates significant ambiguity as does the actus reus of “[menacing] state authorities.”<sup>71</sup> Subsection 4 of the definition of “terrorist activities” listed above further lacks a mens rea component, thus making it possible that an unsuspecting party who has unwittingly provided any form of assistance to terrorists could be liable.<sup>72</sup> In Subsection 2, it is illegal to advocate for terrorism or hold articles advocating terrorism.<sup>73</sup> The interpretation of this section should be read in light of the vague and over-broad definition subsection of terrorism, which, in relevant part includes “*any proposition . . . that, by means of . . . threat, undermines public security . . . with the aim to realize political, ideological or other purposes.*”<sup>74</sup> Free speech and public criticism of PRC policy has long been considered a threat to CCP and is predictably construed as holding any opinion contrary to official party policy.<sup>75</sup> This effectively outlaws contrary thought and opinion, whether one openly advocates their political belief or is merely in possession of articles doing the same. Thus, guilt for terrorism does not require actus reus or attempted actus reus even when there is no intent to resort to violence. These open-ended provisions provide fertile grounds for collective punishment and other unjust consequences fueling mass uncertainty and unfair treatment towards Uighurs.

Additionally, China’s definition of terrorism does not include indicia of the root causes of terrorism as other definitions do,<sup>76</sup>

69. *See id.*

70. *See* WAI HEI SAMSON YUEN, EUROPEAN CONSORTIUM FOR POL. RES., THE POLITICS OF WEIWEN: STABILITY AS A SOURCE OF POLITICAL LEGITIMACY IN POST-TIANANMEN CHINA 13–14 (2014), <https://ecpr.eu/Filestore/PaperProposal/94e6e2c5-c31a-4cd8-8759-266d21ccb81d.pdf> [<https://perma.cc/F87H-8B8F>].

71. *See* Counter-Terrorism Law of the PRC, *supra* note 62, art. 3.

72. *See id.* art. 3(4).

73. *See id.* art. 3(2).

74. *See id.* art. 3 (emphasis added).

75. *See, e.g., China: Events of 2016*, HUMAN RIGHTS WATCH, <https://www.hrw.org/world-report/2017/country-chapters/china-and-tibet> (last visited Apr. 16, 2018) (describing efforts by Chinese Authorities to clamp down on “media outlets for reporting that departs from the party line”) [<https://perma.cc/ULQ3-XVT2>].

76. Unlike China’s policy, the United Nations General Assembly’s first resolution on international terrorism expressly “[c]ondemns the continuation of repressive and terrorist acts by colonial, racist and alien regimes in denying peoples their legitimate right to self-determination and independence and other human rights and fundamental freedoms.”

and as such evinces no sensitivity to a causal approach. By initiating a monistic approach (i.e., law enforcement), along with broad police powers, the ambiguity of the strategy engenders greater isolation and radicalization of the target group and ultimately leads to greater violence.

### 3. Strategic Policy: Enforcement Against Uighurs as a Case Study

China's counter-terrorism enforcement against Uighurs has a mixed history of "efficiency." Other than the Strike Hard campaign in 2001,<sup>77</sup> the retaliatory measures taken after the 2009 protest in Xinjiang's capital Urumqi were allegedly high-handed, disproportional, and not transparent.<sup>78</sup> The state-run media designated the incident as organized by terrorists.<sup>79</sup> Then-Secretary of the Central Political and Legal Affairs Commission of the Communist Party of China Zhou Yongkang ordered that protestors should be "punished heavily and quickly."<sup>80</sup> Official arrestee data is scant and contradictory,<sup>81</sup> but The Financial Times reported at least 4,000 Uighurs were arrested within two weeks of the event.<sup>82</sup>

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*Compare* Counter-Terrorism Law of the PRC, *supra* note 62, with G.A. Res 3034 (XVII), at 4 (Dec. 18, 1972). While the 1994 Declaration on Measures to Eliminate International Terrorism did away with the "good causes" justification, the 2000 discussions by the Ad-hoc Committee of the General Assembly summarized that "several delegations stressed a need to differentiate between terrorism and the legitimate right of peoples to resist foreign occupation." See Christian Walter, *Defining Terrorism in National and International Law, in* TERRORISM AS A CHALLENGE FOR NATIONAL AND INTERNATIONAL LAW: SECURITY VERSUS LIBERTY? 23, 36–37 (Christian Walter et al. eds., 2004) (quoting Rep. of the Ad Hoc Committee Established by G.A. Resolution 51/210 of 17 Dec. 1996, ¶ 16, U.N. Doc. A/55/37 (Mar. 8, 2000)).

77. HUMAN RIGHTS WATCH, HUMAN RIGHTS WORLD REPORT 2002 209 (2002), <https://www.hrw.org/legacy/wr2k2/download.html> [<https://perma.cc/4329-2344>].

78. See Sean Roberts, *Imaginary Terrorism? The Global War on Terror and the Narrative of the Uyghur Terrorist Threat* 15 (PONARS Eurasia Working Paper, 2012), [http://www.ponarseurasia.org/sites/default/files/Roberts\\_WorkingPaper\\_March2012.pdf](http://www.ponarseurasia.org/sites/default/files/Roberts_WorkingPaper_March2012.pdf) [<https://perma.cc/RE6S-HNUJ>].

79. Chen Yejun, 從“7·5”事件看“世維會”暴力本質 [From the “July 5” Incident to See the Essence of the Violence in “World Peace Conference”], PEOPLE'S DAILY ONLINE (July 17, 2009), <http://theory.people.com.cn/BIG5/49150/49152/9673464.html> (examining the violent nature of the World Uyghur Congress from the 7.5 Incident) [<https://perma.cc/D4D2-62LD>].

80. HUMAN RIGHTS WATCH, “WE ARE AFRAID TO EVEN LOOK FOR THEM”: ENFORCED DISAPPEARANCES IN THE WAKE OF XINJIANG'S PROTESTS 18 n.37 (2009), <https://www.hrw.org/sites/default/files/reports/xinjiang1009web.pdf> [hereinafter HUMAN RIGHTS WATCH 2009] [<https://perma.cc/RAH4-JR5E>].

81. *Id.* at 18.

82. Kathrin Hille, *Xinjiang Widens Crackdown on Uighurs*, FIN. TIMES (July 19, 2009), <http://www.ft.com/intl/cms/s/0/5aa932ee-747c-11de-8ad5-00144feabdc0.html#axzz43ekMV4hV> [<https://perma.cc/5XUY-7R8Z>].

There has also been doubt cast on whether those charged received due process<sup>83</sup> as the Xinjiang People's Procuratorate was instructed<sup>84</sup> to process cases under the "three fast" principle: "fast review, fast arrest and fast prosecution."<sup>85</sup> Moreover, there were alleged enforced disappearances of (mostly young) Uighur men, including one fourteen year old.<sup>86</sup> A witness recounts the moment they were taken away:

That day, a large group of armed police arrived to our neighborhood and took many Uighur men away. They went after every young man they could catch — those who lived there, and those who just happened to be there. I saw how they were taken away — the police loaded a full bus of these young men. I think they took some from the street and others from their home . . . . I don't know where the men were taken, and their relatives don't know either. I have not heard of anyone being released after that.<sup>87</sup>

While the vagaries of the Counter-Terrorism Law of the PRC may be intentional, the bill and China's history of counter-terrorism enforcement is a viral form of military-law enforcement strategy. As domestic security chief Meng Jianzhu suggested, by "nip[ping] in the bud violent terrorist activities, [you] destroy them before anything happens."<sup>88</sup> Nevertheless, as seen from the case of Iraq, such a strategy is counter-productive and will, in accordance with the basic principles of the psychology of groups, lead to greater violence in the future.

The fruits of Chinese policy are apparent in the increasingly hostile, insecure, and desperate plight of the Uighurs. Uighur grievances toward Chinese social policies emanate from three principle sources of uncertainty: Han immigration resulting in the dilution of the Uighur identity via assimilation, lack of self-determination, and the hurdles to practicing their faith and cultural lifestyles.

Han migration to the region traces its origins to the Qin Dynasty in the third century BCE in the form of exiles and soldiers.<sup>89</sup> A comprehensive Han migration policy, however, began only after the Communist Party of China came to power and its efforts to

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83. HUMAN RIGHTS WATCH 2009, *supra* note 80, at 18–20.

84. *Id.* at 19.

85. *Id.*

86. *Id.* at 21–32.

87. *Id.* at 23.

88. Ben Blanchard, *China Security Chief Calls for Better Intelligence on Terrorism*, REUTERS (Dec. 11, 2015), <http://www.reuters.com/article/us-china-security-idUSKBNv0TV02H20151212> [<https://perma.cc/8KVL-5AJ3>].

89. Dana Carver Boehm, *China's Failed War on Terror: Fanning the Flames of Uighur Separatist Violence*, 2 BERKELEY J. MIDDLE E. & ISLAMIC L. 61, 84 (2009).

colonize the region through economic incentives or forced transfers.<sup>90</sup> Uighurs comprised 90% of Xinjiang's population in 1949 with Han at 5.5%.<sup>91</sup> In 2016, that number had dropped to 45% while Han Chinese rose to comprise 40% of Xinjiang's population.<sup>92</sup> Instead of assimilating the Uighurs, this policy backfired and has become a rallying call for separatists through calling for the immigration to halt.<sup>93</sup> Uighurs protest the immigration policy for two reasons. First, for fear that it is a policy set out to dilute their Uighur identity.<sup>94</sup> Socially, Uighur children undergo what officials call "bilingual education" which in practice means the usage of Mandarin in most academic instruction.<sup>95</sup> While there is both a social and economic incentive to fluency in Mandarin in Xinjiang, the education policy goes too far and regulates cultural norms. Schools are compelled to conform to Han norms through bans on observing fasting rituals during the month of Ramadan.<sup>96</sup> Economically, China offers financial incentives to Han Chinese who marry Muslim minorities to register their offspring as Han.<sup>97</sup> The Congressional-Executive Commission on China in its 2007 report to the U.S. Congress observed that the Chinese government promotes Han migration to Xinjiang purportedly to recruit talent and ensure stability.<sup>98</sup> Second, as part of those incentives, job opportunities favor Han employees and often displace existing low-skill jobs occupied by Uighurs.<sup>99</sup> This, in turn, deteriorates Uighurs' sense of employment security and economic stability. The privileged and high-paying oil industry requires high-skilled

90. See CHRISTIAN TYLER, *WILD WEST CHINA: THE TAMING OF XINJIANG* 186 (2003).

91. Louisa Lim, *China's Uighurs Lose Out to Development*, BBC (Dec. 19, 2003), <http://news.bbc.co.uk/2/hi/asia-pacific/3330803.stm> [<https://perma.cc/H7QS-RZR9>]; MICHAEL DILLON, *XINJIANG: CHINA'S MUSLIM FAR NORTHWEST* 75 (2004).

92. *Xinjiang Profile – Full Overview*, BBC (Nov. 17, 2016), <http://www.bbc.com/news/world-asia-pacific-16913494> [<https://perma.cc/M9E5-TZAD>].

93. DILLON, *supra* note 91.

94. See TYLER, *supra* note 90, at 214 (describing a perception by Uighur nationalists that the immigration policy amounts to "demographic genocide").

95. *Tongue-Tied: Teaching Uighur Children in Mandarin Will Not Bring Stability to Xinjiang*, *ECONOMIST* (June 27, 2015), <http://www.economist.com/news/china/21656216-teaching-uighur-children-mandarin-will-not-bring-stability-xinjiang-tongue-tied> [<https://perma.cc/C3U4-C3PK>].

96. TYLER, *supra* note 90, at 157.

97. See Edward Wong, *To Temper Unrest in Western China, Officials Offer Money for Inter-marriage*, *N.Y. TIMES* (Sept. 2, 2014), <https://www.nytimes.com/2014/09/03/world/asia/to-temper-unrest-china-pushes-interethnic-marriage-between-han-and-minorities.html> [<https://perma.cc/3TVQ-AKA5>].

98. CONG. EXEC. COMM'N ON CHINA, 2007 ANNUAL REPORT (2007), <http://www.cecc.gov/publications/annual-reports/2007-annual-report> [<https://perma.cc/PX9Q-E9QP>].

99. Lim, *supra* note 91.

labor which is out of reach for most Uighurs, who are generally less educated.<sup>100</sup> Permits for private businesses are given to Han rather than to minorities.<sup>101</sup> Even entry-level jobs, which were intended to be satisfied by local laborers, are dominated by poor Han migrants as they are favored over ethnic minorities.<sup>102</sup> To put things into perspective, Uighurs often can no longer afford to rent stalls at the Erdaoqiao Market, a prominent bazaar in Urumqi, subsequent to the bazaar's redevelopment as they were priced out of the market.<sup>103</sup> Presumably, China had hoped that the "economic liberation" of Xinjiang would result in social harmony.<sup>104</sup> In reality, relevant policies have only polarized social and economic differences between Hans and Uighurs: "the unemployment rate among Uighurs is said to be over 70 percent, while that of Han Chinese in the region is less than 1 percent."<sup>105</sup> While the majority of Han Chinese work and live in sophisticated modern urban areas, Uighurs are left behind in communities that are effectively ghettos.<sup>106</sup>

Though Xinjiang is literally named as a Uighur Autonomous Region,<sup>107</sup> Uighurs who are underrepresented both in the local level and party level do not exercise significant autonomy in the political sphere.<sup>108</sup> In contrast to the former Soviet Union which designated titular groups theoretically with a right to secession, China practices a more limited version in the form of national regional autonomies.<sup>109</sup> An autonomous government could be established under certain circumstances, in Xinjiang's case, where the region is populated by a large national minority, but contains smaller nationalities within its borders.<sup>110</sup> Regardless of Uighur's majority in Xinjiang's population at the time,<sup>111</sup> representation in the region was still divided among thirteen constituent ethnic

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100. See *id.*; Nader Hasan, *China's Forgotten Dissenters: The Long Fuse of Xinjiang*, 22 HARV. INT'L REV. 38, 40 (2000).

101. DILLON, *supra* note 91, at 71.

102. Lim, *supra* note 91.

103. *Id.*

104. Carin Zissis, *China's Slow Road to Democracy*, N.Y. TIMES, (June 18, 2007), [http://www.nytimes.com/cfr/world/slot2\\_20070618.html?\\_r=1&scp=1&sq=carin%20zissis&st=cse](http://www.nytimes.com/cfr/world/slot2_20070618.html?_r=1&scp=1&sq=carin%20zissis&st=cse) [<https://perma.cc/W94R-2JQ3>].

105. Hasan, *supra* note 100, at 40.

106. See, e.g., Lim, *supra* note 91 (describing the story of 70-year old Etam Yusuf, one of many Uighurs in the region that is being left behind).

107. Hasan, *supra* note 100, at 38.

108. See CLARKE, *supra* note 34, at 9–10.

109. *Id.* at 9.

110. *Id.*

111. Lim, *supra* note 91.

minorities or *minzu*.<sup>112</sup> Ethnic minorities who are evidently minorities in an autonomous unit are still made the titular *minzu* of that unit. For instance, Daghuors and Mongols are designated as the titular *minzu* in the Tacheng and Emin county autonomous districts, respectively, even though their populations, less than 17% and 12% of the total, are less than their Uighur counterparts.<sup>113</sup> As one academic observed:

The division of Xinjiang into a number of smaller autonomies was a stroke of administrative genius. In parceling out “sub-autonomies,” the CCP simultaneously satisfied the goals of embodying the idea that Xinjiang belonged to 13 different *minzu* and of counterbalancing the overwhelming political and demographic weight of the Uyghurs.<sup>114</sup>

Additionally, Uighurs are considered politically untrustworthy on the party level and are given very little power.<sup>115</sup> It was reported in 2006 that ethnic minorities comprise only 37% of the 958,000 party members in Xinjiang.<sup>116</sup> Uighurs face culture-specific barriers to party membership, which is almost compulsory for high-level positions both in the government and state-owned enterprises, as they must relinquish their religion.<sup>117</sup> There is a trend of declining Muslim presence in the Xingjiang party as Muslim members fell from 25% of the party in 1990 to 7% in 1996.<sup>118</sup> Presumably that number has since declined given the current climate in Xinjiang, though more recent reliable data is not available. Also, Muslims working in the government structure are informed that they will lose their jobs if they attend mosques.<sup>119</sup> Rather than encouraging the abandonment of religion among ambitious Uighurs, the discouragement of religion has resulted in polarizing disenfranchised and fearful Uighurs from both the self-determination process and economic opportunities.<sup>120</sup>

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112. CLARKE, *supra* note 34, at 10.

