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Amanda Whiting

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# THE TRAINING, APPOINTMENT, AND SUPERVISION OF ISLAMIC LAWYERS IN THE FEDERAL TERRITORIES OF MALAYSIA

Amanda Whiting<sup>†</sup>

*Abstract:* Although much has been written about the place of Islam, as law and as religion, in Malaysia, considerably less attention has been paid to Islamic lawyers (“*peguam syarie*”). This article undertakes a preliminary examination of a topic that demands closer scrutiny, relying chiefly upon parliamentary acts, state enactments and the rules made pursuant to them, as well as in-depth oral history interviews with Islamic and secular lawyers that were recorded from May through August 2010. It describes the training and practice of Islamic lawyers in one jurisdiction of the federation of Malaysia—the Federal Territories of Kuala Lumpur, Putrajaya and Labuan—making comparisons with other states, particularly the state of Selangor, as appropriate. Comparison is also made with aspects of the training, professional accreditation and ethical regulation of secular lawyers in the parallel civil law system in order to identify the similarities as well as differences between these two forms of legal practice.<sup>††</sup>

## I. INTRODUCTION

There is a paucity of scholarly interest in Malaysian Islamic lawyers (“*peguam syarie*”), a lack that is all the more surprising when one considers the large body of commentary and analysis about Islamic law and Islamic courts in Malaysia.<sup>1</sup> This article offers a descriptive overview of a topic that

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<sup>†</sup> B.A.; L.L.B.; Ph.D. (Melbourne); Associate Director (Malaysia), Asian Law Centre, The University of Melbourne. Nazreen Nizam, Ratna Osman, and Saadiah Din of Sisters in Islam provided invaluable assistance and guidance at all stages of the research and writing, and their energy, hard work and insights are all gratefully acknowledged. Amanda Whiting gratefully acknowledges research funding from Australian Research Council Grant DP0986954 (2009-2012) “Lawyers, Civil Society and the State in Post-colonial Malaysia” with additional assistance for fieldwork from Professor Tim Lindsey’s Australian Research Council Federation Fellowship project “Islam and Modernity: Syariah, Terrorism and Governance in South-East Asia.”

<sup>††</sup> In accordance with the policies of the *Pacific Rim Law & Policy Journal*, foreign words that have entered common English usage will not be italicized. Foreign words that are not in common usage will be italicized. Arabic words will not use diacritical marks such as macrons. However, apostrophes and reverse apostrophes will be employed to signal the letters *hamza* and *'ayn*, respectively.

<sup>1</sup> Prominent examples of the broader literature include Donald L. Horowitz, *The Qur'an and the Common Law: Islamic Law Reform and the Theory of Legal Change*, 42 AM. J. COMP. L. 233-93, 543-80 (1994); MICHAEL G. PELETZ, ISLAMIC MODERN: RELIGIOUS COURTS AND CULTURAL POLITICS IN MALAYSIA (2002); Kikue Hamayotsu, *Politics of Syariah Reform: The Making of the State Religio-Legal Apparatus*, in MALAYSIA: ISLAM, SOCIETY AND POLITICS 55 (Virginia Hooker & Norani Othman eds., 2003); Shad Saleem Faruqi, *The Malaysian Constitution, the Islamic State, and Hudud Laws*, in ISLAM IN SOUTHEAST ASIA: POLITICAL, SOCIAL AND STRATEGIC CHALLENGES FOR THE 21ST CENTURY 256 (K. S. Nathan & Mohammad Hashim Kamali eds., 2005); FARID SUFIAN SHUAIB, TAJUL ARIS AHMAD BUSTAMI & MOHD HISHAM MOHD KAMAL, ADMINISTRATION OF ISLAMIC LAW IN MALAYSIA: TEXT AND MATERIAL (2d ed. 2008); FARID SUFIAN SHUAIB, POWERS AND JURISDICTION OF SYARIAH COURTS IN MALAYSIA (2d

requires further empirical investigation. Drawing upon legislation and statutory rules and extensive oral history interviews, it examines the regulation of Shari'ah, or as it is spelled in Malaysia and used in this paper, "Syariah" lawyers in the Federal Territories, making comparisons where appropriate with Syariah lawyers in other states, and with the regulation of lawyers in the civil law system.<sup>2</sup> Such comparisons are important for several practical reasons. First, all Muslims in Malaysia are subject to Syariah jurisdiction as well as the law of general application (the secular common law and statutes), so in a sense they live under two legal systems simultaneously. Also, many Muslims who live or work in the most populous of the Federal Territories, the national capital city of Kuala Lumpur, may regularly traverse the border separating the Federal Territory and the neighboring state of Selangor in their daily commute, bringing them under three jurisdictions: the national secular law, the Syariah laws of the Federal Territories, and the Syariah laws of the state of Selangor. Finally, many lawyers hold dual practicing certificates, allowing them to advise clients and appear before courts in both the secular and Syariah systems (some being admitted to practice in more than one Syariah jurisdiction).

## II. BACKGROUND

The administration of the law of general application in Malaysia, Malaysian common law and statutes (called collectively the "civil law" to distinguish it from "Islamic law") is a federal responsibility,<sup>3</sup> whereas the administration of Islamic law is a matter for each component state's legislative assembly, except for the Federal Parliament with respect to the Federal Territories of Kuala Lumpur, Putrajaya and Labuan.<sup>4</sup> Despite this

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ed. 2008). A useful, although now dated, general introduction to the topic is Sharifah Zubaidah bt Syed Abdul Kader, *How to Become a Syarie Lawyer*, 1 CLJ cxlix (1995).

<sup>2</sup> For this research, interviews were conducted with more than forty lawyers in Kuala Lumpur, Selangor and Penang from May through August 2010. Because of the sensitive nature of this material, interviewees will not be identified and no direct quotations will be used.

<sup>3</sup> Federal Constitution, Aug. 27, 1957, sched. 9, list I (Federal List), item 4 (Malay.) (civil and criminal law and procedure and the administration of justice).

<sup>4</sup> Federal Constitution, sched. 9, list II (State List), item 1 (Malay.) ([e]xcept with respect to the Federal Territories of Kuala Lumpur, Labuan and Putrajaya, Islamic law and personal and family law of persons professing the religion of Islam, including the Islamic law relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions, and non-charitable trusts; *wakafs* and the definition and regulation of charitable and religious trusts, the appointment of trustees and the incorporation of persons in respect of Islamic religious and charitable endowments, institutions, trusts, charities and charitable institutions operating wholly within the State; Malay customs; *zakat*, *fitrah*, and *baitulmal* or similar Islamic religious revenue; mosques or any Islamic public places of worship, creation and punishment of offences by persons professing the religion of Islam against precepts of that religion, except in regard to matters included in the Federal List; the constitution, organization and procedure of Syariah courts, which shall have jurisdiction only over persons

fragmentation, the component jurisdictions of the federation regulate Syariah courts and legal personnel, including *peguam syarie*, in a very similar manner. This has been possible largely because state-directed Islamization, entailing the modernization and upgrading of the state's Islamic legal apparatus, sponsored by the United Malay National Organization (UMNO),<sup>5</sup> well-funded federal agencies such as the Malaysian Office of Islamic Development (Jabatan Kemajuan Islam Malaysia or "JAKIM"), and the Malaysian Office of Syariah Judiciary (Jabatan Kehakiman Syariah Malaysia or JKSM) have considerable oversight and influence and have thus contributed to a substantial degree of uniformity across the country.<sup>6</sup> Modernization of the Malaysian Islamic legal system commenced in the early 1980s, and the various state enactments and federal acts are generally based on a common model with some small, but sometimes significant, differences.<sup>7</sup> In relation to Syariah lawyers in the federal territories, the most important laws are the Administration of Islamic Law (Federal Territories) Act 1993<sup>8</sup> and the Peguam Syarie Rules 1993.<sup>9</sup>

Lawyers who practice in the civil law courts are called advocates and solicitors, and they are all deemed to be members of, and governed by, the Malaysian Bar ("Bar"). The Bar is a self-governing statutory body that regulates the profession for the entire peninsula (but, for constitutional reasons, not the legal profession of the East Malaysian states of Sabah and

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professing the religion of Islam and in respect only of any of the matters included in this paragraph, but shall not have jurisdiction in respect of offences except in so far as conferred by federal law, the control of propagating doctrines and beliefs among persons professing the religion of Islam; the determination of matters of Islamic law and doctrine and Malay custom).

<sup>5</sup> UMNO is the main political party in the ruling coalition national government and, until recently, it also controlled the majority of states in the federation.

<sup>6</sup> See generally Horowitz, *supra* note 1; Hamayotsu, *supra* note 1.

<sup>7</sup> The most notable and notorious differences come with Islamic criminal law, specifically the Kelantan Syariah Criminal Code (II) Enactment 1993, which purports to introduce Qur'anic punishments more authentically. The Kelantan Code is in any case unenforceable as it exceeds the constitutional grant of legislative power to the states. For further discussion and analysis, see SISTERS IN ISLAM, *HUDUD IN MALAYSIA: THE ISSUES AT STAKE* (Rose Ismail ed., 1995); M. B. Hooker, *Submission to Allah? The Kelantan Syariah Criminal Code (II), 1993*, in *MALAYSIA: ISLAM, SOCIETY AND POLITICS* 80 (Virginia Hooker & Norani Othman eds., 2003); Shad Saleem Faruqi, *supra* note 1. Otherwise, Syariah criminal enactments are confined to offences against religion (such as propagation of false doctrine, religious teaching without an official permit, failure to perform Friday prayers; consumption of alcohol) and morality (sexual intercourse out of wedlock, homosexuality). See, e.g., Syariah Criminal Offences (Federal Territories) Act 1997, Act No. 559 of 1997, §§4, 5, 11, 14, 19, 20-29 (There are also small, but important, differences between the various Islamic family law regimes, particularly in relation to polygamy). See Jaclyn Ling-Chien Neo, *Anti-God, Anti-Islam and Anti-Quran: Expanding the Range of Participants and Parameters in Discourse over Women's Rights and Islam in Malaysia*, 21 *UCLA PAC. BASIN L.J.* 29, 56-59 (2003).

<sup>8</sup> Administration of Islamic Law (Federal Territories) Act 1993, Act No. 505 of 1993.

<sup>9</sup> Kaedah-Kaedah Peguam Syarie [Peguam Syarie Rules], P.U. (A) 408 of 1993 (made pursuant to Administration of Islamic Law (Federal Territories) Act 1993, Act No. 505 of 1993, §§59(2), 99).

