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Secularism, the Islamic State and the Malaysian Legal Profession

Amanda J. Whiting

Abstract

Eschewing theoretical discussion of both “secularism” and the “Islamic state,” this article instead examines situated understandings of these ideas as they emerge in contests about the place of religion in Malaysian law, politics and society, paying particular attention to the views of Malaysian legal professionals. It examines the official positions taken by the peak professional legal organisation (the Malaysian Bar Council) speaking on behalf of its professional constituents and to a wider constituency of Malaysia citizens in order to examine how the organised Bar has used its prestige and expertise to explain and clarify the legal aspects of these issues to the general public and how it has attempted to use its privileged status to foster informed discussion about law reform.

KEYWORDS: Malaysian lawyers, religion, Islam, secularism

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I. INTRODUCTION

Through an analysis of the positions taken by the legal profession on select issues of “Islam” and “law” in contemporary multicultural Malaysia,¹ this article investigates the current conflict between the proponents of an increased role for Islam in Malaysian government, law and society, and the defenders of the secular state.² I focus on the legal profession because the role and self-imposed responsibility of lawyers in promoting and sustaining democratic politics and a moderate, constitutional state is a key question in current scholarship about Western societies, and is emerging as a significant topic for post-colonial polities too.³ Research on the Malaysian legal profession (including my own) has found that the organized Malaysian Bar has indeed consistently striven to protect a

¹ Official statistics categorise the population as 66.1% Malay (including other indigenous peoples, many of whom are not Muslims), 25.3% Chinese, 7.4% Indian and 1.2% ‘other’: Economic and Planning Unit, *Third Outline Perspective Plan 2001-2010* (Putrajaya: Economic and Planning Unit, Prime Minister’s Office, 2001), table 6.1, ‘Population Structure 1990-2010’.

² By stating the problem in this manner, I may appear to be assuming a structural opposition between “Islam” (equated with “religion”) and “Law” (equated with the “secular”), and by these essentializing reductions to ignore the myriad ways that institutionalized Islam in Malaysia (as both “religion” and “law”) is embedded in, and expressed through, routinized, bureaucratic state instrumentalities that are modern, political and “secular”. (Regarding Islamic modernization and bureaucratization, see Donald Horowitz, “The Qur’an and the Common Law: Islamic Law Reform and the Theory of Legal Change” (1994) 42 *American Journal of Comparative Law* 233-294 (part 1) and 543-580 (part 2) and Kikue Hamayotsu, “Politics of Syariah Reform: The Making of the State Religio-Legal Apparatus” in Virginia Hooker and Norani Othman (eds.), *Malaysia: Islam, Society and Politics: Essays in Honour of Clive S. Kessler* (Singapore: ISEAS, 2002) [“*Politics of Syariah Reform*”]. Nevertheless, I pose the question in this way for two reasons. First, because that is the way the problem is often put in Malaysian public discourse, especially when lawyers are involved. Second, because to pose it otherwise would require me to pontificate on what in Islam is authentically “religious” and pertains to “faith” (as secular- and post-Christians understand the essence of “religion” (see Hent de Vries, “Why still ‘Religion?’” in Hent de Vries (ed.), *Religion: Beyond a Concept* (New York: Fordham University Press, 2008) 1-98, at 8-11), and what is extrinsic and severably political or secularized. This question of demarcation is, properly, a debate within Islam and for Muslims. That, in any event, is how the **Catholic Lawyers’ Society** interpreted the identical problem when defending the Malaysian Catholic Church’s religious obligation to engage in political and social “charity” from government accusation that the Church was impermissibly mingling “religion” and “politics”: see **Catholic Lawyers’ Society**, “On the warning and ‘show cause’ letters issued by the Home Ministry to the *Herald*”, Press Statement (18 August 2008), online: <<http://www.catholiclawyersociety.org>>).

³ Terence C. Halliday and Lucien Karpik (eds.), *Lawyers and the Rise of Western Political Liberalism: Europe and North American from the Eighteenth to Twentieth Centuries* (Oxford: Clarendon Press, 1997); Terence C. Halliday Lucien Karpik and Malcolm M. Feeley (eds.), *Fighting for Political Freedom: Comparative Studies of the Legal Complex and Political Change* (Oñati International Series in Law and Society, Oxford: Hart, 2007).

moderate, liberal, and implicitly secular, Malaysian state.⁴ However in the last decade, the nature of constitutional arrangements – which include both a provision that Islam is the religion of the Federation and guarantees of equality and freedom of expression and belief (the Federal Constitution, articles 3, 10 and 11 respectively) – have become urgent and divisive matters of political and legal controversy, particularly through several well-publicized court cases involving jurisdictional disputes between *syariah* and the common law. (Some of these cases will be mentioned below, but they are not the focus of this article.) The leadership of the Malaysian Bar has attempted to play an educative and soothing role in public controversies involving both law and religion. However divisions grounded in religious belief and competing understandings of the political role of Islam have emerged and deepened within the legal profession, reflecting the same divisions within wider Malaysian society and indicating that lasting resolution of these legal and political disputes, or even narrower law reform to address specific legal issues, may not be achieved soon.

Understanding “the secular”, “secularism” and “secularization” has also emerged as a pressing scholarly topic, and a torrent of erudite commentary—including significant contributions by Muslim and South Asian intellectuals – demonstrates how far we have all become enthralled with the demise of disenchantment.⁵ Rather than interpret the Malaysian predicament through the

⁴ Andrew Harding and Amanda Whiting, “‘Custodians of Civil Liberties and Justice in Malaysia’: The Malaysian Bar and the Moderate State” in Terence C. Halliday, Lucien Karpik and Malcolm M. Feeley (eds.), *Fortunes and Misfortunes of Political Liberalism: The Legal Complex in British Post-Colonies* (under review) [“Custodians”]; see also Daniel Lev, “Lawyers’ Causes in Indonesia and Malaysia” in Austin Sarat and Stuart Scheingold (eds.), *Cause Lawyering: Political Commitments and Professional Responsibilities* (New York: Oxford University Press, 1998) [“Lawyers’ Causes”] and “A Tale of Two Legal Professions: Lawyers and State in Malaysia and Indonesia” in William Alford (ed.), *Raising the Bar: The Emerging Legal Profession in East Asia* (Cambridge, Mass: Harvard University Press, 2007) 383-414 [“A Tale of Two Professions”]; and Cyrus V. Das, *Justice Through Law: Fifty Years of the Bar Council of Malaysia 1947-1997. A Pictorial Biography of the Legal Profession* (Kuala Lumpur: Bar Council of Malaysia, 1997) [“Justice Through Law”].

⁵ The literature is too vast to be listed comprehensively here, but important recent contributions include: Ashis Nandy, “The Twilight of Certitudes: Secularism, Hindu Nationalism and other Masks of Deculturation” (1998) 1(3) *Postcolonial Studies* 283-288; Abdullah An-Na’im, *Islam and the Secular State: Negotiating the Future of Shar’ia* (Cambridge: Cambridge University Press, 2008); Peter L. Berger (ed.), *The Desecularization of the World: Resurgent Religion and World Politics* (Washington DC, Ethics and Public Policy Centre, 1999); Hent de Vries (ed.), *Religion: Beyond a Concept* (New York: Fordham University Press, 2008); Terry Eagleton, *Reason, Faith and Revolution: Reflections on the God Debate* (New Haven: Yale University Press, 2009); Jurgen Habermas, “Religion in the Public Sphere” (2006) 14(1) *European Journal of Philosophy* 1-25; Anuradha Dingwaney Needham and Rajeswari Sunder Rajan (eds.), *The Crisis of Secularism in India* (Durham: Duke University Press, 2007); Saba Mahmood, *Politics of Piety: the Islamic Revival and the Feminist Subject* (Princeton: Princeton University Press, 2005); David

lens of this academic discourse, with which, for the most part, Malaysian commentators do not meaningfully engage, I propose in this article to examine local and situated understanding of these ideas, values and practices as they are articulated in public contestation about Islam and law, particularly when lawyers are involved.

II. SECULARISM AS A POLITICAL ISSUE

Why is the fate of the secular a problem in Malaysia now and how does it particularly concern the legal profession? Secular governance and the politics of secularism are urgent issues in Malaysia because both the ruling UMNO (United Malays National Organisation) party and the opposition Islamic party, PAS (Parti Islam se-Malaysia), have staked their political legitimacy and electoral fortunes on their capacity to deliver Islamic governance.⁶ This requires them to appeal to Malay nationalist and Muslim voters, without completely alienating the significant non-Muslim minorities. In the “Islamization race” this has inspired, the Federal Government has generously funded and nurtured institutions, bureaucracies and practices to advance Islamic values, policies and laws.⁷ The Islamist opposition (which has held power in Kelantan continuously since 1990, briefly in Terengganu between 1999 and 2004, and since 2008 has participated in coalition governments in several other States) has responded by questioning the Federal Government’s Islamic credentials and proposing more stringent and “authentic” Islamic solutions of its own, including blueprints for an Islamic state, and enacted (but unenforceable) State *hudud* laws which mandate harsh *syariah* punishments for offences such as adultery and apostasy.⁸ Malaysia’s federal

Scott and Charles Hirschkind (ed.), *Powers of the Secular Modern: Talal Asad and his Interlocutors* (Stanford: Stanford University Press, 2006); Tariq Ramadan, *Western Muslims and the Future of Islam* (Oxford: Oxford University Press, 2004); Talal Asad, *Formations of the Secular: Christianity, Islam, Modernity* (Stanford: Stanford University Press, 2003); Charles Taylor, *A Secular Age* (Cambridge, Mass: The Belknap Press, 2007) and the engagements with his work in the Social Science Research Council’s blog, “The Immanent Frame”, online: <<http://www.ssrc.org/programs/religion-and-the-public-sphere/>> (especially postings by Robert Bellah, John Bowen, Jose Casanova and Wendy Brown); and Peter van der Veer, *Imperial Encounters: Religion and Modernity in India and Britain* (Princeton: Princeton University Press, 2001).

⁶ Joseph Chin Yong Liow, “Exigency or Expediency? Contextualising Political Islam and the PAS Challenge in Malaysian Politics” (2004) 25(2) *Third World Quarterly* 359-372; Liew Chin Tong, “PAS Politics: Defining a Islamic State” in Edmund Terence Gomez (ed.), *Politics in Malaysia: The Malay Dimension* (London: Routledge, 2007) 107-137.

⁷ See Hamayotsu, *Politics of Syariah Reform*, *supra* note 2.

⁸ *Kelantan Syariah Criminal Code (II) Enactment, 1993; Terengganu State Syariah Criminal (Hudud and Qisas) Bill, 2002*, analysed in Rose Ismail, *Hudud in Malaysia: The Issues at Stake*

arrangements further complicate this situation. Under the Federal Constitution, the secular national justice system and most legislation is a matter for the Federal Government, whereas Islam – as law and as religion – is a matter for the States (but, of course, the Federal Government in respect of the Federal Territories). However this Islamic jurisdiction is constitutionally enumerated, and thereby restricted, to a specific list of topics which includes Islamic family law, inheritance and gifts; administration of *syariah* courts and the determination of matters of Islamic law and doctrine; and “punishment of offences by persons professing the religion of Islam against the precepts of that religion”.⁹

UMNO and PAS’s competitive but erratically inconsistent repudiation or denigration of secularism and the secular in favour of its putative opposite – a Muslim society governed by Islamic law – is arguably leading to increasing tension and polarisation within Malaysian society.¹⁰ This is especially so because the preeminent place of Islam as the “religion of the federation” (as stipulated by article 3(1) of the Federal Constitution) has become inextricably tied to the political hegemony of the Malay “*bangsa*” (nation) within multicultural Malaysia through the juridical equation of “Malay” ethnicity with the profession of Islam.¹¹ This has exacerbated more recent ultra-nationalist and “nativist authoritarian” political doctrine of “*Ketuanan Melayu*” or Malay supremacy, according to which any challenge to ethnic Malay political dominance or the Malay special privileges recognised in the constitution and extended by the positive discrimination

(Ilmiah Publishers, Petaling Jaya, 1995) [“*Hudud*”], M.B. Hooker, “Submission to Allah? The Kelantan Syariah Criminal Code (II) 1993” in Virginia Hooker and Norani Othman (eds.), *Malaysian Islam, Society and Politics: Essays in Honour of Clive Kessler* (Singapore, Institute of Southeast Asian Studies, 2002) [“*Submission to Allah?*”] and Shad Saleem Faruqi, “The Malaysian Constitution, The Islamic State and Hudud Laws” in K.S. Nathan and Mohamad Hashim Kamali (eds.), *Islam in Southeast Asia: Political, Social and Strategic Challenges for the 21st Century* (Singapore: Institute of Southeast Asian Studies, 2005) [“*The Malaysian Constitution*”].

⁹ Federal Constitution, Schedule 9, List I and List II, item 1.

