

THE SYARIAH IN CONTEMPORARY SOUTHEAST ASIA

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I. Introduction

The Southeast Asian¹ nations with significant Muslim populations are Indonesia, Malaysia, the Philippines, and Brunei Darussalam. This paper will discuss the *Syariah*² in the first three. The preceding paper noted that there is no singular model of the modern Islamic state and that Muslims have not agreed on an ideal temporal polity for Islam in modernity. These observations are valid for Southeast Asian countries as well. Therefore, the major issues confronting *Syariah* will vary within each country of Southeast Asia.

In order to present a coherent discussion of the question, it is productive to first review some key demographics in tabular form³:

	<u>%Muslim</u> (July 2001 est.)	<u>Population</u>	<u>GDP Per Capita</u> (2000 est.)	<u>Land Area</u> q km	<u>Density</u> person/sq.km.
Indonesia	88	228,437,870	US\$ 2,900	1,826,440	125
Malaysia	59	22,229,040	US\$10,300	328,550	68
Philippines	5	82,841,518	US\$ 3,800	298,170	278

Indonesia has the largest population of the three with a great majority of Muslims and the lowest wealth per capita. Malaysia has the smallest population and a small majority of Muslims and the greatest wealth per capita. Philippines takes its place in the middle except for the fact that she has a small minority of Muslims. Population is densest in the Philippines, Indonesia and Malaysia, in declining order.

A comparison of the above statistics will confirm the major issues of *Syariah* in the three countries. For Indonesia the issues derive from the sheer land and population size and the

¹ Professor M. B. Hooker has pointed out that “[t]he term ‘South-East Asia’ was invented during the Second World War as S.E.A.C. – ‘South-East Asian Command.’ In older historicals of the area, it was called ‘Indo-China’, ‘Further India’ and similar compounded words. Today, the phrase refers to Burma [now Myanmar], Thailand, Cambodia Laos, Vietnam, Malaysia, Singapore, Indonesia, Brunei and the Philippines.” M. B. Hooker, Chapter 1 Cultures, Laws and Society in South-East Asia, Northern Territory University, 1995. This nomenclature has stuck – today the nine countries have associated as [Association of Southeast Asian Nations \(ASEAN\)](http://www.aseansec.org/). See, <http://www.aseansec.org/>.

² This is the Bahasa Malaysia spelling – the word is also commonly spelled as *Shariah*, *Sharia* and *Sha’ria*.

³ CIA – The World Factbook. See, <http://www.cia.gov/cia/publications/factbook/geos/>

fact that while Indonesia is 88% Muslim, most are *abangan*, that is folk or nominal Muslim. For Malaysia, the issues derive from the fact that it is a prosperous country with a significant population that is not Muslim (41%). For the Philippines, the issues derive from the fact that Muslims comprise only 5% of this densely populated nation of islands. Each country will now be discussed under its own heading.

II. Indonesia

Indonesia with five big islands and about 30 smaller groups is the largest archipelago in the world.⁴ As a result of this geographic dispersion, Indonesia has about 500 tribes and with a corresponding 500 dialects⁵ As a result of her geographic location at the crossroads of travel between the Indian and Pacific Oceans, the islands have imbibed of all the major religions of world: Hinduism⁶, Buddhism, Christianity – in addition to Islam. Many people retain the vestigial, indigenous customs of animism or shamanism.

Indonesia achieved independence only after a bloody guerrilla struggle against the Dutch who sought to return after the defeat of the Japanese at the end of World War II. Dutch colonialism had left much bitterness. Colonial exploitation under a ruthless “divide and rule” policy, coupled with the ravages of war had left the islands in a fractured and debilitated condition. The immediate challenge to the revolutionaries led by Sukarno was to unify the people and to give Indonesia a national identity. There was no coordination with the Dutch for an orderly transfer of power.

Conservative Muslims advocated an Islamic state but this was rejected – instead in a speech on June 1, 1945, President Sukarno unveiled the doctrine of *pancasila*. *Pancasila* has five principles, namely:

- *Kebangsaan* (nationalism)
- *Kemanusiaan* (international humanism)
- *Kerakyatan* (representative government or democracy)
- *Keadilan Sosial* (social justice), and
- *Ketuhanan* (belief in one God)

Pancasila makes no specific mention of Islam *per se* despite the fact that the great majority of Indonesians, even if they are *abangan* or nominal believers.⁷ Alongside *pancasila* is the grass-roots concept of *gotong-royong* which can be translated to mean a

⁴ It with the total number of islands reported at 17,508. This data is reported Indonesian Naval Hydro-Oceanographic Office and published at http://www.aseansec.org/member_countries.html

⁵ In addition to Bahasa Indonesia which is based on Malay, some of the other distinctly different local languages of Indonesia are: Acehese, Batak, Sundanese, Javanese, Sasak, Dayak, Minahasa, Toraja, Buginese, Halmahera, Ambonese, Ceramese, and several Irianese languages. These languages are also spoken in different dialects.