113. GARDNER BOVINGDON, EAST-WEST CTR., AUTONOMY IN XINJIANG: HAN NATIONALIST IMPERATIVES AND UYGHUR DISCONTENT 13 (2004), <http://www.eastwestcenter.org/fileadmin/stored/pdfs/PS011.pdf> [<https://perma.cc/68V6-HG3V>].

114. *Id.*

115. *Id.* at 14.

116. Colin Mackerras, *Why Terrorism Bypasses China's Far West*, ASIA TIMES (Apr. 23, 2004), <http://www.atimes.com/atimes/China/FD23Ad03.html> [<https://perma.cc/PG9D-EJJK>].

117. Boehm, *supra* note 89, at 95.

118. DILLON, *supra* note 91, at 90–91.

119. TYLER, *supra* note 90, at 157.

120. See Rebecca MacKinnon, *Rumblings of Discontent Among Ethnic Muslims on China's Asian Frontier*, CNN (Dec. 14, 2000), <http://edition.cnn.com/SPECIALS/views/y/2000/12/mackinnon.xinjiang.dec14/> [<https://perma.cc/GW7V-EU2L>].

The Islamic faith is central to Uighur identity,<sup>121</sup> which at the same time incurs suspicion and sanctions from the Chinese government. Other than making atheism a requirement for party membership and certain government positions, Muslims can only visit government sanctioned mosques with approved imams.<sup>122</sup> Those who refuse to fall in line are often charged with participating in “illegal religious activities.”<sup>123</sup> Despite these measures, many Chinese Muslims have refused to register at the Islamic Association of China, considering it “not the true Islam.”<sup>124</sup> Rather than quelling Uighur sentiments by providing religious outlets, measures to appease Uighurs<sup>125</sup> seemed to fan apathy among Uighurs identifying themselves as Mainland Chinese and bolstered their cling to Islam as perhaps a form of disobedience.

The Chinese Uighur population is ripe for further violent radicalization given economic, political, social and ethnic prejudice, and religious isolation. Uighur isolation within their own communities tends to promote alliance seeking with jihadist groups around the world for mutual support and a perceived community of interests grounded in entitativity and common plight. While Uighurs may not perceive anti-Zionism as the principle cause célèbre of their daily life, the rough parallels between them and Palestinians (perceived denial of self-determination, wholesale immigration, political and economic disenfranchisement) are sure to impact their sense of “oneness.”

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121. See Collin Mackererras, *Ethnicity in China: The Case of Xinjiang*, 8 HARV. ASIA Q. 4, 9 (2004) (“Many Uyghurs believe they should be loyal Muslims simply because they are Uyghurs, even though Islam is a universal religion that commands adherence among peoples of many nationalities, both in Xinjiang and worldwide.”).

122. MacKinnon, *supra* note 120.

123. AMNESTY INT’L, PEOPLE’S REPUBLIC OF CHINA: CHINA’S ANTI-TERRORISM LEGISLATION AND REPRESSION IN THE XINJIANG UIGHUR AUTONOMOUS REGION (2002), <https://www.amnesty.org/en/documents/ASA17/010/2002/en/> [<https://perma.cc/T9JG-CEER>].

124. Jehangir Pocha, *China’s Terror Fight Fuels Muslim Fears, Alienation*, BOS. GLOB. (Jan. 17, 2004), <https://www.highbeam.com/doc/1P2-7823723.html> [<https://perma.cc/7SG2-63A8>].

125. See MacKinnon, *supra* note 120.

## B. Indonesia

Indonesia has suffered from recent extremist attacks,<sup>126</sup> including notably the Jakarta bombings and shootings in January 2016.<sup>127</sup> Among the most “at risk” Indonesian organizations for becoming an ISIS conduit is Jemaah Islamiyah.<sup>128</sup> The preconditions to Jemaah Islamiyah’s success in the form of religious intolerance perpetrated by domestic political players are noteworthy. Indonesia boasts the largest Muslim-majority nation in the world with a claimed “long tradition of pluralism, freedom of religion or belief[,] . . . inter-religious harmony”<sup>129</sup> and a successful transition from authoritarian rule to democracy.<sup>130</sup> That pluralism, however, is in peril with the religious intolerance perpetrated by political parties<sup>131</sup> and with the apparent obeisance by the Yudhoyono regime—Indonesia’s first democratically elected President. Intimidation, harassment, and violence have been increasingly directed at religious groups, including certain Muslim sects, which are considered incompatible with conventional Muslim faith in Indonesia.<sup>132</sup> Faiths currently under fire include Christians, Buddhists, Confucians, Baha’is,<sup>133</sup> subscribers to indigenous religions,<sup>134</sup>

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126. For example, the Bali bombings in 2002 and 2005, an attack on the Australian Embassy in 2004, the attack on the J.W. Marriot Hotel twice in 2003 and 2009. See Hikmahanto Juwana, *Anti-Terrorism Efforts in Indonesia*, 11 *INDONESIAN J. INT’L L.* 151, 151–52 (2014).

127. Beh Lih Yi et al., *ISIS Claims Responsibility for Jakarta Gun and Bomb Attacks*, *GUARDIAN* (Jan. 14, 2016), <http://www.theguardian.com/world/2016/jan/14/jakarta-bombings-multiple-casualties-after-indonesian-capital-hit-by-suicide-attacks> [https://perma.cc/Q6D9-AN48].

128. Chilkoti, *supra* note 4.

129. CHRISTIAN SOLIDARITY WORLDWIDE, *INDONESIA: PLURALISM IN PERIL* 8 (2014), [www.csw.org.uk/2014-indonesia-report](http://www.csw.org.uk/2014-indonesia-report) [hereinafter CSW REPORT].

130. *See id.*

131. For example, the Prosperous Justice Party (PKS). See Martin van Bruinessen, *Ghazwul Fikri or Arabization? Indonesian Muslim Responses to Globalization*, in *SOUTHEAST ASIAN MUSLIMS IN THE ERA OF GLOBALIZATION* 61, 74 (Ken Miichi & Omar Farouk eds., 2015).

132. CSW REPORT, *supra* note 129, at 53–87.

133. *Id.* at 84 (“The Baha’i faith was established in Iran in 1863 by Bahaullah (1817–1892), promoting a message of the unity of humankind. While Presidential Decree No. 69/2000 grants the Baha’i permission to exist, having previously been banned by President Sukarno in Decree No. 265/1962, Baha’is still face significant restrictions.”).

134. *Id.* (“Indonesia has an estimated 240 local, indigenous beliefs with approximately 20 million followers. Most of these indigenous beliefs are theistic, and existed in Indonesia before the arrival of Buddhism, Hinduism, Islam and Christianity.”).

Ahmadiyah,<sup>135</sup> Sufi,<sup>136</sup> and Shia Muslims.<sup>137</sup> An 87% majority of the Indonesian population is Muslim with the overwhelming majority of them being Sunni.<sup>138</sup>

## 1. Domestic Law Framework

Religious intolerance in Indonesia's legal system takes two forms: tolerance of extremist groups and discrimination towards minority religions. While Indonesia's Constitution and criminal legislation are comprehensive in safeguarding freedoms of speech and religion and in guarding against hate or inflammatory speech,<sup>139</sup> local and national laws often contradict these protections. Further, their enforcement is dubious and often disregarded by officials and law enforcement.<sup>140</sup> This is evidenced by the inflammatory language employed by government officials including those of Suryadharma Ali, Minister of Religious Affairs, who favored banning the Ahmadiyah sect<sup>141</sup> and argued that Christians bring discrimination upon themselves.<sup>142</sup> Hateful statements such as those by the Islamic Defenders Front (FPI)<sup>143</sup> inciting violence were not prose-

135. *Id.* at 71 (“The Ahmadiyah Muslim community has existed in Indonesia since 1925, and claims to have a population of approximately 500,000. They have 330 branches all over the country, but the majority of Ahmadis are in West Java. Historically they have faced relatively few problems, but since 2005 Ahmadis have faced an increasing campaign of harassment, discrimination and violence.”).

136. *Id.* at 82 (“Sufism is a mystical form of Islam, regarded by Salafis, Wahhabis and other conservative Muslims as heretical because it is perceived as incorporating practices and traditions which predate the Prophet and the Qur’an.”).

137. See CSW REPORT, *supra* note 129, at 79; *Sunnis and Shia: Islam's Ancient Schism*, BBC (Jan. 4, 2016), <http://www.bbc.com/news/world-middle-east-16047709> (“In early Islamic history, the Shia were a movement - literally ‘Shiat Ali’ or the ‘Party of Ali.’ They claimed that Ali was the rightful successor to the Prophet Muhammad as leader (imam) of the Muslim community following his death in 632.”) [<https://perma.cc/C5KW-DCM2>].

138. *International Religious Freedom Report for 2015: Indonesia*, U.S. DEP’T OF STATE, <https://www.state.gov/j/drl/rls/irf/religiousfreedom/index.htm#wrapper> [<https://perma.cc/WA3Q-74S8>].

139. RAFENDI DJAMIN, THE PARADOX OF FREEDOM OF RELIGION AND BELIEF IN INDONESIA 1–4, <http://www.ohchr.org/Documents/Issues/Expression/ICCPR/Bangkok/RafendiDjamin.pdf> (last visited Apr. 16, 2018) [<https://perma.cc/JJ8D-Y98L>].

140. *Id.* Djamin was the representative of Indonesia to the ASEAN Intergovernmental Commission on Human Rights from 2009–2015. *Id.*

141. *Best to Disband Ahmadiyah, Religious Minister Says*, JAKARTA GLOB. (Feb. 28, 2011), <http://www.thepersecution.org/world/indonesia/11/02/jg28.html> [<https://perma.cc/W9KX-TSRR>].

142. *Minister: Christians Bring Discrimination on Themselves*, JAKARTA POST (Apr. 2, 2013), <http://www.thejakartapost.com/news/2013/04/02/minister-christians-bring-discrimination-themselves.html> [<https://perma.cc/YL58-FZEG>].

143. For instance, Shobri Lubis, a central member of FPI, called for a “jihad” against Ahmadiyya in February 2008. See Djamin, *supra* note 139, at 7 (“We wage war against

cuted.<sup>144</sup> Article 29 of the Indonesian Constitution stipulates as follows:

1. The State shall be based upon the belief in the One and Only God.
2. The State guarantees all persons the freedom of worship, each according to his/her own religion or belief.<sup>145</sup>

Though this constitutional provision facially guarantees freedom of (mono-theistic) religion in Article 2, discriminatory laws have been introduced at both the national and regional levels. One ‘legal foundation’ of Indonesia’s religious intolerance is the 1965 Presidential Decree No. 1/PNPS/1965 on the Prevention of Blasphemy and Abuse of Religions (the Decree). Article 1 of the Decree states the following:

Every individual is prohibited in public from intentionally conveying, endorsing or attempting to gain public support in the interpretation of a certain religion embraced by the people of Indonesia or undertaking religious based activities that resemble the religious activities of the religion in question, where such interpretation and activities are in deviation of the basic teachings of the religion.<sup>146</sup>

While prosecuting under this provision requires an administrative warning pursuant to Article 2(1),<sup>147</sup> it was reported by Amnesty International that the prosecution in most cases relies instead on Article 4, which provides as follows:

- By a maximum imprisonment of five years shall be punished for whosoever in public deliberately expresses their feelings or engages in actions that:
- a. in principle is hostile and considered as abuse or defamation of a religion embraced in Indonesia;
  - b. has the intention that a person should not practice any religion at all that is based on belief in Almighty God.<sup>148</sup>

The Decree prohibits the “deviant interpretation” of religious teachings and empowers the president to disband any organization

Ahmadiyya, kill Ahmadiyya members, where ever they are, kill Ahmadiyya members, kill Ahmadiyya members.”).

144. *Id.* at 7.

145. UNDANG-UNDANG DASAR NEGARA REPUBLIC INDONESIA TAHUN 1945 [CONSTITUTION], as restored to force July 5, 1959, and as amended to the Fourth Amendment of 2002, *unofficial English translation published by World Constitutions Illustrated*, available at <http://heinonline.org/HOL/P?h=hein.cow/zzid0002&i=1> [<https://perma.cc/7NLG-HUC9>].

146. Translation of the decree adopted from AMNESTY INT’L, PROSECUTING BELIEFS: INDONESIA’S BLASPHEMY LAWS 11 (2014), [https://www.amnestyusa.org/files/\\_index-asa\\_210182014.pdf](https://www.amnestyusa.org/files/_index-asa_210182014.pdf) [<https://perma.cc/H4U6-459F>].

147. *Id.* at 12.

148. *Id.*

preaching “deviant” teachings.<sup>149</sup> This is problematic particularly since the Decree only recognizes the six official religions: Islam, Buddhism, Hinduism, Confucianism, Catholicism, and Protestantism<sup>150</sup>; which renders unofficial religions and non-Sunni Muslims particularly vulnerable.<sup>151</sup> This is comparable to the state-sanctioned religions in China which also lack, from a secular viewpoint, a non-establishment clause. It also leaves the other unofficial religions subject to discriminatory local regulations and official religions subject to discriminatory interpretations. The Decree further engenders other discriminatory laws such as the 2006 Joint Regulation on Houses of Worship,<sup>152</sup> which in effect makes it practically impossible for minority religions to build places of worship,<sup>153</sup> and the 2008 anti-Ahmadiyah Joint Decree which requires all Ahmadis “to discontinue the promulgation of interpretations and activities that are deviant from the principle teachings of Islam, that is the promulgation of beliefs that recognize prophets and all their teachings who came after the Prophet Mohamad.”<sup>154</sup> These laws were described as having “allowed the hardliners to capitalize on majority support to attack [minority religions] . . . [and] in many instances, have legitimized the majority oppression over the minorities.”<sup>155</sup>

The Blasphemy law came into sharp focus in 2016 when the now former governor of Jakarta, Ahok, ran for reelection and was later convicted of blasphemy and received a two year prison sentence for citing a passage from the Koran as evidence that there were no

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149. CSW REPORT, *supra* note 129, at 35.

150. *Id.*

151. *Id.*

152. *Id.* at 32–34.

153. The requirements are strenuous. It is on the applicant to provide: “[ (1) ] The names and identity cards of at least ninety members of the congregation who will use the new house of worship, approved by the local authority; [ (2) ] Support from at least sixty other members of the local community, endorsed by the village head; [ (3) ] Written recommendation from the district Ministry of Religious Affairs; [ and (4) ] Written recommendation from the district or city Religious Harmony Forum.” *Id.* at 32–33. This is problematic for minority religions in Indonesia since it is not possible for congregations with fewer than ninety members to meet legally. *Id.* at 33.

154. *Id.* at 34. The purpose of the decree is indicated as intending “to admonish and instruct all members of the public not to preach, advocate, or gather public support to interpret a religion adhered to in Indonesia, or to perform religious activities resembling the activities of that religion, where those interpretations and activities deviate from the principles of that religion.” *See id.*

155. *Why Are Hard-Liners Unbeatable?*, JAKARTA POST (May 16, 2012), <http://www.thejakartapost.com/news/2012/05/16/why-are-hard-liners-unbeatable.html> [<https://perma.cc/P6XE-JN9M>].

restrictions on Muslims for voting for non-Muslim candidates<sup>156</sup>; he was a Christian. According to Australian National University Associate Professor of Indonesian Politics, Greg Fealy, “the Blasphemy law has really been a blight on the rule of law and democracy in Indonesia for decades.”<sup>157</sup>

According to a U.S. Department of State report in 2016, religious discrimination takes many forms at both the national and local level of the Indonesian government.<sup>158</sup> These include the laws against blasphemy, atheistic and heretical statements,<sup>159</sup> many laws at the local level placing restrictions on marriage,<sup>160</sup> houses of worship, and the implementation of Sharia law in Aceh (pursuant to the 2005 peace arrangement).<sup>161</sup> Moreover, the discriminatory measures in the Indonesian landscape include, inter alia, bans on proselytizing by the Ahmadi Muslims,<sup>162</sup> mandatory religious training in schools limited to one of the six official religions,<sup>163</sup> application of Sharia law to non-Muslims in Aceh (including economic transactions and criminal law),<sup>164</sup> and mandatory religious affiliation printed on national ID cards.<sup>165</sup>

## 2. Counter-Terrorism Laws and Potential Reforms

Indonesia’s 2003 anti-terrorism laws<sup>166</sup> have been soundly criticized as weak and ineffectual<sup>167</sup> and, consistent with government tolerance of terrorist groups, leads to impunity for perpetrators.<sup>168</sup>

156. Ben Westcott, *Jakarta Governor Ahok Found Guilty in Landmark Indonesian Blasphemy Trial*, CNN (May 10, 2017), <http://edition.cnn.com/2017/05/09/asia/ahok-trial-verdict/index.html> [<https://perma.cc/E7MJ-8EJP>].