¹⁰ Raymond L.M. Lee, “Patterns of Religious Tension in Malaysia” (1988) *Asian Survey*, Vol. 28, No. 4, 400-418; Michael G. Peletz, “Sacred Texts and Dangerous Words: The Politics of Law and Cultural Rationalism in Malaysia” (1993) 35(1) *Comparative Studies in Society and History* 66-109; Neo Jaclyn Ling-Chien, “Malay Nationalism, Islamic Supremacy and the Constitutional Bargain in the Multi-ethnic Composition of Malaysia” (2006) 13 *International Journal of Minority and Group Rights* 95-118; Albert Sundararaj Walters, “Issues in Christian-Muslim Relations: A Malaysian Christian Perspective” (2007) 18(1) *Islam and Christian-Muslim Relations* 67-83.

¹¹ Article 160(2) of the Federal Constitution defines “Malay” as “a person who professes the religion of Islam, habitually speaks the Malay language, conforms to Malay custom” and fulfils certain birth or residential prerequisites. This provision was interpreted by a single judge in the High Court to mean that “a Malay under article 160(2) remains in the Islamic faith until his or her dying days”: *Lina Joy v. Majlis Agama Islam Wilayah Persekutuan & Anor.* [2004] 6 C.L.J. 242, at 271.

assistance of the New Economic Policy (NEP) and successor policies is liable to be denounced as both treason and an attack upon Islam.¹² Avowedly secular political parties in coalition with UMNO (such as Gerakan and the Malaysian Chinese Association (MCA)) or with PAS (such as the Democratic Action Party (DAP)) compete for electoral advantage by publicly characterising their political opponents as timid time-servers who are unable or unwilling to forestall the desecularization of Malaysia,¹³ while keeping a wary eye on the more outspokenly Islamic of their coalition partners. Hence the polarization and mutual distrust continue.

At the same time, alternative and dissenting Muslim voices are sidelined, chastised or silenced by authoritarian elements within both government and the opposition that claim exclusive authority and capacity to interpret Islam. Consider, for example, the campaign of intimidation being waged against the women's advocacy and research organisation Sisters in Islam (SIS). In late 2008 the government banned one of SIS's publications, *Muslim Women and the Challenge of Islamic Extremism*. According to SIS the book, edited by SIS founder Norani Othman and first published in 2005, contained "strategies that were used to curb extremism and promote women's rights"; according to the federal Publications and Qur'anic Texts Control Division, the book "twisted facts on Islam that could undermine the faith of Muslims".¹⁴ In June 2009, PAS's 55th annual general assembly (*muktamar*) called for SIS to be banned because it

¹² Cheah Boon Kheng, "Ethnicity and Contesting Nationalisms in Malaysia" in Cheah Boon Kheng (ed.), *The Challenge of Ethnicity: Building an Nation in Malaysia* (Singapore: Marshall Cavendish, 2004) 40-53 and Mavis Puthuchery, "Malaysia's 'Social Contract': the Invention and Historical Evolution of an Idea" in Norani Othman, Mavis Puthuchery, and Clive S. Kessler (eds.), *Sharing the Nation: Faith, Difference, Power and the State 50 Years after Merdeka* (Petaling Jaya: Strategic Information and Research Development Centre, 2008). For select examples of recent public debate, see also: "Of creeping Islamization and breeding racism", *Malaysiakini* (27 August 2006); Humayun Kabir, "Nazri lashes out at Malay supremacy advocates", *Malaysiakini* (12 December 2009); Aidila Razak, "Speakers flay 'ketuanan melayu'", *Malaysiakini* (12 December 2009); Joe Fernandez, "Perkasa's hype of Malay supremacy is self-serving", *Malaysiakini* (5 May 2010); and "Perkasa and Khairy on collision course", *Malaysiakini* (27 June 2010) (quoting the UMNO Youth Wing leader characterising the leader of Perkasa, a new ultra-right wing Malay supremacist group, as a "gangster" and "village thug").

¹³ E.g., Ashraf Ali, "Gerakan: AF manifesto a bunch of contradictory policies", *The Sun* (5 November 1999); Susan Loone, "Kit Siang: is BN's 'Islamic State' the same as UMNO's?", *Malaysiakini* (6 October 2001).

¹⁴ Royce Cheah, "Government bans compilation of research papers", *The Star* (Kuala Lumpur, 14 August 2008). At the time of writing (July 2010), SIS has been successful in challenging the legality of the government's ban. A judge of the High Court of Malaya found that the Minister's decision to ban the book was tainted by both illegality and irrationality: *SIS Forum (Malaysia) dan Dato' Seri Syed Hamid bin Syed Jaafar Albar (Menteri Dalam Negri), High Court of Malaya* (unreported) 25 January 2010.

practises a “liberal” form of Islam which causes “confusion” amongst Muslims.¹⁵ A member of PAS’s women’s wing counselled engagement rather than banning,¹⁶ however PAS’s national president forcefully reasserted the party’s stance that SIS “has no right to talk about Islam” by analogy with the inappropriateness of a “Somalian [talking] about aerospace”.¹⁷

In July 2009 the Pahang Syariah Court convicted Kartika, a young Muslim woman, of the *syariah* criminal offence of drinking a glass of beer and sentenced her to a fine, imprisonment and whipping. This was the first occasion when a *syariah* court had sentenced a woman to corporal punishment. In coalition with other NGO members of the multicultural Joint Action Group for Gender Equality (JAG), SIS publicly criticized the *syariah* court’s decision as contrary to international human rights standards, disproportionate to the gravity of the offence and clearly ineffective as a deterrent.¹⁸ A Muslim woman cabinet minister condemned the *syariah* court’s decision as “shocking” and unfair, and was promptly reprimanded by the Syariah Lawyers’ Association (PGSM — Persatuan Peguam Syarie Malaysia) for challenging and insulting Islamic courts.¹⁹ When SIS later publicly condemned the court’s reaffirmation of the sentence and refusal to entertain SIS’s application for judicial reconsideration, stating that this was a “human rights issue” and that “the perception of Malaysia as a moderate Muslim state will be permanently jeopardised”,²⁰ the women’s group was rebuked by PAS for “ridiculing Islam”, and the administration of Islamic justice.²¹ After approximately 50 criminal complaints were filed against them by organisations such as various branches of PAS Youth and UMNO Youth, ABIM (Angkatan Belia Islam Malaysia — Muslim Youth Movement of Malaysia) and PGSM, key members of SIS staff were questioned by the police for possible breaches of the *Sedition Act*.²²

¹⁵ Deborah Loh and Shanon Shah, “PAS wants Sisters in Islam investigated”, *The Nut Graph* (Kuala Lumpur, 7 June 2009).

¹⁶ *Ibid.*

¹⁷ Rahmah Ghazali, “Hadi adamant on SIS: ‘ban them’”, *Malaysiakini* (11 June 2009).

¹⁸ Shahanaaz Habib, “Is whipping the answer?”, *The Star* (26 July 2009); *JAG Memorandum on Justice for Kartika: Stop Whipping and End Corporal Punishment for all Offences* (25 August 2009).

¹⁹ “Syariah lawyers association regrets Shahrizat’s statement on whipping of model”, *Bernamea* (22 July 2009).

²⁰ “SIS files for revision of Kartika’s whipping sentence”, *The Star* (20 September 2009); JAG Media Statement, “Stop whipping, stop the whipping of Kartika” (30 September 2009); Hazlan Zakaria, “JAG questions ‘judicial stealth’ in Kartika Case”, *Malaysiakini* (30 September 2009). See also SIS, “SIS revision of Kartika’s case turned down by registrar of the Kuantan Syariah Court”, Press Statement (3 October 2009).

²¹ “Pas Youth slams SIS, JAG, calls for boycott”, *Malaysiakini* (2 October 2009).

²² Ding Jo-Ann, “SIS critics using police”, *The Nut Graph* (5 November 2009); “Caning – police record statement of SIS director”, *Malaysiakini* (22 March 2010).

III. SECULARISM AS A LEGAL ISSUE – SOME TYPICAL INSTANCES

Whether Malaysia was, is, or should be an Islamic state is, of course, a *political* question involving public debates, electoral strategies and choices.²³ It is also, inevitably, a *legal* question, or rather a set of legal questions; and legal questions entail legal reasoning and the need for professional legal expertise and advice, hence my interest in the involvement of the legal profession. The place of Islam in Malaysia has become a legal question for several reasons. First, because the legality of state action is determined by reference to the Malaysian Federal Constitution, and so the secular — or religious — identity of the state directly shapes judicial interpretation of the constitution and answers to the question of what kinds of laws may lawfully be enacted: for example, the legal question whether the PAS State governments of Kelantan and Terengganu have the constitutional power to enact and enforce laws mandating the death penalty for apostasy from Islam, or valuing women’s testimony at half the rate of men’s, despite the fact that the Federal Constitution guarantees due process (article 5), equality before the law (article 8) and freedom of religion (article 11), and confines State Islamic jurisdiction to matters of family law and the religion of Islam (Ninth Schedule, List II).²⁴

Second, it is a legal question because so much of state-sponsored Islamization in Malaysia has been conducted in an increasingly intolerant, authoritarian, and chauvinist manner which directly challenges the existing constitutional rights guarantees of Malaysian citizens to equality before the law and freedom of religion, expression and association.²⁵ For example, and in addition to the campaign to discredit SIS mentioned above, consider: the “moral police” raids upon places of entertainment;²⁶ the violent persecution and then prosecution for religious “deviance” of members of the syncretic Sky Kingdom commune, compounded by the apparent reluctance of qualified *syariah* lawyers to

²³ Patricia Martinez, “The Islamic State or the State of Islam in Malaysia” (2001) 23(3) *Contemporary Southeast Asia* 474-503; Andrew Harding, “The Keris, Islam and the Blind Goddess: The State, Islam and the Constitution in Malaysia” (2002) 6(1) *Singapore Journal of International and Comparative Law* 154-180; Liew Chin Tong, “PAS Politics: Defining a Islamic State” in Edmund Terence Gomez (ed.), *Politics in Malaysia: The Malay Dimension* (London: Routledge, 2007) 107-137.

²⁴ See further Ismail, *Hudud*; Hooker, *Submission to Allah?*; and Faruqi, *The Malaysian Constitution*, *supra* note 8.

²⁵ In articles 8, 11 and 10 respectively, and see further Zainah Anwar, “Is an Islamic State possible”, *New Straits Times* (22 December 1999) and “Islam Hadhari champions needed”, *New Straits Times* (3 November 2006).

²⁶ Roshan Jason, “JAWI Raid: PAS Youth claims government shielding VIP kids”, *Malaysiakini* (February 25 2005); “DBKL Officer: I saw couple acting indecently”, *Malaysiakini* (25 September 2006).

represent commune members;²⁷ and recent government pressure on the Catholic weekly *Herald* to refrain from editorializing about political or social issues, and prohibiting it from translating “God” as “Allah” in its Malay language section on pain of losing its publication permit.²⁸

Third, this is a legal question because there is a strong predisposition to identify Islam with Islamic *law* — a tendency that seems to mirror global processes of the juridification of politics and social relations²⁹ — and so the success of Islamization is equated with the spread and enforcement of Islamic laws (particularly criminal laws³⁰) and *fatawa* (singular: *fatwa*) (opinions on Islamic legal issues issued by a state Mufti) and the reputation and jurisdictional reach of *syariah* courts. Furthermore, State Legislatures (and again the Federal Parliament with respect to the Federal Territories) extend the scope of Islamic law by enacting statutes criminalising defiance or disobedience of gazetted *fatawa*, regardless of whether such *fatawa* — which have the legal status of regulations or delegated legislation — are *ultra vires* through violation of Federal Constitution rights guarantees. Thus, followers of Ayah Pin, the founder of Sky Kingdom, are being prosecuted for possession of “false” publications that the Terengganu state

²⁷ “Lawyers avoid Ayah Pin case”, *New Straits Times* (5 August 2005).