⁶ In is from the word “Hindu” that Indonesia derives its name.

⁷ The five principles of *Pancasila* also diverge from the *rukun* of Islam the Five Pillars which requires (1) *shahadah*, (2) *salat*, (3) *zakat*, (4) *sawm* during *Ramadan*, and (5) *hajj*.

communal turn-out to work for a common goal. Both *pancasila* and *gotong-royong* are Indonesian and bear very little heritage to classical Islam. Indonesia on 17 August 1945 proclaimed independence and on 27 December 1949, became legally independent.⁸

With the adoption of the 1945 Constitution (which other than an interim decade of 1949-1959⁹ when it was abrogated by the Federal Constitution of 1949 and by the Provisional Constitution of 1950 remains in force today), Indonesia emerged as a modern Republic. The Indonesian Constitution is remarkable for its brevity¹⁰, perhaps reflecting its rushed birth under wartime conditions. The question of religion is covered by Chapter XI. (Article 29) which provides for the following

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.

Under the Elucidation of the Constitution, the exegesis for Chapter XI provides simply:

This clause states the belief of the Indonesian people in the One, Supreme God.

Just as with *Pancasila*, the Constitution does not mention Islam but suggests monotheism.¹¹ *Pancasila* is best described as being neither favoring a secular nor a religious state, but it seeks to foster freedom of worship.¹² It is a modern political ideology that is deliberately neutral, seeking to give something to everyone in Indonesia.¹³

An examination of the Constitution and the record of the debates and writings of the independence period confirms that the focus was to quickly build a strong modern nation under a strong executive.¹⁴ Sukarno stated in 1945:

⁸ On September 26, 1950, Indonesia is admitted into the United Nations, thereby joining the world community of nations.

⁹ It is reinstated by presidential decree after Sukarno rejected the parliamentary experiment of the early 1950s and introduced his concept of "Guided Democracy," that is Indonesia under a strong president.

¹⁰ When compared with other Constitutions, the Indonesian ranks as one of the briefest.

¹¹ II.4. of Elucidation of the Constitution merely provides this reiteration: The fourth fundamental idea contained in the Preamble is that the state is based upon that **Belief in the One, Supreme God** which conforms with the principles of just and civilised humanity.

¹² See Zifirdaus, Adnan, Islamic Religion: Yes, Islamic (Political) Ideology: No, in Arief Budiman (Ed.) State & Civil Society in Indonesia, Clayton VIC Centre for Southeast Asian Studies, Monash University, 1990. Pp 448-449. The observation that *Pancasila* is neither religious nor secular is attributed to Eka Dharmaputera, an Indonesian Christian. See, Eka Dharmaputera, Pancasila and the Search for Identity and Modernity, in Indonesian Society: A Cultural and Ethical Approach, University Microfilms International, Ann Arbor, 1982.

¹³ Perhaps from the viewpoint of the eastern tradition and philosophy, the five *silas* (principles) give *Pancasila* both its strength and its weakness, the thesis and antithesis in western nomenclature. It follows that out of the contradiction will emerge the harmonious universe, the synthesis in the western philosophical tradition.

¹⁴ As a consequence the judiciary became and remains a weak institution that by design and operation is vastly subordinate to the executive. Indonesian judges, unlike those under the common law tradition, have

We shall find an Indonesian national state ... I beg your pardon for using the word nationalism. I am a Muslim myself. I pray, however, gentlemen, do not misunderstand me when I say that the first basis for Indonesia is nationalism.¹⁵

The question of religion was given a lesser priority. The dominant belief was that a pluralistic country like Indonesia could only be independent and strong if it was firmly united and integrated along modernist line. This was the obvious answer to the malaise flowing from colonial practices. Hence, the national motto of the United State was "*Bhinneka Tunggal Ika*."¹⁶ President Sukarno, already flamboyant, imposed his personal brand of non-religious rule on the nation.¹⁷

With respect to Islamic law. Indonesia manifests a strong tradition of *adat*. Professor M. B. Hooker observed that