157. *Id.*

158. *International Religious Freedom Report for 2015: Indonesia*, *supra* note 138, at 1.

159. *Id.* at 3.

160. *Id.* at 4–5.

161. Some local governments require Ahmadi Muslims to renounce their religious faith to get a marriage license or to get permission to go on a holy Hajj (pilgrimage to Mecca). *Id.* at 4.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.* at 1.

166. Law of the Republic of Indonesia No. 15 of 2003, Concerning Stipulation of Government Regulation in lieu of Law No. 1 of 2002, Concerning the Eradication of the Criminal Acts of Terrorism, to be enacted as Law.

167. BILVEER SINGH, RSIS COMMENTARY, REVISING INDONESIA’S ANTI-TERRORISM LAWS 1 (2016).

168. See, e.g., Francis Chan, *Indonesia ‘Keeping an Eye’ on ISIS Returnees*, STRAITS TIMES (Nov. 27, 2015), <http://www.straitstimes.com/asia/se-asia/indonesia-keeping-an-eye-on-isis-returnees> (describing the release from police custody of individuals affiliated with ISIS due to the fact that Indonesian law does not provide for ‘preventative detention’) [<https://perma.cc/3Y3Q-4PM4>].

In response to the 2016 Jakarta bombings, new measures have been suggested to strengthen the anti-terrorism laws but they have been criticized as overly harsh and likely to impede due process and fundamental fairness.<sup>169</sup> It has become apparent that many Indonesians have traveled abroad to fight in Jihad for ISIS and there is growing domestic concern over the violence emanating from their return as battle-hardened zealots bent on terrorist activity in Indonesia<sup>170</sup> and elsewhere in the Region. Some estimates place the number of Indonesians who have fought for ISIS at over one thousand, with hundreds already returned home.<sup>171</sup> The 2003 Indonesian anti-terrorism law contained many obstacles to the arrest and trial of terrorists but was in most ways consistent with domestic criminal law.<sup>172</sup> The new reforms purport to make exceptions to the criminal law to overcome hurdles concerning detention of suspects, types of evidence and burdens of proof, and broadening the definition of terrorist.<sup>173</sup> It also calls for treating those who fight in foreign theatres with terrorist groups (and/or pledge loyalty to foreign terrorist groups) as traitors subject to criminal sanction and/or being stripped of citizenship.<sup>174</sup> These measures have been critiqued as too restrictive or arbitrary, subject to abuse against legitimate peaceful protesters, and contrary to mainstream human rights assumptions.<sup>175</sup>

Indonesia's domestic criminal law (KHUHAP) contains substantial hurdles to the enforcement of its Anti-Terror laws. Indonesia's anti-terrorism law is substantially more complex than the laws of the other two states particularly in laying out the *actus reus* of the crime. And, it includes attacks against aviation, military targets, nuclear, chemical and biological attacks, environment destruction, as well as the use of firearms and explosives.<sup>176</sup> However, trial and pretrial obstacles to successful prosecutions are formidable under the KHUHAP. These include, *inter alia*, restrictions on the types of evidence that may be admitted, for instance, no electronic evi-

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169. Singh, *supra* note 167, at 2–3.

170. *Id.* at 3.

171. *Id.*

172. See generally Simon Butt, *Anti-Terrorism Law and Criminal Process in Indonesia* (ARC Federation Fellowship: Islam, Syari'ah and Governance Background Paper Series, 2008), available at [http://law.unimelb.edu.au/\\_\\_data/assets/pdf\\_file/0011/1547786/butt\\_final\\_forwebsite2.pdf](http://law.unimelb.edu.au/__data/assets/pdf_file/0011/1547786/butt_final_forwebsite2.pdf) (comparing provisions of the anti-terrorism law to criminal process provisions in Indonesia) [<https://perma.cc/675B-2D9C>].

173. Singh, *supra* note 167, at 2.

174. *Id.*

175. *Id.* at 3.

176. Butt, *supra* note 172, at 5–11.

dence such as email, SMS, internet transactions, photos, or videos.<sup>177</sup> Additionally, the burden of proof on the prosecution requires at least two pieces of “valid” or “objective” evidence with a network of corroborative evidence required for any evidence to be given weight, restrictions on documentary evidence, and restrictions on circumstantial evidence.<sup>178</sup> It is noted that these barriers reflect the same hurdles that the prosecution must overcome for any criminal case in Indonesia and initiatives are underway to remove some of the legal barriers to prosecution.<sup>179</sup> Nonetheless, these challenges to prosecution of terrorist activity, though perhaps unintentional, still provide a legal environment for impunity from arrest and prosecution for these crimes.

The current Indonesian bill is still a draft, currently under discussion in the national parliament’s lower house, the DPR.<sup>180</sup> One source described the state of the bill as being in limbo.<sup>181</sup> The delay is caused by fears of infringement on human rights by some political parties,<sup>182</sup> and as of May 2017, one committee member on the DPR reportedly observed that the “committee members have not yet agreed on a definition for terrorism.”<sup>183</sup> In June 2017, it was reported that the bill plans to jail returnees from conflict zones for up to fifteen years and may be passed as early as September 2017.<sup>184</sup> This is in stark contrast with reports in May that the discussions were still preliminary. There is considerable pressure, particularly from the president, to pass the bill.<sup>185</sup> This pressure may

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177. *Id.* at 15–16.

178. *Id.* at 16.

179. Singh, *supra* note 167.

180. John Roberts, *Indonesian President Supports Military Role in New “Anti-Terror” Law*, WORLD SOCIALIST WEB SITE (June 17, 2017), <https://www.wsws.org/en/articles/2017/06/17/indo-j17.html> [<https://perma.cc/VGF9-BPGN>]; Rina Chadijah, *After Attack, Indonesian Leader Presses Lawmakers to Speed Up Anti-Terror Bill*, BENAR NEWS (May 26, 2017), <http://www.benarnews.org/english/news/indonesian/ct-law-05262017194451.html> [<https://perma.cc/C76H-KNSX>].

181. Haeril Halim & Marguerite Afra Sapiie, *Terrorism Law Still in Limbo*, JAKARTA POST (May 27, 2017), <http://www.thejakartapost.com/news/2017/05/27/terrorism-law-still-in-limbo.html> [<https://perma.cc/8S3M-LAB5>].

182. Chadijah, *supra* note 180.

183. *Id.*

184. *New Indonesia Law to Allow Jailing of Militant Returnees*, REUTERS (June 21, 2017), <http://www.reuters.com/article/us-indonesia-security-idUSKBN19C0U8?il=0> [<https://perma.cc/2AJ5-5P6T>].

185. *Indonesia Must Revise Antiterrorism Law, Early Action Necessary: Top Spook*, JAKARTA GLOBE (May 28, 2017), <http://jakartaglobe.id/news/indonesia-must-revise-antiterrorism-law-early-action-necessary-top-intel/> [<https://perma.cc/ARK4-M4QD>]; Karlis Salna & Rieka Rahadiana, *Jokowi Seeks to Bolster Police After Indonesia Suicide Attacks*, BLOOMBERG (May 26, 2017), <https://www.bloomberg.com/news/articles/2017-05-26/jokowi-seeks-to-bolster-police-after-indonesia-suicide-attacks> [<https://perma.cc/U494-YM4D>].

also stem from the fact that the president suffered a political defeat recently with the arrest and conviction of his ally Ahok.<sup>186</sup>

Foreseeable amendments include a greater military role and increased police powers.<sup>187</sup> Other proposed changes include “the revocation of the citizenship of alleged terrorists; the further extension of the period of arrest and detention without charge; and a provision to allow the arrest and detention of suspected ‘terrorists’ without trial for six months to undergo ‘de-radicalisation.’”<sup>188</sup> What exactly “de-radicalisation” consists of is unknown but seems to be a hopelessly optimistic enterprise considering the vitality of the societal factors that drove suspects to ultra-radicalization initially. This calls for a retrospective approach to de-radicalize instead of a prospective approach aimed at halting ultra-radicalization preemptively.

### 3. Strategic Policy: The Sunni Majority and Religious Intolerance

In 2011, an attack was waged on the Ahmadiyah Muslims in the village of Cikeusik, Banten Province. A mob of approximately 1,500 people attacked twenty-one Ahmadis, killing three and injuring five.<sup>189</sup> It was reported that the police were informed the day earlier about the attack and were present at the time but did little to stop it.<sup>190</sup> A graphic account of a survivor puts the attack into context:

They stripped me naked on the road, dragged me through a river, beat me with sticks and machetes and tried to cut off my penis. About 20 to 30 people attacked me, and bashed stones on my head. They called the rest of the mob to beat me, and then about 20 to 30 people dragged me between 200 and 500m around the village. One man used a bamboo spear to hit my

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186. See Salna & Rahadiana, *supra* note 185 (“Jokowi suffered a political defeat last month when his close ally Basuki Tjahaja Purnama lost a bid to become the first ethnic Chinese Christian elected governor of Jakarta after he was accused of insulting the Koran. Ahok was convicted of blasphemy after the vote, and was sentenced to two years in jail.”).

187. Roberts, *supra* note 180 (“At the cabinet meeting, Widodo ordered his security ministers to pressure the DPR to expand the military’s role. Widodo told his ministers the change ‘is urgently needed to ensure that our law enforcers have the legal umbrella to carry out their jobs in the field. The [military] should have a role in the law.’ The police handling of alleged terrorist cases has been just as ruthless as the previous military methods. The police counter-terrorist unit, Densus 88, built up with assistance from the United States and Australia, had been responsible for the deaths of at least 121 terror suspects in custody, according to Indonesia’s National Commission on Human Rights.”).

188. *Id.*

189. CSW REPORT, *supra* note 129, at 74.

190. *Id.*

eye. They shouted that I was an ‘infidel’ and should be killed. I lost consciousness.<sup>191</sup>

What had been a phenomenon in conservative regions such as Aceh and West Java has escalated into a nationwide occurrence as evidenced by the forced closure and destruction of religious institutions in East Java and the island Lombok.<sup>192</sup> It is hoped that the current President, Widodo, will reverse the intolerance instilled by his predecessor.<sup>193</sup> Reversing these trends and moderating public opinion will be a significant challenge as evidenced by Dr. Fealy’s observation that “the fact that Ahok was charged at all [for blasphemy] was really a product of massive street demonstrations that frightened the government into acting.”<sup>194</sup>

Unlike the Uighur situation in China, extremism in Indonesia<sup>195</sup> arises from elements within the Sunni majority<sup>196</sup> rather than the oppressed minority religions aforementioned. This too can be attributed to the connection between uncertainty and extremism. Acute poverty abounds in Indonesia with 10.9% of its population living under the poverty line and 40% lingering near it.<sup>197</sup> This, coupled with lagging employment rates,<sup>198</sup> creates economic conditions leading to social uncertainty tending to heighten the disadvantaged majority population’s need for self-identification by clinging to religious values even tighter.<sup>199</sup> Emerging institutional-

191. *Id.* at 54.

192. *See id.* at 58.

193. *Indo President Widodo Calls for Religious Tolerance After Aceh Church Attacks*, TODAY (Oct. 15, 2015), <http://www.todayonline.com/world/asia/widodo-religious-tolerance-aceh-church-attacks> [<https://perma.cc/SEF6-H4DS>].

194. Westcott, *supra* note 156 (quoting Dr. Greg Fealy).

195. Jemmah Islamiyah identifies with Sunni Islam. *See Jemaah Islamiyah (JI)*, COUNTER EXTREMISM PROJECT, <http://www.counterextremism.com/threat/jemaah-islamiyah-ji> [<https://perma.cc/HL3H-MQ48>].

196. 99% of Indonesia’s population identify themselves as Sunni Muslims. *See The Future of the Global Muslim Population: Sunni and Shia Muslims*, PEW RESEARCH CTR. (Jan. 27, 2011), <http://www.pewforum.org/2011/01/27/future-of-the-global-muslim-population-sunni-and-shia/> [<https://perma.cc/RL93-JGLT>].

197. *Indonesia: Overview*, WORLD BANK, <http://www.worldbank.org/en/country/indonesia/overview> (last visited Apr. 16, 2018) [<https://perma.cc/C8YV-W25N>].

198. The rate of job creation now lags behind Indonesia’s population growth, leaving Indonesia’s young without work. *Id.*

199. Individual interviews conducted in underdeveloped areas in the West Java province revealed skepticism towards the West; sympathy towards Sunni Muslims in the Middle East; hostility towards developed cities like Bali as they are considered to be a “maksiat” (sinful) place; and willingness to join the global jihad:

If they were being offered to join the jihad to Afghanistan or Iraq, they would be pleased to serve, as the best opportunity to pursue a so-called ticket to heaven. They believe as soldier of Islam (Hizbullah), they are promised paradise as glorious martyrs, while the one left behind would be recipients of a global Islamic state or of local bylaws based on Syariah (Islamic law).

ized religious intolerance in the form of discriminatory laws, condoning intolerant politico-social viewpoints and violence serves to amplify as much as cause extremism in Indonesia. Majority population's hegemonic adherence to a violent prototype identity sounding in paranoia and xenophobia can lead to equally disastrous consequences as with minority extremism, resulting in vigilantism, discrimination, and even genocidal practices. The practice of mandatory designation of religious affiliation on the Indonesian national identity card is disturbingly reminiscent of mandatory Tutsi/Hutu/Twa ethnic affiliation on Rwandan national identity cards prior to the genocide, now banned by law,<sup>200</sup> or even the required Star of David badges worn by Jews before and during the Holocaust. As Yale Professor Michael Reisman observed:

These phenomena form the substructure for nationalist and racist hysteria, the imposition of a single language, forced name changes, official efforts to obliterate the cultures and religions of smaller groups, and, ultimately, demands for purging the body politic of "foreign contamination." This is a spiral that can conclude in genocide.<sup>201</sup>

Widespread social extremism inures to another theory of social science known as "the conformity effect,"<sup>202</sup> sometimes called the "herd mentality."<sup>203</sup> Social scientist Paul Roth postulates this theory in the context of situational and dispositional factors.<sup>204</sup> Though typically applied in genocide studies, this theory has equal applicability to terrorism in the case of Indonesia as a majority population adheres to a particular faith with some assuming violent prototype identities, others assuming roles encouraging, or at least, sympathetic attitudes and still others practicing denial. The "situational factors" dovetail with the uncertainty theory such that majoritarian uncertainty creates the situation in which extremism

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Sukawarsini Djelantik, *Terrorism in Indonesia: The Emergence of West Javanese Terrorists* 10–11 (International Graduate Student Conference Series, No. 22, 2006).

200. ANTONIO CASSESE ET AL., *INTERNATIONAL CRIMINAL LAW: CASES AND COMMENTARY* 207 (2011).

201. W. Michael Reisman, *Autonomy, Interdependence, and Responsibility*, 103 *YALE L.J.* 401, 415 (1993) (citing RAUL HILBERG, *THE DESTRUCTION OF THE EUROPEAN JEWS* 760–62 (1961)).

202. See generally Paul A. Roth, *Social Psychology and Genocide*, in *THE OXFORD HANDBOOK OF GENOCIDE STUDIES* 198, 205 (Donald Bloxham & A. Dirk Moses eds., 2010) (defining the conformity effect as "the amazing willingness of people to simply assimilate the norms of the situations in which they find themselves").

203. Roth, *supra* note 38.

204. See *id.*; see also MARK KJELSGARD, *RESPONDING TO MODERN GENOCIDE: AT THE CONFLUENCE OF LAW AND POLITICS* 119 (2015).

becomes ubiquitous. In Indonesia, the situational factors are reinforced by normative government action in its discriminatory formal law and implementation of policy when government either officially sanctions or tolerates violent vigilantism within a community with a well-grounded prototype identity.

Moreover, state sanctioned extremism on this scale is seldom limited to the national polity and inevitably spills out into the international arena in one form or another as witnessed in historic genocides throughout the last century. The form of the spill-over in the modern era is arguably terrorist activity, particularly with groups, such as modern international jihadists' non-state actors, who share commonalities of identity and aspirations but might also be national populations with radicalized and ultra-radicalized populations.

This spillover is clearly seen in the terrorist violence that erupted in the Philippines in early 2017 where a war on terrorism rages.<sup>205</sup> The President, Duterte, declared martial law<sup>206</sup> and massive casualties resulted. Many of the fighters engaged with the Philippine army are reportedly Indonesians and Malaysians who have returned from Syria,<sup>207</sup> trained and battle hardened. In an application to the Philippines Supreme Court for martial order, the government counsel submitted that there were twenty ISIS-linked groups operating on the ground.<sup>208</sup> Though figures are understandably cursory, a month into the conflict an estimated 300 casualties were reported as a result of terrorist attacks in the Mindanao region,<sup>209</sup> geographically close to Indonesia.