²⁸ National Human Rights Commission of Malaysia (SUHAKAM), “Rights to expression”, Press Statement (13 August 2008); “Catholic weekly seeks court order to use ‘Allah’”, *The Star* (28 December 2007). In December 2009, a single judge of the High Court of Malaya ruled in favour of the *Herald’s* constitutional right to use “Allah” and quashed the decision of the Minister for Home Affairs to restrict publication: *Titular Roman Catholic Archbishop of Kuala Lumpur v. Menteri Dalam Negeri*, High Court of Malaya (R1-25-28-2009, unreported 31 December 2009). However the constitutional freedom is by no means assured as the Home Ministry has filed an appeal (reported in Hafiz Yatim “‘Allah’ issue: Home Minister gets stay order”, *Malaysiakini* (6 January 2010)) and meanwhile the government, which has obtained a stay order, has stated that it will refuse to recognise the legitimacy of non-Muslim use of “Allah” in the peninsula (there is limited cultural exception for the East Malaysian states of Sabah and Sarawak). (See Joe Fernandez, “Putrajaya concedes on Allah for Sabah, S’wak”, *Malaysiakini* (15 January 2010)). There were some violent, although thankfully limited, attacks on Christian and Muslim places of worship, (see, e.g., Aidila Razak, “Brothers, Friend claim trial to firebombing church”, *Malaysiakini* (29 January 2010); and “BN-Pakatan Youth issue rare joint statement”, *Malaysiakini* (28 January 2010), which the government used to justify continuing the ban as a public security measure, and offices of the *Herald’s* lawyers were ransacked (Hafiz Yatim, “Herald lawyer’s office targeted in break-in”, *Malaysiakini* (14 January 2010); “Allah row: Protect lawyers and judges”, *Malaysiakini* (16 January 2010)). Meanwhile, other Christian groups, such as the Evangelical Church of Borneo (Sidang Injil Borneo), still face restrictions on Malay language publications (Hafiz Yatim, “Allah row: court puts off SIB hearing again”, *Malaysiakini* (23 June 2010)).

²⁹ For which, see Alan Hunt and Gary Wickham, *Foucault and Law: Towards ad Sociology of Law and Governance* (London: Pluto Press, 1994), 48.

³⁰ Kim Beng Phar, *Islamic Statehood and Maqasid al-Shariah in Malaysia: A Zero-Sum Game?* (Chang Mai, Silkworm Books, 2009).

Fatwa Committee has decided are “contrary to the precepts of Islam”, but that, in a fully secular state, might well be constitutionally protected by freedom of speech and belief guarantees.³¹

Fourth, this is a legal question because in multicultural and multi-faith Malaysia, where Muslims are subject to state-based *syariah* law for family and religious affairs, but all citizens (including Muslims) are regulated by the national, secular, common law system for all other matters, the boundaries between the two jurisdictions are not clear-cut, despite a constitutional amendment intended to make them so by ousting the jurisdiction of the secular courts over *syariah* matters.³² The jurisdictional boundaries are unclear and contested for a variety of technical reasons beyond the scope of this article,³³ and these intricate questions particularly require legal knowledge for their explication, although ultimately political will — currently lacking — is required for their satisfactory resolution.³⁴ Of relevance here is the social context in which jurisdictional disputes arise. They can be grouped in three broad categories.

One scenario occurs when a Muslim renounces Islam (for example, Daud bin Mamat and Kamariah Ali),³⁵ or seeks to convert to another religion (for example, Tongiah Jumali and Lina Joy),³⁶ or claims that she has been incorrectly listed in official records as a Muslim (for example, Revathi/Siti Fatimah and

³¹ This is the effect of the Federal Court decision in *Sulaiman bin Takrib v. Kerajaan Negri Terengganu (Kerajaan Malaysia, intervener) and other applications* [2009] 6 M.L.J. 354. An earlier and, in its time notorious, instance of an arguably *ultra vires fatwa* being enforced occurred in the famous ‘Miss Petite Malaysia’ beauty pageant of 1997: see Mohammad Imam, “Islamic Criminal Law in Malaysia: Federal State Jurisdictional Conflict” [1994] 1 Current Law Journal Malaysia xxiii-xxxii and Sisters in Islam, *Memorandum on the Provisions in the Syariah Criminal Offences Act and Fundamental Liberties* (8 August 1997), online: <http://www.sistersinislam.org.my/index.php?option=com_content&task=view&id=699&Itemid=209>.

³² Federal Constitution, article 121(1A).

³³ These are expertly analysed by Thio Li-ann, “Jurisdictional Imbroglia: Civil and Religious Courts, Turf Wars and Article 121(1A) of the Federal Constitution” in Andrew Harding and HP Lee (eds.), *Constitutional Landmarks in Malaysia: The First Fifty Years 1957-2007* (Kuala Lumpur: LexisNexis, 2007) 197-226.

³⁴ Amanda Whiting, “Desecularising Malaysian Law?” in Pip Nicholson and Sarah Biddulph (eds.), *Examining Practice, Interrogating Theory: Comparative Legal Studies in Asia* (Leiden: Martinus Nijhoff, 2008) 223-266, at 241-2 [“Desecularising”].

³⁵ *Daud bin Mamat v. Majlis Agama Islam* [2001] 2 M.L.J. 390; *Kemariah bte Ali dan satu lagi lwn Majlis Agama Islam dan Adat Melayu Terengganu dan satu lagi* [2006] 5 M.L.J. 470 and see also Claudia Theophilus, “Judiciary, bureaucracy blamed for unresolved religious issues”, *Malaysiakini* (26 June 2004).

³⁶ *Tongiah Jumali v. Kerajaan Negri Johor* [2004] 5 M.L.J. 40; *Lina Joy lwn Majlis Agama Islam Wilayah Persekutuan dan lain lain* [2007] 4 M.L.J. 585.

Banggarma).³⁷ Malaysians in these situations have applied to the national secular courts for justice and rejected the authority of the State *syariah* courts to punish them for deviance or apostasy, or to require compliance with Islamic procedures in order to exit the religion (which can include forced rehabilitation). They have argued, rather, that they are not now Muslims and therefore the *syariah* courts can have no personal jurisdiction over them.

A second scenario occurs when Islamic religious bureaucrats demand custody for burial of the body of a recently deceased Muslim, and surviving family members deny the reality or legality of the deceased's status as a Muslim convert, contesting both the fact of the conversion and the application of Islamic inheritance laws which deny non-Muslims a share in the deceased's estate. This is the dilemma of the families of "Everest" Moorthy, Rayappan Anthony and Mohan Singh, amongst others.³⁸

A third scenario arises in the context of civil law marriage breakdown, when one spouse converts to Islam and unilaterally converts the children of the marriage, and then files for divorce and custody in the *syariah* courts, leaving the non-Muslim spouse to seek redress in the secular courts. This is the predicament facing the Hindu wives of newly converted Muslim spouses in the cases of *Shamala* (2003 – 2004),³⁹ *Subashini* (2007)⁴⁰ and *Indira Gandhi* (2009-).⁴¹ In

³⁷ These incidents are dealt with in the following cases: "Revathi: toughest experience of my life", *Malaysiakini* (9 July 2007) and "Welfare home conversion: lawyer wants proof", *Malaysiakini* (1 December 2009).

³⁸ *Kaliammal a/p Sinnasamy lwn Pengarah Jabatan Agama Islam Wilayah Persekutan (JAWI) dan lain lain* [2006] 1 M.L.J. 685 ["Moorthy's case"]; "Court: movie-maker a Muslim, family devastated", *Malaysiakini* (7 July 2009) (Mohan Singh's case); regarding the contest for Rayappan Anthony's body, see MCCBCHS Press Statement (6 December 2006), online: <<http://www.article11.org>> and "Syariah lawyers wants MAIS to explain", *Bernama* (12 December 2006) (and see further Whiting, *Desecularising*, *supra* note 34). Moorthy's widow has appealed to the Court of Appeal and as of this writing the decision is pending. See "Moorthy Case: MAIWP acted in bad faith, court told", *Malaysiakini* (21 July 2010) and Debra Chong "Everest mountaineer 'Body Snatching' case decision on August 6", *The Malaysian Insider* (21 July 2010).

³⁹ *Shamala a/p Sathiyaseelan v. Dr. Jeyaganesh a/l C. Mogarajah* [2003] 6 M.L.J. 515; *Shamala a/p Sathiyaseelan v. Dr. Jeyaganesh a/l C. Mogarajah* [2004] 2 M.L.J. 241; *Shamala a/p Sathiyaseelan v. Dr. Jeyaganesh a/l C. Mogarajah* [2004] 2 M.L.J. 648; *Shamala a/p Sathiyaseelan v. Dr. Jeyaganesh a/l C. Mogarajah* [2004] 3 C.L.J. 516. At the time of writing, Shamala's appeal is pending in the Federal Court, see Hafiz Yatim, "Conversion of children: Federal Court to decide", *Malaysiakini* (28 April 2010); "Five vexed questions for Federal Court", *Malaysiakini* (29 April 2010); Hafiz Yatim, "Test case emotionally and mentally traumatizing", *Malaysiakini* (3 May 2010), Hafiz Yatim, "Shamala case: Objections raised, decision postponed", *Malaysiakini* (3 May 2010).

⁴⁰ *Subashini a/p Rajasingam v. Saravanan a/l Thangathoray* [2007] 2 M.L.J. 798; *Subashini a/p Rajasingam v. Saravanan a/l Thangathoray* [2007] 2 M.L.J. 705; *Subashini a/p Rajasingam v. Saravanan a/l Thangathoray* [2007] 4 M.L.J. 97; *Subashini a/p Rajasingam v. Saravanan a/l Thangathoray and other appeals* [2008] 2 C.L.J. 1.

Shamala and *Subashini*, the secular courts refused to interfere with the fathers' unilateral conversions of the children, ruling that the conversions were constitutionally permissible, despite the fact that the equality clause of the constitution (article 8) and the *Guardianship of Infants Act 1961* (section 5) had recently been amended, in accordance with Malaysia's obligations under the *International Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW), to give equal legal rights to women. Furthermore, the Hindu mothers were told that whether or not a person is a Muslim is a question of Islamic law and thus within the exclusive purview of the *syariah* courts. Since *syariah* courts do not have jurisdiction over non-Muslims — and the mothers in any event did not want to submit to that jurisdiction — there was no forum in which they could challenge the conversions. This lacuna in the law has allowed the same issue to arise in *Indira Gandhi's case* in 2009.

Furthermore, in *Shamala's case* the secular court used a combination of Islamic legal principles and common law statutory interpretation to reach the conclusion that the non-Muslim mother could have joint custody of her now-Muslim children, but that she would lose custody if she attempted to teach them about Hinduism — a cultural legacy that remained hers, but was no longer theirs. At the time of writing there is an appeal pending before the Federal Court.⁴² In *Subashini's case*, the apex Federal Court upheld the legal conclusion from *Shamala* that the secular courts could make decisions about the marriage, including divorce, maintenance and child custody, because both spouses were originally non-Muslims and had married and registered the union under the civil *Law Reform (Marriage and Divorce) Act 1976*. However the *Subashini* court went further to rule that while the subsisting marriage of the Muslim-convert husband might still be subject to the secular law for this limited family law purpose, nevertheless as a Muslim the husband was free to apply to the *syariah* courts — which had no jurisdiction over the non-Muslim wife — for remedies in relation to the marriage. By attempting to accord equal respect to both the secular and Islamic legal systems through permitting each spouse to apply to his or her respective family law forum, the Federal Court in *Subashini* only restated the jurisdictional problem more starkly, without resolving it. Indeed, it appears to have created a situation where each party may still seek competing orders for divorce, custody or property division from the secular or the *syariah* courts, orders which will be based upon different legal principles regarding the amount and period of maintenance, division of marital property, and inheritance.

⁴¹ Indira Gandhi's story received extensive coverage in the press; a useful summary is Humayun Kabir, "Conversion row: mother gets visiting rights", *Malaysiakini* (14 May 2009); the plight of Shamala and Subashini is analysed in Whiting, *Desecularising*, *supra* note 34, at 232-237.

⁴² Hafiz Yatim, "Test Case emotionally and mentally traumatising", *Malaysiakini* (3 May 2010) and see sources cited *supra* note 39.

Moreover, as the Muslim convert spouse may not initiate divorce proceedings in the secular court, because conversion to Islam as a ground of divorce is only available for the non-converting partner according to *Law Reform (Marriage and Divorce Act) 1976*, sections 3 and 51, the incentive to convert the children as a bargaining chip remains, as Indira Gandhi discovered.⁴³

This tangled set of affairs has achieved such a degree of notoriety in Malaysia that it has recently been turned into the sub-plot of a popular detective story (*Inspector Singh Investigates: A Most Peculiar Malaysian Murder*), in which the convert husband's secret and vengeful conversion of the children to Islam is considered a plausible motive for his murder.⁴⁴ This predicament has been the focus of fierce debates about the need for, and shape of, law reform, involving the legal profession on both sides, as I will examine below.