When Islamic law entered into the archipelago, the population of this vast area were subject to their respective customary rules which were different from one tribe to another, and from one region to the next. Islamic legal theory (*Usul al-Fiqh*) recognizes the significance of *adah* (customs) and *'urf* (usages) as supplementary sources of Islamic law. ... Considering the broad legal injunctions of the Quran, plus the tolerant attitudes of the Sufi and mercantile Muslims who introduced the religion to this region, it may be assumed that most existing customs and usages were revived after conversion. The Islamization of local customs must have been a long and peaceful process, a process which some writers observe is still continuing to date. In some areas, such as Ache and later also in Minangkabau, *adat* has been integrally immersed into Islamic law.¹⁸

Nevertheless, the majority of Indonesians are *abangan* Muslims who recognize the authority of *adat*.

not used the natural advantages inherent in the judicial function to develop a greater prestige and independence for themselves.

¹⁵ Quoted in C.A. Van Nieuwenhuijze, Aspects of Islam in Post-Colonial Indonesia, The Hague: W. Van Hoeve Ltd. 1958 p. 205.

¹⁶ Literally this translates to "Many remains One" or "Unity From Diversity." This curiously resembles the "*E Pluribus Unum*" of the United States of America. Here is where the similarities end – the Indonesian Constitution vests almost plenary powers in the Executive, the President.

¹⁷ Under the language of the Constitution, the People's Consultative Assembly (MPR), theoretically was the highest state institution. As an institution which fully exercises the sovereign rights of the Indonesian people MPR is supposed to reflect the aspirations and the wishes of the people with all its decisions or decrees. The Assembly has the potential to appoint the President and Vice-President and to determine the Guidelines of State Policy for implementation by the President. The House of Representatives (DPR), the members of which are from the people and are elected by the people, has the function of exercising control over the conduct of the administration by the President. . In actual practice, the Assembly and House of Representatives have consistently deferred to the will of President Sukarno.

¹⁸ Nur Ahmad Fadhil Lubis, Institutionalization and the Unification of Islamic Courts Under the New Order, (1995) Chapter 7 p 37.

A feature of the *Syariah* as a direct consequence of the “closing of the gates of *ijtihad*,” is the limited range of its subject matter jurisdiction. Traditionally, the *Syariah* in Indonesia, beyond legislating religious rites, addressed the personal law subject matters such marriage, divorce, inheritance, and charitable gift trusts. The *in personam* jurisdiction of *Syariah* extended only to Muslims.

Since independence, the most pressing needs of Indonesia were consolidating political unity in a geographically and culturally diverse archipelago, and expanding economic development. On these matters, the *Syariah* appeared to have little efficacy vis-à-vis the civil and military leadership of Indonesia. As a result, under *Pancasila*, the *Syariah* was not given a direct role. This omission caused great distress to the *ulama* and *santri* which translated into some protracted and continuing civil dissension and violent insurgency.

The tendency towards a secular Republic under a strong leader without explicit recognition of Islam distressed many Muslim *ulama*. Islamic inspired revolts erupted against the national government. Of particular note was the *Darul Islam* rebellion under Kartosuwiryo. Islamic dissidents terrorized the countryside of West Java and elsewhere in their bid for an Islamic State. In 1958, the violence prone *Masyumi* party was banned. It took many years and much effort to quell the Muslim insurgency.

The other major and in all likelihood a more dangerous threat to the young nation was the Communists.¹⁹ The campaign of the Indonesian Communist Party (PKI) culminated in an abortive coup, when they kidnapped and killed six top army generals (while a seventh, A. Nasution, escaped) in the early hours of October 1, 1965.²⁰ The Strategic Reserve of the Army Forces (KOSTRAD), commanded by General Suharto, reacted quickly and successfully counter-attacked. This revolt was thwarted by the quick military response of General Suharto who with the aid of the Muslim faction and the loyal officer corp gradually completed a purge of Communists throughout Indonesia, especially amongst the Chinese.²¹ A discredited and dissipated Sukarno²² was obligated to turn the Presidency over to Suharto by signing the *Surat Perintah Sebelas Maret* or *Supersemar* letter which surrendered power to Suharto.²³

President Suharto's regime came to be called the *Orde Baru* or New Order²⁴ which constructed the following platform:

¹⁹ Sadly for Indonesia, she was plagued by a odd host of other rebels. For example, there was the terrorist APRA band of former Dutch army captain Turco Westerling, which claimed the lives of thousands of innocent people. Outside Java, demobilized ex-colonial arm men who remained loyal to the Dutch crown, staged a revolt and proclaimed what they called "the Republic of South Maluku". In South Sulawesi an ex-colonial army officer, Andi Aziz, also rebelled. In Kalimantan Ibnu Hadjar lead another armed revolt. Sumatra could also account for a number of separatist movements.