Other than terrorist organizations, religious intolerance and violence also emanate from violent vigilante groups, non-violent ideological organizations, and political parties,<sup>210</sup> though the lines between some of these groups are blurred.<sup>211</sup> If religious intoler-

205. *See supra* notes 11–13.

206. *Philippines Duterte: Martial law extended in Mindanao, supra* note 11.

207. *See* Morales, *supra* note 13.

208. Tetch Torres-Tupas, *20 IS-Linked Terrorist Groups Operating in Mindanao – Calida*, INQUIRER (June 19, 2017), <http://newsinfo.inquirer.net/906858/20-is-linked-terrorist-groups-operating-in-mindanao-calida> [<https://perma.cc/6V7V-W8RL>]; *see also supra* note 13 (illustrating the range of foreign fighters fighting in Mindanao).

209. Chad de Guzman, *Marawi Crisis Hits 300 Death Toll Mark*, CNN (June 19, 2017), <http://cnnphilippines.com/news/2017/06/19/Marawi-crisis-hits-300-death-toll-mark.html> [<https://perma.cc/D3MN-QZX9>].

210. CSW REPORT, *supra* note 129, at 44.

211. *See* Sidney Jones, *Islamist Civil Society and Violent Extremism in Indonesia: A Tactical Merger?*, in RELIGION, LAW AND INTOLERANCE IN INDONESIA 276, 276 (Tim Lindsey & Helen Pausacker eds., 2016) (“The blurring of lines between Islamist civil society and violent jihadism in Indonesia has been gathering pace over the last five years. More cases are emerg-

ance is a causative factor, then vigilante groups like the FPI<sup>212</sup> provide enforcement. Established in 1998, FPI claims a membership of four million across twenty-eight provinces.<sup>213</sup> It is a vigilante group in the sense that it targets immoral establishments such as bars and brothels, while allegedly also serving as a protection racket accepting bribes from same.<sup>214</sup> Recently, the group has increasingly turned its attention towards “heretical groups.”<sup>215</sup> The Yudhoyono regime pledged zero tolerance towards vigilante groups,<sup>216</sup> but compelling evidence suggests the government has not only adopted a relaxed approach to enforcement against them, but has also in the past indicated support.<sup>217</sup> A document leaked on WikiLeaks in 2011 confirmed suspected cooperation between the group and the Indonesian military and police.<sup>218</sup>

Moreover, groups such as Hizb ut-Tahrir Indonesia (HTI) also play an important role. Capturing audiences in universities and mosques, HTI has been described as “the largest organization in Indonesia openly calling for the overthrow of democracy and its replacement with a caliphate.”<sup>219</sup> The group is tolerated by the

ing of members of non-jihadi groups making the transition to the use of deadly violence, while jihadi groups are increasingly taking part in civil society-led advocacy coalitions against deviance, apostasy and vice. At both the local and national levels, violent and non-violent extremists are sharing some of the same mentors, reading the same websites and increasingly seeing the same enemies — above all, the police.”).

212. See CSW REPORT, *supra* note 129, at 45.

213. *Id.*

214. *Id.*

215. *Id.*

216. Yuliasri Perdani & Suherdjoko, *Deriding Calls for Ban, FPI Calls SBY “Loser”*, JAKARTA GLOB. (July 23, 2013), <http://www.pressreader.com/indonesia/the-jakarta-post/20130723/281496453895596> [<https://perma.cc/2VC4-3PHJ>].

217. Home Affairs Minister Gamawan Fauzi described FPI as a potential “national asset” that should be “empowered,” calling local officials to “foster a constructive relationship with the group.” See *Home Minister Clarifies Comments, Calls for FPI To Be ‘Empowered’*, JAKARTA GLOB. (Oct. 29, 2013), <http://www.thejakartaglobe.com/news/home-minister-clarifies-comments-calls-for-fpi-to-be-empowered/> [<https://perma.cc/6G9Q-MDBS>]. The group had historical significance during Suharto’s “New Order” era as confirmed by Dr. Dewi Fortuna Anwar, the senior adviser to the vice-president, in an interview with CSW: “The idea was to try to co-opt radical groups, through giving them funding, freedom to organise, but to control them, to establish a standard practice, to domesticate them.” See CSW REPORT, *supra* note 129, at 45.

218. According to the leaked documents, a contact in the Indonesian State Intelligence Agency stated that the FDI is “a tool [of intimidation] that could spare the security forces from criticism for human rights violations, and he said funding FPI was a ‘tradition’ of the Police and BIN.” See *Indonesian Police Used FPI as ‘Attack Dog,’ Leaked US Cable Alleges*, JAKARTA GLOB. (Sept. 3, 2011), <http://jakartaglobe.beritasatu.com/archive/indonesian-police-used-fpi-as-attack-dog-leaked-us-cable-alleges/> [<https://perma.cc/3K8Y-4E77>].

219. M. Iqbal Ahnaf, *Antidemocratic Messages on State TV*, JAKARTA POST (June 14, 2013), <http://www.thejakartapost.com/news/2013/06/14/antidemocratic-messages-state-tv.html>

government<sup>220</sup> and even received positive support. For instance, the state-owned television station TVRI allowed it to use its nationwide broadcast to call for a rally and denounce the democratic process in Indonesia.<sup>221</sup> In the province Kalimantan HTI members were invited to provide training to high school teachers.<sup>222</sup> The situation is intensified by Indonesian students furthering their studies in Cairo and Saudi Arabia<sup>223</sup> where they “often circulated in Muslim Brotherhood circles.”<sup>224</sup> The teachings of HTI further manifests in the political arena through the Prosperous Justice Party (PKS),<sup>225</sup> Indonesia’s fourth largest political party with weight on the provincial level,<sup>226</sup> which has been described as “an Indonesian version of the Muslim Brotherhood . . . [which] owe[s] allegiance to a leadership abroad.”<sup>227</sup> PKS also has some limited influence on both the executive and legislature level by forming a governing coalition with two other Islamist parties,<sup>228</sup> holding cabinet-level ministerial positions<sup>229</sup> and 57 out of 560 seats in parliament in 2014.<sup>230</sup>

It is inequitable and inaccurate to paint an entire country with a single brush and many elements of the Indonesian government strive for equality of religious belief, but those who push for strict Sunni hegemony within Indonesia are well-organized, hold significant political clout at both the national and local levels of government, and enjoy a groundswell of popular support. The 2015 U.S. Department of State country report on international religious freedom concluded in August 2016 the following:

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[<https://perma.cc/3EFT-QU7G>]. Dr. M. Iqbal Ahnaf is based at the Center for Religious and Cross-cultural Studies at Gadjah Mada University in Yogyakarta. *Id.*

220. See CSW REPORT, *supra* note 129, at 48.

221. See Ahnaf, *supra* note 219.

222. *Id.*

223. See CSW REPORT, *supra* note 129, at 50 (“In 2005, it was reported that the Egyptian government was granting 120 scholarships a year for Indonesian students, and a year earlier, the Ministry of Religious Affairs’ figure for the total number of Indonesian students in Egypt was 3,528.”).

224. ANTHONY BUBALO & GREG FEALY, BROOKINGS INST., BETWEEN THE GLOBAL AND THE LOCAL: ISLAMISM, THE MIDDLE EAST AND INDONESIA 18 (2005).

225. Bruinessen, *supra* note 131.

226. CSW REPORT, *supra* note 129, at 49 (“Even in those regions which are not directly controlled by the PKS or other Islamist parties, their influence is felt, and many shari’a bylaws and other discriminatory and repressive religion-based regulations have been introduced by secular parties, most likely under indirect pressure from the PKS and, separately, the vigilante and jihadi organisations.”).

227. Bruinessen, *supra* note 131.

228. CSW REPORT, *supra* note 129, at 9.

229. *Id.*

230. *Id.* at 48.

The government did not resolve longstanding religious disputes. There were instances where local governments and police gave in to demands of groups labeled locally as “intolerant groups” to close houses of worship for permit violations, or otherwise restrict the rights of minority religious groups. The government at both the national and local levels at times reportedly failed to prevent or appropriately address intimidation and discrimination against individuals based on religious belief.<sup>231</sup>

The number of reported and unreported government abuses of religious freedom is impossible to calculate but according to Setara, a NGO operating in Indonesia, seventy reported cases of such government abuse occurred between January and August 2015.<sup>232</sup> The number of government-tolerated abuses is unknown.

The types of government policy failures can be roughly categorized into at least ten different groups:

- I. *Permit requirement for the construction of houses of worship or the closing/ demolition of existing houses of worship.* “According to minority religious groups, meeting the requirements of the permitting regulation after the fact and under protest from intolerant groups was nearly impossible. Even when permits were attained, some houses of worship were forced to close or halt construction after facing legal challenges and public protest.”<sup>233</sup>
- II. *Bans on non-Sunni proselytizing while Sunni Proselytizing permitted.* “The MRA [Ministry of Religious Administration] maintained its authority to conduct ‘development’ of religious groups and believers in Indonesia, including efforts to convert minority religious groups to Sunni Islam.”<sup>234</sup>
- III. *Bans or obstacles to marriage of individuals with minority religions.* “In several West Java regencies, local governments continued efforts to force or encourage conversion of Ahmadis with a requirement that Ahmadis sign forms renouncing their beliefs in order to register their marriages.”<sup>235</sup> In June 2015, the Constitutional Court of Indonesia refused to strike down an article of the marriage ordinance requiring ceremonies to be performed in a religious ceremony which is shared by both bride and groom, effectively banning interfaith marriage by not allowing for a civil ceremony,<sup>236</sup> though inter-faith marriage is not expressly banned.<sup>237</sup>
- IV. *Religious conversion requirements.* See (III) above.

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231. *International Religious Freedom Report for 2015: Indonesia*, *supra* note 138, at 6.

232. *Id.* at 7.

233. *Id.* at 12.

234. *Id.* at 7.

235. *Id.*

236. *Id.* at 12.

237. *Id.*

- V. *Police tolerance of vigilante violence from intolerant groups but failing to arrest or protect victims.* The U.S. Department of State report found that “[p]olice also did not always actively investigate and prosecute crimes by members of intolerant sectarian groups.”<sup>238</sup>
- VI. *Failure to revoke/challenge patently discriminatory and unconstitutional law, particularly local law.* Though the Ministry of Home Affairs was reaffirmed with the power to revoke unconstitutional local religious regulations in 2014, it never exercised that power.<sup>239</sup> In October of 2015, a local regulation was published in Bogor, Bima Arya, banning the Shia observance of Ashura.<sup>240</sup>
- VII. *Application of Sharia law to non-Muslims.* “[S]ome local regulations require restaurants to close during fasting hours during Ramadan, ban alcohol, or mandate the collection of Islamic alms (*zakat*). Other local regulations forbid the activities of minority religious groups, especially Shia and Ahmadi Muslims.”<sup>241</sup>
- VIII. *Identity cards.* Though “the government generally allowed citizens to leave the religion column blank on their national identification cards, (KTPs), some reported difficulties accessing government services and other discrimination if they exercised this right.”<sup>242</sup>
- IX. *Uneven and discriminatory application of blasphemy against non-Sunnis and failure to apply bans on hate speech to intolerant groups.* “On June 15 [2015], a state court in Banda Aceh convicted six members of Gerakan Fajar Nusantara (GAFATAR) for blasphemy.”<sup>243</sup> “[M]embers stated the organization was a social movement . . . focused on food security, ecology, and organic farming.”<sup>244</sup>
- X. *Designation of official status religions and unofficial status religions.* There is forced religious education of children in officially recognized religions.<sup>245</sup>

#### 4. Nurturing Tolerance via Civil Societies

One counterbalance to Indonesia’s religious intolerance is the existence of civil societies directly connected at the grass root level where grievances and religious intolerance brew. Two major organizations are the traditionalist Nahdlatul Ulama (NU) and the modernist Muhammadiyah, with a combined membership base

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238. *Id.* at 6.

239. *Id.* at 8.

240. *Id.*

241. *Id.* at 5.

242. *Id.* at 13.

243. *Id.* at 7.

244. *Id.*

245. *Id.* at 4.

representing nearly 50% of the population.<sup>246</sup> The organizations' policies in addressing Islamic extremism includes nurturing religious understanding and tolerance, and creating positive images of Muslims as "problem-solvers" both at the domestic and international levels.<sup>247</sup> To this end, the NU has been disseminating a "nationalistic discourse related to the Indonesian state's ideology and system [through] . . . seminars, workshops, training sessions, and dialogues involving many participants from diverse backgrounds, not only Muslims but also non-Muslims."<sup>248</sup> For example, NU promotes a human relationships model with four "brotherhoods": internal, Islamic, national, and human.<sup>249</sup> The last two are particularly relevant to curbing religious intolerance and the global jihad movement. The national brotherhood encourages NU members as part of the largest Indonesian Muslim organization to protect all fellow citizens, including religious minorities, against Islamic violence.<sup>250</sup> The human brotherhood calls for a sense of brotherhood "with people from other nations and religious affiliations" and seeks to break down the Islam-West dichotomy preached by jihadists.<sup>251</sup> Both organizations address polarized Koran studies by challenging controversial interpretations<sup>252</sup> or regulate its preachers by introducing rules and codes of conduct.<sup>253</sup> On the international level, NU contributes to conflict resolution relating to Islamic violence by exploring solutions and cooperating with foreign governments to develop moderate Islam worldwide.<sup>254</sup>

Though these civil society organizations have taken constructive steps to curb religious intolerance and thus address causal factors

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246. See NOORHAIDI HASAN ET AL., NETH. INST. OF INT'L RELATIONS 'CLINGENDAEL', COUNTER TERRORISM STRATEGIES IN INDONESIA, ALGERIA AND SAUDI ARABIA 39–40 (Roel Meijer ed., 2012), [https://www.wodc.nl/binaries/1806-volledige-tekst\\_tcm28-70796.pdf](https://www.wodc.nl/binaries/1806-volledige-tekst_tcm28-70796.pdf) [<https://perma.cc/3HZ6-YE4Y>].

247. *Id.* at 40.

248. *Id.* at 40–42.

249. See *id.* at 41 (respectively ukhuwwah nadhiyyah; ukhuwwah Islamiyyah; ukhuwwah wataniyyah; and ukhuwwah insaniyyah).

250. *Id.*

251. *Id.*

252. *Id.* ("For instance, the Koranic verse (QS 9:29) saying 'Qatilu alladhina la yu'minuna billah wala blyawm alakhir wala yuharrimuna ma harrama Allah wala yaturuna bilhaqq alladi'na utu alkitab hatta yu'tuna aljizyah 'an yadhuh saghirun,' which has been used by radical Islamists as legitimacy to call on Muslims to fight jihad against the 'Muslim enemy' that is associated with Zionists and the Christian West. For NU, this verse was revealed in the context of warfare.").

253. *Id.* at 44.

254. *Id.* at 42.

leading to violent extremism, they fall far short of the ‘situational factors’ promoting a common violent prototype identity. Initiatives by the Ministry of Religious Affairs to integrate their efforts into the nation’s counter-terrorism efforts have been allegedly half-hearted<sup>255</sup> and lack fiscal support.<sup>256</sup> These allegations are cemented by the Indonesian government’s weakness in addressing intolerance head-on,<sup>257</sup> a view shared by many stake holders.<sup>258</sup> Though efforts are underway by some factions of the government to reverse intolerance, the normative structure still tends to reinforce it. The U.S. Department of State country report stipulated the following:

Observers stated that the central government made efforts to reaffirm constitutional guarantees of religious freedom, promote tolerance, and prevent religiously motivated violence. They also stated that the central government did little to intervene at the local level or solve past religious conflicts through its mandate to enforce court rulings, override unconstitutional local regulations, or otherwise uphold the constitutional and legal protections afforded to minority religious groups. Local government selectively enforced blasphemy laws, permitting regulations, and other local regulations in ways that affected various religious groups.<sup>259</sup>

Part of the concession of the Indonesian central government is made to the local governments with particularly radicalized populations as well as many hardliners in the central government itself.

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255. According to International Crisis Group, an NGO based in Brussels, the initiative’s ineffectiveness was caused by “ignorance of the scale of the Islamist radical and terrorist threat” and unfamiliarity with “the content of the radical teachings and how they were supposed to respond.” *Id.* at 46.

256. Director of Islamic Guidance at the Ministry of Religious Affairs, Ahmad Djauhari, stated in an interview that the Ministry was starved of government funding and support. *See id.* at 48.