These kinds of inter-faith entanglement and inter-jurisdictional conflict are not uncommon occurrences; given the degree of Islamic proselytizing amongst non-Muslims in multicultural Malaysia, they are likely to continue and perhaps increase, although for reasons of cost, fear of reprisal, or social stigma, these issues are not always brought before the courts.⁴⁵

IV. LAW'S VIEW OF THE QUESTION

Is Malaysia a secular state, or an Islamic state? Contemporary Malaysian responses include: "No, never"; "Yes, always"; "Not yet"; and "Yes and no". The first response belongs to the minor secular political parties (in government and opposition) and is also the official position of the peak interfaith NGO, the Malaysian Consultative Council of Buddhism, Christianity, Hinduism, Sikhism and Taoism (MCCBCHST), the Catholic Church of Malaysia and the Malaysian Bar Council, and is grounded in evidence that the drafters of the Malaysian Constitution intended to establish a secular and not a theocratic state, recognition of Islam as the official religion of the nation notwithstanding.⁴⁶ The second is the

⁴³ See further Whiting, *Desecularising*, *supra* note 34 and also Whiting, "Gendered Vulnerabilities and the Juridification of Identity in Malaysia" (2008) 1 (June) *NIASnytt Asia Insights* 25-27. The High Court's approach in Indira Gandhi's case will depend upon the outcome of Shamala's pending appeal in the apex Federal Court. In addition to the reports listed *supra* notes 39 and 41, see Humayun Kabir, "Conversion: judge needs time to study complex case", *Malaysiakini* (2 April 2010); Hafiz Yatim, "Five top judges to hear Shamala case on Monday", *Malaysiakini* (29 April 2010); Humayun Kabir, "M Indira case – court postpones for third time", *Malaysiakini* (7 May 2010); Humayun Kabir, "No relief for Indira, case postponed again", *Malaysiakini* (21 June 2010).

⁴⁴ Shamini Flint, *Inspector Singh Investigates: A Most Peculiar Malaysian Murder* (London: Piatkus, 2009).

⁴⁵ Deborah Loh, "Conversion still a problem", *The Nut Graph* (15 December 2009).

⁴⁶ For minor political parties' statements, see, for example: "PAS plan for Islamic State shocks DAP", *The Sun* (Kuala Lumpur 25 June 2001); "Ling Assures Chinese Malaysia is Secular State",

position taken by two former Prime Ministers who assert that an Islamic state is one where Muslims live peacefully in a land governed by Muslim leaders in accordance with fundamental Islamic principles of justice, and that such is the position of Malaysia under their guardianship.⁴⁷ The third is the adversarial position of PAS in its various blueprints for a future Islamic state⁴⁸ and the implicit position of the Attorney-General's Chambers, which works with the International Islamic University of Malaysia and the Department of Syariah Judiciary of Malaysia (JKIM) to promote the harmonization of *syariah* and the common law through the compliance of the latter with the former.⁴⁹ The fourth interpretation, that Malaysia is a hybrid, is offered by various academics and politicians as a way to reconcile Malaysian social and legal realities with categories perceived as "Western".⁵⁰

The Sun (21 October 2001), and "Drama in Dewan Rakyat", *Malaysiakini* (11 July 2005). The Catholic Church of Malaysia's statement is reported in M Jegathesan, "Catholic Church alarmed by Mahathir's Islamic State Declaration", *Malaysiakini* (6 August 2001); the MCCBCHS statement is reported in Terence Netto, "Religious coalition cautions against altering the Merdeka Contract", *Malaysiakini* (31 January 2001). The Malaysian Bar's official position has been stated several times, see "Infringes on rights – proposed tax", *The Sun* (15 December 1999); "Constitution clear on Islamic State", *The Sun* (4 November 2001), "PM's declaration a 'political statement': Bar Council", *Malaysiakini* (2 November 2001); and Soon Li Tsin, "A Secular constitution protects all religions", *Malaysiakini* (6 June 2007); Bar Council Statement, "Malaysia is a Secular State" (18 July 2007) and Bar Council Statement, "Statement on the Common Law" (24 August 2007). For a careful and persuasive history of the constitutional drafting process, see Joseph M. Fernando, "The Position of Islam in the Constitution of Malaysia" (2006) 37(2) *Journal of Southeast Asian Studies* 249-266; also Tommy Thomas, "Is Malaysia an Islamic State" (2006) 14 *Malayan Law Journal* 15.

⁴⁷ For reports of statements by former Prime Ministers Mahathir Mohamad and Abdullah Badawi, and supporting statements from deputies, see Susan Loone, "Islamic infrastructure and court are marks of 'Islamic state': Rais", *Malaysiakini* (7 October 2001); "PM defends 'Islamic State' declaration", *Malaysiakini* (17 September 2002); "Islam Hadhari", *New Straits Times* (24 September 2004); R Manirajan, "Malaysia Islamic State as Islam official religion", *The Sun* (18 July 2007). "This is an Islamic State: Najib", *Malaysiakini* (17 July 2007).

⁴⁸ Liew Chin Tong, "PAS Politics: Defining a Islamic State" in Edmund Terence Gomez (ed.), *Politics in Malaysia: The Malay Dimension* (London: Routledge, 2007) 107-137.

⁴⁹ The harmonization project (Projek Harmonisasi) was officially launched in December 2007 at the "Third International Conference on Harmonization of Civil Laws and Shari'ah", but has been longer in the making. See the report of the third conference, including resolutions to "amend laws that are not Shari'ah compliant", "to ensure new statutes are in accordance with Shari'ah" and "to create Malaysian common law and rules of equity which is based on Shari'ah and acceptable rules and customs": Attorney-General's Chambers website, online: <<http://www.agc.gov.my/agc/images/pdf/syar/isu08/harmonisasi.pdf>>. See also the keynote address of the Attorney-General at the opening of the conference, supporting the harmonization proposal, online: <<http://www.agc.gov.my/agc/pdf/speech/KEYNOTE%20ADDRESS.pdf>>.

⁵⁰ Shad Saleem Faruqi, *The Malaysian Constitution*, *supra* note 8; Chandra Muzaffar, "Malaysia: a secular or Islamic State?", *Malaysiakini* (20 June 2007).

In formally legal terms, Malaysia's apex Supreme Court (now the Federal Court) settled the question more than two decades ago in favour of the secular, not theocratic or Islamic, nature of the state and constitution in a decision that has never been reversed.⁵¹ In the *Che Omar* decision, the Court held that Malaysia was a secular state because the effects of British colonialism on Malay governance, as well as the drafting history of the independence Constitution, plainly showed that the meaning of "Islam" in article 3 of the Constitution had become confined to "rituals and ceremonies" and therefore Islam was not intended to be the fundamental law of the land. In strictly legal terms, then, it is the "law" that Malaysia is not an Islamic state and may not become one as long as the current constitutional arrangements remain as they are. Yet, as I have already shown, the reifications of legal discourse cannot authoritatively dispose of the social and political dispute, and many proponents of the Islamic state idea ignore or downplay this binding Supreme Court decision. However I draw attention to this case for more than its precedential value. What I find most interesting about it are the strategic and principled positions taken during the hearing, and subsequently, by the legal actors involved.

In the criminal prosecution from which this Supreme Court appeal arose, the defendants faced a mandatory death sentence for drug trafficking and firearms offences. Their defence counsel argued that the provisions of the criminal law — the *Fire Arms (Increased Penalties) Act* — were constitutionally invalid because the Constitution made Islam the religion of the Federation, and thereby the source of law and legal principle in the land. Since arms and drug felonies are not *hudud* offences in Islamic criminal law, they argued, the imposition of the death penalty was unconstitutional.⁵² Significantly, the defence lawyers advocating the constitutional supremacy of Islamic precepts and principles were not Muslims, whereas both deputy public prosecutors representing the state and arguing for the validity of the impugned law on the basis of the secular nature of the state and constitution were Muslims.⁵³ In this legal episode we can see non-Muslim criminal defence lawyers promoting the supremacy of Islam and Islamic justice in order to achieve a precise and strategic objective: the human rights goal of overturning draconian secular legislation mandating the death penalty and ousting judicial discretion or compassion in sentencing. On the other side, Muslim public prosecutors, as agents of the secular state that enacted the mandatory death penalty statute for public security reasons, were put in the position of defending the secular nature of the state, and of denying that Islamic precepts or principles might be deployed to interpret the Constitution.

⁵¹ *Che Omar bin Che Soh v. Public Prosecutor* [1988] 2 M.L.J. 55.

⁵² *Ibid.*, at 57.

⁵³ *Ibid.*, at 55.

The legal actors on the bar and the bench remained faithful to their professional duty to promote the best interest of their clients, and of justice, by proffering the best plausible legal arguments; in taking this principled position, they acted strategically. Yet these principled legal positions may not, perhaps, have chimed with their own deeply held legal values. The views of the two Muslim prosecutors are not publicly known. However that of defence counsel Ramdas Tikamdas certainly is: he has been a leading member of HAKAM (the National Human Rights Society of Malaysia⁵⁴) and in that capacity has resisted the extension of Islamic law to non-Muslims because “ours is a secular constitution”.⁵⁵ Likewise, the judge delivering the majority opinion of the Supreme Court, Lord President Salleh Abas, performed true to his judicial oath to deliver justice impartially when he concluded his judgment with the statement that “we have to set aside our personal feelings because the law in this country is still what it is today, secular law, where morality not accepted by the law is not enjoying the status of law. ... until the law and the system is changed, we have no choice but to proceed as we are doing today”.⁵⁶ In his subsequent career⁵⁷ as a legal advisor to PAS in the states of Kelantan and Terengganu, Salleh Abas drafted and defended the *hudud* enactments of those states — which human rights lawyers (including prominent liberal Muslim lawyers), SIS and the UMNO Federal Government criticized as unconstitutional, undemocratic and barbaric⁵⁸ — on the basis that PAS had been legitimately and democratically elected in those two states.⁵⁹ He advised that while Malaysia was indeed a secular state, as he had

⁵⁴ HAKAM – (Persatuan Hak Asasi Kebangsaan) was founded in 1989 out of concern with the deterioration of civil and political rights in under the Mahathir administration, especially with the use of detention without trial under the Internal Security Act as a means to silence political opponents of the government, see online: <http://www.hakammalaysia.org/?page_id=2>.

⁵⁵ Quoted in “Infringes on rights – proposed tax”, *The Sun* (15 December 1999).

⁵⁶ *Supra* note 51, at 57.

⁵⁷ During the infamous ‘judiciary crisis’ of 1988, Lord President Salleh Abas was dismissed from judicial office by the Mahathir government because of the robust way that he defended the independence of the judiciary from executive attack. Ironically, and implausibly at that time, given his ruling in *Che Omar*, one of the charges against him was that he had sought to introduce Islamic law. The saga is notorious in Malaysian political and legal history and much written about. See Visu Sinnadurai, “The 1988 Juridicary Crisis and its Aftermath” in Andrew Harding and H. P. Lee (ed) *Constitutional Landmarks in Malaysia: The First Fifty Years 1957-2007* (Kuala Lumpur: LexisNexis, 2007): 173-196 for the most recent review of this episode and citation of key literature.

⁵⁸ SIS et al. (n.d.), Letter to the Editor, “Hudud in Terengganu: A Law to Protect Rapists”, online: <http://www.sistersinislam.org.my/index.php?option=com_content&task=view&id=467&Itemid=178>; see also Ismail, *Hudud*, *supra* note 8.

⁵⁹ Arfa’eza A Aziz, “BN trapped itself within Islamic state declarations: Salleh Abas”, *Malaysiakini* (October 2002); also Arfa’eza A Aziz, “Respect the right of states to implement religious laws: Salleh”, *Malaysiakini* (2 October 2002).

held when on the bench, nevertheless the Constitution could, and should, be amended to make it more consonant with the Qur'an because this would reflect the democratic will of the majority of the electorate.⁶⁰

I am not at all suggesting that any of the legal actors involved in the *Che Omar* case were unprincipled or inauthentic Muslims or secularists. Rather I draw attention to this case and its wider context, and to the legal values and conduct of the legal actors involved, because this episode illustrates so many of the complexities of law and religion, for lawyers and others, in contemporary Malaysia. But most importantly of all, it reveals some of the potential – as yet unrealised – for interfaith and inter-jurisdictional dialogue. Specifically it lets us see how the team of secular human rights lawyers recognized the possibility, in the normative values of Islam, of a set of legal principles that might challenge the fundamental injustices of a secular law that had ousted judicial discretion and mercy in favour of an homogenizing and totalizing view of national security and legal certainty. It also show us how a Muslim judge subordinated his “personal” belief that Islamic religious morality and law should not be separated in order to uphold the integrity of his judicial oath to interpret the Constitution and laws under it according to accepted methods of secular, common law reasoning, all the while having faith that democratic processes of legal change could eventually install Qur'anic precepts as state law. These conditions of possibility for respectful dialogue are currently unrealised, in Malaysia, where the secularism-Islam debate is so often conducted — at least in public — in a much less courteous manner than the gentlemanly exchange of pleasantries at the conclusion of the *Che Omar* case, where the Lord President “thanked counsel for their efforts in making researches into the subject”, and noted that the court was “particularly impressed in view of the fact that they are not Muslims.”⁶¹ But we should not, perhaps, become too beguiled by the interfaith potential of this legal pantomime. For in the actually prevailing conditions in Malaysia, both options presented in the court room lead to an increased space for state-sanctioned violence and murder, albeit for different crimes: the secular security law, which the court upheld, imposes the mandatory death penalty for narcotics and firearms offences, while the more compassionate vision of Islamic justice advocated by the non-Muslim defence lawyers, but rejected by the court, was later reinterpreted and encoded by the Lord President-turned-PAS-legal-advisor in the *hudud* laws to require the death penalty for apostasy and severe corporal punishment for women who have sex before marriage.