²⁰ Of interest is that at this time Indonesia was involved in *Konfrontasi* or Confrontation with Malaysia.

²¹ Some persons accused of involvement in the September 30th coup were tried and sentenced by special "Mahmillub" tribunals. Many others simply disappeared. It has been estimated that some 500,000 to 600,000 people were killed under the label of communist although the exact number will never be known.

²² On June 21 1970 Sukarno died in Bogor.

²³ On March 12, 1967, the Assembly acts to formally deprive Sukarna of all power and affirms Suharto as president.

²⁴ Sukarno's rule became know as the Old Order.

1. Restoration of order, security and political stability
2. Economic rehabilitation.
3. National development with the emphasis on economic development.
4. Ending confrontation and normalization of diplomatic relations with Malaysia.²⁵
5. Readmission to the United Nations.²⁶
6. Consistent pursuit of independent and active foreign policy.
7. Resolution the West Irian question.
8. Regain Indonesia's economic credibility overseas.
9. General elections once every five years.

Curiously, again there is no mention of Islam and for that matter of religion at all. The thrust of the New Order remained the building of a politically stable and economically strong nation with a respected place in the world community. Indonesia was to have elections every five years. *Pancasila* was placed on an even higher pedestal as the answer to nation building.²⁷ The many political parties were trimmed and President Suharto's party GOLKAR, to which all civil servants must join, became dominant.

The Islamic factions again felt great disappointment or even betrayal. By early 1967, the *Dewan Dakwah Islamiyah* convened in Jakarta to plan for Islamic evangelism (*dakwah*), and to counter a perceived growth in Christianization.²⁸ In July, *Nahdlatul Ulama* met in Bandung, demanding rapid elections and an end to the ban on civil servants holding membership in other political parties. After anti-Christian riots erupted in Makassar, President Suharto publicly denounced religious violence.

In 1968, Muslims of the Assembly tried a parliamentary maneuver to bring up the issue of the Jakarta Charter and measures against "religious conversions", but ABRI members of the Assembly cut off the debate. Suharto admonished the leaders of the four Islamic parties to voluntarily agree on the meaning of the Jakarta Charter.

In the bloody aftermath of 1965, many citizens who had not professed a religion before registered as a member of one of Indonesia's five recognized religions.²⁹ A person who did not ran the risk of being branded a Communist. Consequently, the number of Catholics and Protestants increased in the late 1960s, although Muslims remained 90% of the population. In the late 1960s, and again in the late 1970s, the government, possibly Suharto himself, floated the idea of adding *kebatinan*³⁰ or *Islam-abangan* as another

²⁵ With respect to Malaysia, after relations normalized, Indonesia together with Malaysia, the Philippines, Singapore and Thailand first joined to establish the Association of Southeast Asian Nations (ASEAN). The objective of the association is the establishment of regional cooperation in the economic, social and cultural fields, but ASEAN also confers in the political area.

²⁶ Indonesia had withdrawn from the U.N. in January 1965.

²⁷ See, 1983 Guidelines of State Policy and on the basis of Act No. 3 of 1985.

²⁸ Former Masyumi leaders, including Natsir and Mohammed Roem, attend. Christian churches are attacked in Aceh. Several days of anti-Chinese demonstrations break out in Jakarta.

²⁹ The five religions are Islam, Hindu, Buddhist, Catholic, or Kristen (Protestant)

³⁰ *Kebatinan* was included the practitioner Javanese mysticism, much of which had survived for centuries and had little to do with orthodox Islam.

official religion. The effect would be to reduce the number of registered Muslims in the census, and so to reduce the political power of Islamic parties across the board. President Suharto had revealed his posture towards the Islamic state.

In 1973, Islamic political organizations such as the *Nahdlatul Ulama* (the Moslem Scholars Party), *Parmusi* (the Moslem Party)³¹, PSII (the Islamic Confederation) and PERTI (the Islamic Union) were straitjacketed by the government into one organization, the *Partai Persatuan Pembangunan* (PPP).³² Later that year Islamist students took over the Assembly in protest of proposed secular marriage laws. This protest were not so much over the specific statutes but arose from a general feeling that the secular government should act on behalf of the Muslim community.³³ The winds shifted in 1978 when *Majlis Dakwah Islamiyah* was established as a Muslim organization within with GOLKAR and the Department of Religion forbade Indonesians to seek converts from among the other religions. The Muslims were not placated for in 1981 militants hijacked a Garuda airliner.³⁴ The government responded by banning the wearing of *jilbab* (scarf for Muslim women) in high schools. This triggered a PPP rally in Jakarta of one million.³⁵ The *Nahdlatul Ulama* continued to resist Suharto and Abdurrahman Wahid became its leader in 1983. Bloody communal violence erupted the next year in Tanjung Priok and spread outwards. Amidst this turmoil, the PPP agreed to accept *Pancasila* but *Nahdlatul Ulama* then quit the PPP and withdrew from politics. Sensing a rift in the Islamic parties, the government implemented another round of crackdowns.³⁶