257. Provincial governments have ignored the national Supreme Court’s ruling and disallowed the opening of churches, perpetrators of religious violence have been let off with light sentences, and victims of such violence are frequently charged on fabricated charges. *See CSW REPORT, supra* note 129, at 11.

258. Reverend Gomar Gultom, general secretary of the Communion of Churches in Indonesia, stated: “[T]he most worrying . . . development is the absence of the state. In various acts of violence . . . it looked as if the police were helpless and even tended to let the violence occur in front of them.” *Id.* at 11; *see also Tolerating Intolerance: Indonesia’s President is Accused of Turning a Blind Eye to Religious Violence*, *ECONOMIST* (June 9, 2012), <http://www.economist.com/node/21556618> (“The president has uttered a few vague public statements about non-violence and respecting other people’s rights, but he has largely left the problem to local governments. This has appeared only to embolden extremist groups, which now feel that they can act with impunity. Sometimes the police are in cahoots with the hardliners. The situation continues to worsen.”) [<https://perma.cc/XB5T-FH4L>].

259. *International Religious Freedom Report for 2015: Indonesia, supra* note 138, at 6.

With such a high percentage of polarized Sunni adherents (ultra-radicalized, supporters, or bystanders), reforms are hard won. This is evident in the peace accords with the Aceh region where concessions had to be made (e.g., imposition of Sharia law) to maintain territorial integrity and is also evident in the central government's reluctance to intervene at the local level or to enforce constitutional guarantees. Fracturing of the legal basis and polarizing of strategic policy decisions have operated in such a way that the normative message of Sunni hegemony persists. The sectarian violence in Aceh is roughly similar to fears of Uighur independence in China, but highly distinguishable as Chinese policy seeks radical assimilation of a minority population while Indonesian policy is bent on placating a majority population sympathetic to many of the aims of the sectarians. The normative character of Sunni hegemony catalyzes into support, in some quarters or indifference in others, to terrorist action at home and abroad. This serves to empower impunity and mitigate legal reform efforts to prevent Indonesians from fighting in foreign wars or incarceration of those who return from Jihad as well as acts of domestic terrorism directed against religious minorities.

The problems in Indonesia are both legal and political with the imposition of contradictory and discriminatory law and a policy of, at times, appeasement, as well as other hurdles such as the cumbersome evidence laws. In this nascent democracy political actors need to demonstrate profound leadership skills to help shape public opinion rather than just follow it. This brand of political leadership is far more difficult in Indonesia; as Amitav Acharya put it, “[c]ounter-terrorism and electoral politics make uneasy bedfellows in a majority Muslim Nation.”<sup>260</sup> Thus, “[l]eaders . . . have become trapped in a discourse that they cannot break without marginalizing a growing portion of their constituency.”<sup>261</sup> Until this can be accomplished, Indonesia's contribution to terrorism in the Region and abroad will not abate.

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260. Amitav Acharya, *Terrorism and Security in Asia: Redefining Regional Order* 3 (Asia Research Ctr., Murdoch U., Working Paper No. 113, Oct. 2004) (as cited in ACHARYA, *supra* note 14, at 30).

261. David Wright-Neville, *Prospects Dim: Counter-Terrorism Cooperation in Southeast Asia*, in WOODROW WILSON INT'L CTR. FOR SCHOLARS, ASIA PROGRAM SPECIAL REPORT NO. 112: FIGHTING TERRORISM ON THE SOUTHEAST ASIA FRONT 5, 7 (June 2003), <https://www.wilsoncenter.org/sites/default/files/Asia%20Report%20112.pdf> (as cited in ACHARYA, *supra* note 14, at 31) [<https://perma.cc/VC3P-3U4W>].

### C. Thailand

#### 1. Domestic Law Framework

Like China and Indonesia, Thailand only officially recognizes certain religions including Buddhism, Islam, Christianity, Brahmin-Hinduism, and Sikhism.<sup>262</sup> Unlike China, Thailand has well-defined mechanisms for unofficial religions to obtain official status which would allow, *inter alia*, for them to receive financial government subsidies.<sup>263</sup> Unlike in Indonesia, there has traditionally been no comparable Blasphemy ordinances in Thailand, but there has been constitutional provision for the protection of Theravada Buddhism as a favored religion<sup>264</sup>—singling it out for support and protection.<sup>265</sup> Effective as of 2017, the new Thai Constitution builds on that protection. Thailand’s law on religion is stipulated in its Constitution Section 67:

The State should support and protect Buddhism and other religions.

In supporting and protecting Buddhism, which is the religion observed by the majority of Thai people for a long period of time, the State should promote and support education and dissemination of dharmic principles of Theravada Buddhism for the development of mind and wisdom development, and shall have measures and mechanisms to prevent Buddhism from being undermined in any form. The State should also encourage Buddhists to participate in implementing such measures or mechanisms.<sup>266</sup>

This provision is consistent with the 2007 Thai Constitution,<sup>267</sup> but adds new implementation provisions calling for “[t]he state [to] . . . establish measures and mechanisms to prevent the desecration of Buddhism in any form and encourage the participation

262. U.S. DEP’T OF STATE, INTERNATIONAL RELIGIOUS FREEDOM REPORT FOR 2015: THAILAND 3 (2015), <https://2009-2017.state.gov/j/drl/rls/irf/religiousfreedom/index.htm?year=2015&dclid=256145> [<https://perma.cc/NN9Y-K7Y2>].

263. *See id.* at 1 (“The government continued to provide financial support for officially recognized religions, including Buddhist, Muslim, Christian, Brahmin-Hindu, and Sikh organizations. Unrecognized groups did not receive subsidies, but did not report restrictions on their activities.”).

264. Thailand’s population is between 85% to 95% Buddhist and 5% to 10% Muslim. *Id.* at 2.

265. Mong Palatino, *Thailand’s New Constitution: A Threat to Religious Freedom*, DIPLOMAT (Sept. 2, 2016), <http://thediplomat.com/2016/09/thailands-new-constitution-a-threat-to-religious-freedom/> [<https://perma.cc/6SPD-MXTZ>].

266. CONST. OF THE KINGDOM OF THAILAND, enacted Apr. 6, 2017, *unofficial English translation published by Thai Office of the Council of State*, available at [http://heinonline.org/gwlaw.idm.oclc.org/HOL/cowdocs?state=&file=th\\_2017\\_Council\\_of\\_State\\_eng.pdf](http://heinonline.org/gwlaw.idm.oclc.org/HOL/cowdocs?state=&file=th_2017_Council_of_State_eng.pdf) [<https://perma.cc/FA2X-TBW8>].

267. Palatino, *supra* note 265.

of all Buddhists in the application of such measures and mechanisms.”<sup>268</sup> What form these measures and mechanisms will take is an open question, but it is strikingly similar, in potential effect at least, to the Blasphemy laws of Indonesia. Some scholars and journalists suggest that a narrow reading of this provision will bring about government sanctioned discrimination against Buddhists who practice different forms or interpretations of Buddhism, and/or non-Buddhist religious groups.<sup>269</sup> This concern has heightened scrutiny to the extent that as early as August 2016 (before the new Constitution came into effect) the Thai Prime Minister, Prayut Chan-o-cha, issued an executive order to “patronize and protect all religions acknowledged by the Thai state” and further elaborated that “some groups have distorted cultural diversity to cause conflicts among people of different faiths.”<sup>270</sup> Thai scholar Surapot Thaweesak has criticized the order as providing insufficient protection of religious minorities as balanced against a constitutional provision.<sup>271</sup> Other scholars, such as Khemthong Tonsakulrungruang, have argued that the new constitutional provision could lead to “thought crime allegations” and “curb freedom of expression and freedom of religious minorities.”<sup>272</sup>

Thus, Thailand’s new constitutional law can be seen as creating a three tier hierarchy with a quasi-proscribed religion<sup>273</sup> (Theravada Buddhism) at the pinnacle similar to Indonesia (with Sunni Muslim), followed by a second tier of officially recognized religions (including Islam), and a third tier of unofficial religions. Like China and Indonesia, it also lacks any non-establishment provisions.

Islam is the second largest religious demographic after Buddhism in Thailand, of which almost all are Sunni Muslims.<sup>274</sup> Estimates based on the 2010 Thai census and NGO reports place the

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268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.* The Constitution was rejected by southern provinces where the Malay Muslim population lay. *Id.* Reporting on the campaign against the draft was also banned while authorities arrested activists and journalists alike. See *Thailand: Activists, Journalist Arrested for Vote-No Campaign*, HUM. RTS. WATCH (July 12, 2016), <https://www.hrw.org/news/2016/07/12/thailand-activists-journalist-arrested-vote-no-campaign> [<https://perma.cc/Q5MW-PT2P>].

273. Technically, there is no state religion in Thailand (or Indonesia) but the additional legal protection devices in both states for their favored religion (Theravada Buddhism and Sunni Islam respectively) strongly suggest such a favoritism. See *supra* notes 145, 146 & 266.

274. *International Religious Freedom Report for 2015: Thailand*, *supra* note 262, at 2.

number of Muslims at 5% to 10% with all other non-Buddhist religions combined at less than 5% and Buddhist making up the rest of the population.<sup>275</sup> Thus, religious biased provisions and implementing mechanisms are predictably going to have the most impact on the Malay-Muslim population. Moreover, traditional separatist activity has been localized among Malay-Muslims in the southern most provinces of Thailand<sup>276</sup>; separatist sentiments are not shared by other religious adherents. Therefore, it was not surprising when the southern provinces voted overwhelmingly against the new Constitution<sup>277</sup> as the Buddhist bias in Section 67 would potentially fuel greater strife and polarize the country even more. Nor was this lost on the Prime Minister as he observed when signing the executive order that there is a danger that some groups distort cultural diversity for the purpose of stimulating discord between followers of different faiths.<sup>278</sup> Opinions expressed in the popular press also voiced their concerns that separatists would manipulate religious issues for propaganda purposes.<sup>279</sup>

When coupled with the emergency decree in effect in the southern provinces,<sup>280</sup> which “since 2005 gave military, police, and civilian authorities significant power to restrict certain basic rights,”<sup>281</sup> Section 67 profoundly impacts the Malay-Muslims sense of identity, fuels feelings of insecurity and unfair treatment, and bolsters radicalization. By attacking the perceived religious identity in Section 67, in addition to other civil and political rights deprivations under the emergency decree, the Thai government is flinging fuel on a blazing fire in terms of radicalization. The results of the radicalization of the Malay-Muslims is expressed in a report by the U.S. Department of State where it concluded for the year 2015 alone that, “Malay Muslim insurgents continued attacks against both military and civilian targets. According to statistics from the NGO Deep South Watch, violence (including common crime) resulted

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275. *Id.*

276. *Id.* at 1.

277. Palatino, *supra* note 265; *see also* Panarat Thepgunpanat & Patpicha Tanakasempipat, *Wave of Attacks Across Southern Thailand After New Constitution Signed*, REUTERS (Apr. 7, 2017), <http://www.reuters.com/article/us-thailand-south-attacks-idUSKBN17908H> (discussing the violent aftermath in southern Thailand after the new Thai king signed the new constitution after the referendum) [<https://perma.cc/54RK-LLFL>].

278. Palatino, *supra* note 265.

279. *An Appeal for Harmony*, BANGKOK POST (Aug 30, 2016), <http://www.bangkokpost.com/archive/an-appeal-for-harmony/1074028> [<https://perma.cc/QCU8-ZV6M>].

280. *International Religious Freedom Report for 2015: Thailand*, *supra* note 262, at 4.

281. *Id.* Rights deprivations include “pretrial detention and searches without warrant.” *Id.* at 4.

in 227 individuals — predominately civilians but including security service personnel and insurgents — being killed and 481 injured in 582 incidents as of November [2015].”<sup>282</sup>

## 2. Counter-Terrorism Laws

Thailand’s anti-terrorism legislation is proportionately drafted and largely consistent with international norms pursuant to Security Council Resolution 1373.<sup>283</sup> Thailand’s criminal code provision Offence Relating to Terrorism provides for the elements of the offense including the actus reus (murder, causing grievous bodily harm, serious damage to infrastructure, and destruction of state property likely to cause significant economic damage), and mens rea (intent to threaten/compel Thai/other governments or international organizations to do or refrain from an act, or to cause widespread terror).<sup>284</sup> The legislation includes a caveat that lawful protest of government policy is not a terrorist act.<sup>285</sup> There are also provisions against threats to commit terrorism, conspiracy and incitement to terror,<sup>286</sup> and liability for secondary parties.<sup>287</sup>

## 3. Strategic Policy: Reluctance in Naming the Problem

Before the dramatic Erawan bombing and news of a planned attack by ISIS against Russians,<sup>288</sup> Thailand’s extremist problem was more correctly defined as an insurgency than a jihad.<sup>289</sup> Unrest stems from the Southern regions. Southern Thailand consists of a large Malay-Muslim population and is more impoverished and underdeveloped than the north.<sup>290</sup> Indeed, the three southern border provinces have 47.6% of the entire region’s poor and a high unemployment rate.<sup>291</sup> The city and the rural areas are fur-

282. *Id.* at 6.

283. S.C. Res. 1373 (Sept. 28, 2001); *see infra* notes 284–287 and accompanying text.

284. *See* CRIMINAL CODE, OFFENCE RELATING TO TERRORISM, § 135/1 (Thai.).

285. *See id.*

286. *See* CRIMINAL CODE, OFFENCE RELATING TO TERRORISM, § 135/2 (Thai.).

287. *See* CRIMINAL CODE, OFFENCE RELATING TO TERRORISM, § 135/3 (Thai.).

288. *See Islamic State Agents from Syria ‘in Thailand to Target Russians’*, BBC (Dec. 4, 2015), <http://www.bbc.com/news/35003912> (locations such as Pattaya and Phuket in Southern Thailand are popular among Russians, which Moscow has warned to have been targeted last December potentially in retaliation against Russia’s Syria campaign) [<https://perma.cc/A44X-M4XY>].

289. DUNCAN McCARGO, *TEARING APART THE LAND: ISLAM AND LEGITIMACY IN SOUTHERN THAILAND* (2008).

290. *Id.* at 2.

291. NAT’L RECONCILIATION COMM’N, *OVERCOMING VIOLENCE THROUGH THE POWER OF RECONCILIATION* 24–26 (2006). The National Reconciliation Commission is an independent body established by the Thaksin government specifically to address the source of vio-

ther polarized by political differences, primarily in the north, between the red-shirts and the yellow-shirts.<sup>292</sup> The red-shirts are comprised of mainly rural workers from outside Bangkok who support the ousted former Prime Minister Thaksin Shinawatra.<sup>293</sup> The yellow-shirts, on the other hand, opposed Thaksin and consist of royalists, ultra-nationalists, and the urban middle class.<sup>294</sup> Thus, there are three defined groups in Thailand, the Malay-Muslims seeking greater political autonomy or self-determination, the red-shirt populists, and the yellow-shirt elites.

However, some academics have pointed out that socioeconomic grievances are not the triggering point for the insurgency<sup>295</sup> by Malay-Muslims in the south. Some have even stated that “Malay Muslims [in Thailand] were better off than ever before” given high rubber prices.<sup>296</sup> Experts instead point to the unattended separatist sentiments in the south as the source of Islamization of the insurgency.<sup>297</sup> Nevertheless, it was observed that “Islam is a resource that the militant movement mobilizes for political ends; the violence is not primarily animated by religious grievances.”<sup>298</sup> This is further evidenced as the Thai administration of the region has mainly focused on depriving Malay-Muslims’ political autonomy rather than their religious identity. What is interesting is despite a lack of hostility on part of the Thai majority towards Islam, an Islamic rhetoric has managed to manifest in the insurgency and contribute to rallying support.<sup>299</sup>

Separatism sentiments in the south are deeply rooted. The region is home to 1.8 million, close to 80% of which are Muslims who speak Malay as their mother tongue.<sup>300</sup> Ever since its annexa-

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lence in the south. Duncan McCargo, *The Trouble with Reconciliation*, NIKKEI ASIAN REV. (May 22, 2015), <https://asia.nikkei.com/Politics-Economy/Policy-Politics/The-trouble-with-reconciliation> [<https://perma.cc/UE2X-2WDE>].

292. *Profile: Thailand's Reds and Yellows*, BBC (July 13, 2012), <http://www.bbc.com/news/world-asia-pacific-13294268> [<https://perma.cc/73PJ-C97F>].