⁶⁰ Tong Yee Siong, “M’sia a Muslim county, not Islamic state: Salleh Abas”, *Malaysiakini* (9 October 2001).

⁶¹ *Supra* note 51, at 57.

In the remainder of this article I want to examine the mobilization of the organized Malaysian legal profession in response to the kinds of public contests about secularism, Islam, and law that were referred to earlier. I will no longer be concerned with the positions taken by individual advocates during actual court cases. Rather, I examine the official positions taken by the peak professional legal organization speaking on behalf of its professional constituents and to a wider constituency of Malaysia citizens in order to examine how the organized Bar has used its prestige and expertise to explain and clarify the legal aspects of these issues to the general public, and how it has attempted to use its privileged status to foster informed discussion about law reform. The divisions that emerged amongst lawyers in response to the Bar's official position, and the vociferous reaction of organised pressure groups, including some sponsored by lawyers, reveals some of the obstacles to discussing, let alone achieving, meaningful law reform in this area.⁶²

V. THE PENINSULAR MALAYSIAN LEGAL PROFESSION

At present there are approximately 13,020 common law practitioners in peninsular Malaysia, of whom nearly half are located in the Federal Capital.⁶³ They are regulated – and permitted a considerable degree of self regulation – by the *Legal Profession Act 1976* (“LPA”) which deems all currently registered lawyers to be members of the national Malaysian Bar. The Bar is governed by the democratically elected Bar Council, which also represents the organized Bar to the public through official press statements and media interviews, and a very sophisticated website (<http://www.malaysianbar.org.my>).

Despite the fact that the Malaysian Bar and Bar Council are entities created by a statute of the Malaysian Parliament, the organized Malaysian legal profession can also be understood as an association which arises historically from, and is currently grounded in, civil society. The history of the independent and self-regulating English Bar as an exemplar of the historic development of civil society in that country is well known,⁶⁴ and there is a large literature tracing the

⁶² The remainder of this article draws upon and substantially extends material and argument canvassed in Harding and Whiting, *Custodians*, *supra* note 4.

⁶³ This article focuses on the situation in peninsular (West) Malaysia and does not examine lawyers or legal and political issues in the East Malaysia states of Sabah and Sarawak. The legal profession in East Malaysia has received practically no scholarly attention, a neglect I hope to rectify in a later stage of this research project. Statistics are taken from the Bar Council of Malaysia's own calculations: see Bar Council General Statistics 2009 (as at 19 January 2010), online: <http://www.malaysianbar.org.my/general_notices/bc_general_statistics_2009.html>.

⁶⁴ See the excellent account in Michael Burrage, “Mrs Thatcher Against the ‘Little Republics’: Ideology, Precedents and Reactions” in Terence C. Halliday and Lucien Karpik (eds.), *Lawyers*

links between the professional autonomy of lawyers and a creed of “civic professionalism” and the corporate enunciation of a doctrine of ‘legal liberalism’ which fosters and sustains values such as the separation of powers and the rule of law, basic civil and political rights and the ideal of the moderate state.⁶⁵ The English common law and the professional ethics and practices of the English Bar were introduced into Malaysia through colonialism. After independence, and by reference both to the traditions of the English Bar and to emerging international norms concerning the responsibility of lawyers to clients, the public and justice, the Malaysian Bar has fostered and enriched these values, often as a narrowly expressed *legal* response to encroachments upon constitutional democracy and the rule of law by Malaysia’s soft-authoritarian governments.⁶⁶

Particularly noteworthy is its strong and consistent commitment to due legal process, the separation of powers and judicial independence and integrity, and basic civil rights of speech and assembly. Looking at positions on public issues taken by the Bar since the Independence, but particularly since the “judicial crisis” caused by government interference in the independence of the judiciary in 1988, it is evident that the Bar Council has regularly interpreted the mission of the Bar within this civil society and civic professional framework.⁶⁷ Furthermore, the concept of “civil society” in Malaysia is frequently given a narrower and sharper definition than the notion of organisational autonomy from the state, or the dense and multiple associational ties lovingly eulogised by Robert Putnam.⁶⁸ In local usage “civil society” often refers to non-government organisations (NGOS) and activist groups dedicated to furthering a common cause. The Bar Council’s recent active cooperation with human rights and women’s organizations in law reform

and the Rise of Western Political Liberalism: Europe and North America from the Eighteenth to Twentieth Centuries (Oxford: Clarendon Press, 1997).

⁶⁵ Discussed in Terrence C. Halliday, “Review: Politics and Civil Professionalism: Legal Elites and Cause Lawyering” (1999) 24(4) *Law and Social Inquiry* 1013-1060; see also Robert Gordon, “The Independence of Lawyers” (1988) 68 *Boston University Law Review* 1.

⁶⁶ There is an unresolved debate about the proper way to characterise Malaysian state and government: soft-authoritarian? semi-democratic? electoral authoritarianism? illiberal democracy? pseudo-democracy? See William Case, “Malaysia’s General Elections in 1999: A Consolidated and High-Quality Semi-Democracy” (2001) 25(1) *Asian Studies Review* 35-55 and William Case, “Testing Malaysia’s Pseudo-democracy” in Edmund Terence Gomez (ed.), *The State of Malaysia: Ethnicity, Equity and Reform* (London: RoutledgeCurzon, 2004); Anne Munro-Kua, *Authoritarian Populism in Malaysia* (New York: St Martin’s Press, 1996).

⁶⁷ See Harding and Whiting, *Custodians*; Lev, *Lawyers’ Causes* and *A Tale of Two Legal Professions*; and Das, *Justice Through Law*, *supra* note 4.

⁶⁸ Robert Putnam, *Bowling Alone: The Collapse and Revival of American Community* (New York: Simon & Schuster, 2000); see also the helpful analysis in Michael Walzer, “The Concept of Civil Society” in Michael Walzer (ed.), *Toward a Global Civil Society* (Providence: Berghahn Books, 1995).

and public awareness campaigns (discussed below) has contributed to the perception that it is a civil society organisation in this latter sense, too.

Like wider Malaysian society, the Malaysian legal profession is multicultural and multi-faith. Allowing for some imprecision with the statistical data and calculations, it seems that currently 38%–40% of the Bar are Malay–Muslims, approximately 37% are Chinese, and around 24% are Indian.⁶⁹ These indicia of ethnicity do not correlate with religious affiliation, of course: whereas all Malays are constitutionally deemed to be Muslims, by virtue of article 160, members of Malaysia’s Indian, Chinese, indigenous (or “native”) and Eurasian communities might be Buddhist, Christian, Hindu, Sikh, Taoist, or Muslim. Thus, to take just one example, a Roman Catholic lawyer might be of Indian, Chinese, Iban or Eurasian ethnicity, but not Malay. On the other hand, a countervailing force in favour of unanimity is the fact that members of the Bar are products of a broadly similar common law legal education from local or overseas (Commonwealth) universities, and possession of a recognised LLB degree is a prerequisite for admission to practice.⁷⁰ The process of indoctrination in the secular values of common law legal liberalism, through a common legal education, seems to have ensured that lawyers from differing cultural and religious communities develop a shared intellectual orientation and a core of shared professional values.⁷¹

Moreover a recent survey found that the majority of Malaysian Muslim lawyers support ideals of democratic governance and constitutional civil liberties as well as multiculturalism and tolerance of difference and diversity, so any stereotypical assumption that Muslim lawyers might be somehow less oriented to the rule of law, constitutional government and the moderate state than their colleagues of other faiths can be dismissed.⁷² Indeed, it must be emphasized that some of the key proponents of an expansive role for Islam have also been amongst the most steadfast champions of the rule of law, judicial independence, and civil and political liberties. For example, former Bar Council President Haji

⁶⁹ Economic and Planning Unit, *Third Outline Perspective Plan 2001-2010* (Putrajaya: Economic and Planning Unit, Prime Minister’s Office, 2001), table 4.6; Economic and Planning Unit, *Ninth Malaysia Plan 2006-2010* (Putrajaya: Economic and Planning Unit, Prime Minister’s Office, 2006), table 16.5; Bridget Welsh, “New Identities, New Politics: Malaysia’s Muslim Professionals” (2008) 18(3) *National Bureau of Asian Research (NRB) Analysis* 35-51, at 39-40 [“*New Identities*”]. Current Bar Council statistics confirm this too: of a total of 1320 registered legal practitioners, 4848 are Chinese, 5089 are Malay, and 2480 are Indian (copy on file with author).

⁷⁰ *Legal Profession Act 1976*, sections 3, 10 and 11.

⁷¹ Johan Sabaruddin, Johan and Grace Xavier, “Legal Ethics, Taught and practiced – A Malaysian Perspective”, LawAsia Conference, March 21-24, 2005, Gold Coast, Queensland, Australia (delivered on 21 March 2005).

⁷² Welsh, *New Identities*, *supra* note 69, at 46.

Sulaiman Abdullah famously defended a more prominent role for Islam in an Al-Jazeera current affairs debate, and he is often briefed by state Islamic authorities; at the same time, he has vigorously defended judicial independence and constitutional civil and political rights and campaigned for the abolition of detention without trial.⁷³ Similarly, the two Islamic lawyers' organizations which issued an election-eve demand in 2008 for an increased role for Islam in law and government simultaneously demanded "free and fair elections", that executive power be subject to "the rule of law and the constitution" and a wider "democratic space in order to allow civil society institutions to contribute to social empowerment and nation building".⁷⁴

Yet, despite the homogenizing effect of legal education there are significant divergences within the profession, sourced in the multicultural composition of the Bar, as well as religious orientation or social and political engagement. As former Bar Council President Yeo Yang Poh acknowledged in a media interview in 2006, "the Bar is not comprised of people who believe in something, therefore we come together. You have to be a member of the Malaysian Bar because you are practising law".⁷⁵ Compulsory membership, that is to say, entails heterogeneity and frustrates consensus, except on a very narrow but also very firm platform of shared commitment to legal professionalism.⁷⁶ For the purposes of this article, I identify sources of specifically religious-based divergence — but, it must be emphasised, not necessarily conflict — within the legal profession. There are two: one is due to permeable walls between secular and *syariah* legal practice; the other arises from the formation of voluntary faith-based associations within the common law legal profession.

⁷³ The debate was hosted by Riz Khan and first screened on 8 August 2007; it can now be viewed online: <<http://www.youtube.com/watch?v=5L9i2EqnpJk>>; for subsequent discussion, see the commentary posted on *The People's Parliament*, online: <<http://harimibrahim.wordpress.com/2007/08/07/sulaiman-vs-imtiaz/>> and *Disquiet*, online: <<http://malikimtiaaz.blogspot.com/2007/08/riz-khan-interview.html>>. Examples of Haji Sulaiman Abdullah's defence of judicial independence, the rule of law and civil liberties include: Bar Council, "Judges dispute: a reply to the Chief Justice", Press Statement (9 August 2002); "Bar Council's move to hold EGM is in 'national interest'", *New Straits Times* (Kuala Lumpur, 15 June 2000); S Pathmavathy, "A unified Bar rejects ISA", *Malaysiakini* (20 September 2008).

⁷⁴ Islamic NGO Election Demands (20 February 2008) (copy on file with author); and see *infra* note 120.

⁷⁵ Quoted in Soon Li Tsin, "Division in the Bar is 'natural'", *Malaysiakini* (17 October 2006).

⁷⁶ This explanation builds upon the sophisticated analysis of Chicago lawyers advanced in John P. Heinz, Edward O. Laumann, Charles L. Cappell, Terence C. Halliday and Michael H. Schaalman, "Diversity, Representation and Leadership in an Urban Bar: A First Report on a Survey of the Chicago Bar" (1976) *American Bar Foundation Research Journal* 717-785 and Terence C. Halliday, "The Idiom of Legalism in Bar Politics: Lawyers, McCarthyism and the Civil Rights Era" (1982) *American Bar Foundation Research Journal* 911-988.

In the state-based *syariah* jurisdictions, admission to practice as a *syariah* lawyer — *peguam syarie* — is governed by separate State Enactments, not national statutes (except of course with respect to the Federal Territories), which regulate the administration of Islamic law. There are currently around 2,500 *syariah* practitioners in peninsular Malaysia⁷⁷ and their peak professional advocacy body is the Malaysian Syariah Lawyers Association (Persatuan Peguam Syarie Malaysia, PGSM), formed in 2000. The requirements differ between the component parts of the federation, but they are broadly similar. Typically, a candidate for admission to practice as a *peguam syarie* must demonstrate “sufficient knowledge of Islamic law”⁷⁸ and also satisfy any qualifying rules made by the *Majlis* (religious affairs council) pursuant to the governing statute.⁷⁹ The “sufficient knowledge” standard is usually satisfied by obtaining a *syariah* diploma or degree⁸⁰ and then passing the *Sijil Peguam Syarie* qualifying examination set by the *Peguam Syarie* Committee.⁸¹ Accordingly, members of the Malaysian Bar, who possess common law LLB qualifications, may also be able to demonstrate sufficient Islamic law knowledge to enable them to practice in the *syariah* courts, and indeed many do. But the converse is not true, and *syariah* practitioners may not practise in the national courts nor belong to the Malaysian Bar unless they also obtain relevant common-law LLB qualifications and possess an annual practising certificate (*sijil* annual). Consequently, it appears that many lawyers practising exclusively in one jurisdiction have a limited understanding of the legal principles and professional practices of the other system, but that there is a group of lawyers who are comfortable practising across the secular and religious jurisdictions and might thus be well placed to explain each to the other.⁸²

⁷⁷ Welsh, *New Identities*, *supra* note 69, at 47-48.