In 1989, clashes between the *Gerakan Aceh Merdeka* (GAM), the movement supporting Aceh independence in North Sumatra, and ABRI troops became very serious. To quell Islamic separatism, Aceh was declared a "daerah operasi militer" (military operation district), placed under martial law but fighting continues to this day. At the same time, and in part due to economic woes and unveiled corruption within the Suharto regime, the government sought to mollify Muslims by creating *Bank Muallamat Indonesia* for observant Muslims. With a deteriorating economy, communal violence plagued Indonesia throughout the nineties. In May, 1998, major rioting in Jakarta and elsewhere erupted, especially against the Chinese minority. This proved too much for President Suharto and he resigned on May 21, 1998. Executive power passed to Vice President B. J. Habibie. Key leaders of *Nahdlatul Ulama* reemerged, announced the formation of a new party, *Partai Ummat Islam*, and stepped up their agitation for *Reformasi* (Reform).

³¹ The *Parmusi* party was supposed to be a replacement for the *Masyumi* party *Parmusi* was never able to win support of most former *Masyumi* supporters and Suharto refused to lift on ban on *Masyumi*.

³² United Development Party – a name that gave no suggestion of the Islam. Despite the discouragement of the government the *Majelis Ulama Indonesia* was organized in Jakarta in 1975 to coordinate the rulings of Islamic religious scholars, including members of *Muhammadiyah* and *Nahdlatul Ulama*. In 1976, the government announced that a plot against the government by an Islamic group called *Komando Jihad* had been foiled, but it was never clear whether this was a fabrication to discredit the PPP before elections.

³³ In 1974, secular marriage laws are enacted, despite Muslim opposition.

³⁴ The plane is stormed by Indonesian troops in Bangkok; seven are killed.

³⁵ A counter GOLKAR rally was attacked by PPP supporters, and security forces open fire, killing seven. Tempo Magazine is closed for two months for reporting on the incident.

³⁶ For example, in 1987, the Pelajar (Student's) Islam Indonesia organization is banned due to its opposition to receiving *Pancasila* as a guiding doctrine.

Yet others formed a moderate Islamic party the *Partai Bulan Bintang* (the Stars and Crescent Party). ABRI was stretched thin all over Indonesia in its efforts to suppress violence, especially in the face of severe guerrilla in Aceh and unrest in the eastern islands. The opposition, led by Wahid (who now headed PKB), Megawati Sukarnoputri (the daughter of Sukarno who heads the *PDI Perjuangan*), and two others formed a coalition. The October 1999 elections elevated the Islamic cleric Wahid as the new President after Habibie withdrew from the race. Wahid won the election for President by combining votes from his own PKB party, other Islamic-oriented parties (including PAN, PPP, *Partai Bulan Bintang*, and *Partai Keadilan*), and from Golkar members who were left without a candidate when Habibie withdrew from the race. Megawati while receiving all the votes from her PDI-Perjuangan party, was unable to gain outside her own party and had to be content to be Vice President.³⁷ Those who had struggled for an Islamic state gained a big stride forward.

Even with the election of an *ulama*, communal violence continued especially in Aceh and Maluku and other eastern islands. ABRI hinted that it was also unhappy with Wahid. Worse yet, Wahid and his administration came under criticism for having at least the appearance of corruption, even as the World Bank and IMF pressured the Indonesian government for audits and the formation independent agencies for financial oversight. The *Rupiah* lost much of its foreign exchange value and the common people faced ruin. Wahid, nearly blind, was impotent to solve any of the Republic's problems. Pressure for his ouster mounted. On July 24, 2001, the 700-seat People's Consultative Assembly, voted to replace Wahid with Megawati. After an ineffectual appeal for public support, Wahid yielded the presidential office. Since taking office as the fifth and first woman president of Indonesia, President Megawati shows an inclination for a more secular Indonesia, even in face of Islamic anger over the bombing of the Taliban. The cause of an Islamic state now took a major step backward.