Sarawak) in accordance with the Legal Profession Act 1976.<sup>10</sup> As will be explained below, lawyers who hold practicing certificates in both the civil and Syariah systems will be subject to the regulatory schemes of each jurisdiction.<sup>11</sup>

### III. WHAT ARE THE FORMAL REQUIREMENTS TO PRACTICE BEFORE ISLAMIC COURTS ?

The Administration of Islamic Law (Federal Territories) Act 1993 provides in section 59(1) that the Majlis Agama Islam Wilayah Persekutuan (MAIWP or “Majlis”)—a statutory council established to advise the executive on Islamic matters<sup>12</sup>—“may admit any person having sufficient knowledge of Islamic Law to be *peguam syarie* to represent parties in any proceedings before the Syariah Court” and that the Majlis may make rules regarding qualification, admission, regulation, control and supervision of *peguam syarie*.<sup>13</sup> The Majlis has a special committee for that purpose.<sup>14</sup> This provision is typical of those contained in the various state-level Administration of Islamic Law Enactments.<sup>15</sup> Until rules regulating *peguam syarie* were made in each jurisdiction, it was possible for advocates and solicitors<sup>16</sup> to be given letters of appointment (*wakalah*) by the Majlis without further requirement for Syariah study or qualifications, as long as

<sup>10</sup> Legal Profession Act 1976, Act No. 166 of 1976.

<sup>11</sup> Dr. Wan Azhar bin Wan Ahmad, *Non-Muslim Syarie Lawyers*, INSTITUTE OF MUSLIM UNDERSTANDING MALAYSIA (Aug. 6, 2010), [http://www.ikim.gov.my/v5/index.php/v5/index.php?lg=1&pt=com\\_article&grp=2&sec=&key=2099&cmd=resetall](http://www.ikim.gov.my/v5/index.php/v5/index.php?lg=1&pt=com_article&grp=2&sec=&key=2099&cmd=resetall).

<sup>12</sup> The Majlis Agama Islam Wilayah Persekutuan [Religious Affairs Council of the Federal Territories] is established under section 4 of the Act to advise the King (*Yang di-Pertuan Agong*) on “matters relating to the religion of Islam.” Administration of Islamic Law (Federal Territories) Act 1993, Act No. 505 of 1993, §4. It is a body corporate having perpetual succession. Administration of Islamic Law (Federal Territories) Act 1993, Act No. 505 of 1993, §5.

<sup>13</sup> The Act further specifies that, with certain exceptions, only a duly admitted *peguam syarie* may appear in a Syariah Court. Administration of Islamic Law (Federal Territories) Act 1993, Act No. 505 of 1993, §59(2). The exception in section 59(3) is for a member of the Judicial and Legal Service, or someone appointed under the Legal Aid Act 1971, who has the permission of the *Majlis*. Legal Aid Act 1971, Act No.26 of 1971. Since members of the Judicial and Legal Service are now legally qualified, the exception is unlikely to dilute the standard.

<sup>14</sup> Jawatankuasa Peguam Syarie (Syariah Lawyer Committee), established under section 6 of the Act. Administration of Islamic Law (Federal Territories) Act 1993, Act No. 505 (1993), §6. For more information on this body, see *Jawatankuasa MAIWP*, MAJLIS AGAMA ISLAM WILAYAH PERSEKUTUAN, <http://www.maiwp.gov.my/index.php/maklumat-korporat-mainmenu-38/jawatankuasa-mainmenu-41.html> (last visited Nov. 18, 2011).

<sup>15</sup> See Administration of the Religion of Islam (State of Selangor) Enactment 2003, §80; Kaedah-Kaedah Peguam Syarie [Peguam Syarie Rules] P.U. 23 of 2008, rule 3 (Selangor) (establishing the committee).

<sup>16</sup> That is, members of the Malaysian Bar who possessed LL.B. qualifications and were duly admitted to practice in the civil courts.

some Syariah awareness of could be demonstrated.<sup>17</sup> With the passage of relevant rules in each jurisdiction from the mid-1980s, qualifications and admission procedures have been particularized in a manner that both raises the requirement for specific and relevant Islamic legal knowledge and disqualifies non-Muslims from being granted practicing certificates (*sijil*) in many jurisdictions.<sup>18</sup>

Hence, Rule 10 of the Federal Territories Peguam Syarie Rules specifies that to qualify for admission, an applicant must be a Malaysian Muslim citizen of at least twenty-one years of age who has also obtained a Bachelor of Syariah from a recognized tertiary institution.<sup>19</sup> Alternatively, an applicant may be a Muslim member of the judicial and legal service, a Muslim advocate and solicitor enrolled under the Legal Profession Act 1976 (i.e., a registered common law practitioner with an LL.B.),<sup>20</sup> or someone who has served as a Syariah judge with any Malaysian state for not less than seven years.<sup>21</sup> In addition, the applicant must be of “good behavior,” never been convicted of any criminal offence or declared bankrupt, and, if an advocate and solicitor, also have passed the Sijil Peguam Syarie examination specified in Rule 7.<sup>22</sup> It appears that the additional written Syariah examination is only necessary for LL.B. qualified advocates and solicitors who seek admission as *peguam syarie* on the basis of further Syariah study, whereas other candidates may be admitted without the need to sit for such a written examination.<sup>23</sup> In this respect, the Federal Territories is less strict than neighboring Selangor, where all applicants are required to sit a written exam, an interview, or both, as specified by the Committee. Selangor candidates are also required to serve a nine-month period of pupillage under the supervision of an established Syariah legal firm.<sup>24</sup>

Law schools at the International Islamic University of Malaysia, University of Malaya, Islamic Science University of Malaysia, National University of Malaysia (Universiti Kebangsaan Malaysia), and University

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<sup>17</sup> Although there is also evidence that it could be difficult to obtain such permission. See Zubaidah, *supra* note 1; Horowitz, *supra* note 1, at 262; cf. Zaid Ibrahim, *Letter to the Bar Council*, Apr. 10, 1982, XV INSAF: THE NEWSL. OF THE BAR COUNCIL, no. 1 (Malaysian Bar Council, Malaysia), Apr. 1982, at 58-60.

<sup>18</sup> For more information on admission procedures, see *Admission Requirements*, MALAYSIAN BAR (Apr. 30, 1998), [http://www.malaysianbar.org.my/admission\\_requirements.html](http://www.malaysianbar.org.my/admission_requirements.html).

<sup>19</sup> Kaedah-Kaedah Peguam Syarie [Peguam Syarie Rules], P.U. (A) 408 of 1993, rule 10.

<sup>20</sup> A Bachelor of Laws (LL.B., Legum Baccalaureus) is the undergraduate law degree recognized in common law jurisdictions. It is functionally similar to the JD.

<sup>21</sup> Kaedah-Kaedah Peguam Syarie [Peguam Syarie Rules], P.U. (A) 408 of 1993, rule 10.

<sup>22</sup> *Id.*

<sup>23</sup> FARID SUFIAN SUHAIB, POWERS AND JURISDICTION, *supra* note 1, at 526.

<sup>24</sup> Kaedah-Kaedah Peguam Syarie [Peguam Syarie Rules] P.U. 23 of 2008, rules 8(1)(e), (f), (2)(a)(iii) (Selangor).

Teknologi MARA, to name only a few of the leading tertiary institutions, offer appropriate courses.<sup>25</sup>

IV. MAY A LAWYER QUALIFIED TO PRACTICE BEFORE A CIVIL COURT PRACTICE BEFORE THE ISLAMIC COURT? MAY A LAWYER QUALIFIED TO PRACTICE BEFORE AN ISLAMIC COURT PRACTICE BEFORE A CIVIL COURT? WHO IS RESPONSIBLE FOR ESTABLISHING THE QUALIFICATIONS TO PRACTICE BEFORE ISLAMIC COURTS?

It is possible for a lawyer to practice in both the civil and Syariah courts, and there are many Malaysian lawyers with dual practicing certificates. There are, however, distinct qualification and admission regimes for civil and Syariah practitioners, and each must be satisfied.<sup>26</sup>

As explained above, the minimum academic qualification for admission to practice as a *peguam syarie* in the federal territories is a Bachelor of Syariah from a recognized university.<sup>27</sup> A candidate must then also satisfy the other specifications as to age, citizenship, religion and character.<sup>28</sup> To be qualified for practice as an advocate and solicitor before the civil court (High Court of Malaya), an applicant must satisfy the requirements set out in the Legal Profession Act 1976, specifically to possess an LL.B. from a recognized university or be admitted as a barrister-at-law in England.<sup>29</sup> As for *peguam syarie*, there are also age, nationality and character requirements for advocates and solicitors; the civil law standard, however, is not as restrictive. According to the Legal Profession Act, a person who meets the academic definition of a “qualified person” must also be at least eighteen years of age, whereas a *peguam syarie* must be at least twenty-one.<sup>30</sup> In practical terms, this distinction is meaningless as it would be impossible to obtain an LL.B. or be admitted as a barrister in England by the age of 18. Other differences are more significant. The

<sup>25</sup> For more information on these universities, see *Faculty of Syariah and Law*, UNIVERSITI SAINS ISLAM MALAYSIA, [http://www.usim.edu.my/usimweb/en/index.php?option=com\\_content&view=article&id=88&Itemid=148](http://www.usim.edu.my/usimweb/en/index.php?option=com_content&view=article&id=88&Itemid=148); *Faculty of Law*, UNIVERSITY OF MALAYA, <http://law.um.edu.my/>; *Ahmad Ibrahim Kulliyyah of Laws*, INTERNATIONAL ISLAMIC UNIVERSITY OF MALAYSIA, <http://www.iium.edu.my/aikol>; *Faculty of Law*, UNIVERSITI TEKNOLOGI MARA (UTiM), <http://law.uitm.edu.my/programmes/postgraduate/51-dlsa/75-lw601-diploma-in-Syariah-law-and-practice.html> (Diploma of Syariah Law and Practice is a one year full-time study or two years part-time study, for students who already hold LL.B. (Hons.), Bachelor of Syariah (Hons.) or Bachelor of Legal Studies (Hons.)).

<sup>26</sup> *Id.*

<sup>27</sup> See *supra* note 25 and accompanying text.

<sup>28</sup> Kaedah-Kaedah Peguam Syarie [Peguam Syarie Rules], P.U. (A) 408 of 1993, rule 10(a).

<sup>29</sup> Legal Profession Act 1976, Act No. 166 of 1976, §3 (giving the definition of “qualified person”).

<sup>30</sup> Legal Profession Act 1976, Act No. 166 of 1976, §11(1)(a); cf. Kaedah-Kaedah Peguam Syarie [Peguam Syarie Rules], P.U. (A) 408 of 1993, rule 10(b).