⁷⁸ For example, see *Administration of Islamic Law (Federal Territories) Act 1993*, section 59(1); *Enakmen Pentadbiran Agama Islam (Negri Melaka) 2002*, section 68(1); *Enakmen Pentadbiran Agama Islam (Negri Sembilan) 2003*, section 80; *Enakmen Pentadbiran Agama Islam (Perak) 2004*, section 69; *Enakmen Pentadbiran Hal Ehwal Agama Islam (Terengganu) 2001*, section 57.

⁷⁹ See, for e.g., *Administration of Islamic Law (Federal Territories) Act 1993*, section 59(2): the *Majlis* may, with the approval of the Yang di-Pertuan Agong [King], make rules (a) to provide for the procedure, qualifications and fees for the admission of *Peguam Syarie*; and (b) to regulate, control, and supervise the conduct of *Peguam Syarie*. In the case of the Federal Territories, these are the *Peguam Syarie Rules 1993 P.U.(A) 408/93*.

⁸⁰ For example, *Peguam Syarie Rules 1993 P.U.(A) 408/93*, Rule 10.

⁸¹ For example, *Peguam Syarie Rules 1993 P.U.(A) 408/93*, Rule 7.

⁸² I am alluding here to the possibility of developing further the notion of lawyers as ‘cultural intermediaries’ advanced in excitingly original work by Lauren A. Benton, *Law and Colonial Cultures: Legal Regimes in World History 1400-1900* (Cambridge: Cambridge University Press); Mitra Sharafi, “A New History of Colonial Lawyering: Likhovski and Legal Identities in the British Empire” (2007) 32(4) *Law & Social Inquiry* 1057-109. Benton and Sharafi examine indigenous legal actors under colonial rule and understand them as ‘ethno-juridical translators’ or ‘intellectual middlemen’ (at 1078, 1084) in encounters between local communities and the

However the limits of this mediating role have recently become apparent as Federal and some State *Majlis* have sought to strengthen the separation between the two bodies of lawyers by specifying religious adherence as a further requirement for *syariah* practice. For example, Federal Territories *Administration of Islamic Law Act* only stipulates that an applicant for admission to practise as a *peguam syarie* must be a “person” with “sufficient knowledge of Islamic law”,⁸³ yet the Rules further specify that the candidate “must be a Muslim”,⁸⁴ and this has been glossed by the Director of the statutory Institute for Islamic Understanding (Institut Kefahaman Islam Malaysia, IKIM) to mean that an applicant “must first of all believe in all fundamentals prescribed by Islam”.⁸⁵ For these reasons, a non-Muslim lawyer who otherwise satisfied all education and qualifications requirements for admission as a *peguam syarie* was refused a *sijil*. Her application to compel the Federal Territories *Majlis* to admit her to practice, and for declarations that the *Pegulam Syarie* Rules are *ultra vires* the parent Act and in contravention of her constitutional guarantees to equality and freedom of the person and association, is pending before the High Court of Malaya.⁸⁶ Unsurprisingly, given its persistent support for interfaith dialogue and understanding in multicultural Malaysia, and its consistent advocacy of equality

Imperial power, translating each to the other and thereby assuming some level of expertise and power over the knowledge thus produced and a degree of prestige over the local communities thus represented. I am suggesting here that this notion could gainfully be shifted to a different temporal frame, and that postcolonial Malaysian lawyers who straddle both the secular-national and religious-state jurisdictions might be in a strong position to assume the authority to speak to and on behalf of each regime of legal knowledge. In this article, all I can do is raise this question, which will be pursued in the next stage of this research project.

⁸³ *Administration of Islamic Law (Federal Territories) Act 1993*, section 59(1).

⁸⁴ *Pegulam Syarie Rules 1993* P.U.(A) 408/93, Rule 10(a)(i); see also (a)(ii), (iii). The requirements vary throughout the Federation. For example, like the Federal Territories, the Selangor *Administration of Islamic Law Enactment* does not specify that a *peguam syarie* applicant must be a Muslim, but the Rules do (compare *Enakmen Pentadbiran Agama Islam (Negri Selangor) 2003*, section 80 with the rule in *Kaedah-Kaedah Pegulam Syarie (Negri Selangor) 2008* (Sel P.U. 23/2008), rule 8(1)(a) “*seorang yang beragama Islam*”); whereas Penang makes no requirement in either the statute or the subordinate instrument (*Enakmen Pentadbiran Agama Islam (Negri Pulau Pinang) 2004*, section 80 and *Kaedah-Kaedah Pegulam Syarie (Negri Pulau Pinang) 1997* (Pg P.U. 5/97) rule 9); yet in the State of Pahang both the parent statute and the subordinate instrument require that a *peguam syarie* be a Muslim (“*beragama Islam*”): *Enakmen Pentadbiran Undang-Undang Islam 1991* (Negri Pahang) section 66 and *Peraturan-Peraturan Pegulam Syarie 1995* (Pahang P.U. 12/95), Rule 9.

⁸⁵ Dr Wan Azhar Wan Ahmad, “Non-Muslim syarie lawyers”, online: <<http://www.ikim.gov.my/v5/print.php?grp=2&key=2099>>.

⁸⁶ See, for e.g. “Non-Muslim gets leave in bid to be syariah lawyer in FT”, *Malaysiakini* (14 May 2010); M Mageswari, “Test case for non-Muslim lawyer in syariah court”, *The Star* (15 May 2010).

before the law, the Bar Council has publicly endorsed the petitioner's application.⁸⁷

Membership of voluntary associations based upon religious affiliation or identity gives rise to a second source of divergence — but again, not necessarily or constantly, of conflict — within the legal profession. As we have seen, Muslim lawyers who are *peguam syarie* may join the PGSM, which frequently takes public positions defending the extended jurisdiction and reputation of the *syariah* courts and criticizing lawyers or activists whom they perceive to be attacking Islam. Additionally, the Muslim Lawyers Association (Persatuan Peguam Muslim Malaysia, PPMM) claims to represent Muslim common lawyers. It was established in 1982 and initially led by Zaid Ibrahim, who, two decades later, mounted a well-publicized legal challenge to the constitutionality of the Kelantan and Terengganu *hudud* enactments because their harsh punishments violated constitutional human rights guarantees and the supremacy of the secular Federal Constitution.⁸⁸ He later briefly held a cabinet position as a Law Minister in the UMNO-led Abdullah Badawi government, but has since resigned and joined the opposition Parti Keadilan Rakyat (PKR) (“Keadilan”). Despite the progressive and secular credentials of one of its founders, the Muslim Lawyers Association has more recently mobilized in defence of Islam in a manner that puts it at variance with the official Bar Council position on the supremacy of the secular constitution. A third association for Muslim lawyers – Lawyers in Defence of Islam (Peguam Pembela Islam – PPI) was formed in 2006 in the context of the *Lina Joy* religious freedom litigation, specifically to combat the secular and “anti-Islam” position of the Bar Council. I will return to the public clashes between these organizations and the Bar Council later.

Catholic lawyers also have a separate voluntary organization, the **Catholic Lawyers' Society** established in 1992 to nourish religious values amongst legal co-religionists and their families through social and faith-based activities.⁸⁹ It has more recently mobilised around the pressing issues of religious freedom and the perceived encroachment of *syariah* courts and Islamic religious bureaucracies into the lives of non-Muslims, and in particular to press for the right of the Catholic weekly *Herald* to keep its annual publication licence and to publish in the national language, Malay, which entails using the word “Allah” to translate the Christian God.⁹⁰ In contrast with all three Muslim legal associations, the **Catholic Lawyers' Society** does not seem to have had any public disagreements with the policies

⁸⁷ Bar Council, “Syariah courts must embrace all lawyers”, Press Statement (17 June 2010).

⁸⁸ “Court order sought on state assemblies’ powers to pass criminal laws”, *Bernama* (14 June 2002); “Court to hear both petitions challenging hudud law”, *Bernama* (19 March 2004).

⁸⁹ The Society’s webpage is <http://www.catholiclawyersociety.org/index.htm>.

⁹⁰ A collection of press releases from 2007 until 2009, stating the Society’s position can be found online: <<http://www.catholiclawyersociety.org/reporting/reporting.htm>>.

enunciated for the Bar by the Bar Council. Like religious minorities in many other countries, it views secularism as a political ideology that protects religious faith. It has also avoided directly engaging the Muslim lawyers associations.

VI. BAR COUNCIL MOBILIZATION, AND THE DIVISIONS WITHIN THE PROFESSION AND SOCIETY

In all its public statements about religion and law, the Bar Council has consistently taken the position that Malaysia is a secular state and that conflicts must be resolved within the secular constitutional framework, with its guarantees of equality before the law (article 8), freedom of expression and association (article 10) and freedom of religion (article 11). Space precludes me from mentioning them all and the following are selected as indicative only.⁹¹

In 2002 when the new PAS government in Terengganu enacted its *hudud* law, containing similar offences and punishments to the 1993 Kelantan *hudud* code, the Bar Council expressed disappointment that the law had been made “in utter disregard and defiance by the Terengganu State government towards the will and opinion of the general public, the rule of law and the constitutional framework of the nation” and that it violated the constitutional equality guarantee by discriminating between Muslim and non-Muslim Malaysians, and encouraging discrimination and injustice against women.⁹² The following year, the Bar Council publicly supported the decision of the federal Attorney-General to embrace his role as “guardian of the public interest” and uphold the supremacy of the secular constitution by deciding to intervene in prominent Muslim lawyer Zaid Ibrahim’s challenge to the constitutionality of these *hudud* enactments,⁹³ and it instructed its own president to hold a watching brief in the litigation.⁹⁴

When in July 2007 the then-Deputy Prime Minister Najib Razak declared that Malaysia “has never been a secular state” — a reassertion of former Prime Minister Mahathir’s famous declaration that Malaysia was *already* an Islamic State — the Bar Council responded forcefully by appealing to legal history. It instructed the Minister that his claim was “startling” since it “ignores the

⁹¹ A broader selection of examples are canvassed in Harding and Whiting, *Custodians*, *supra* note 4.

⁹² Bar Council, “Disappointment with the passing of the Terengganu Hudud Bill”, Press Statement (19 July 2002). The state of Kelantan enacted a similar law in 1993. Neither is fully enforceable, as both are subject to constitutional limits on the criminal jurisdiction of *syariah* courts (provided for in Federal Constitution Schedule 9, List II, item 1 and *Syariah Courts (Criminal Jurisdiction) Act 1965*); see further, Shad Saleem Faruqi and M.B. Hooker, *supra* note 8.

⁹³ Bar Council, “Proceedings concerning constitutionality of laws”, Press Statement (3 November 2003).

⁹⁴ “Hudud – Lawyer obtains leave to file petition for declaration”, *Bernama* (11 July 2002).

undisputed constitutional history of the country as well as the social contract by which the multi-racial and multi-religious people of this nation came together” and the entire framework of government and justice built upon that constitutional bargain. It concluded the lesson with the assertion: “there is no doubt whatsoever that Malaysia is a secular state”.⁹⁵ When in the same year the Chief Justice of the Federal Court implied that the common law should be brought into compliance with *syariah*, the Bar Council repeated the same arguments defiantly and with alacrity:

Let there be no mistake. Any attempt to dismantle the common law system is a direct attack on our Federal Constitution. It is a backdoor attempt to rewrite it and to move Malaysia towards becoming a theocratic state which our founding fathers and recently our Prime Minister have recognised we are not. It violates the social contract. That it comes from those who ought to uphold the law and the constitution is all the more regrettable.⁹⁶

Concerning the many fraught jurisdictional cases of conversion into or out of Islam, the Bar issued several public statements championing constitutional religious freedom and equality before the law, and chastising the common-law courts for deferring to the competing *syariah* system, thereby subordinating the supremacy of the secular Federal Constitution and their judicial obligation to uphold it to religious and political sensitivities. For example, a Bar Council press statement about *Shamala's case* complained that the court had failed to “uphold constitutional rights and freedoms” and ignored the internationally accepted principle of the best interests of the child, and that such a dilution of religious freedom and parental rights risked “endanger[ing] peace and harmony in a multiracial society”. The Bar then called upon the secular courts to take a “progressive and egalitarian approach” to fundamental rights, and appealed to the Parliament for a political and legislative solution to inter-faith and inter-jurisdictional family law disputes.⁹⁷ The Bar’s second statement on this issue congratulated the court for recognising the Hindu mother’s claim to custody, but asserted that unilateral conversion of children was “unacceptable” and that the legislature must step in if the courts would not.⁹⁸ In relation to Subashini’s predicament, the Bar Council stated publicly that it was simply incorrect for the

⁹⁵ Bar Council, “Malaysia is a secular state”, Press Statement (18 July 2007).