Thus the complex saga of Indonesia will continue to unfold in real time. By the traditional criteria of Islam, a woman is not to assume political leadership in *Dar-ul-Islam*. President Megawati can expect no meaningful support from the *ulama*. She, however, has the backing of ABRI. Indonesia's armed forces have a tradition of religious neutrality and this posture is consistent with *Pancasila*. In these islands, ABRI has historically played kingmaker, especially if the *abangan* stay away from taking to the city streets and village lanes. The President's most pressing priorities are to rebuild the Indonesian economy, reduce sectarian violence, negotiate peace in Aceh, all the while avoiding fallout from the international conflict in the Middle East.³⁸ It appears she intends to bravely go forward without the *Syariah* and the *ulama*, but with the blessing of the *abangan*.

³⁷ Wahid, an Islamic cleric who built his political career with *Nahdlatul Ulama* and Megawati, the daughter of Indonesia secular first president were promptly dubbed "Indonesia's odd couple."

³⁸ For example, an emerging activist, Habib Muhammad Rizieq bin Hussein Syihab of the Islamic Defenders Front who had threatened to "sweep" Jakarta for American citizens and attack them was warned by the government to tone down his rhetoric or face arrest. See <http://www.washingtonpost.com/wp-dyn/articles/A52622-2001Oct12.html>.

The fact is that the five presidents of Indonesia, with the possible exception of Abdurrahman Wahid who held tenure to less than one year (October 2000 – July 2001), was steadfast in holding the course under the compass of *Pancasila*. Since taking office as the fifth³⁹ and first woman president of Indonesia, President Megawati Sukarnoputri manifests an inclination for a more secular Indonesia, even in face of anger over the bombing of the Taliban. Presently, the cause of an Islamic state under *Syariah* must bid its time while Indonesia struggles to rebuild economically.

III. Malaysia

Malaysia differs from Indonesia in that she is a constitutional parliamentary monarchy with a strong common law heritage. The political aspirations of Malaysian Muslims have been channelled through the constitutional and democratic process. Article 3(1) of the Malaysian *Federal Constitution* provides:

"Islam is the religion of the Federation; but other religions may be practised in peace and harmony in any part of the Federation."

This pronouncement for the freedom of religion is further reinforced by Article 11 which guarantees the following:

11. Freedom of religion

- (1) Every person has the right to profess and practise his religion and, subject to Clause (4) to propagate it.
- (2) No person shall be compelled to pay any tax the proceeds of which are specially allocated in whole or in part for the purposes of a religion other than his own.
- (3) Every religious group has the right –
 - (a) to manage its own religious affairs;
 - (b) to establish and maintain institutions for religious or charitable purposes; and
 - (c) to acquire and own property and hold and administer it in accordance with law.
- (4) State law and in respect of the Federal Territories of Kuala Lumpur and Labuan, federal law may control or restrict the propagation of any religious doctrine or belief among people professing the religion of Islam.
- (5) This Article does not authorise any act contrary to any general law relating to public order, public health or morality.

³⁹ The five presidents of Indonesia are Sukarno, Suharto, B. J. Habibie Abdurrahman Wahid and Megawati Sukarnoputri.

During the drafting of the constitution, the Reid Commission gave the following recommendation on the question of whether Islam should be elevated to state religion:

We have considered the question whether there should be any statement in the Constitution to the effect that Islam should be State religion. There was universal Agreement that if any such provision were inserted it must be made clear that it would in any way affect the civil rights of non-Muslims. In the memorandum submitted by the Alliance it was stated – “the religion of Malaya shall be Islam. The observance of this principle shall not impose any disability on non-Muslim nationals professing and practising their own religions and shall not imply that the State is not a secular State.”

In 1988, a *Constitution (Amendment) Act*, added Clause 1(A) to Article 121 which provides that “[t]he courts referred to in Clause (1) shall have no jurisdiction in respect to any matter within the jurisdiction of the Syariah [Islamic] courts.”⁴⁰

Article 8 of the *Federal Constitution* also recites that “all persons are equal before the law and entitled to equal protection of the law”⁴¹ and “there shall be no discrimination against citizens on the ground only of religion, race, descent or place of birth in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment.”⁴² This general spirit of religious freedom and non-discrimination is extended to the sphere of education by Article 12.