Peguam Syarie Rules require the applicant to be a Malaysian citizen, whereas the Legal Profession Act permits an advocate and solicitor to be a citizen or a permanent resident (and, in certain “special cases,” a foreign lawyer possessing expertise not readily available in Malaysia).<sup>31</sup> The Legal Profession Act specifies that a candidate must be “of good character,” and this is defined as not being “convicted in Malaysia or elsewhere of a criminal offence as would render him unfit to be a member of his profession, and in particular, but not limited to, an offence involving fraud or dishonesty,”<sup>32</sup> a characterization of unfitness which leaves open the possibility of admitting to civil practice an otherwise qualified person who had been convicted of a minor offence, or convicted a long time ago, or of an offence not involving dishonesty. By contrast, the Peguam Syarie Rules categorically disqualify a person convicted anywhere of “any criminal offence.”<sup>33</sup> Similarly, bankruptcy disqualifies an applicant under both regimes; but while the disqualification appears to be absolute in the Peguam Syarie Rules—an applicant must “never have been adjudged a bankrupt”—an advocate and solicitor who is discharged from bankruptcy may be eligible for admission to practice (or readmission after a period of suspension).<sup>34</sup>

The most significant difference is in relation to religion. There is no requirement for an advocate and solicitor to profess any faith at all; religion is simply irrelevant to qualification and admission to practice and the Legal Profession Act is silent on the topic.<sup>35</sup> The situation for *peguam syarie* is quite different and also becoming contentious, for while the Administration of Islamic Law Act does not specify that a *peguam syarie* must be a Muslim, and only requires demonstration of “sufficient knowledge of Islamic Law,” the Rules made pursuant to this Act stipulate that a person seeking admission must be a Muslim, and further state that an applicant who is an advocate and solicitor must be a Muslim.<sup>36</sup> The validity of this requirement<sup>36</sup> was recently at issue before the High Court, where Victoria Jayaseele Martin—a non-

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<sup>31</sup> Kaedah-Kaedah Peguam Syarie [Peguam Syarie Rules], P.U. (A) 408 of 1993, rule 10(d), *cf.* Legal Profession Act 1976, Act No. 166 of 1976, §§11(1)(c), 18. The “Special Provisions” for admission of foreign lawyers in Part IIA, sections 28A-28E were inserted by the UMNO-led government to overcome the effect of a lawyers’ boycott of criminal trials conducted under the Emergency (Security Cases) (Amendment) Regulations (ESCAR) provisions, which had suspended or made unavailable the basic due process protections for the accused. The Bar Council strenuously objected to both the erosion of basic liberties for the accused and the attack upon legal professional independence. *Editorial*, X INSAF: THE NEWSLETTER OF THE BAR COUNCIL, no. 3 (Malaysian Bar Council, Malaysia), Dec. 1977, at 1-5.

<sup>32</sup> Legal Profession Act 1976, Act No. 166 of 1976, §11(1)(b).

<sup>33</sup> Kaedah-Kaedah Peguam Syarie [Peguam Syarie Rules], P.U. (A) 408 of 1993, rule 10(c)(i).

<sup>34</sup> Kaedah-Kaedah Peguam Syarie [Peguam Syarie Rules], P.U. (A) 408 of 1993, rule 10(c)(ii); *cf.* Legal Profession Act 1976, Act No. 166 of 1976, §§11(1)(b)(ii) (read with §33(1)(f)).

<sup>35</sup> Legal Profession Act 1976, Act No. 166 of 1976.

<sup>36</sup> Kaedah-Kaedah Peguam Syarie [Peguam Syarie Rules], P.U. (A) 408 of 1993, rules 10(a)(i)-(iv).



Muslim advocate and solicitor who has obtained relevant Syariah qualifications (a Diploma of Syariah Law and Practice) from the International Islamic University—sought an order of mandamus to compel the Majlis to consider the application for admission to practice that she submitted in 2006. She also sought a declaration that the religious requirement of these statutory rules is *ultra vires* the parent Act as well as the Federal Constitutional provisions regarding liberty of the person, freedom of association and equality before the law.<sup>37</sup>

Her challenge to the validity of the Peguam Syarie Rules and the decision-making processes of the Majlis was contested by the Majlis which applied to have her application struck out for want of jurisdiction, contending that this was a question of Islamic law and as such only a Syariah court could have jurisdiction over the matter.<sup>38</sup> In March 2011, a single judge of the high court dismissed Victoria Martin's application, ruling that the Rule 10 requirement for a *peguam syarie* to be a Muslim was a valid exercise of delegated legislative power of the Majlis.<sup>39</sup> In reaching this decision, he also took judicial notice<sup>40</sup> of a *fatwa* (opinion on Islamic law) issued by the National Fatwa Committee on December 16 of the previous year, which advised against admitting non-Muslims to the practice of Syariah because, amongst other reasons, it would cause "confusion" if a non-Muslim were to manage the affairs of believers, and furthermore because non-Muslims were not subject to the jurisdiction of the Syariah courts, there would be no mechanism for Syariah courts to discipline errant non-Muslim *peguam syarie*.<sup>41</sup>

The public debate this litigation has engendered about the relevance and justice of a faith precondition for legal practice is extremely valuable evidence of the range of views about what it means to be a lawyer in both jurisdictions. Briefly, the Bar Council (the elected body which represents

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<sup>37</sup> For a brief discussion of this issue, see Amanda Whiting, *Secularism, The Islamic State and the Malaysian Legal Profession*, 5.1 ASIAN J. COMP. L. 21-23, available at <http://www.bepress.com/asjcl/vol5/iss1/art10> (2010).

<sup>38</sup> Reena Raj, *Application to Strike Out Test Case on Non-Muslim Lawyer*, MALAY MAIL (Sept. 1, 2010), <http://mmail.com.my/content/48224-application-strike-out-test-case-nonmuslim-syarie-lawyer>. Of course, as the applicant is not a Muslim, she would not have been able to apply to a Syariah Court for determination of the issue because Syariah courts only have jurisdiction over Muslims.

<sup>39</sup> Victoria Jayaseele Martin v. Majlis Agama Islam Wilayah Persekutuan & Anor [2011] 1 LNS 483. See also Irdiani Mohd Salleh, *Lawyer loses bid to practice syarie*, NEW STRAITS TIMES, March 18, 2011; Hafiz Yatim, *Non-Muslim loses bid to practise in Syariah courts*, MALAYSIKINI, March 17, 2011.

<sup>40</sup> Victoria Jayaseele Martin v. Majlis Agama Islam Wilayah Persekutuan & Anor [2011] 1 LNS 483, paras. 9, 23, 24.

<sup>41</sup> *Hukum Melantik Orang Bukan Islam Sebagai Peguam Syari'e*, PORTAL RASMI FATWA MALAYSIA, <http://www.e-fatwa.gov.my/fatwa-kebangsaan/hukum-melantik-orang-bukan-islam-sebagai-peguam-syari-e> (last visited Nov. 18, 2011) (this *fatwa* is posted in Malay at the official internet portal of the National Fatwa Committee).

and governs advocates and solicitors in peninsular Malaysia) has stated that permitting all Syariah-qualified lawyers, regardless of faith, to practice in the Syariah system will promote racial and interfaith understanding and harmony, and also uphold a litigant's constitutional right to be represented by a legal practitioner of his or her choosing.<sup>42</sup> Other lawyers, including *peguam syarie* as well as Muslim and non-Muslim advocates and solicitors, have publicly agreed, arguing that Syariah courts apply and determine questions of law, not faith, and lawyers with the appropriate technical expertise in Islamic law can and should be allowed to represent litigants in the Syariah courts. The judge who decided against Victoria Martin apparently concurs, stating *obiter*, "[t]hough personally I am inclined to agree [with counsel for the applicant] that it would have been more appropriate to allow a non-Muslim to be a *peguam syarie* in a multi-racial and multi-religious society, I am however in no position to question the choice made or the wisdom of the Majlis in accepting a given interpretation [of Islamic law]."<sup>43</sup>

Victoria Martin had argued that as the civil courts have tended to defer to the Syariah courts in questions of disputed jurisdiction, it is important to allow non-Muslims to be able to appoint a lawyer of their choice to represent them if they are to be directed to the Syariah courts.<sup>44</sup> Conversely, some Muslim legal experts insist that "law" and "faith" are inextricably linked in Islam, so that a expertise in Islamic law requires not just a technical legal knowledge but also belief in the revealed truth of Islam: "Therefore," wrote the Director of the Institute of Islamic Understanding (Institut Kefahaman Islam Malaysia or IKIM), "for a non-Muslim to become an effective syarie lawyer, he must first of all believe in all the fundamentals prescribed by Islam."<sup>45</sup> Similarly Muslim Syariah Lawyers Association president Mohamed Isa Abdul Ralip stated that a *peguam syarie* must be a Muslim

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<sup>42</sup> *Press Release: Syariah courts must embrace all lawyers*, THE MALAYSIAN BAR (June 17, 2010), [http://www.malaysianbar.org.my/press\\_statements/press\\_release\\_Syariah\\_courts\\_must\\_embrace\\_all\\_lawyers.html](http://www.malaysianbar.org.my/press_statements/press_release_Syariah_courts_must_embrace_all_lawyers.html) (last visited Nov. 18, 2011).

<sup>43</sup> *Victoria Jayaseele Martin v. Majlis Agama Islam Wilayah Persekutuan* [2011] 1 LNS 483, at para. 27; *See, e.g., Jo-Ann Ding, Who Qualifies as a Syariah Lawyer?*, THE NUT GRAPH (May 27, 2010), <http://www.thenutgraph.com/who-qualifies-as-a-Syariah-lawyer/> (last visited Nov. 18, 2011). *See also* Shanmuga K, *Non-Muslims as Syariah Loyers?*, LOYARBUROK (June 18, 2010), <http://www.loyarburok.com/2010/06/18/non-muslims-as-Syariah-loyers/> (last visited Nov. 18, 2011).

<sup>44</sup> *Non-Muslim Gets Leave in Bid to be Syariah Lawyer in FT*, MALAYSIAKINI (May 13, 2010), <http://malaysiakini.com/news/131766> (last visited Nov. 18, 2011). The lawyers interviewed by Ding Jo-Ann and K. Shanmuga disagree with this point, arguing that the Syariah Courts have no jurisdiction over non-Muslims. Ding, *supra* note 43; Shanmuga K, *supra* note 43.

<sup>45</sup> Dr. Wan Azhar Wan Ahmad, *What makes a syarie lawyer?*, THE STAR (June 8, 2010), <http://thestar.com.my/columnists/story.asp?file=/2010/6/8/columnists/ikimviews/6423588&sec=ikimviews> (last visited Nov. 18, 2011).

because Islamic legal knowledge involves study of the revealed sources of law and commentaries, and “to deal with this, they must have a belief in God.”<sup>46</sup> How can a [non-Muslim] bring a case in the Syariah Court if they don’t believe in the Qur’an and hadith?”<sup>47</sup>

Counsel for Victoria Martin had argued in the High Court that the states of Kelantan and Selangor permitted non-Muslims to be admitted as *peguam syarie*, and so a proper construction of the Federal Territories legislation should do likewise.<sup>48</sup> Perhaps as a direct result of the publicity generated by this case, the Selangor Majlis Agama Islam issued a *fatwa* in similar, though stronger, terms to that of the National Fatwa Council.<sup>49</sup> Shortly thereafter the Selangor Peguam Syarie Committee declined to renew the practicing certificate of the only non-Muslim *peguam syarie* in that state, a lawyer with tertiary qualifications in Syariah who had been in continuous, and successful, practice in the Syariah courts since 1991.