⁹⁶ Bar Council, “Leave the common law alone”, Press Statement (24 August 2007); see also Bar Council, “Common Law”, Press Statement (23 August 2007).

⁹⁷ Bar Council, “Religion of children – Parental Rights”, Press Statement (23 April 2004).

⁹⁸ Bar Council, “Shamala’s case”, Press Statement (22 July 2004).

secular courts to direct her to the *syariah* system (as the Court of Appeal had done), and pointed out that the fundamental issue was not the fairness of *syariah* justice, but the fact that the religious courts had no jurisdiction over persons who were not Muslim, and that non-Muslims had a fundamental right not to be obliged to subject themselves to a system based on religious precepts that they did not accept.⁹⁹ The Bar Council made this same point again with great clarity in early 2008, asserting that it would be “wrong in principle” to impose upon non-Muslim Malaysians the *syariah* ‘moral policing’ laws (such as *khalwat*, the criminalisation of close proximity between unmarried couples of the opposite sex), as participants at an Islamic law seminar had recently proposed, since this would be an infringement of religious freedom and a “wholly unacceptable” imposition of theocratic law. “Equally troubling” in the eyes of the Bar Council, given the “history of over-zealous enforcement of *khalwat* and other moral policing laws in this country” were the proposals to construct more “religious rehabilitation” centres and increase the severity of *syariah* punishments for Muslims convicted of offences against Islamic faith. In a very clear normative statement asserting the moral primacy of liberal legal values over theocratic ones, the Bar Council stated:

A progressive and moderate government must be very slow in criminalizing a perceived breach of moral conduct in relation to the private lives of its citizens, or using public funds to police the private behaviour of its citizens, particularly in a pluralistic society such as ours. We urge the authorities to focus their attention on more pressing issues like fighting corruption rather than on the private lives of individuals.¹⁰⁰

Concerning the right to renounce Islam in the *Lina Joy case*, the Bar Council upheld the constitutional right to freedom of religion, including the freedom to change religion without obstacle or penalty. It instructed Malik Imtiaz Sarwar, a prominent human rights lawyer, to hold a watching brief in the case, and when Malik received death threats the Bar Council condemned this intimidation as a “shameful” attack upon an individual lawyer carrying out his professional duties and the “whole system of justice”.¹⁰¹ When Lina Joy lost her Federal Court appeal, the Bar Council’s press release commended the dissenting judgment of the non-Muslim judge on the panel and criticized the majority for

⁹⁹ Bar Council, “Syariah court only for Muslims”, Letter to the Editor, *The Sun* (26 March 2007).

¹⁰⁰ Bar council, “Islamic laws not to be applied to non-Muslims”, Press statement (3 April 2008).

¹⁰¹ Bar Council, “Death threat against Malik Imtiaz Sarwar”, Press statement (22 August 2006).

denigrating the supremacy of the secular constitution and its guarantees of fundamental rights for all Malaysians.¹⁰²

The Bar Council also came to the defence of SIS when that organization was threatened by PAS in early 2009, explaining that disagreement ought to be conducted rationally through “dialogue and debate”, not in the “typical Malaysian political approach” of banning and silencing opponents and critics, and that PAS, as a political party with “aspirations to represent all Malaysians” ought to be “open to diverse opinions and able to accept dissenting views”.¹⁰³ Perhaps the Bar Council’s interjection in the “use of Allah” controversy is its strongest articulation of this position, and also one of its clearest enunciations of its self-understanding as “custodian of civil liberties and justice in Malaysia,” and thereby morally obliged to instruct the Malaysian public in law’s relation to politics and religion and the legally correct way to conduct political and religious debate in a civilized and moderate state. As public controversy raged about whether the government had the legal authority to ban the Catholic *Herald’s* usage of “Allah”, the Bar Council conducted an on-line poll of its members on this issue via its website. When the Selangor Islamic Religious Council (MAIS) threatened to prosecute the Bar for breaching the local *fatwa* prohibiting use of Allah by non-Muslims¹⁰⁴ (ironically the precise issue at the heart of the *Herald’s* case), the Bar Council swiftly responded that it is “committed to embark on dialogues with diverse stakeholders including the government, Muslim NGOs and individuals to engage in discourse on issues of mutual concern”, and it urged the Home Affairs Minister to support “responsible exercise of freedom of expression” as a necessity in a democratic system:

The Bar Council remains committed to the promotion and protection of full, free and informed debate on the basic rights and fundamental freedoms in our Federal Constitution. We shall continue our public duty to educate our fellow citizens on the various issues and different perspectives, so that all of us may benefit from a more complete comprehension of the diverse views and opinions. We strongly believe that the unique multi-racial and multi-religious make-up of our country is a strength that must be harnessed for the good of our people ... we call on others to do the same, constructively and peaceably.¹⁰⁵

¹⁰² Bar Council, “Lina Joy decision”, Press statement (31 May 2007).

¹⁰³ Bar Council, “Embrace diversity and engagement”, Press statement (8 June 2009).

¹⁰⁴ Neville Spykerman, “Bar Council threatened with action over online Allah poll”, *The Malaysian Insider* (13 March 2009).

¹⁰⁵ Bar Council, “Malaysians must rise above polemics”, Press Statement (25 March 2009).

Through its involvement with campaigns in support of constitutional rights and of law reform to clarify or enhance those rights in the context of disputes about religious and secular authority and jurisdiction, the Bar Council has conducted itself like a civil society association in both senses of the concept specified above: that is, as professional association dedicated to promoting mutually sustaining networks within and for its members, and as an advocacy group committed to protecting and advancing shared ideals about democratic constitutionalism and the rule of law within and for the broader society. Indeed, human rights NGOs and other civil society organizations often refer to the Bar Council as another species of the same genus as themselves, and together they participate in rights-promoting activities. Along with NGOs such as Suaram, Aliran, Sisters in Islam and International Movement for a Just World (JUST), the Bar Council played an important role in coordinating the Inter-Faith Council (IFC) initiative in 2003-2005. It played host to a workshop at which the proposal was debated in 2003, and in 2005 it again hosted a National Conference where the draft Inter-Faith Commission Bill was tabled for discussion. The Bar explained that its role was to act as a “neutral ... platform for discourse” and that it was “not aligned with any religious group”.¹⁰⁶ In 2006 when it seemed that neither political parties nor the courts had the capacity or will to resolve the legal and social dimensions of the inter-jurisdictional conversion disputes, the Bar Council joined with human rights groups, women’s organisations and faith-based associations to form “Article 11” — named for the constitutional religious freedom clause — and to conduct a public awareness campaign involving media releases, publications and public travelling “road-show” forums about freedom of expression and belief under the secular constitution.¹⁰⁷ In August 2008, the Bar Council used its own premises to host a public forum about the social problems caused by the failure of the courts and legislature to squarely address the current secular-*syariah* jurisdictional impasse in family law in cases such as *Shamala* and *Subashini*, and to discuss possible legislative solutions in a “just” and “amicable” manner.¹⁰⁸

¹⁰⁶ “Bar Holds Workshop on Inter-religious Council”, *The Star* (Kuala Lumpur, 18 May 2003).

¹⁰⁷ Discussed further in Whiting, *Desecularising*, *supra* note 34. The group’s activities and press statements are available on its website: “Article 11: The Federal Constitution, Protection for All”, online: <<http://www.article11.org>>. Members include: All Women's Action Society (AWAM); Bar Council Malaysia; Catholic Lawyers’ Society; Malaysian Civil Liberties Society, Protem Committee (MCLS); Malaysian Consultative Council of Buddhism, Christianity, Hinduism, Sikhism and Taoism (MCCBCHST); National Human Rights Society (HAKAM); Sisters In Islam (SIS); Suara Rakyat Malaysia (SUARAM); Vivekananda Youth Movement, Seremban; Women's Aid Organisation (WAO); Women's Development Collective (WDC).

¹⁰⁸ V. Anbalagan, “Forum will go on, says Bar Council”, *New Straits Times* (Kuala Lumpur, 7 August 2008); Fauwas Abdul Aziz, “Conversion forum goes ahead”, *Malaysiakini.com* (8 August 2008).

All three campaigns were aborted when police and the government bowed to Islamist pressure groups and effectively closed down the activities. Muslim organisations publicly boycotted the IFC Initiative and established ACCIN — the Allied Coordinating Committee of Muslim NGOs — to denounce the IFC as a clandestine attack upon both Islam and Malay rights and privileges.¹⁰⁹ Prime Minister Abdullah Badawi thereupon rejected the proposal and silenced further discussion by characterising the issue as “sensitive” — a coded threat to use the *Sedition Act 1948* against its proponents.¹¹⁰ Two of the Article 11 forums in 2006 were disrupted by angry mobs wielding placards proclaiming that “Allah’s laws prevail over human rights”, and then brought to a premature close when the police elected to end the forums rather than hold back the violent and trespassing protesters.¹¹¹ Again, the government chose to silence the campaign by designating it “sensitive.”¹¹² The Bar family law forum held in August 2008 was likewise conducted in the shadow of threats and violence: PAS opposed the forum because it might “confuse” Muslims, but formally defended freedom of expression and counselled that discussion amongst only invited “experts” should take place behind closed doors.¹¹³ UMNO Youth wing took a more strident position and demanded that the government use detention without trial under the *Internal Security Act 1960* and the *Sedition Act 1948* to prevent the Bar Council “stoking the fires of disunity” and “provoking the Muslims which will eventually create unrest”.¹¹⁴ In the face of these threats, and despite finding unexploded Molotov cocktails outside the Bar premises and the former house of the Bar Council President, the Forum commenced on schedule.¹¹⁵ However it was soon closed at

¹⁰⁹ ACCIN Press Statement, “National conference on initiative towards the formation of an Interfaith Commission (IFC), held at Bangi, February 2005”, online:

<http://bantahifc.bravehost.com/accin_press_statement_on_ifc_nationalconference.htm>; and see also ACCIN Statement, “Reasons for non-countenance”, online:

<http://bantahifc.bravehost.com/ACCIN_reasonsfornoncountenance.htm>.

¹¹⁰ “PM: Interfaith Commission could hold back unity”, *Malaysiakini* (22 June 2005); see further “Interfaith Commission: two competing views”, *Malaysiakini* (3 March 2005); and Fauwaz Abul Aziz, “Lack of trust and timing cancel out Interfaith Commission”, *Malaysiakini* (5 April 2005).

¹¹¹ Anil Netto, “Mob rule: déjà vu in Penang”, *Malaysiakini.com* (16 May 2006); Claudia Theophilus, “Police ignored mob, say forum organisers”, *Malaysiakini.com* (15 May 2006); “Article 11 coalition will not be cowed”, *Malaysiakini* (18 July 2006).

¹¹² WAMI, Writers’ Alliance for Media Independence, “Silencing the Article 11 Debate is Undermining Democracy”, Press Statement (2006), online: <<http://www.article11.org>>.

¹¹³ “PAS strongly opposes Bar Council’s conversion to Islam forum”, *Bernama* (7 August 2008) and Chan Kok Leong, “PAS opposes Bar’s forum on Islam”, *Malaysiakini.com* (7 August 2008).

¹¹⁴ “UMNO Youth warns Bar Council”, *The Star* (Kuala Lumpur, 7 August 2008); “Invoke ISA if Bar Council goes ahead with forum – Ali Rustam”, *Bernama* (8 August 2008).

¹¹⁵ Derrick Vinesh, “Molotov cocktail shock for Shahrizat”, *The Star* (Kuala Lumpur, 9 August 2008); Debra Chong, “Desperately seeking law and order”, *Malaysian Insider* (Kuala Lumpur, 23 September 2008); Seira Sacha, Binti Abu Bakar and Noor Binti Arianti Osman, “Molotov

the direction of police who did not seem able to prevent angry protesters from entering the auditorium and shouting abuse.¹¹⁶

When the Bar Council issues media statements, participates in campaigns, holds watching briefs in litigation and enunciates policy, it does so on behalf of all members — this is its statutory function. Moreover as Councillors are democratically elected by members, the Bar Council can claim a mandate to define policy and speak on issues as it does. However its legitimacy and representativeness might be brought into question by reference to the low numbers of lawyers who bother to vote in Bar elections.¹¹⁷ Of course it is difficult to know how to interpret silence or apathy, and these figures may not signify disaffection with the Bar's policies on either the rule of law and constitutional governance issues, or with its stand on secularism; indeed, they might signify the opposite, a passive contentment with Bar Council leadership. More telling, although again perhaps not representative of a larger constituency, is the organised Islamist pressure from inside and outside the Bar which sometimes directly contests the Bar Council's official position on questions of law, religion and secularism.