Tunku Abdul Rahman Putra, the first prime minister and a lawyer, in the early years in independence was stated during a debate in the Federal Legislative Council has declared:

I would like to make it clear that this country is not an Islamic State as it is generally understood. We merely provide that Islam shall be the official religion of the State.⁴³

This statement casts a very illuminating light on the legislative history of the religious clauses in the *Federal Constitution*. The Tunku has restated his vision for Malaysia in his book:

.... I mentioned that this country is a secular state. It means that it is not a Muslim state. Islam is the official religion of the country, but other religions have a right to play their part as far as religion is concerned. This is about it – but it is

⁴⁰ Article 121(1A) of the *Federal Constitution*. This clause appears to comport with the holding in Che Omar bin Che Soh v. PP, [1988] 2 MLJ 55, *infra*.

⁴¹ Article 8(1).

⁴² Article 8(2).

⁴³ 1 May 1958 *Official Report of Legislative Council Debates*.

not absolutely a secular state because if it were so, there would be officially no religion. So it is the state which give freedom to all religions to carry out their worship. The Constitution has more or less set out the point.⁴⁴

The “Islam is the religion of the Federation” clause of the *Federal Constitution*, has been examined by courts. For example, in Che Omar bin Che Soh v. PP, [1988] 2 MLJ 55, a case which involved a defense argument that the death penalty for drug trafficking was contrary to Islam, Lord President Salleh Abas agreed that the British during the period of advice had introduced a secular legal system and the jurisdiction of Islamic law is to be concerned only with marriage, divorce, and inheritance among Muslims.⁴⁵ Teoh Eng Huat v. Kadhi, Pasir Mas & Anor⁴⁶ held that a minor did not have the capacity to choose his or her own religion. For non-Muslims, the parents or guardian normally has the choice of the minor’s religion.

A review of other case decisions confirm a consistent judicial philosophy - the common law judges of Malaysia appear to have risen to the occasion when called upon to adjudicate inter-religion controversies in favor of freedom of religion in Malaysia. This does not mean a lack of differing opinions among traditional Muslims and activist *ulama* who strive for an Islamic state under *Syariah*. This political philosophy can be observed in Kelantan and Trengganu where the *Parti Islam SeMalaysia* (Pan Malaysian Islamic Party - PAS) commands a majority amongst the Malay *ummah* who predominate there. The counterweight is found in other Malaysians who have long acquired a sensitive respect for each others’ religion and are very careful in circumscribing problematic issues. Because of this broad “grass-roots” understanding of the delineation of religion amongst the races, the burden on the judiciary and the other branches of government is light, especially when compared with the onus brought by cases that involve such political issues as the separation of powers and the powers of the hereditary rulers. As Malaysia is a politically stable and economically advanced modern nation-state, especially by Southeast Asian comparisons, this Nation has attained this in the absence of Islamic state where the *Syariah* is all encompassing.

IV. Philippines

The call of Islam in the Philippines is presently manifesting in armed conflict. The tradition of armed resistance in these islands is not new as it can be traced back to the Spanish period. Islam in the Philippines features indigenous practices, such as offerings to spirits (*diwatas*), malevolent or benign, under the belief that spirits affect health, family relationships, and fertility of agriculture. Pre-Islamic rites of passage such as

⁴⁴Tunku Abdul Rahman Putra, *The Role of Religion in Nation Building*, in *Contemporary ‘Issues on Malaysian Religions*, 1984 at p. 25

⁴⁵ See, Article 121(1A) of the *Federal Constitution*. See also, Sheridan, *The Religion of the Federation*, [1988] 2 MLJ xiii.

⁴⁶ [1990]2 MLJ 300.

birth, marriage, and death are retained. Moros share the essentials of Islam, but specific practices vary between Moro communities. For example, while Muslim Filipino women stay at the back of the mosque for prayers (out of the sight of men), they enjoy a larger measure of equality in daily life.

Muslims in the Philippines share in feeling of Islamic revival seen during the last half of the 20th century. This activism gathered speed in the early 1970s, as more Muslim teachers have visited the nation and more Philippine Muslims have traveled on the *hajj* or on scholarships to Islamic centers. Upon return, Muslims have built many new mosques and religious schools, where students (male and female) learn the basic rituals and principles of Islam and learn to read the Quran in Arabic. A number of Muslim institutions of higher learning, such as the *Jamiatul Philippine al-Islamia* in Marawi, also offer advanced courses in Islamic studies.

Some Moro youth, dissatisfied with the leadership of their parents, contend that *datu* and sultans were unnecessary in modern Islamic society. The young activists were divided between moderates, and militants. Generally, many Moros are unhappy by the continued expansion of Christians into southern islands, by the lack of full legal representation in the Manila government, and by the prolonged presence of Philippine army troops in their communities.