It is possible for an Islamic lawyer to be employed in a firm of advocates and solicitors, so that the same firm may handle both civil law and Syariah cases; however, Bar Council rules specify that Syariah practitioners may not be a “sole proprietor, partner, consultant or legal assistant of a law firm” unless also duly admitted as an advocate and solicitor and holding a valid annual civil practicing certificate.<sup>50</sup> Indeed the Syariah Law Subcommittee of the Bar Council (discussed further below) has consistently adopted the position that the terminology in the administration of Islamic law statutes is misleading, and that only Syariah practitioners who are also qualified and admitted as advocates and solicitors (*peguam*) should be permitted to call themselves “*peguam syarie*,” while the more restrictive term “*pengamal syariah*” (Syariah practitioner) should be used for those

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<sup>46</sup> Ding, *supra* note 43.

<sup>47</sup> *Id.*

<sup>48</sup> Victoria Jayaseele Martin v. Majlis Agama Islam Wilayah Persekutuan & Anor [2011] 1 LNS 483, para. 25.

<sup>49</sup> The *fatwa* was issued on March 16, 2011 and gazetted on March 31. See GOVERNMENT OF SELANGOR GAZETTE MARCH 31, 2011 (2011), available at [http://www.muftiselangor.gov.my/PortalFatwaSelangor/html/Download/Pewartaan/PewartaanFatwa2011/PewartaanFatwa2011\(10\).pdf](http://www.muftiselangor.gov.my/PortalFatwaSelangor/html/Download/Pewartaan/PewartaanFatwa2011/PewartaanFatwa2011(10).pdf) (last visited Nov. 18, 2011). The significant difference between the *fatwa* of the National Fatwa Committee and that of the Selangor *Majlis* is that the former takes into account the benefit of having non-Muslims practice Syariah with the greater public good in reaching a decision to exclude non-Muslims, whereas the latter does not consider any benefit that might derive from admitting non-Muslim *peguam syarie*, but rather emphasises that Muslims should only place their trust in other Muslims.

<sup>50</sup> Malaysian Bar Council Rulings, rule 15.01 (Syariah Practitioner who is not an Advocate and Solicitor), available at [http://www.malaysianbar.org.my/rulings/chapter\\_15\\_Syariah\\_practitioners\\_15.01.\\_Syariah\\_practitioner\\_who\\_is\\_not\\_an\\_advocate\\_and\\_solicitor.html](http://www.malaysianbar.org.my/rulings/chapter_15_Syariah_practitioners_15.01._Syariah_practitioner_who_is_not_an_advocate_and_solicitor.html) (last visited Nov. 18, 2011).

practitioners with only Syariah credentials.<sup>51</sup> This tussle over credentials can perhaps best be understood as a desire by the better qualified dual certified civil-Syariah lawyers to preserve the hierarchical distinction and product differentiation in the market for legal services between themselves and mere Syariah-qualified practitioners.

#### V. IS THE LICENSING OF ISLAMIC LAWYERS A STATE OR FEDERAL AUTHORITY?

As explained above, each component segment of the Federation is responsible for Syariah within that jurisdiction; hence, federal authorities are responsible for licensing Islamic lawyers within the Federal Territories. However it is the executive, not the Syariah courts or the Syariah legal profession, which exercises that authority. The Majlis Agama Islam of the Federal Territories, which is comprised of, *inter alia*, the Chief Secretary to the Government, the Attorney-General, the Inspector General of Police, the Mufti, and the Commissioner for the City of Kuala Lumpur,<sup>52</sup> has the statutory responsibility for admitting *peguam syarie* to practice in the Federal Territories, and also has the power to make any rules, procedures, or standards regarding qualifications, supervision or discipline.<sup>53</sup>

The Peguam Syarie Rules issue from the Majlis. Applications for admission to practice are made to the Peguam Syarie Committee of the Majlis, and that Committee maintains the roll (*daftar*) of Islamic lawyers and issues annual practicing certificates (*sijil peguam syarie annual*).<sup>54</sup> In contrast, advocates and solicitors are admitted through enrollment by the High Court. Practicing certificates are issued by the representative body of the profession itself, the Bar Council, and discipline for breaches of the Legal Profession Act or any of the Bar Council's Rules is imposed by the Advocates and Solicitors Disciplinary Board, which is comprised of representatives of the profession.<sup>55</sup> In other words, a strong separation of

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<sup>51</sup> See, e.g., *Report of Syariah and Hudud Laws Committee*, 1995 MALAYSIAN BAR COUNCIL ANNUAL REPORT—ANNUAL GENERAL MEETING 42; *Report of the Syariah Laws Committee*, 2001 MALAYSIAN BAR COUNCIL ANNUAL REPORT—ANNUAL GENERAL MEETING 29-30.

<sup>52</sup> Administration of Islamic Law (Federal Territories) Act 1993, Act No. 505 of 1993, §10. Other members are a Chairman and Deputy Chairman and fifteen others, at least five of whom must be “learned in Islamic studies”; if any of the other required members are not Muslims, then the next most senior Muslim person from the same department or ministry must be appointed instead. *Id.*

<sup>53</sup> Administration of Islamic Law (Federal Territories) Act 1993, Act No. 505 of 1993, §59.

<sup>54</sup> Kaedah-Kaedah Peguam Syarie [Peguam Syarie Rules], P.U. (A) 408 of 1993, preamble, rules 11, 13, 14, 25 (Federal Territories) (rule 11 is the application for admission, rule 13 is the issue of *sijil*, rule 14 is on roll, and rule 25 is the renewal of *sijil*).

<sup>55</sup> Legal Profession Act 1976, Act No. 166 of 1976, §§28, 31, 32, 93-111.

powers doctrine operates in the civil system, but is notably absent in the way that lawyers are regulated in the Syariah system.

Yet, the power to regulate lawyers sits oddly with the way that the authority of the Majlis is described in section 31 of the Administration of Islamic Law (Federal Territories) Act, which provides that “the Majlis shall aid and advise the Yang di-Pertuan Agong in respect of all matters relating to the religion of Islam within the Federal Territories, except matters of Islamic Law and those relating to the administration of justice.”<sup>56</sup> Logically, it seems only possible to reconcile section 31, prohibiting the Majlis from dealing with Islamic law and the administration of Islamic justice, with section 59 and the Peguam Syarie Rules, empowering it to regulate Islamic lawyers, if *peguam syarie* are considered an aspect of “religion” and not “law” or “the administration of justice.”<sup>57</sup> This conceptualization perhaps also explains the readiness with which some Islamic legal experts insist upon faith in Islam as an essential requirement for proper Islamic legal practice.

As there is no national Syariah system of justice, *peguam syarie* must be separately admitted in each jurisdiction. The variation in qualifications, administrative requirements (including fees), and procedures for admission to practice between the Syariah jurisdictions is a cause for considerable dissatisfaction amongst Islamic lawyers and jurists, and there is pressure for a uniform, national set of standards and procedures.<sup>58</sup> Of course these regional variations in legal practice accreditation, admission standards, and procedures, and disciplinary regimes are commonplace in other federal systems, such as the United States, Canada, or Australia. Perhaps the lower level of tolerance in Malaysia is grounded in practical awareness of the contrastingly streamlined, uniform national legal system and unified Bar for civil lawyers, an enviable standard which is all too familiar to dual-certificated lawyers.

## VI. WHAT PROPORTION OF LITIGANTS ARE REPRESENTED BY A LAWYER?

Until recently, there was little role for lawyers in Malaysian Syariah courts, and research suggests that people appearing before the lower Syariah courts, and in rural areas, were rarely represented. The role of a Syariah judge (“*kadi*” or “*qadi*”) was to facilitate mediation of family law matters, or to conduct an investigation that resembled an inquisitorial, rather than adversarial, process, and legal representation was not deemed necessary.

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<sup>56</sup> Administration of Islamic Law (Federal Territories) Act 1993, Act No. 505 of 1993, §31.

<sup>57</sup> Kaedah-Kaedah Peguam Syarie [Peguam Syarie Rules], P.U. (A) 408 of 1993, §59.

<sup>58</sup> See, e.g., FARID SUFIAN SHUAIB, POWERS AND JURISDICTION, *supra* note 1, at 544-51. Interviews with several *peguam syarie* conducted in mid-2010 confirmed this sense of frustration.

Nor could most people afford it.<sup>59</sup> The increase in Syariah lawyer numbers and their growing involvement in criminal and civil litigation is related to three factors: the expansion of the Malay middle class, and hence the increased value of assets at stake in family law or deceased-estate litigation, the modernization of the Syariah system since the 1980s, which has entailed the establishment of more tertiary courses to train more graduates as Syariah lawyers and judges, and an increased awareness of legal rights amongst the Muslim community, especially in urban areas, contributing to an increased demand for Syariah legal services.<sup>60</sup>

Yet, despite the growth in *peguam syarie* numbers and increased demand for their services, anecdotal evidence suggests that currently as many as seventy percent of Syariah court litigants in Malaysia are unrepresented.<sup>61</sup> This figure may be striking, but it is not unique to the Syariah system, as it appears that up to eighty percent of litigants in the civil subordinate courts (again, for the peninsula) are also unrepresented.<sup>62</sup>

Syariah lawyers, as well as their critics, have suggested that postponements and delays—which cause financial and emotional distress to all litigants—are directly related to a shortage of Syariah court personnel at all levels, including but not limited to Syariah lawyers and judges.<sup>63</sup> The inexperience or poor training of judges and lawyers causes even further unnecessary delay.<sup>64</sup> Conversely, a litigant's desire to represent herself and avoid unsympathetic or unaffordable legal representation is also a factor. Research conducted by the women's advocacy group Sisters in Islam has

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<sup>59</sup> See, e.g., SHARIFAH ZALEHA SYED HASSAN & SVEN CEDERROTH, *MANAGING MARITAL DISPUTES IN MALAYSIA: ISLAMIC MEDIATORS AND CONFLICT RESOLUTION IN THE SYARIAH COURTS* 81-82 (Nordic Inst. of Asian Studies Monograph Ser., No. 75, 1997); PELETZ, *supra* note 1, at 74.

<sup>60</sup> See PELETZ, *supra* note 1, at 74. Islamic lawyers interviewed for this research in Kuala Lumpur, Selangor and Penang in mid-2010 agreed with these factors. Peletz further observes that women's advocacy groups such as Sisters in Islam encourage women to become aware of their legal rights, and that this in turn probably encourages them to seek formal legal representation. *Id.*

<sup>61</sup> Sonia Ramachandran, *Expanding Reach of Legal Aid*, NEW STRAITS TIMES (Sept. 19, 2009), <http://www.nst.com.my/nst/articles/19ragu/Article/>.

<sup>62</sup> *Id.* (quoting Bar Council President Ragnath Kesavan, saying that the Prime Minister was "shocked by the fact that about 80 percent of those charged in the magistrate's courts for criminal cases were unrepresented").

<sup>63</sup> Press Statement, Sisters in Islam, *Delays in Divorce Cases* (Aug. 24, 2001) *available at* <http://sistersinislam.org.my/print.php?news.830>.