For example, when the Bar Council condemned passage of the Terengganu *hudud* law, its own *syariah* law subcommittee contradicted this with a statement of support;¹¹⁸ yet the committee's endorsement for the "democratic right of the people of Terengganu to choose to be governed by the Syariah law (including Hudud)" was tempered by a strong criticism that the law as currently framed discriminated against rape victims.¹¹⁹ On the related issue of the Islamic State we have already seen the Bar Council's unambiguous endorsement of secular constitutional democracy; in contrast, on the eve of the 2008 general election, both the Muslim Lawyers Association and the PGSM endorsed a

Cocktail thrown into Bar President's old house", Malaysian Bar Web report (9 August 2008), online: <<http://www.malaysianbar.org.my>>.

¹¹⁶ Seira Sacha, Binti Abu Bakar and Noor Binti Arianti Osman, "Molotov Cocktail thrown into Bar President's old house", Malaysian Bar Web report (9 August 2008), online: <<http://www.malaysianbar.org.my>>; Andrew Ong, "Protesters stop Bar's conversion forum", *Malaysiakini.com* (9 August 2008).

¹¹⁷ For example, Bar Council elections in December 2008 for the 2009/2010 term reveal a very low level of interest amongst the national profession, as 12,747 postal ballots were issued, but only 3,683 were returned. Voter response was not much better for the 2010/2011 period, with 12,949 ballots issued in November 2009, but only 3,094 returned. These figures are taken from "Shafee voted out of Bar Council with 13th placing", *New Straits Times* (6 December 2008); and "Bar Council 1010/2011 Election Results" (1 December 2009), online: <<http://www.malaysianbar.org.my>>.

¹¹⁸ Welsh, *supra* note 69, at 48.

¹¹⁹ Malaysian Bar, *Annual Report 2002-2003*, Syariah Laws Committee Report (Kuala Lumpur: Malaysian Bar Council, 2003), at 140-141.

manifesto of election demands that included “the significant role of Islam in the state and reject[ion of] the notion of Malaysia as a secular state”.¹²⁰ While the Bar Council officially endorsed the IFC, its *syariah* law subcommittee boycotted the event.¹²¹ The Muslim Lawyers Association opposed the IFC initiative in 2005, and later objected to the Bar Council’s family law forum in 2008 because it discussed “sensitive issues”; and its president hinted that the government ought to use the *Sedition Act* against the forum’s organisers.¹²² He subsequently demanded that the Bar Council should dissolve itself and reconstitute as an opposition political party, since it was more concerned to “dabble in politics” than carry out its proper functions.¹²³ It would appear that he did not interpret the conduct of his own association as in any way “political”.

During the *Lina Joy* litigation, dissatisfaction with the Bar Council’s public support for Lina Joy’s right to freedom of religion and its stated opposition to the Islamic State was so intense that a group of Muslim lawyers formed Lawyers in Defence of Islam (Peguam Pembela Islam – PPI). Its founder – a former Bar Council president – urged a well-attended public forum to pass resolutions condemning the Bar Council for its “partisan stand in the name of human rights”, by which he presumably meant that the Bar Council was interpreting human rights in a partisan manner, not that it should refrain from supporting human rights.¹²⁴ In several of the controversial *syariah*-common law jurisdiction cases mentioned above, Islamic legal associations instructed counsel to hold watching briefs to monitor the fate of Islam in the legal process, just as the Bar Council sent lawyers to observe the litigation from a secular and human rights perspective.¹²⁵

¹²⁰ Islamic NGO Election Demands (20 February 2008) (copy on file with author).

¹²¹ Malaysian Bar, *Annual Report 2002-2003*, Syariah Laws Committee Report (Kuala Lumpur: Malaysian Bar Council, 2003), at 139-140. Carolyn Hong, “Legal fraternity split over interfaith conference”, *The Straits Times* (Singapore, 18 February, 2005).

¹²² Carolyn Hong, “Legal fraternity split over interfaith conference”, *The Straits Times* (Singapore, 18 February, 2005); “Invoke ISA if Bar Council goes ahead with forum – Ali Rustam”, *Bernama* (8 August 2008).

¹²³ “Bar Council told to stay away from politics”, *Bernama* (16 November 2008).

¹²⁴ “Muslim Lawyers form group to defend Islam from ‘attacks’”, *The Star* (Kuala Lumpur, 14 July 2006). “10,000 Muslims attend forum on apostasy”, *Malaysiakini* (24 July 2006).

¹²⁵ For example, the Bar Council, the PGSM and the Muslim Lawyers instructed lawyers to hold watching briefs in the *Lina Joy* litigation (see Peguam Pembela Islam, “Lina Joy, murtad and freedom of religion under article 11(1) of the Federal Constitution” (2007), posted online: <<http://www.myislamnetwork.net>>; the Bar Council and the Malaysian Syariah Lawyers Association (PGSM) instructed lawyers in the *Moorthy case* (K Shanmuga, “Re Everest Moorthy”, online: <http://www.ccmalaysia.org/news/constitution/Everest_Moorthy_summary.pdf>), and Zainul Rijal Abu Bakar, currently president of the Muslim Lawyers Association and previously president

Protesters against the Bar Council's family law forum in August 2008 were instigated by Zulkifli Noordin, at that time an opposition Parti Keadilan Rakyat (PKR) Member of Parliament and also member of the Bar Council (he was later expelled from PKR, and failed to gain re-election to the Bar Council). He told reporters that he had convinced the police to halt the forum "or else we will act" and threatened to repeat the intimidation if the Council organised further seminars.¹²⁶ On a later occasion he told reporters "I am a Muslim first, lawyer second; I am Muslim first, MP second",¹²⁷ however he was cautioned by his political masters and temporarily silenced.¹²⁸ He subsequently tabled amendment bills fashioned to subordinate the Constitution and the legal system to Islam, but they have not received support sufficient from his own party or any other.¹²⁹

Islamic lawyers' groups have taken opposing positions to the Bar Council over the issues of *syariah* punishments as well. The Bar Council condemned Kartika's whipping sentence on secular human rights grounds as "anachronistic and inconsistent with a compassionate society",¹³⁰ while the PGSM condoned it.¹³¹ And as mentioned above, PGSM has campaigned for Sisters in Islam, which has often been in coalition with the Bar Council on religious freedom issues, to be banned and prosecuted for its criticism of the *syariah* court's sentencing of Kartika.¹³² When the Sultan of Pahang, in his capacity as head of Islam in that State, resolved the issue by commuting Kartika's corporal punishment into community service in an orphanage, both the PGSM and the Muslim Lawyers Association publicly queried the wisdom and legality of his decision,¹³³ seemingly unconcerned with the irony of their position, given that questioning the judgment of Islamic authorities was the basis of the sedition allegations made against SIS by Islamist pressure groups.

of the PGSM, held a watching brief for PGSM in the litigation concerning Rayappan Anthony's funeral, see "Body tussle case: Cabinet steps in", *The Sun* (6 December 2006).

¹²⁶ Adib Zalkapli, "Harsher actions if Bar Council holds more forums on religion, warn Muslim protestors", *The Malaysian Insider* (Kuala Lumpur, 9 August 2008).

¹²⁷ S Pathmawathy, "Zulkifli defends his action at Bar forum", *Malaysiakini.com* (18 August 2008).

¹²⁸ Shannon Teoh, "PKR mulls action over MP who stormed forum", *The Malaysian Insider* (11 August 2008).

¹²⁹ Salbiah Ahmad, "Adding grey to article 3", *Malaysiakini* (26 October 2009).

¹³⁰ Bar Council, "Abolish whipping for any offence", Press Release (24 August 2009).

¹³¹ Shahanaaz Habib, "Is whipping the answer?", *The Star* (26 July 2009) (quoting the views of the current PGSM president).

¹³² "Muslim lawyers want action taken against SIS, WAO", *Malaysiakini* (1 October 2009).

¹³³ "Muslim lawyers question legality of Sultan's decision", *Malaysiakini* (2 April 2010); "Kartika punishment: Sultan has the power, says Nazri", *Malaysiakini* (5 April 2010).

VII. CONCLUSION

When in early 2009 Indira Gandhi's husband converted to Islam, abducted her infant daughter and then had the child converted too, both spouses turned to their respective legal systems, and the mass media was primed to cover the story in full. Online news portal *Malaysiakini* gave extensive coverage to her heart-rending plea to the Prime Minister:

I am not anti-Islam But why do non-Muslims have to suffer like this? ... even if I get back my children, will they be Hindu again? Why does it take a day to convert my children but it is so difficult to return them to their old religion? Don't I have a say in it, when I was the one who carried them for 9 months? Aren't they my children too?¹³⁴

The Federal Government responded to the resulting and widespread disquiet with a Cabinet resolution that the law would be changed to prevent conversion of minors without the consent of both parents, and the Law Minister promised that the reforms would also ensure that converting spouses would not be able to use their conversion to Islam as a way to escape legal obligations such as maintenance or custody required by the civil marriage law.¹³⁵ The Bar Council promptly issued a statement welcoming the Cabinet's initiative and urging it to implement these law reforms "without delay", but also made the precise legal observation that policy statements were not legally enforceable without the proper legislative action.¹³⁶ Just as predictably, the PGSM responded that the executive must not interfere with the courts, thus dressing up its opposition to the government's law reform proposal in the vocabulary – but not values – of classic separation of powers doctrine. Meanwhile ABIM president Yusri Mohamad (also a legal academic at the International Islamic University) issued a statement on behalf of a coalition of Muslim NGOS stating that the government's policy was "unacceptable", contrary to Islam, and designed to appease non-Muslims.¹³⁷ Yet non-Muslims clearly feel that the appeasement is in the other direction. When the government prepared to introduce the bills into parliament in June 2009, it held a

¹³⁴ S Pathmawathy, "Anguished mom knocks on PM's door", *Malaysiakini* (17 April 2009).

¹³⁵ "Gov't bars secret conversion of children", *Malaysiakini* (23 April 2009).

¹³⁶ Bar Council, "Bar Council urges government to move swiftly", Press Statement (28 April 2009).

¹³⁷ "Conversion case puts gov't promise to test", *The Straits Times* (27 April 2009); "Muslim groups upset with religious conversion ruling", *Malaysian Insider* (29 April 2009).

briefing only for Muslim MPs;¹³⁸ when the bills were again revived in November 2009, a senior government lawyer attempted to sell them to the Muslim public by explaining that the legal reform was designed to “avoid Muslim converts being abused by their spouses who refuse to file for divorce”, a rather startling reinterpretation of the current state of affairs.¹³⁹ At present the bills have not been made fully public. They were withdrawn when the Conference of Rulers required them to be first approved by State Islamic religious authorities, and currently a Cabinet committee comprising JAKIM (the Islamic Development Authority), IKIM (the Malaysian Institute of Islamic Understanding), PGSM (the Syariah Lawyers Association), MCCBCHST (Malaysian Consultative Committee of Buddhism, Christianity, Hinduism, Sikhism and Taoism), the Bar Council and various *syariah* and common law practitioners and academics, as well as representatives of the Federal Government coalition political parties, is considering the drafts. However it seems that the proposals may still not satisfy most of the concerns of non-Muslims regarding conversion of children and spousal maintenance.¹⁴⁰

The profoundly politicised religious divisions within Malaysian society revealed in the incidents examined in this article suggest that it will be difficult for Malaysians to achieve any meaningful and stable resolution to the political question of the Islamic state, or to the legal question of how to manage jurisdictional conflicts between *syariah* and the common law. Furthermore, the existence, and perhaps deepening, of these same divisions within the legal profession illustrate some of the obstacles to the Bar acting as a neutral broker; for although internal religious differences have not prevented the Bar Council from articulating a common platform in support of constitutional democracy and the ideal of the rule of law when these values are threatened by authoritarian tendencies within government, they seem nevertheless to be hampering the Bar from harnessing its social and professional prestige to make a meaningful contribution to inter-jurisdictional law reform.

¹³⁸ Zedeck Siew, “Why only briefing for Muslim MPs?”, *The Nut Graph* (29 June 2009).

¹³⁹ “Amendment to marriage laws will help converts”, *Malaysiakini* (24 November 2009).

¹⁴⁰ Karen Arukesamy, “Proposal to let converts file for divorce in civil court”, *The Sun* (25 November 2009); “Gov’t urged to come clean on conversion laws”, *Malaysiakini* (26 November 2009); MCCBCHST, “Report on proposals for family law reform troubling” (30 November 2009); S Pathmawathy, “State religious authorities sitting on conversion bills”, *Malaysiakini* (14 July 2010).