The government responded with troops with one hand and diplomats on the other, Talks between the government and the Moros began in late 1976 under the auspices of the Organization of the Islamic Conference, to which the Moros turned for support. The government and the MNLF signed in Tripoli that year providing for a cease-fire and for Moro autonomy in the southern Philippines. To be complete, the government also responded with lawyers/theologians – on February 4, 1977, President Marcos signed Presidential Decree No.1083, A Decree to Ordain and Promulgate a Code Recognizing the System of Filipino Muslim Law, Codifying Muslim Personal Laws, and Providing for its Administration and for Other Purposes. The effort began in 1973 under of the Presidential Task Force for the Reconstruction and Development of Mindanao. The original English text was translated by the Philippine Shariah Institute⁴⁷ into Arabic. According to Datu Michael O. Mastura, this Code of Muslim Personal Laws is intended to be applied on the propositions that (a) the government cannot possibly recognize Islamic institutions independently from its roots just a Filipino citizens (who happen to be Muslim) cannot construe Islamic law without due regard of the church state separation clause in the constitution⁴⁸, and (b) the Muslim community in the Philippines cannot live and lead justly an Islamic way of life without adhering to the corpus of Quranic-inspired legislation just as the state cannot assume to tamper with their Personal Law system without due regard to the religious freedom clause⁴⁹ under the constitution.⁵⁰

⁴⁷ This institute was created on March 12, 1982 by the Ministry of Muslim Affairs.

⁴⁸ Article II Section 6 (Declaration of Principles and State Policies) provide that “The separation of Church and State shall be inviolable.”

⁴⁹ Article III Section 5 (Bill of Rights) provides that “No law shall be made respecting an establishment of religion, or prohibiting the free exercise thereof. The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed. No religious test shall be required for the exercise of civil or political rights.”

Hence, on one hand Filipino Muslims got their Code of Personal Law based on the *Syariah*, and on the other, they were required to live under the constitution of the Philippines. This was the government's polite answer to the demand for separation. Was it surprising then that the truce collapsed in the same year (1977) in the face of accusations that the government's efforts were a mere placebo. The Moro Islamic Liberation Front (MILF)⁵¹ was formed in 1977 when Hashim Salamat, supported by ethnic Maguindanaos from Mindanao, split from the Moro National Liberation Front (MNLF) led by Nur Misuari. The latter advocated a more moderate and conciliatory approach toward the government. Guerrilla warfare resumed.

In January 1987, after the Aquino government once again extended the olive branch, the MNLF signed an agreement relinquishing its goal of independence for Muslim regions and accepting the government's offer of autonomy. The MILF refused to accept, instead preferring to strive for a separate *Bangsamoro* (Moro people) homeland in Mindanao and the neighboring islands. In 1988, the MNLF too underwent internal reform and resumed the armed struggle, although infighting among Muslim groups weakened the *jihad*. On September 2, 1996, the Philippines government signed yet another agreement with the MNFL, but not all factions were placated. Following this trend, in August, 2001, the government and MILF signed a cease-fire and on October 18, 2001, negotiators began a new round of peace talks aimed at cementing a peace arrangement. These peace efforts do not embrace the Abu Sayyaf, which claims to fight for Islamic independence but who has been dismissed by the government as a mere bandit group⁵² which has kidnapped dozens of foreigners and Filipinos in recent years and extorted millions of dollars in ransom. And so the guerrilla struggle for an Islamic state drags on, albeit at a low intensity.

V. Conclusion

The *Syariah* has legal legitimacy in Indonesia, Malaysia, and the Philippines. All three of these Southeast Asian nations have constitutions that grant protection of the freedom of religion. Malaysia, perhaps by virtue of the small size of her population, a concentrated land mass and high standard of living exhibits the most stability in religious affairs and national cohesion, despite the racial diversity of Malaysians. This is followed by Indonesia, a nation with a large *abangan* population that is struggling to implement national unity, avoid violent separation by Aceh and outer fringe regions, and to rebuild an economy laid low during the Asian recession of the nineties. The Philippines, also having a large population but a small percentage of Muslims, is fighting to keep its southern islands from Islamic separation. The challenge for Muslims in all three

⁵⁰ Mastura, M. Muslim Filipino Experience, Manila Filipino Islam Series, Ministry of Muslim Affairs 1984.

⁵¹ The MILF can be regarded as the successor of the Bangsa Moro Liberation Organization.

⁵² The Abu Sayyaf is believed to field about 1,000 guerrilla fighters.

countries is to find a practical way to live traditional lives under the *Syariah* and at the same time give allegiance to the modern nation-state.

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