<sup>64</sup> See, e.g., Ainawati Husin, *Family Cases Should be Speeded Up to Avoid Emotional Distress—Lawyers Clear Backlog*, THE SUN, Sept. 21, 2001, at 14 (citing opinions of Women Lawyers' Association of Malaysian President K. Rasamani, Syariah lawyer Dr Mohd Radzuan Ibrahim, and Muslim Lawyers' Association president Datin Zaitoon Othman); Memorandum from Sisters in Islam to the Government of Malaysia (Mar. 1997), *available at* <http://www.sistersinislam.org.my/news.php?item.33.8>; *Report of the Syariah laws subcommittee*, 2002 MALAYSIAN BAR COUNCIL ANNUAL REPORT—ANNUAL GENERAL MEETING 141-42 (noting, among other things, that court procedures are unclear and many female litigants in family law matters lodge papers with the wrong division).

found evidence that Syariah courts sometimes postpone divorce proceedings initiated by wives because the women are unrepresented, even though there is no requirement for litigants to engage Syariah lawyers. They have also uncovered many instances where Syariah lawyers resist their female clients' clear instructions to file for divorce, appearing to side with the husbands by counseling reconciliation.<sup>65</sup> Clearly, there is a need for more systematic study of developing dynamics of relationships between Islamic lawyers and their clients in Malaysia's Syariah courts .

Free legal assistance provided by the Bar Council's long-standing Legal Aid program fills some of the gaps. For example, and specifically in relation to the Federal Territory of Kuala Lumpur, the Bar Council's Legal Aid Centre (Kuala Lumpur office), which provides free advice and representation to people who satisfy the means test, runs a Syariah clinic during business hours, five days a week from the Bar Council premises near the Central Market Complex.<sup>66</sup> The clinic is staffed by pupils (LL.B. graduates serving their period of pupillage or apprenticeship prior to full admission to legal practice) who are supervised by qualified practitioners who volunteer their time and expertise.<sup>67</sup> Members of the Bar Council's Syariah Committee and experienced Syariah lawyers regularly volunteer their time. In 2009, the Syariah clinic saw 141 Syariah clients (out of a total of 19,328 legal aid clients, including prisoners and clients handled in partnership with NGOs and the United Nations High Commission for Refugees).<sup>68</sup> To get a fuller picture of Syariah legal advice or legal awareness, we should also take into account the additional 755 clients Kuala Lumpur Legal Aid dealt with through the legal clinic run by the Sisters in Islam.<sup>69</sup>

## VII. DO PERSONS WHO ARE NOT LICENSED TO PRACTICE LAW PROVIDE SERVICES TO LITIGANTS IN ISLAMIC COURTS?

Legal direction and advice is often given to litigants by court personnel who are not licensed to practice law as *peguam syarie*, but whose

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<sup>65</sup> Sisters in Islam, *supra* note 64; Memorandum from Sisters in Islam to the Government of Malaysia, *supra* note 64.

<sup>66</sup> *Legal Aid Help*, KUALA LUMPUR LEGAL AID CENTRE, <http://www.kllac.com/LegalAidHelp.html> (last visited Nov. 18, 2011).

<sup>67</sup> *Programs*, KUALA LUMPUR LEGAL AID CENTRE, <http://www.kllac.com/Programs.html> (last visited Nov. 18, 2011).

<sup>68</sup> *Report of the Bar Council Legal Aid Centre, 2009 KUALA LUMPUR BAR—ANNUAL GENERAL MEETING 57.*

<sup>69</sup> *Id.* at 57, 61. Figures for earlier years are as follows: for 2008, 130 Syariah clients and 665 SIS clients out of a total of 16,572, and for 2007, 129 Syariah clients and 673 SIS clients out of a total of 15,105.

appointed role in the administration of Islamic law empowers them to offer legal advice or other legal services. These legal actors may have significant Syariah knowledge, or even formal Syariah qualifications, but not be licensed practitioners.

Legal anthropological research conducted in Malaysian Syariah courts in the 1980s and 1990s found considerable flexibility in the way the various Syariah personnel interpreted their roles, and this fluidity of function is one explanation of how legal services are provided by non-lawyers. These detailed, but now dated, observations and analyses of the behavior of court-appointed marriage counselors, arbitrators, and judges in handling marriage disputes concluded that “although in theory the counselor may resort to conciliation, the *kadi* to arbitration and the judge to adjudication, in reality these remedy agents can opt for other techniques of dispute settlement originally not associated with them.”<sup>70</sup> Thus, the counselor often suggests solutions and so turns conciliation into mediation; the *kadi* who is supposed to arbitrate often “assists individuals to arrive at a consensus;” and the judge “despite the formality and procedural rigor that typify court proceedings . . . occasionally encourages litigants to work out compromises in the courtroom or the privacy of his own office” so that “what appears as an adjudicative decision . . . in actual fact is a negotiated settlement.”<sup>71</sup>

These days, marriage counselors or “reconciliation officers” are often highly qualified, holding the same diplomas or degrees in Syariah as candidates for Syariah judicial office.<sup>72</sup> *Sulh* mediation became a compulsory first stage in all non-criminal Syariah litigation in the Federal Territories in 2005, and since then, parties who register disputes must meet with a Syariah-qualified *sulh* officer to attempt settlement.<sup>73</sup> The *sulh* officer (who possesses the same qualifications as the “reconciliation officer”) is required to explain Islamic law to the parties so that they can frame their dispute and resolve their conflict within an Islamic legal framework, and also to ensure that the settlement does not contain terms that contravene

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<sup>70</sup> SHARIFAH & CEDERROTH, *supra* note 59.

<sup>71</sup> *Id.* at 4-5 (summarizing the conclusions of the book); *see also* PELETZ, *supra* note 1 (finding a similar intermingling of roles in the 1980s and early 1990s).

<sup>72</sup> *Report of the Syariah Law Committee*, 2007 MALAYSIAN BAR COUNCIL ANN. REPORT—ANNUAL GENERAL MEETING 176 (pointing out that there was no good reason for the refusal of the *Majlis* to appoint female Syariah judges, when female reconciliation officers all possessed the requisite qualifications and considerable relevant experience).

<sup>73</sup> Syariah Court Civil Procedure (Sulh) Rules 2004, P.U. (A) 018 of 2004 (Federal Territories). The similar procedures in neighbouring Selangor are examined in considerable detail in, Su'aida bt Safei, *Majlis Sulh (Islamic Mediation) in the Selangor Syariah Court and Malaysian Mediation Centre of the Bar Council: A Comparative Study*, 5 MLJ 83 (2009).



Islamic law.<sup>74</sup> Parties may only involve their respective *peguam syarie* at the stage when a settlement agreement has been drafted, but will be advised by the *sulh* officer not to be influenced by their lawyers to alter the agreement in any way.<sup>75</sup> Parties are not legally obliged to agree to the settlement draw up by the *sulh* officer and may elect to proceed to trial.<sup>76</sup> Nevertheless they may face considerable pressure from *sulh* officers to settle out of court, on the basis that reconciliation rather than conflict is the preferred Islamic way. In addition, women's advocacy groups have observed that women seeking divorce, child custody, or maintenance are sometimes prevented from accessing their legal rights by constant delays and persuasion to resolve the matter amicably.<sup>77</sup>

At the same time, it must be noted that Muslim lawyers (in both the civil and Syariah systems) who were interviewed during this research expressed great personal and professional satisfaction with their successes in persuading clients to mediate or reconcile rather than engage in an adversarial contest. These lawyers variously described their roles as like a counselor, a preacher, or a fellow Muslim guiding a Muslim brother or sister to the correct path, although none of them had backed away from a full-blown court contest if that is what the client finally wanted.<sup>78</sup> Admittedly these few interviews cannot be taken as representative of the body of Muslim lawyers in Malaysia, let alone the more densely lawyer-infested and litigious Federal Territories. However they do suggest a line of inquiry worthy of further study, i.e., how do Muslim lawyers understand their role as legal advisors and as advocates in court, and how do their religious values interact with their professional ethical standards?

#### VIII. WHAT ARE THE PROCEDURES FOR LICENSING AND ADMISSION TO PRACTICE BEFORE THE ISLAMIC COURTS?

The Federal Territories Majlis has the responsibility to license and admit practitioners, and it has delegated this duty to its *Peguan Syariah*

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<sup>74</sup> FEDERAL TERRITORY SYARIAH COURT, *SULH PROCEDURE MANUAL* ch. 8. The Manual is reproduced on the Official Website of the Federal Territory Syariah Court, where *sulh* procedure is also explained in some detail. For more information, see OFFICIAL WEBSITE OF FEDERAL TERRITORY SYARIAH COURT, <http://www.mswp.gov.my/en/main.php?Content=sections&SectionID=1> (last visited Nov. 18, 2011).

<sup>75</sup> *SULH PROCEDURE MANUAL*, *supra* note 74, ch. 8.

<sup>76</sup> *Id.*

<sup>77</sup> Press Statement, Sisters in Islam, *supra* note 63; see also Memorandum from Sisters in Islam to the Gov't of Malay., *supra* note 64.

<sup>78</sup> Interviews with lawyers, anonymous, in Kuala Lumpur (May 15, 2010; July 29, 2010), Selangor (July 29, 2010), and Penang (Aug. 3, 2010; Aug. 4, 2010).

Committee, which also prepares and administers any further examination.<sup>79</sup> The Committee is comprised of the Chief Syariah Judge, the Attorney General, the Chief Syariah Prosecutor, two other persons appointed by the Majlis and the Registrar of the Syariah High Court, and members hold office for a term of three years.<sup>80</sup>

Qualified applicants use the standard-form application stipulated in the rules,<sup>81</sup> which is also now available online.<sup>82</sup> Practicing certificates can also now be renewed online using a standard form.<sup>83</sup> Applicants for admission and practicing certificates must declare that they satisfy the requisite age, nationality, religion and character standards, and attach proof of qualifications. As there is no requirement for pupillage in the Federal Territories, applicants do not have to submit a testimonial that the period of practical training has been satisfactorily completed. A small fee of ten ringgit is payable in the Federal Territories for admission, and a larger, but still modest, fee of 100 ringgit is charged for renewal of the annual practicing certificate.<sup>84</sup> The roll (*daftar*) of *peguam syarie* is a public document, which may be searched for free by any member of the public; it is maintained by the Secretary of the Committee, who is also the Registrar of the Syariah High Court.<sup>85</sup> Applicants who are refused admission or issue of a *sijil* may appeal from the Committee's decision to the Majlis, but the decision of the Majlis is final, and there is no recourse to the Syariah courts for judicial review. Of course the question whether an aggrieved applicant may seek judicial review in the civil courts is, in part, a jurisdictional question involving issues of constitutional interpretation.<sup>86</sup> Victoria Martin's case, referred to above, tested precisely these issues.

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<sup>79</sup> Administration of Islamic Law (Federal Territories) Act 1993, Act No. 505 of 1993, §§59(1)-(4); Kaedah-Kaedah Peguam Syarie [Peguam Syarie Rules], P.U. (A) 408 of 1993, rule 7 (Functions of the Committee).