293. *Id.*

294. *Id.*

295. McCARGO, *supra* note 289, at 11–12.

296. *Id.* at 6; *see generally* Srisompob Jitpiromsri & Panyasak Sobhonvasu, *Unpacking Thailand's Southern Conflict: The Poverty of Structural Explanations*, in *RETHINKING THAILAND'S SOUTHERN VIOLENCE* 89–111 (Duncan McCargo ed., 2007).

297. McCARGO, *supra* note 289, at 180–81.

298. *Id.* at 180.

299. *See id.*

300. INT'L CRISIS GROUP, *THAILAND: THE EVOLVING CONFLICT IN THE SOUTH I* (2012), <http://www.crisisgroup.org/en/regions/asia/south-east-asia/thailand/241-thailand-the-evolving-conflict-in-the-south.aspx> [<https://perma.cc/3DXB-NERS>].

tion by the Siamese empire in 1902,<sup>301</sup> Southern Thais, composing only a fortieth of Thailand's total population, have been embroiled in a futile struggle to have their interests represented in the nation's Buddhist-dominated political order.<sup>302</sup> The first signs of insurgency emerged between the 1960s and 1990s in the form of a variety of militant groups, most notably the Barisan Revolusi Nasional (BRN), the Patani United Liberation Organization (PULO), and the New PULO.<sup>303</sup> This phase of insurgency reached its climax in 1997 when the three groups operated under the same banner—Bersatu,<sup>304</sup> and waged coordinated attacks that wreaked considerable havoc.<sup>305</sup> Soon after, Malaysia was pressured by Thai authorities to forbid these groups safe havens and to cooperate in arresting high-profile militants, spelling the demise of the three groups.<sup>306</sup> Then followed a short-lived peace where the Thai authorities began to show "somewhat more sensitivity to the lack of economic and administrative development" in the south and pledged to "promote the region's natural resources and invest greater sums in occupational training for local Malays."<sup>307</sup> Steps were also taken to "enhance police, military, and political understanding of the unique Malay-Muslim way of life."<sup>308</sup> Such is a result of accumulated reconciliatory efforts under the Prem Tinsulanond regime which brought Malay-Muslim elites into the fold via a combination of political privileges and development funds administered by the Southern Border Provinces Administrative Centre (SBPAC),<sup>309</sup> which also oversees the education of "bureaucrats and security officials in cultural awareness and the local Patani language."<sup>310</sup> Nevertheless, the renewed promises in the 1990s rang hollow as Malay-Muslim participation in local politics remained insignificant.<sup>311</sup> Co-opting Malay-Muslim elites also did

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301. *Id.*

302. McCARGO, *supra* note 289, at 183.

303. PETER CHALK, RAND CORP., THE MALAY-MUSLIM INSURGENCY IN SOUTHERN THAILAND UNDERSTANDING THE CONFLICT'S EVOLVING DYNAMIC 5-7 (2008).

304. Literally, "solidarity." *Id.* at 8.

305. *Id.*

306. *Id.*

307. *Id.* at 9.

308. *Id.*

309. McCARGO, *supra* note 289, at 2.

310. Chalk, *supra* note 303, at 9.

311. "[S]ome 80 percent of the civil service for the administration of the region were non-Malay (a ratio that largely exists to this day), while the majority of the local political economy remained in the hands of [Thai] officials." *Id.* n.11 (citing interviews with Thai journalists and academics regarding Pattani province, Sept. 2006).

not pay off given the increasing gulf between them and villagers<sup>312</sup>; when violence surged in 2004 they were nowhere to be seen, least to play a mediating role between the state and the south.<sup>313</sup>

While some have dismissed the potential of rising global jihadism in Thailand,<sup>314</sup> the August 2016 bombings over Thailand may evince a change in tactic of local extremists. On August 11 and 12, 2016, incendiary devices and bombs went off at bars and nightlife streets in popular tourist and expatriate locations such as Phuket and Hua Hin.<sup>315</sup> No organization has yet claimed responsibility, but Thai police have ruled out links to both international terrorism and separatist insurgency in the south.<sup>316</sup> Instead, officials have described the attacks as domestic sabotage emanating from a referendum vote which “approved a new constitution which entrenches long-term military influence in Thai politics” strongly opposed by red-shirts.<sup>317</sup> This view is nevertheless inconsistent with the fact that red-shirts are not active in the region and that the style of attack is similar to BRN tactics such that the Thai police chief has now acknowledged a possible link between the attacks and the southern insurgency.<sup>318</sup> Similar to the Erawan bombing, we see a culture of denial and downplay in the Thai junta’s handling of potentially terrorist-related incidents.<sup>319</sup> If this is truly the work of the BRN, which has a history of avoiding western targets and keeping the Al-Qaeda linked Indonesia-based Jemaah Islamiyah at arm’s length to maintain “international sympathy as an oppressed minority fighting for cultural and religious rights,”<sup>320</sup> then the new wave of bombings signifies a substantial escalation in BRN’s ideol-

312. McCARGO, *supra* note 289, at 9.

313. *Id.* at 184.

314. See, e.g., Shawn W. Crispin, *Islamic State in Thailand: A Phantom Threat?*, DIPLOMAT (Mar. 4, 2016), <http://thediplomat.com/2016/03/islamic-state-in-thailand-a-phantom-threat/> [<https://perma.cc/ZS49-EVEY>].

315. *Thailand Bomb Blasts Target Phuket and Hua Hin Tourist Spots*, BBC (Aug. 12, 2016), <http://www.bbc.com/news/world-asia-37046943> [<https://perma.cc/CW3E-NKJR>].

316. Jonathan Head, *Who is Behind the Thailand Bombings?*, BBC (Aug. 12, 2016), <http://www.bbc.com/news/world-asia-37059508> [<https://perma.cc/37EU-QENV>].

317. *Id.*

318. *Id.*

319. See James Hookway, *Thailand Bombings Expose Guerrillas in the Midst*, WALL STREET J. (Aug. 21, 2016), <http://www.wsj.com/articles/thai-bombings-expose-hidden-southern-conflict-1471813202> (“Junta chief and Prime Minister Prayuth Chan-ocha initially said the blasts were the work of individuals opposed to the outcome of a recent referendum endorsing a new constitution that gives the military extensive political powers. Then on Thursday, the ruling junta said it arrested 15 people in connection with the bombings, only to reverse course the following day and say none of the suspects had anything to do with the attack.”) [<https://perma.cc/E7TK-SEQR>].

320. Crispin, *supra* note 314.

ogy towards the direction of jihadism. Viewing this radical departure from previous *modus operandi*, avoiding westerners as targets, and the sophistication of the coordinated attacks points to the influence of international jihadism; at the least, it is consistent with the goals of international jihadism. Following on from the bombings at Erawan and the jihadist influences alleged in that attack, this new attack raises serious inferences of the southern insurgencies connections and/or sympathies with international jihadist organizations. Thailand appears to be tilting toward this direction.

#### 4. One Man's Ego

The Thaksin Shinawatra administration, Thailand's President from 2001 to 2006, oversaw a dramatic surge of fresh violence in 2004,<sup>321</sup> which continues today.<sup>322</sup> A number of scholars view Thaksin's moves in the south as either dismantling the Democrat's traditional hold of the region or exploiting Buddhist chauvinism and nationalist sentiments to create distractions from his political shortcomings.<sup>323</sup> His policy largely involved dismantling existing structures such as the SBPAC which he considered the Democrats' tool,<sup>324</sup> and introducing his own people<sup>325</sup> to head what was effectively a military approach.<sup>326</sup> The SBPAC, though imperfect, was the only institution in which representatives of soldiers and police

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321. Violent incidents in the south largely remained below a hundred cases a year until 2004, which recorded a staggering 1,843 incidents. See Srisonpob Jitpiromsri & Panyasak Sobhonvasu, *supra* note 296, at 90. There is also speculation that the attack on April 28, 2004 marked the 57th anniversary of the Dusun-nyor "rebellion." Chaiwat Satha-Anand, *The Silence of the Bullet Monument: Violence and "Truth" Management, Dusun-nyor 1948, and Kru-Ze 2004*, in *RETHINKING THAILAND'S SOUTHERN VIOLENCE* 11, 30–31 (Duncan McCargo ed., 2007).

322. See *Thailand: Insurgents Seize Hospital in South, Attack Latest in Campaign Against Medical Facilities*, HUM. RTS. WATCH (Mar. 15, 2016), <https://www.hrw.org/news/2016/03/15/thailand-insurgents-seize-hospital-south> [<https://perma.cc/JTM4-A2VE>].

323. See, e.g., Satha-Anand, *supra* note 321, at 6 (describing this view as expressed by Professor Ukrist Pathmanand).

324. See Chalk, *supra* note 303, at 9.

325. For instance, Thaksin appointed his classmate Songkitti Chakkabhatra, who described southern assailants as nothing more than "common bandits," and argued that there is no real insurgency in the South, as deputy commander of the Fourth Army. See Satha-Anand, *supra* note 321, at 45.

326. It was reported in 2012 that "[t]here are some 41,000 professional security forces in the region, including 24,000 troops and 17,000 police. Paramilitary forces include 18,000 volunteer rangers (*thahan phran*) and 7,000 Or Sor (Volunteer Defence Corps). Almost 85,000 civilians organised as volunteer militias augment these forces." See INT'L CRISIS GROUP, *THAILAND: THE EVOLVING CONFLICT IN THE SOUTH* 12 (Dec. 11, 2012), <https://www.deepsouthwatch.org/sites/default/files/241-thailand-the-evolving-conflict-in-the-south.pdf> [<https://perma.cc/G79R-RLRD>]. The militarization of the south thus was not amended by Thaksin's successor Yingluck Shinawatra. *Id.*

could meet and exchange views with Muslim leaders, religious educators, and local officials.<sup>327</sup> Without contacts to the Malay-Muslim population, any effort to install a similar civil structure has been ineffective.<sup>328</sup>

Despite Thailand's modern anti-terrorism legislation, Thaksin's "solution" for the southern problem materialized into his "war on drugs."<sup>329</sup> It was indeed a war, leaving thousands dead at the end of the 2003 campaign.<sup>330</sup> Governmental encouragement for violence came in the form of cash incentives, with the Prime Minister himself stating: "at three Baht [U.S. \$0.07] per methamphetamine tablet seized, a government official can become a millionaire by upholding the law, instead of begging for kickbacks from the scum of society."<sup>331</sup> Interior Minister, Chalerm Yubamrung, expressed his distaste for human rights while hailing Thaksin's war in a parliament speech.<sup>332</sup> The result was unaccountable extrajudicial killings carried out by the police and numerous breaches of due process.<sup>333</sup> A subsequent investigation appointed by the military-installed government of General Surayud Chulanont in 2007 produced the number and nature of deaths: of the 2,819 deaths only 1,370 were related to drug dealing, 878 were not, and the other 571 were killed without reason; the report was not made public.<sup>334</sup>

327. Satha-Anand, *supra* note 321, at 47.

328. *See id.* at 48 (describing how Thaksin reversed course soon after abolishing the SBPAC by creating the Southern Border Provinces Peace-Building Command, and how this institution has thus far has been ineffective due in part to its lack of direct contacts with Muslim leaders).

329. *See Thai PM Hails Drug War Success*, BBC (Dec. 3, 2003), <http://news.bbc.co.uk/2/hi/asia-pacific/3256836.stm> [<https://perma.cc/EWY6-SQFK>].

330. The official death toll was 2,274, *see 2,274 Dead in Thai Drugs Crackdown*, CNN (May 7, 2003), <http://edition.cnn.com/2003/WORLD/asiapcf/southeast/05/07/thailand.drugs/> [<https://perma.cc/69SS-8YEW>], though Human Rights Watch reported 3,000 dead during that period, *see* HUMAN RIGHTS WATCH, NOT ENOUGH GRAVES: THE WAR ON DRUGS, HIV/AIDS, AND VIOLATIONS OF HUMAN RIGHTS 12 (2004), <https://www.hrw.org/reports/2004/thailand0704/thailand0704.pdf> [<https://perma.cc/H8RY-VX44>].

331. *Id.* at 7 (citing M. Dabhoiwala, *A Chronology of Thailand's "War on Drugs"*, ASIAN LEGAL RES. CTR. (May 9, 2003)).

332. *See* Tom Fawthrop, *Not Another War on Drugs*, GUARDIAN (Apr. 18, 2008), <http://www.theguardian.com/commentisfree/2008/apr/18/notanotherwarondrugs> ("[F]or drug dealers, if they do not want to die, they had better quit staying on that road. Drugs suppression in my time as interior minister will follow the approach of Thaksin. If that will lead to 3,000-4,000 deaths of those who break the law, then so be it. That has to be done.") [<https://perma.cc/WG48-ZKDL>].

333. *Not Enough Graves: The War on Drugs, HIV/AIDS, and Violations of Human Rights*, *supra* note 330, at 6–27.

334. *Thailand: Prosecute Anti-Drugs Police Identified in Abuses*, HUMAN RIGHTS WATCH (Feb. 7, 2008), <https://www.hrw.org/news/2008/02/07/thailand-prosecute-anti-drugs-police-identified-abuses> [<https://perma.cc/8B4P-N47M>].

Militants later claimed that Thaksin's disproportional "war on drugs" rendered side-line Malay-Muslims to join their cause out of fear and spite for the government.<sup>335</sup>

Unlike China, but consistent with Indonesia, Thailand has been reluctant to name the problem in the south, instead characterizing it as "simple banditry, a conflict over benefits such as the spoils of smuggling or the drugs trade" and even "malevolent machinations of local and national politicians."<sup>336</sup> Such avoidance is rooted in Thailand's administration of the region as evidenced by the 1948 Dusun-nyor "rebellion," the bloodiest conflict between Malay-Muslims and the Thai administration in the region. While accounts vary,<sup>337</sup> a survivor recounts that Thai police fired the first shot after trying to persuade villagers from conducting an Islam-inspired ceremony prior to fighting Chinese bandits; the police thought the villagers had Thai targets in mind.<sup>338</sup>

### III. DIFFERENT PATHWAYS TO VIOLENCE

While the responses and situations in all three countries differ widely in terms of national priority and domestic objectives, the common feature is the autocatalytic character of their policy initiatives and the lack of preemptive measures based on a causal theory of counter-terrorism. A monolithic approach to counter-terrorism employing military and law enforcement mechanisms relying on conventional deterrence theory (general and specific) has proven a failure in light of the increasingly violent trends in global and transnational terrorism. This "one size fits all" process only continues to feed its autocatalytic character. A causal approach also cannot be applied effectively as a generic solution since it tends to default to unrelated political aspirations and objectives. To be effective a causal approach requires a rigorous determination of

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335. A member of BRN-Coordinate, a new militant organization in Thailand, told Human Rights Watch:

Out of resentment towards Thai authorities, those villagers were desperate and requested us to give them protection. We gave them training in military and self-defense tactics, in parallel with political indoctrination about the struggle for independence. This is how we reestablished control of the population and stepped up attacks on the government. We truly believe in our cause—that we are fighting to liberate our land and protecting our people from the oppressive Thai authorities.

IT WAS LIKE SUDDENLY MY SON NO LONGER EXISTED, *supra* note 20, at 13–14.

336. McCARGO, *supra* note 289, at 88.

337. From a premeditated Muslim rebellion by official accounts, to an intentional provocation by the Thai security forces by Malay-Muslim academics. See Chaiwat Sathanand, *supra* note 321, at 17–20.

338. *Id.* at 18–19.

the conditions on the ground specific to the conflict zone or geographic area or polity affected. While there are certain common features of human experience or desires, such as those extrapolated in the social identity theory and other related insights from social psychology, each resolution requires customized initiatives that account for the differing cultural, economic, political, and historic experience specific to the at-risk community. Simply throwing money at a problem or implementing toothless politico-legal solutions alone may prove to be as ineffective as marshaling military or law enforcement forces without rigorously making context specific determinations and fashioning remedies related to all significant causal factors for each specific situation. This is poignantly illustrated in the three countries set out in this Article.

### A. *Domestic Law*

Domestic anti-terrorism laws in each of the three countries are either well suited to government policy, as in China and Indonesia, or largely irrelevant, as in Thailand. China's legislation is open-ended and ambiguous, Indonesia's law is difficult to enforce, and Thailand's law, though conforming to international standards, is underused. In particular, Chinese law's tautologous definition of terrorist activity defaults to whatever the government or bureaucratic authority, with large discretion, declares it to be. Its inadequate mens rea element allows for the arrest and punishment of those without a "guilty mind" making all "at risk" community members subject to arrest.<sup>339</sup> The actus reus of the offense of undermining public security,<sup>340</sup> or stability of the regime, potentially has the force of labeling peaceful protests or publicly stating grievances (oral or written), as terrorist activity. This is in stark contrast with the Thai law, which specifically excludes peaceful protests from the list of terror activity.<sup>341</sup> By casting such a broad net, Chinese law enlarges the perceived terrorist threat and further tightens control of Xinjiang as an emergency measure of its own creation. This is further evidenced by other claims exaggerating the terror threat such as a claim by a Chinese think tank that put the number of Uighurs fighting in Syria in the thousands,<sup>342</sup> when most objective

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339. See Counter-Terrorism Law of the PRC, *supra* note 62, art. 18.