<sup>80</sup> Kaedah-Kaedah Peguam Syarie [Peguam Syarie Rules], P.U. (A) 408 of 1993, rule 4.

<sup>81</sup> *Id.* Schedule, Form A.

<sup>82</sup> The online application form, which is actually administered by the federal Office of Syariah Judiciary, is available at, <http://www2.eSyariah.gov.my/eSyariah/mal/sppsv1/permohonanspps.nsf/ppohon?openform>. However, admission is still one state at a time.

<sup>83</sup> This form is also available from the federal Office of Syariah Judiciary webpage, <http://www2.eSyariah.gov.my/eSyariah/mal/sppsv1/permohonanspps.nsf/pbaharu?openform>. The form for the Federal Territories is scheduled to the rules as Form B.

<sup>84</sup> Kaedah-Kaedah Peguam Syarie [Peguam Syarie Rules], P.U. (A) 408 of 1993, rules 11, 25 (rule 11 is the application and fee for admission; rule 25 is renewal of *Sijili*). By contrast, the *sijil* fee in Selangor is 500 ringgit. Kaedah-Kaedah Peguam Syarie [Peguam Syarie Rules], P.U. 23 of 2008, rule 13(3) (Selangor).

<sup>85</sup> Kaedah-Kaedah Peguam Syarie [Peguam Syarie Rules], P.U. (A) 408 of 1993, rule 14.

<sup>86</sup> Particularly on the meaning of Federal Constitution article 121(1A), which ousts the jurisdiction of civil courts over Syariah matters, but which arguably cannot prevent the civil courts determining the constitutionality of state and federal Syariah legislation, see Li-ann Thio, *Jurisdictional Imbroglia: Civil and Religious Courts, Turf Wars and Article 121(1A) of the Federal Constitution*, in CONSTITUTIONAL

## IX. THE ISLAMIC BAR

### A. *How Many Islamic Lawyers Are There?*

According to the Office of Syariah Judiciary (“JKSM”), there are currently 2,114 registered *peguam syarie* in the Federation. However, this figure is unlikely to be an accurate representation of the total number of persons holding Syariah practising certificates, because *peguam syarie* must be separately accredited and registered in each of the fourteen jurisdictions of the Federation (i.e., the thirteen states and the Federal Territories) where they wish to practice. Because some *peguam syarie* are certified to practice in more than one jurisdiction, the total number for Malaysia will be less than the combined totals for each separate jurisdiction. Furthermore, there may be fewer *peguam syarie* in active practice than is suggested by the number of registered practitioners, as many lawyers renew their Syariah practicing certificates annually so that they are able to take Syariah clients if the need arises, but in fact they do little or no appearance work in the Syariah courts. They may, of course, do occasional advice work on the Syariah side, while maintaining a civil practice as an advocate and solicitor.<sup>87</sup> At present, there are 262 accredited *peguam syarie* in the Federal Territories and 204 in the surrounding state of Selangor.<sup>88</sup> By comparison, at the end of 2010, there were 13,358 advocates and solicitors in peninsular Malaysia, 5,459 in the Federal Territory of Kuala Lumpur, and 2,863 in Selangor.<sup>89</sup>

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LANDMARKS IN MALAYSIA: THE FIRST 50 YEARS (1957–2007) 197-200 (Andrew Harding & HP Lee eds., 2007). In an earlier high profile case, the high court ruled that it did have jurisdiction to review a decision of the Johor Syariah Qualifying Committee not to issue a Syariah practicing certificate. *See Dates for Hearing of Bid to Quash Syariah Panel’s Decision*, NEW STRAITS TIMES, June 26, 1996 (discussing the application of Kamar Ainiyah Kamaruzaman).

<sup>87</sup> *See* Zubaidah, *supra* note 1, at cxlix (“a number of practicing Syariah lawyers have either limited the number of Syariah cases that they handle or have completely stopped handling Syariah cases and have ventured into non-Syariah litigation”). There are no publicly available figures comparing Syariah lawyers in active practice with the total number of practicing certificate holders in any jurisdiction. Lawyers interviewed for this research in Penang on August 3 and 4, 2010 suggested that, of the total number *peguam syarie* registered in that state, probably only ten were in active practice.

<sup>88</sup> LAMAN WEB RASMI JABATAN KEHAKIMAN SYARIAH MALAYSIA [OFFICIAL WEBSITE OF THE OFFICE OF SYARIAH JUDICIARY, MALAYSIA] <http://www.jksm.gov.my/> (last visited Nov. 18, 2011) [hereinafter SYARIAH LAWYER DIRECTORY] (statistics based on figures obtainable from the Carian Peguam Syarieh [Syariah lawyer search] function on the website).

<sup>89</sup> *Statistics*, MALAYSIAN BAR, [http://www.malaysianbar.org.my/legal\\_directory\\_statistics.html](http://www.malaysianbar.org.my/legal_directory_statistics.html) (last visited Nov. 18, 2011).

*B. What Is the Demographic Profile of the Islamic Bar?*

Fifty percent of accredited *peguam syarie* in the Federal Territories are women, or 131 out of a total of 262.<sup>90</sup> All have Muslim names, and thus it appears that there are no non-Muslims currently holding Syariah practicing certificates in the Federal Territories. There is no official analysis of these statistics according to ethnicity, and it is not possible to derive such figures from names alone. There is no publicly available information about age demographics.

To put the gender figures in some comparative context, the approximate portions of female *peguam syarie* in the other states are as follows: 38% in Penang (95 of a total of 248), 36% in Pahang (62 out of 173), 38% in Kelantan (98 out of 257), 35% in Melaka (51 out of 144), 54% in Johor (69 out of 128), 36% in Kedah (31 out of 85), 35% in Negri Sembilan (48 out of 138), 35% in Perak (19 out of 55), 35% in Perlis (17 out of 48), 47% in Sabah (28 out of 60), 45% in Sarawak (33 out of 74), 51% in Selangor (104 out of 204), and 40% in Terengganu (91 out of 225).<sup>91</sup> By contrast, women advocates and solicitors are 47% of the total for the peninsula (6,138 out of 13,020), and 48% for the Federal Territories (2,696 out of 5,576 for the Federal Territories, excluding Labuan, where they are 7 out of a total of 11).<sup>92</sup>

*C. What Credentials Do Islamic Advocates Have?*

There is no formal Islamic bar in Malaysia to play a role in accreditation. As discussed above, qualifications, standards, and admission procedures for Islamic advocates are regulated by the Majlis and its Peguam Syarie Committee.

*D. What Continuing Education Is Offered or Required for Islamic Court Advocates?*

In the Federal Territories, there is no formal requirement for *peguam syarie* to undertake continuing education in order to renew practicing certificates or retain accreditation, although there is an expectation that good Islamic lawyers will seek to increase legal knowledge.<sup>93</sup> In neighboring

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<sup>90</sup> SYARIAH LAWYER DIRECTORY, *supra* note 88.

<sup>91</sup> *Id.*

<sup>92</sup> These figures derived from Bar Council internal statistics for the year 2009 (copy on file with author).

<sup>93</sup> JABATAN KEHAKIMAN SYARIAH MALAYSIA [DEPARTMENT OF SYARIAH JUDICIARY], ARAHAN AMALAN NO. 4: ETIKA PEGUAM SYARIE [PRACTICE DIRECTION NO. 4: SYARIAH LAWYERS CODE OF ETHICS],

Selangor, applicants for admission as *peguam syarie* must serve a nine-month period of pupillage with a Syariah firm as a condition of admission; in other words, a form of post-tertiary apprenticeship that is identical to the admission requirements for advocates and solicitors.<sup>94</sup> However, that is the only formal continuing education requirement and it does not apply in the Federal Territories, despite the lobbying by the Bar Council's Syariah Laws Subcommittee that this would raise the proficiency and status of *peguam syarie*.<sup>95</sup>

The Malaysian Bar Council's Professional Standards and Development Committee runs regular and *ad hoc* continuing legal education programs (most importantly the compulsory ethics training course), which Syariah practitioners who are also advocates and solicitors may attend.<sup>96</sup> In particular, training in alternative dispute resolution (counseling and mediation), hosted by the Bar Council and run by private mediators from Australia, has had a considerable impact, and *peguam syarie* and other Syariah court officers have been encouraged to attend training workshops in modern mediation techniques.<sup>97</sup> Syariah officers are required to attend regular training seminars and workshops as part of their continuing professional development, where it appears to be linked bureaucratically to satisfaction of their key performance indicators. However, these sessions are not specifically targeted at *peguam syarie*.<sup>98</sup>

Over the three decades of its existence, the Muslim Lawyers Association (a voluntary organization examined below) has held many seminars and conferences to foster exchange of information amongst Muslim lawyers, and it has seen continuing professional education for lawyers as a core organizational objective. However the Association currently has few members and is not very active.<sup>99</sup>

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rule 4 (2002) (“[A] Syariah lawyer should always strive to increase knowledge of Syariah Law and legislation so that legal advocacy can be conducted more efficiently and effectively.”).

<sup>94</sup> Kaedah-Kaedah Peguam Syarie [Peguam Syarie Rules], P.U. 23 of 2008, rule 8(2) (Selangor); Legal Profession Act 1976, Act No. 166 of 1976, §§11(1)(d), 12, 13.

<sup>95</sup> *Report of the Syariah Laws Committee*, 2002 MALAYSIAN BAR COUNCIL ANNUAL REPORT—ANNUAL GENERAL MEETING 30.

<sup>96</sup> For more information on the Professional Standards and Development Committee, see MALAYSIAN BAR, PROFESSIONAL STANDARDS AND DEVELOPMENT COMMITTEE, 2010/2011 ANNUAL REPORT, available at [http://www.malaysianbar.org.my/professional\\_standards\\_and\\_development/professional\\_standards\\_and\\_development\\_committee\\_2010/2011\\_annual\\_report.html](http://www.malaysianbar.org.my/professional_standards_and_development/professional_standards_and_development_committee_2010/2011_annual_report.html) (last visited Nov. 18, 2011).

<sup>97</sup> Interviews with lawyers, anonymous, in Kuala Lumpur (July 29, 2010); Interviews with lawyers, anonymous, in Selangor (July 29, 2010).

<sup>98</sup> For information on current training and professional development, see OFFICIAL WEBSITE OF FEDERAL TERRITORY SYARIAH COURT, <http://www.mswp.gov.my/en/main/php> (last visited Nov. 18, 2011).

<sup>99</sup> Interviews with Muslim lawyers, anonymous, in Kuala Lumpur (July 29, 2010); Interviews with Muslim lawyers, anonymous, in Selangor (July 29, 2010); Interviews with Muslim lawyers, anonymous, in Penang (August 3-4, 2010).

*E. How Are Islamic Advocates Regulated and What Are the Mechanisms for Discipline?*

Advocates and solicitors in Malaysia are regulated in accordance with standards propounded by their own profession. The Malaysian Bar, comprised of all advocates and solicitors possessing valid annual practicing certificates,<sup>100</sup> was involved in the drafting of its own governing statute, the Legal Profession Act 1976, and is governed by a Bar Council democratically elected by an annual poll of all members.<sup>101</sup> Annual practicing certificates (*sijil annual*) are issued by the Bar Council upon receipt of the necessary paperwork and payment of the requisite fee,<sup>102</sup> and the Bar Council is empowered to make statutory rules and *ad hoc* rulings on practice and etiquette.<sup>103</sup> Importantly, the Bar has a principal role in disciplining its own members: the Advocates and Solicitors Disciplinary Board, before which errant lawyers are brought, is comprised of members of the legal profession, and breach of Bar Council Rules and *ad hoc* rulings can be “misconduct” for the purposes of a disciplinary hearing.<sup>104</sup> Because all practicing advocates and solicitors are deemed members of the Malaysian Bar and subject to its authority, it follows that lawyers who hold dual civil and Syariah practicing certificates will be members of the Malaysian Bar and subject to the discipline of the Bar Council with respect to their civil practice. Furthermore, the Bar Council has ruled that Syariah practitioners who are also advocates and solicitors are subject to Bar Council rulings with respect to their Syariah practice.<sup>105</sup>

By contrast, there is no national or state-based representative association of Syariah lawyers that could carry out any of these responsibilities of self-government and internal regulation. Rather, *peguam syarie qua peguam syarie* are supervised and disciplined by the executive, as they are subject to the control, supervision and discipline of the Peguam Syarie Committee of the Majlis. Furthermore, there is no formal

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<sup>100</sup> Legal Profession Act 1976, Act No. 166 of 1976, §§3, 43.

<sup>101</sup> Legal Profession Act 1976, Act No. 166 of 1976, §§ 49-53.

<sup>102</sup> Legal Profession Act 1976, Act No. 166 of 1976, §32.

<sup>103</sup> See, e.g., *Legal Profession (Practice and Etiquette) Rules 1978*, MALAYSIAN BAR, available at [http://www.malaysianbar.org.my/legal\\_profession\\_practice\\_etiquette\\_rules\\_1978/](http://www.malaysianbar.org.my/legal_profession_practice_etiquette_rules_1978/) (last visited Nov. 18, 2011); *Legal Profession (Publicity) Rules 2001*, THE MALAYSIAN BAR, available at [http://www.malaysianbar.org.my/legal\\_profession\\_publicity\\_rules\\_2001/](http://www.malaysianbar.org.my/legal_profession_publicity_rules_2001/) (last visited Oct. 30, 2011). For other rules and *ad hoc* Malaysian Bar Council rulings, see THE MALAYSIAN BAR, [www.malaysianbar.org.my/governing\\_laws/](http://www.malaysianbar.org.my/governing_laws/) (last visited Nov. 18, 2011).

<sup>104</sup> Legal Profession Act 1976, Act No. 166 of 1976, §94.

<sup>105</sup> *Application to Syariah Practitioners 15.02*, MALAYSIAN BAR, [http://www.malaysianbar.org.my/rulings/15.02.application\\_to\\_Syariah\\_practitioners.html](http://www.malaysianbar.org.my/rulings/15.02.application_to_Syariah_practitioners.html) (last visited Nov. 18, 2011).

requirement for any member of that Committee to be a *peguam syarie*.<sup>106</sup> A *peguam syarie* may appeal from the decision of the Committee to the Majlis—as may the complainant—and the Majlis’ decision is final.

Conduct for which a *peguam syarie* may be censured, suspended, or removed from the register of practitioners is not tightly defined in the *Peguan Syarie* Rules, allowing the Committee a considerable degree of latitude in identifying a disciplinary offence. Rule 17 states that a *peguam syarie* may be disciplined for conduct including: being convicted of a criminal offence, being found guilty of a breach of trust or fraudulent conduct, conduct which amounts to touting for business or offering a commission as an inducement for being retained, for allowing subordinates to conduct unsupervised legal business in the practitioner’s name, for carrying on any trade or business “which, in the opinion of the Committee is incompatible with his position as a *peguam syarie*,” or for contravening or failing to comply with any of the provisions of the Rules (including practicing without a valid practicing certificate).<sup>107</sup> Additionally, a Syariah lawyer may be disciplined for “conduct otherwise unbefitting a *peguam syarie*,” an offense which is not dissimilar to the misconduct offense for Malaysian civil lawyers of “being guilty of any conduct which is unbefitting of an advocate and solicitor or which brings or is calculated to bring the legal profession into disrepute.” Indeed, Rule 17 of the Federal Territories Peguan Syarie Rules is in many places a direct borrowing from the definition of professional misconduct in section 94(3) of the Legal Profession Act.<sup>108</sup>

By contrast, when comparing the disciplinary rules of the Federal Territories with the disciplinary provisions of the adjacent state of Selangor, Selangor is considerably more prescriptive and authoritarian in nature. Specifically, the State of Selangor’s Peguan Syarie Enactment 2008 permits the Majlis Agama Islam to take action against an Islamic lawyer whose conduct is not consistent with the law of Islam (*hukum Syarak*) or whose statement could bring the religion of Islam into contempt. Some commentators have speculated that such conduct could include where a *peguam syarie* represents or gives advice to an apostate, or where a female

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<sup>106</sup> Legal Profession Act 1976, Act No. 166 of 1976, §§3, 4, 17 (the Committee is established by Rule 3 and comprises the Chief Syariah Judge, the Attorney General, the Chief Syariah Prosecutor, two other persons appointed by the Majlis, and the Registrar of the Syariah High Court). Moreover, unlike civil court judges, Syariah judicial officers are never chosen from amongst a pool of legal practitioners, i.e., there is no Syariah career path from bar to bench, so Syariah judges have no direct experience of independent legal practice.

<sup>107</sup> Kaedah-Kaedah Peguan Syarie [Peguan Syarie Rules], P.U. (A) 408 of 1993, rule 17.

<sup>108</sup> *Id.*

*peguam syarie* appears in a Syariah court without adequate covering of Islamic “modest dress.”<sup>109</sup> Significantly, the Selangor non-Muslim *peguam syarie* whose practicing certificate was not renewed in 2011 on faith grounds (referred to above) had been legal counsel in a well-publicized apostasy case.<sup>110</sup> On the other hand, the Selangor rules provide a greater assurance of procedural fairness to a *peguam syarie* who is the subject of a public complaint or under investigation for misconduct, as they specify that the lawyer must be furnished with a written notice setting out the substance of the complaint, and be given sufficient notice of the hearing and a “reasonable opportunity to be heard” in defense.<sup>111</sup>

*F. Is There a Code of Ethics for Islamic Advocates?*

A Syariah Lawyers Code of Ethics was developed by the Department of Syariah Judiciary (“JKSM”) and was published 2002.<sup>112</sup> It is expressed to apply to all Syariah lawyers and prosecutors nationally. It did not emanate from the Islamic legal profession, but rather from a federal government agency. This is in marked contrast to the ethical rules for the civil law profession, which issue from the Bar Council. Muslim lawyers had lobbied for a Syariah practitioners code of ethics for some time before one was finally drafted. A joint committee of the Bar Council’s Syariah Laws Subcommittee, the Muslim Lawyers Association, and the *Peguan Syarie* Association (“PGSM”) met several times in 2003 to comment upon the JKSM Code and to propose revisions and refinements. Then the Bar Council’s subcommittee continued to consider the Code over the next few years.

In essence, the *Peguan Syarie* Ethics Code produced by JKSM was a modified and simplified version of the Bar Council’s Legal Profession (Practice and Etiquette) Rules 1978 (“LPPER”) and it had to be further modified to take into account the modern publicity (i.e., advertising) rules

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<sup>109</sup> FARID SUFIAN SHUAIB, POWERS AND JURISDICTION, *supra* note 1, at 539.

<sup>110</sup> The case of Nyonya Tahir (unreported, Negri Sembilan Syariah Court, January 23, 2006) concerns an 89-year-old woman who was raised and always lived as a Buddhist. However, because her grandmother was married to a Chinese man who later converted to Islam, she was recorded as a Muslim. Her Chinese Buddhist children and grandchildren applied to the Syariah court for a declaration that she had never lived as a Muslim so that she could be given a Buddhist burial. Media reports of the case include *MCA akan kemuka bukti status agama nyonya Tahir [The Malaysian Chinese Association will Submit Proof of the Religious Status of Madam Tahir]*, MALAYSIKINI (Jan. 21, 2006); *Nyonya Tahir - a landmark judgment*, MALAYSIKINI, (Jan. 24, 2006); *Proof of justice for non-Muslims*, MALAYSIKINI, (Jan. 26, 2006).

<sup>111</sup> Kaedah-Kaedah *Peguan Syarie* [*Peguan Syarie* Rules], P.U. 23 of 2008, rule 19 (Selangor).

<sup>112</sup> DEPARTMENT OF SYARIAH JUDICIARY, *supra* note 93.



adopted by the Bar Council in 2001.<sup>113</sup> Thus, there are broad similarities between the civil and Syariah ethical standards, but also some significant differences. Generally, the exhortations to maintain professional independence, to avoid conflicts of interest and conduct that would bring the profession into disrepute, to attend diligently and honestly to the client's needs and the interests of justice, to not mislead the court, to act with courtesy at all times, and so on, are similar. However, breach of the LPPER can be a relevant "misconduct" for the purposes of a disciplinary hearing,<sup>114</sup> whereas the Syariah ethics code is not specifically keyed to the Federal Territories Peguam Syarie Rules. A detailed comparison of the two regimes is beyond the scope of this article. However, the differences in emphasis and interpretation of a lawyer's obligations to client and to the court are worthy of close attention because of the differences in the ways that lawyers in the two systems are called upon to balance obligations to the client, the reputation and dignity of the profession, and the interests of justice.<sup>115</sup>

The Bar Council rules stipulate a modified version of the English Barristers' "cab rank" principle that a lawyer must make her expertise available for all clients, regardless of lawyer's personal views about the client or the client's case.<sup>116</sup> Rule 2 of the LPPER demands that that "an advocate and solicitor shall give advice on or accept any brief in the Courts in which he professes to practice at the proper professional fee dependent on the length and difficulty of the case"; nevertheless "special circumstances may justify his refusal, at his discretion, to accept a particular brief" and a lawyer may refuse if taking the case would be practically impossible, or would cause professional embarrassment or a conflict of interest.<sup>117</sup> Allied to this rule is the "without fear or favour" requirement in Rule 16 that

An advocate and solicitor shall while acting with all due courtesy to the tribunal before which he is appearing, fearlessly uphold the interest of his client, the interest of justice and

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<sup>113</sup> See *Report of Syariah and Hudud Laws Committee*, 2003 MALAYSIAN BAR COUNCIL ANNUAL REPORT—ANNUAL GENERAL MEETING 121; *Report of the Syariah and Hudud Laws Committee*, 2004 MALAYSIAN BAR COUNCIL ANNUAL REPORT—ANNUAL GENERAL MEETING 148.

<sup>114</sup> Legal Profession Act 1976, Act No. 166 of 1976, §94(3).