340. *Id.* art. 3.

341. See CRIMINAL CODE, OFFENCE RELATING TO TERRORISM, § 135/1 (Thai.).

342. Ananth Krishnan, *Hundreds, Maybe Thousands, of Chinese Uighurs Fighting in Syria, Warns Beijing Expert*, INDIA TODAY (Jan. 14, 2016), <http://indiatoday.intoday.in/story/hundreds-maybe-thousands-of-chinese-uighurs-fighting-in-syria-warns-beijing-expert/1/570524.html> [https://perma.cc/94R5-QBYG].

estimates imply an insignificant role played by Uighurs and place the numbers in the hundreds.<sup>343</sup> Moreover, as the unfair treatment of Chinese Uighur populations expands, it augments a self-fulfilling prophecy as the disenfranchised in Xinjiang feel compelled to resort to greater radicalization culminating in terror activity.

Thailand's anti-terrorism law is drafted in accordance with U.N. standards and provides for peaceful protests but tends to be underused because of the authority's reluctance to name the terror threat. In 2015 and 2016 numerous attacks took place throughout Thailand but the government continues to practice denial. Thailand's tourism department still lauds the country as having amongst the lowest crime rates<sup>344</sup> though recent experience tends to contradict that claim. *Bona fide* terror activity is likely to be prosecuted under domestic ordinances such as murder, destruction of property, or kidnapping. Moreover, though conforming to international standards, Thailand's definition of terrorism<sup>345</sup> still fails to reference underlying causal features that give rise to terrorist activity. However, the Thai law is less open-ended than the Chinese counter-terrorism law as its definition does not necessarily default to administrative opinion and is less subject to abuse, to a degree, than the Chinese law and has relatively well-defined act and mental element requirements.

Indonesia's new counter-terrorism law has the most sophisticated act requirements of the three subject countries laying out an exhaustive list.<sup>346</sup> It also recognizes the inherent obstacles to prosecution in the Indonesian criminal justice system,<sup>347</sup> particularly in the area of evidence law,<sup>348</sup> and seeks to overcome the same through legislative reform—perhaps at the risk of deconstructing the safeguards in the domestic criminal law system.<sup>349</sup> The threat largely consists of its potential misuse against domestic non-Sunni religious groups as a tool for further discrimination against them,

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343. See THE SOUFAN GROUP, FOREIGN FIGHTERS: AN UPDATED ASSESSMENT OF THE FLOW OF FOREIGN FIGHTERS INTO SYRIA AND IRAQ 8 (2015); see also Roberts, *supra* note 78 (questioning “expert analysis” which the author views as designed to perpetrate a false narrative on the degree of the Uygher threat to China and the rest of the world).

344. TOURISM AUTHORITY OF THAI., A TRIP OF A LIFETIME: LONG STAY IN THAILAND 79, [https://www.tourismthailand.org/fileadmin/upload\\_img/Multimedia/Ebrochure/370/trip-of-lifetime.pdf](https://www.tourismthailand.org/fileadmin/upload_img/Multimedia/Ebrochure/370/trip-of-lifetime.pdf) (last visited Apr. 16, 2018) [<https://perma.cc/N4JD-S9JS>].

345. See *supra* notes 284–287.

346. See generally Butt, *supra* note 172.

347. See *supra* notes 167, 172.

348. See *supra* note 173 and accompanying text.

349. See *supra* notes 175, 187.

consistent with quasi-radical public intolerance. The Indonesian draft is also context specific as it addresses and provides penalties for the serious problem of a significant number of natives fighting in foreign wars.<sup>350</sup> Moreover, it has some features of causal phenomena with its efforts to address radicalization of subjects under arrest and/or post-conviction.<sup>351</sup> However, its approach to de-radicalization is retrospective, not preemptive, making those efforts unlikely to succeed with already radicalized terrorists.

Neither the Chinese nor the Thai counter-terrorism laws provide for causal phenomena, preemptive or retrospective, as to do so would be contrary to the public policy of forcible assimilation of the Uighur populations in China or the threat to tourism in Thailand. Neither China nor Thailand have context specific counter-terrorism laws addressing the actual threat in those countries or inherent legal and judicial structural defects as China provides for ambiguous terminology to allow administrative and judicial officers to apply their own discretion according to CCP policies and Thai reluctance to properly name the threat. Thailand provides the most robust protections for free speech in its counter-terrorism law<sup>352</sup> and China the least protection,<sup>353</sup> while Indonesia allows for incitement to commit terrorism,<sup>354</sup> but it does not reserve specific protections for free speech.<sup>355</sup> However, Indonesia's Blasphemy law<sup>356</sup> and, perhaps, Thailand's predictable measures for the protection of Theravada Buddhism<sup>357</sup> tend to undercut the available free speech in those states and thus create the risk of labeling peaceful political activists as terrorists. Indonesia still has not reached consensus on a definition of terrorism for its draft proposal for a new counter terrorism law,<sup>358</sup> which will have a significant bearing on, inter alia, what sort of speech will be allowed.

### B. *Religious Law*

All three states provide for religious freedom of thought,<sup>359</sup> but they also provide serious disincentives for many who practice relig-

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350. *See supra* note 174.

351. *See supra* note 188.

352. *See supra* note 285.

353. *See supra* note 75.

354. *See supra* notes 166–179.

355. *Id.*

356. *See supra* notes 146–148.

357. *See supra* note 264.

358. *See supra* note 183.

359. *See supra* notes 54, 145, 266.

ion inconsistent with the national religion; Sunni Islam in Indonesia, Theravada Buddhism in Thailand, and atheism in China. As all three countries lack a non-establishment clause as a means of religious protection, they have highly regulated registration systems in place for established religions.<sup>360</sup> Despite the constitutional guarantees for religious freedom in each state, there are numerous laws, national and local, that punish religious adherents of the non-established faith. In China, non-atheists are disallowed from practical participation in the sole political party, the CCP,<sup>361</sup> and the political boundary setting in the so-called Xinjiang (Uighur) autonomous region has diminished any realistic Uighur political voice,<sup>362</sup> particularly in light of the mass migration of Han Chinese who are given economic and legal incentives to relocate to that province.<sup>363</sup> In Thailand, the dominant religion is specifically laid out in the Constitution<sup>364</sup> and coupled with measures and mechanisms to prevent the desecration of Theravada Buddhism,<sup>365</sup> which will, many believe, lead to even greater government sanctioned discrimination against non-Theravada Buddhists.<sup>366</sup>

In Indonesia, there are myriad ancillary and local laws that either patently or latently discriminate against religious freedom including uneven permit requirements for the construction of houses of worship,<sup>367</sup> bans on non-Sunni proselytizing (while no corollary bans are placed on Sunni proselytizing),<sup>368</sup> obstacles to marriage of religious minorities,<sup>369</sup> religious conversion requirements,<sup>370</sup> application of Sharia law to non-Muslims,<sup>371</sup> and perhaps most significant, the discriminatory application of the Blasphemy law against non-Sunnis.<sup>372</sup>

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360. All religious organizations in China have to be state-sanctioned. *See supra* note 54. Indonesia penalizes “deviant interpretation[s]” of religious teachings and recognizes six official religions. *See supra* notes 149, 150. Thailand singles out Theravada Buddhism and the new Constitution provides that the state may intervene in preventing its “desecration.” *See supra* note 268.

361. *See supra* note 54.

362. *See supra* notes 107–119.

363. *See supra* notes 90–92.

364. *See supra* notes 265–266.

365. *See supra* note 268.

366. *See supra* notes 269–272.

367. *See supra* notes 152–153.

368. *See supra* note 237.

369. *See supra* notes 235–237.

370. *See supra* note 235.

371. *See supra* note 263.

372. *See supra* note 244.

Though each countries' law has chosen a different pathway to religious discrimination or intolerance, they have two features in common: a de facto established state religion (or atheism in China) and impotent constitutional guarantees of religious freedom. With regard to the latter, Chinese constitutional and legal interpretation falls under the authority of the Standing Committee of the National People's Congress,<sup>373</sup> a political body made up of high ranking CCP members,<sup>374</sup> rather than the Supreme People's Court, a judicial body,<sup>375</sup> and can be assumed to be consistent with state policy objectives.<sup>376</sup> Therefore, any challenges to discriminatory religious laws are predictably hopeless if they contradict the state policy of forcible assimilation. In Indonesia, the Ministry of Home Affairs has to date failed to exercise its power to challenge even the most blatantly unconstitutional discriminatory local laws against religious minorities and there is little prospect that such steps will be undertaken in the near future.<sup>377</sup> Thailand's constitutional guarantee of religious freedom is highly suspect as the constitutional provision establishing mechanisms for the protection of Theravada Buddhism<sup>378</sup> is likely to trump the more aspirational religious freedom provisions, particularly in the context of the current military dictatorship.<sup>379</sup>

### C. Strategic Policy

At its heart, counter-terrorism is criminal law. Criminal law, indeed most public law, is arguably more dependent on strategic public policy than private law because of, inter alia, the proprio motu powers of prosecutors to prosecute or decline to prosecute, the discretion of magistrates to charge different offenses (particu-

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373. See XIANFA [CONSTITUTION], art. 67, § 1 (2004) (China).

374. *Standing Committee*, NAT'L PEOPLE'S CONG. OF THE PEOPLE'S REPUBLIC OF CHINA, [http://www.npc.gov.cn/englishnpc/Organization/node\\_2847.htm](http://www.npc.gov.cn/englishnpc/Organization/node_2847.htm) [https://perma.cc/S2CR-3FRE].

375. *Id.*

376. See, e.g., David Bandurski, *Xi Jinping: CCP Rule Undergirds "Rule of Law"*, CHINA MEDIA PROJECT (Oct. 29, 2014), <http://cmp.hku.hk/2014/10/29/xi-jinping-ccp-rule-undergirds-rule-of-law/> [https://perma.cc/4NZH-5KZD]; Paul Gewirtz, *What China Means by 'Rule of Law'*, N.Y. TIMES, (Oct. 19, 2014), <https://www.nytimes.com/2014/10/20/opinion/what-china-means-by-rule-of-law.html> (discussing the Chinese Communist Party's use of the phrase "rule of law" with the Party's de facto exercise of "control" over society) [https://perma.cc/UB78-DAE3].

377. See *supra* notes 239–240.

378. See *supra* note 264.

379. Greg Botelho, Paula Hancocks & Kocha Olarn, *Thai Military Takes Over in Coup—Again*, CNN (May 22, 2014), <http://edition.cnn.com/2014/05/22/world/asia/thailand-martial-law/index.html> [https://perma.cc/PG3B-8CGW].

larly with the extant overlap in offenses in most modern criminal law systems), the discretion of law enforcement officials to investigate and charge, and the sensitivity of officials to public opinion. In criminal law, the government acts as the moving party, rather than private individuals or corporations, and is unabashedly driven by public policy, which in most cases is to deter and punish anti-social criminal activity. Thus, strategic public policy has greater influence on what cases are brought and arguably impact the result in those cases. In the selected states, this can be seen in such examples as the reluctance of many Indonesian law enforcement officials to charge returning jihadist fighters from the Middle East and the management of law and law enforcement to allow disproportionately harsh results for non-Sunni Muslims; or Thailand's practice of charging terrorist suspects with conventional domestic crimes instead of terrorism; or China's wholesale labeling of perceived dissident groups as terrorists. In this way, public opinion is manipulated (particularly with state run media) to create a national dialog consistent with public policy objectives to either exaggerate the terrorist threat, in the case of China, or downplay the threat in Thailand and Indonesia.

Moreover, central to strategic policy in all three states is to assuage or otherwise deal with the right to self-determination of identifiable sub-groups with the social structure of each country. In China, it is the forcible assimilation of the Uighur population into the Han majority; in Thailand, it is the rights of Malay-Muslims while the conflict between red shirts and yellow shirts persist; and in Indonesia, it consists of the relatively recent autonomy afforded to Aceh,<sup>380</sup> which is currently under Sharia law.<sup>381</sup> Self-determination is an international human right guaranteed under Article 1 of the International Covenant on Civil and Political Rights (ICCPR), and its deprivation also impinges upon several other rights laid out in the ICCPR including inter alia Articles 25, 26, and 27.

All three states examined can be both loosely characterized as authoritarian (though Indonesia does have democratic elections) and sensitive to developing an international reputation conducive to trade and foreign relations. Further, all three states have varying degrees of poverty. In China overall, there is significant disparity

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380. *Conflict and Peacemaking in Aceh: A Chronology*, WORLDWATCH INST., <http://www.worldwatch.org/node/3929> (last visited Apr. 16, 2018) [<https://perma.cc/AD2X-FXYW>].

381. *See id.*; Thomas Latschan, *Public Canings - Shariah Defines Indonesia's Aceh Province*, DEUTSCHE WELLE (May 23, 2017), <http://www.dw.com/en/public-canings-shariah-defines-indonesias-aceh-province/a-38949106> [<https://perma.cc/WS6F-RP4P>].

of wealth, but with a developing middle-class and some government sensitivity to the poor shown through the repeal of the agricultural tax,<sup>382</sup> tolerance of labor movements<sup>383</sup> (consistent with a Marxist ideology), and encouragement of individual home ownership.<sup>384</sup> But this sensitivity is unevenly applied and has resulted in a net diminution of the Uighur economic well-being. This is paralleled in Thailand with a seemingly disparate priority on poor red-shirts rather than the Malay-Muslims in the south. In Indonesia, the ubiquitous poverty, or near poverty, of a large portion of the population creates fertile grounds for scapegoating non-conforming groups. Thus, China intentionally impoverishes Uighur populations while Thailand ignores the economic situation of the Malay-Muslims, and both cases create greater financial instability and therefore insecurity amongst at-risk groups. Indonesia provides a conduit for the frustration felt by a majority of the population, which stems from economic instability, by tolerating vigilante action against non-conforming groups.

In China and Thailand, the self-determination component is confined within a small defined population seeking greater political and economic autonomy. In Indonesia, by contrast, there is a relatively cohesive majoritarian polity with elements that arguably favor a departure from nascent democratic structures<sup>385</sup> toward greater theocratic control; the polity also scapegoats disparate non-conforming religious groups lacking significant political clout. The relevant Indonesian population is most likely to view international counter-terrorism measures against jihadism as an attack on Islam generally. The relevant minority Islamic populations in China and Thailand are generally more concerned with domestic issues, but as internal conditions continue to deteriorate these populations increasingly look abroad to make common cause with international jihadist movements.<sup>386</sup> This is made apparent by the August 2016 bombing attacks in Thai resort areas,<sup>387</sup> ostensibly by

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382. See Mark Kielsgard & Lei Chen, *The Emergence of Private Property Law in China and its Impact on Human Rights*, 15 *ASIAN-PAC. L. & POL'Y J.* 94, 113 (2013).

383. *Id.*

384. *Id.*

385. See *supra* notes 233–245.

386. See Krishnan, *supra* note 342.

387. See *Thailand Bombs: Travel Warnings as Tourist Resorts Hit by Fatal Explosions – As It Happened*, *GUARDIAN* (Aug. 12, 2016), <https://www.theguardian.com/world/live/2016/aug/12/thailand-explosions-resort-towns-phuket-hua-hin> [<https://perma.cc/J9VT-PPLH>]; *Two Bombs Explode in Thai Coastal Town of Pattani*, *GUARDIAN* (Aug. 24, 2016), <https://www.theguardian.com/world/2016/aug/24/two-bombs-explode-in-thai-beach-resort-of-pattani> [<https://perma.cc/5VNF-36B6>].

southern separatists, and the growing Uighur participation with the international jihadist movement.<sup>388</sup> This is also shown in the Syria-trained jihadist from Indonesia that are reportedly playing a significant role in the conflict in the Philippines.<sup>389</sup>

National policy in China calls for tighter CCP control over the Xinjiang region under a Han majority in terms of economic benefit<sup>390</sup> and political control<sup>391</sup> with a forced cultural and political assimilation of Uighur populations providing little power-sharing and no autonomy.<sup>392</sup> This is accomplished in part through state-sanctioned political and economic disparity<sup>393</sup> and iron-fisted law enforcement initiatives<sup>394</sup> predicated on an exaggerated terrorist threat<sup>395</sup> and ambiguous domestic counter-terrorism legislation.<sup>396</sup> Political priority in Indonesia consists of, inter alia, maintaining democratic control by pandering to popularly perceived attacks on Islam internationally, and bringing radicalized populations under the banner of extant political leadership. Indonesia overlooks vigilante violence, thus subtly encouraging it similar to Duterte's policy in his "war on drugs" in the Philippines,<sup>397</sup> which arguably helped spark its recent domestic war on terrorism.<sup>398</sup> Thailand has moved away from a reconciliatory posture with the Islamic south and is

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388. See Krishnan, *supra* note 342; Yenni Kwok, *Is There a Uighur Terrorist Buildup Taking Place in Southeast Asia?*, TIME (Dec. 28, 2015), <http://time.com/4161906/uighur-terrorism-indonesia-thailand-islam-isis/> (In Dec. 2015, a raid by Indonesian police concluded with the discovery of an explosive device, a model of a government building, bomb-making materials, and the arrest of an Uighur—it was alleged that he was "learning Indonesian, and he was a [suicide bomber] in training.") [<https://perma.cc/T3KA-JRHY>]. An estimate by The Telegraph in August 2015 puts foreign fighters in Syria from China, Indonesia, and Malaysia at 300, 159, and unknown respectively. See FOREIGN FIGHTERS: AN UPDATED ASSESSMENT OF THE FLOW OF FOREIGN FIGHTERS INTO SYRIA AND IRAQ, *supra* note 343.

389. See *supra* note 13.

390. See *supra* note 90.

391. See *supra* notes 107–15.

392. See *id.*

393. See *supra* note 90.

394. See *supra* notes 77–88.

395. See Roberts, *supra* note 78.

396. See *supra* note 63; see also *supra* notes 76–77.

397. Rishi Iyengar, *Inside Philippine President Rodrigo Duterte's War on Drugs*, TIME (Sept. 15, 2016), <http://time.com/4495896/philippine-president-rodrigo-duterte/> [<https://perma.cc/YQ9F-9QQZ>].

398. Nyshka Chandran & Martin Soong, *Battle in Southern Philippines is Related to Duterte's Drug War, Says Finance Chief*, CNBC (June 18, 2017), <http://www.cnbc.com/2017/06/18/marawi-siege-is-related-to-dutertes-drug-war-says-finance-chief.html> [<https://perma.cc/HU6A-XPYK>]. Alternatively, the war in the south was allowed to rage on because Duterte focused on the war on drugs. See Richard C. Paddock, *Duterte, Focused on Drug Users in Philippines, Ignored Rise of ISIS*, N.Y. TIMES (June 10, 2017), <https://www.nytimes.com/2017/06/10/world/asia/duterte-philippines-isis-marawi.html> [<https://perma.cc/5BAQ-CNVG>].

largely focused on the dispute between the red-shirts and the yellow-shirts. It also has a lucrative tourism trade catering mostly to Asians, Australians, and Europeans.<sup>399</sup> Thailand deals with the violence in the south through law enforcement and has historically concealed the terror problem as a “war on drugs” or ordinary criminality. Parallels are likely to emerge in the Philippines under Duterte.<sup>400</sup> Thus, the law enforcement approach adopted by China is strict enforcement of its overly broad, ambiguous anti-terrorism law; in Thailand, it is the uneven enforcement of its “war on drugs;” and in Indonesia, it is the lack of enforcement leading to impunity.

All three states have adopted a version of the law enforcement model of counter-terrorism. In China, this is accomplished through labeling the Xinjiang situation as a terror threat, enacting overbroad legal measures and cracking down on law enforcement to camouflage the disparity of treatment of the indigenous Uighur populations. In Thailand, the law enforcement approach is masked as a war on drugs allowing for what amounts to group punishment without naming a terrorist threat to protect the lucrative tourism industry in the relevant region. In contrast, Indonesian national priority consists of maintaining political primacy by not offending radicalized groups and thus its law enforcement strategy consists of non-enforcement and impunity for offenders both domestically and abroad. The Philippines has adopted a military model in its war on terrorism in Mindanao. More recently, however, the Philippine president in a surprising move has declared that the government will provide for greater autonomy for Mindanao,<sup>401</sup> consistent with previous official pledges,<sup>402</sup> which suggests a willingness to embrace a preemptive causal approach to

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399. It has been proposed that the Thai junta avoided connecting the Erwana attack with Uighurs or terrorism to preserve their alliance with China and the lucrative tourism business. See Philip Sherwell, *Thailand links Bangkok shrine bomb to Chinese Uighurs for first time*, TELEGRAPH (Sept. 15, 2015), <http://www.telegraph.co.uk/news/worldnews/asia/thailand/11866250/Thailand-links-Bangkok-shrine-bomb-to-Chinese-Uighurs-for-first-time.html> [https://perma.cc/98M6-U5R8].

400. See, e.g., Audrey Morallo, *Duterte Claims Drug Money Funding Terrorism in Mindanao*, PHIL. STAR, (May 31, 2017), <http://www.philstar.com/headlines/2017/05/31/1705434/duterte-claims-drug-money-funding-terrorism-mindanao> [https://perma.cc/2D9B-T9VJ].

401. Carolyn O. Arguillas, *Duterte: “There shall be a Bangsamoro country”*, MINDA NEWS, (July 18, 2017), <http://www.mindanews.com/peace-process/2017/07/duterte-there-shall-be-a-bangsamoro-country1/> [https://perma.cc/5MT8-ZQML].

402. *Philippines to Enact Law on Muslim Autonomy*, AL JAZEERA (Sept. 10, 2014), <http://www.aljazeera.com/news/asia-pacific/2014/09/philippines-enact-law-muslim-autonomy-201491042920151184.html> [https://perma.cc/KDD5-7RL7].

de-radicalization. This is ironic, as Duterte is an outspoken opponent against human rights norms.<sup>403</sup>

Moreover, Thailand differs radically from Indonesia as the majority of the population does not attach a religious component to economic, political, or cultural deprivations and is not as radicalized as a whole. While religion plays an increasingly important role within the insurgency, as with the Uighurs in China, the chief complaint is a lack of political power-sharing. Moreover, despite increased rubber prices,<sup>404</sup> the stark economic realities of most in Southern Thailand also plays a role in disaffection and popular insecurity. Thailand is similar to Indonesia as the official government downplays the terrorist ties as well as its vitality as an insurgency often opting to identify manifestations as mere criminal conduct. Its diminution of the terrorist threat stems not from efforts to protect and tolerate a majority radicalized population, as with Indonesia or government accountability for some, but from an interest in maintaining its lucrative tourist trade, especially in southern resort areas. This position is untenable in light of the attacks in 2015 and 2016, and only fuels greater acts of violence in a misguided effort to force the government to come to terms with Malay-Muslim complaints.

Thailand also differs from China as its majority population is not a cohesive Han population without visible dissent, as unified under the banner of the CCP. The friction between the red-shirts and the yellow-shirts and the political instability it creates, distracts from the dialog in the south and precludes effective initiatives (both political and economic) to quell feelings of uncertainty and unfairness. Additionally, Thai authorities have, in the past, made overtures toward a causative solution by addressing Malay-Muslim concerns<sup>405</sup> in the late 1990's and early 2000's as explicated above. These initiatives arguably led to reducing tensions and dialog,<sup>406</sup> however temporary,<sup>407</sup> and served to corroborate the effectiveness of a causative model for countering extremism. However, indicia

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403. Most notably Duterte stated during his final campaign rally: "Forget the laws on human rights. If I make it to the presidential palace, I will do just what I did as mayor. You drug pushers, hold-up men and do-nothings, you better go out. Because I'd kill you . . . I'll dump all of you into Manila Bay, and fatten all the fish there." See *Philippines President Rodrigo Duterte in Quotes*, BBC (Sept. 30, 2016), <http://www.bbc.com/news/world-asia-36251094> [<https://perma.cc/V6QM-XCR8>].

404. See McCARGO, *supra* note 289, at 6.

405. See *supra* notes 307–310.

406. *Id.*

407. Short lived peace lasted roughly between 1997 and 2004. See *supra* notes 306, 313.

of a causative solution were mired by disingenuous policies without effective implementation or local leadership.<sup>408</sup> Later, Thai leadership abandoned those efforts and opted for a viral form of the law enforcement approach, consistent with its denial efforts, by waging its capricious war on drugs.<sup>409</sup> Resorting to “the stick” approach naturally led to a resumption of violence as terrified ordinary Malay-Muslims looked to religious groups and the insurgents for protection and closure.<sup>410</sup> Additionally, the current political situation in Thailand appears amenable to employing a ‘carrot’ approach to the southern insurgency. Yet, despite contemporary political polarization in the north, of the three countries reviewed, Thailand presents the greatest practical potential for effectively utilizing a causative approach—if implemented effectively and in good faith. Unfortunately, the window is closing as more widespread radicalization appears on the horizon among Thailand’s Malay-Muslim population with insurgents likely to forge greater alliance with jihadists out of common cause and adopting consistent radical prototype identities.

Government encouraged and tolerated extremism in Indonesia differs from China such that it is a majoritarian radicalization and is likely to yield more per capita extremist but perhaps of a less violent character—who would be less disposed toward international jihadism. The bleak economic and xenophobic situational factors in Indonesia are less likely to fuel a sufficiently violent character in most (as a percentage of the population) as the tiny minority of Uighurs in China who face more desperate and pervasive threats to their sense of well-being, fairness, and cultural identity. Yet as a percentage of the population, Indonesia draws from a much larger radicalized pool and thus poses a greater threat of capitulation to international jihadism. Moreover, the violently radicalized Indonesians draw on a huge support system from those less radicalized for sympathetic support for their agenda comparable to the so-called “bystander liability”<sup>411</sup> prevalent in many of the historic genocide and pre-genocidal societies. Moreover, as the government is not the polarized author of the misery, violently

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408. *See supra* notes 311–313.

409. *See supra* notes 329–335.

410. *See supra* note 298.

411. Bystander liability has been recognized in transitional justice scholarship as an element allowing escalation of violence in majority populations, though it is typically not treated as criminal unless complicit acts rise to the level of secondary liability. *See* KIELSGARD, *supra* note 204, at 211.

radicalized actors in Indonesia increasingly scapegoat international actors<sup>412</sup> with relative impunity<sup>413</sup> and governmental denial.<sup>414</sup>

Nonetheless, Indonesia has some promising trends for a causative approach such as the recognition of a democratically-elected form of government,<sup>415</sup> growing vitality of civil society organizations<sup>416</sup> (even without government support),<sup>417</sup> and efforts to revamp its anti-terrorism laws. Whilst radicalization seems ubiquitous in Indonesia, it is noted that the most radical parties still hold only a minority of positions in the legislature<sup>418</sup> and under the recently initiated reforms some measures loosely characterized as causal are being contemplated. Such measures include efforts at de-radicalization such as isolation from the general population for those incarcerated who have the most radical background as the prison system is seen as a robust breeding ground for jihadist recruitment.<sup>419</sup> This measure is a mere band-aid and unlikely to reverse radical trends without political action pragmatically designed to transform populist opinion away from radicalism. Indonesia needs to take greater preemptive measures as part of its strategic policy to shape public opinion and de-radicalize its population through such measures as encouraging its civil society groups to create a consistent dialog of tolerance and taking steps to repeal the obviously unconstitutional provisions in its domestic religious law to stop sending mixed messages to the population. It also needs to target those Indonesians who fight in foreign terrorist theaters with greater vigor to stop impunity for those crimes. China seems least likely to reverse its trends as the government appears bent on dealing with the problem through attrition rather

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412. Figures reported by the Straits Times put Indonesian volunteers to Daesh at 700. See Chan, *supra* note 168.

413. Returnees from Syria were released and merely put under surveillance “to ensure that they do not propagate ISIS ideology or mount terror attacks at home.” *Id.*

414. Numbers of fighters going to ISIS downplayed as an Indonesian Foreign Ministry official said figures of returnees were “confusing” as “not all of them joined ISIS as fighters.” See *id.*

415. Indonesia’s democratic transition took place in 1999 and has since included democratic elections with new political parties, the first presidential election in 2004, and rolled out decentralization governance through thirty-three provinces and over 500 districts and municipalities. See *Indonesian Democracy Index (IDI): What We Do*, UNITED NATIONS DEV. PROGRAMME, [http://www.id.undp.org/content/indonesia/en/home/operations/projects/democratic\\_governance/indonesian-democracy-index—idi—project.html](http://www.id.undp.org/content/indonesia/en/home/operations/projects/democratic_governance/indonesian-democracy-index—idi—project.html) (last visited Apr. 16, 2018) [<https://perma.cc/DS8U-WQE3>].

416. See *supra* notes 246, 249.

417. See *supra* note 258.

418. CSW REPORT, *supra* note 129, at 48.

419. Singh, *supra* note 167.

than peaceful co-existence and equitable treatment—its anti-terrorism law facilitates this aim.

Thus, while China seeks to enlarge the perceived terrorist threat in Xinjiang to justify its policy aims of radical assimilation of the Uighur population, Indonesia seeks to diminish the perceived threat to protect its radicalized majority population and walks a tightrope between subtly encouraging a resort to international jihadism and being labeled a state supporter of terrorism. In either scenario, the assessment for future dangerousness is grave with domestic policy trumping all other considerations and creating a counterproductive anti-terrorism regime.

### CONCLUSION

What lies at the heart of radicalization, and thus terrorism, in the Region are failed calls for self-determination, political power sharing, or unfair treatment of religious minorities. In China, the failure of the Xinjiang autonomous region and its discriminatory practices has motivated increasing numbers of Uighurs to radicalize and join the international narrative of jihadism. Near complete indifference to the Malay-Muslim demands for greater power-sharing and fair treatment in Thailand with the occasional war on drugs has spurred those in the south on to greater violence. In the Philippines, the failure of the Bangasmo peace process has helped precipitate an internal war on terrorism. In Indonesia, despite political and legal power sharing in some regions, a large majority of the population still feels victimized by a democratic government, which they believe, fails to reflect the Muslim contour of that land. The Region is particularly vulnerable to terrorist activity and serves as a vast reservoir of terrorist resources because, unlike Europe and North America, it has significant Muslim populations with largely unresolved grievances and with little hope of resolution given regional governments' policy strategies.

Accentuating the problem, particularly in Indonesia, is the growing vitality of ISIS and their radicalized dialog. Failures of al-Qaeda to gain ascendancy a decade before have not been replicated by ISIS and the common cause of establishing Islamic states is a message that resonates in the at-risk countries in the Region. This also produces an autocatalytic effect as the radicalized narrative of ISIS yields more regional fighters to the Syrian conflict theatre who return and reinforce the narrative, if not continue in terrorist attacks at home or other conflict zones in the Region.

Counter-terrorism laws in the Region have failed to provide a solution as they either serve as paper tigers in the target states with Indonesia's judicial failures, inter alia, and Thailand's administrative enforcement failures; or as a stimulus for greater securitization and instrument of oppression of those communities at greatest risk of radicalization by means of ambiguity in China. The treatment of religious minorities according to law also exacerbates the problems as each has an implied established state religion (or atheism) with unfair treatment of non-conforming faiths and the failure of effective judicial review to enforce freedom of religious belief (Muslim or non-Muslim).

Of greater impact is the unrelated national policy strategies of each of the targeted states which work against any comprehensive approach to preventing radicalization and resultant terrorist activity and tend to neutralize formal law aspirations. China's policy of forcible assimilation of Uighur minorities, Thailand's indifference to Malay-Muslims with a focus on the red-shirt yellow-shirt conflict and the interest of preserving tourism trade in the south and Indonesia's efforts to hold together a democratic state with an increasingly radicalized population, are all elements which favor a theocratic form of government. Continued indifference or avoidance of the radicalization process or increased securitization pursuant to unrelated policy strategy creates an opportunity for terrorist groups like ISIS to gain significant traction in the Region and is doubly troubling as contrary to groups in the Middle East, many indigenous radical groups have shown a willingness to negotiate, meaning they are not *per se* an existential threat.

As illustrated above, a monolithic solution that focuses on a lack of power sharing, uneven economic priorities, and suppressing dissent through the military and law enforcement has not brought Asian states closer to solving their respective extremism issues and may have, such as in China's case, created one that was initially non-existent. If anything, the existing political and legal policies have created more instability in the respective states which are increasingly vulnerable to exploitation by the global jihad movement. Simply financing enhanced security and infrastructure or ignoring longstanding social justice disputes without understanding underlying grievances is a waste of limited resources which could otherwise be more meaningfully applied to uproot politico-socioeconomic factors contributing to individual uncertainty and feelings of insecurity.