<sup>115</sup> For a longer treatment of these two regimes, see Zulkifli Hassan, *Ethical Principles of Lawyers in Islam*, 4 SHARIAH L. REP. (2008), available at <http://zulkiflihasan.files.wordpress.com/2008/10/shariah-law-report-ethics.pdf> (last visited Nov. 18, 2011). However, my analysis differs from his.

<sup>116</sup> See generally ALISDAIR GILLESPIE, *THE ENGLISH LEGAL SYSTEM* 243 (2007).

<sup>117</sup> *Legal Profession (Practice and Etiquette) Rules 1978*, *supra* note 103, at rules 2-6 (Rule 3 is "not to accept brief if embarrassed," Rule 4 is "not to accept brief if professional conduct likely to be impugned," Rule 5 is "not to accept brief if impossible to maintain professional independence," Rule 6 is "not to accept brief if unable to appear").

dignity of the profession without regard to any unpleasant consequences either to himself or to any other person.<sup>118</sup>

One must not take too romantic a view about the Malaysian Bar's adherence to the "cab rank" rule. Most of the more than forty civil lawyers interviewed for this research did not believe that the rule applied strictly to them, and were comfortable turning away clients if they felt a strong sense of religious, ethical, or political discomfort with the client's cause, on the basis that there are many lawyers in Malaysia and the client would have no difficulty obtaining sympathetic and affordable legal counsel. At the same time, most of these lawyers agreed that their personal views should not interfere with their legal advice, and that they ought to defend or assist a client of whom they disapproved, especially if that client was facing difficulty obtaining appropriate legal counsel, as long as this could be done professionally and lawfully.

The Syariah Lawyers Code of Ethics also instructs *peguam syarie* to have regard to the dignity of the profession, the client's expectation of diligent and impartial advice, and the duty to uphold the law and the administration of justice. However the priority between these three considerations is markedly different from the way the balance is struck in the civil system. Whereas an advocate and solicitor "shall give advice on or accept any brief" unless special circumstances apply, a *peguam syarie* "is not obliged to give advice to or to defend every person who requests her services," although she must accept a court direction to do so if one is given.<sup>119</sup> For Syariah lawyers, then, the starting point is reversed, and the expectation is that a brief may be refused, rather than that it ought to be taken. The "without fear or favour" rule from the civil professional standards also starts from a different assumption. Advocates and solicitors are to show courtesy to the court while "fearlessly upholding the interests" of the client, and the interests of the client and those of justice and the profession's dignity are assumed to be interlinked, so that courageously advancing the client's cause, regardless of "unpleasant consequences"—such as public or judicial disapproval—is not separate from, and may be an element of, affirming "the interests of justice and the dignity of the profession." For Syariah lawyers, however, the interests of the client appear to be weighted differently. Rule 15 provides: "[a] Syariah lawyer shall, while behaving in an orderly manner before the court in which he appears, have the courage to defend the interests of justice, the client and the dignity

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<sup>118</sup> *Id.* at rule 16.

<sup>119</sup> DEPARTMENT OF SYARIAH JUDICIARY, *supra* note 93, rule 5.

of the profession.”<sup>120</sup> In this formulation, the authority of the court seems to be given more consideration than the entitlement of the client to robust defense.

However, like the civil lawyers, Syariah lawyers interviewed for this research did not interpret these rules literally. Some agreed that a Syariah client was entitled to a vigorous defense and that there was no practical difference between criminal advocacy in the civil and Syariah courts, i.e., that the ethical obligations were the same. Others generally agreed with this proposition, but made a distinction for “religious” issues. In these cases—such as apostasy or “deviant teachings”—they felt that it was entirely proper for a Syariah lawyer to decline to represent a client whose conduct was contrary to Islam. This view accords with the Selangor Peguam Syarie Rules, discussed above, which expressly prohibit a lawyer from “conducting herself in a manner not consistent with Islamic Law.”<sup>121</sup> Further empirical work is needed to investigate the practical interpretation of these ethical rules by both Syariah and civil lawyers.

### *G. What Is the Role of Professional Organizations?*

The only bar association in peninsular Malaysia with any statutory authority to regulate or discipline lawyers is the Malaysian Bar. However, it has no responsibility to regulate Syariah practitioners unless they are also civil lawyers. The Malaysian Bar also has a strong advocacy role, with a statutory mandate to “maintain and improve the standards of conduct and learning of the legal profession,” and to “represent, protect and assist members of the legal profession.”<sup>122</sup> There are two voluntary professional associations for Muslim lawyers, examined below. Neither has any formal role in the regulation of the legal profession, and they function as civil society advocacy organizations rather than as accreditation or disciplinary bodies.

Because all advocates and solicitors possessing valid annual practicing certificates are members of the Malaysian Bar,<sup>123</sup> Syariah practitioners who are also enrolled and practicing civil lawyers are members of the Malaysian Bar as well. In this capacity, Muslim lawyers may expect to be able to call upon the expertise and resources of their professional association to assist them, and there is plentiful evidence that they have done

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<sup>120</sup> Legal Profession (Practice and Etiquette) Rules 1978, *supra* note 103, rule 15.

<sup>121</sup> Kaedah-Kaedah Peguam Syarie [Peguam Syarie Rules], P.U. 23 of 2008, rule 17(2)(a), (b) (Selangor).

<sup>122</sup> Legal Profession Act 1976, Act No. 166 of 1976, §§42(1)(b), 42(1)(e).

<sup>123</sup> *Id.* §§3, 43.

so. For example, in 1982 lawyer Zaid Ibrahim appealed in an open letter to the Bar Council to perform a “great service to the Muslim community” by investigating why so few “urbane, middle class Muslim lawyers” were “able or willing” to appear in the Syariah courts, and why religious authorities placed so many obstacles in their way if they did seek permission to appear, thus depriving Muslim litigants and the criminal accused of their constitutional right to legal representation of their choice.<sup>124</sup>

The Bar Council has also been willing to speak up for the professional integrity and independence of lawyers conducting Syariah matters. For example, in April 2010 the president of the Bar Council denounced police interrogation of a lawyer concerning his Syariah client as intimidation and unlawful interference in the administration of justice.<sup>125</sup>

Of course, the Bar Council has not consistently or strenuously been involved in commenting upon or investigating Islamic legal matters, both because its core statutory responsibility is for advocates and solicitors in the civil law, and also because public commentary on Islamic law is politically sensitive and liable to be considered trespass on rival jurisdictional turf.<sup>126</sup> Nevertheless, it has from time to time established a Syariah Laws Subcommittee, comprised of Muslim lawyers with dual practicing certificates, which has monitored and commented upon issues, participated in public and continuing legal education seminars, and made recommendations or formal submissions to Syariah courts or relevant government agencies concerning a very wide variety of issues. Select examples include disciplinary action against unqualified or unregistered *peguam syarie*, enforcement orders between the different state Syariah courts, the compatibility of the proposed Domestic Violence Bill and Syariah principles, refusal of a state Islamic affairs department to renew the practicing certificate of a high profile *peguam syarie*, the content of Syariah courses at various tertiary institutions,<sup>127</sup> implementation of *hudud* law, reform of Islamic family law, improving the quality of Syariah court reporting, terminology and appropriate qualifications for Syariah

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<sup>124</sup> Zaid Ibrahim, *supra* note 17, at 58-60.

<sup>125</sup> Press Statement, Bar Council, Police Must Stop Harassment of Lawyers, (Apr. 29 2010) available at [www.malaysianbar.org.my](http://www.malaysianbar.org.my) (last visited Nov. 18, 2011).

<sup>126</sup> *Report of the Syariah and Hudud Laws Committee*, 2010 MALAYSIAN BAR COUNCIL ANNUAL REPORT—ANNUAL GENERAL MEETING 243 (criticizing the Bar Council President for making “statements and tak[ing] positions on matters affecting Islam and Islamic laws without regard to the sensitivities of the Muslim Members of the Bar,” and regarding Bar Council comments on matters of Islamic law and politics, and the controversy this often provokes); *see also* Whiting, *supra* note 37 (discussing the convoluted jurisdictional battles between Syariah and civil law systems); Thio, *supra* note 86, at 200, 210-26.

<sup>127</sup> *Report of the Syariah and Hudud Laws Committee*, 1997 MALAYSIAN BAR COUNCIL ANNUAL REPORT—ANNUAL GENERAL MEETING 46-47.

practitioners and dual certificate holders (advocates and solicitors who are also Syariah qualified),<sup>128</sup> the desirability and content of codes of ethics for Syariah practitioners and judges, civil-Syariah jurisdictional issues regarding Muslim wills, compatibility of gender equality reform in civil law with Islamic legal principles,<sup>129</sup> human rights and interfaith dialogue, the desirability and practicability of achieving uniformity of Syariah laws and legal practice across the federation, problems of unrepresented female litigants in Syariah proceedings and the inflexibility of Syariah court procedures,<sup>130</sup> the desirability appointing female Syariah judges,<sup>131</sup> and Islamic banking and finance.<sup>132</sup>

Apart from the Malaysian Bar, there are two professional associations specifically for Muslim lawyers in peninsular Malaysia: the Muslim Lawyers Association (Persatuan Peguam Muslim Malaysia or “PPMM”), open to Muslim lawyers in both the civil and Syariah systems, and the Peguam Syarie Association of Malaysia (Persatuan Peguam Syarie Malaysia or “PGSM”), representing only *peguam syarie*, who, of course, may also be civil law practitioners.<sup>133</sup> The PPMM was founded in the 1980s by Zaid Ibrahim.<sup>134</sup> Reflecting on his involvement in founding the association, Zaid recently explained the rationale this way:

The Association was established primarily to pool lawyers from the Bar who understand civil law and also Syariah law. . . . Non-Muslim lawyers, including those in the Malaysian Bar, were reluctant to comment on Muslim law issues, and understandably so, because of the heated political fallout from such encounter. We thought that the Syariah lawyers (*peguam syarie*) on their own would not understand the demands of Common Law jurisprudence and the principles of the Federal constitution. So, Muslim lawyers from the Bar would help bridge the gap and bring enlightenment to those issues. That is

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<sup>128</sup> *Report of the Syariah and Hudud Laws Committee*, 1995 MALAYSIAN BAR COUNCIL ANNUAL REPORT—ANNUAL GENERAL MEETING 42-43.

<sup>129</sup> *See, e.g. Report of the Syariah and Hudud Laws Committee*, 2002 MALAYSIAN BAR COUNCIL ANNUAL REPORT—ANNUAL GENERAL MEETING 95-96.

<sup>130</sup> *Id.* 139-42.

<sup>131</sup> *Report of the Syariah and Hudud Laws Committee*, 2003 MALAYSIAN BAR COUNCIL ANNUAL REPORT—ANNUAL GENERAL MEETING 121-22; *Report of the Syariah Laws Committee*, 2007 MALAYSIAN BAR COUNCIL ANNUAL REPORT—ANNUAL GENERAL MEETING 176.

<sup>132</sup> *Report of the Syariah and Hudud Laws Committee*, 2010 MALAYSIAN BAR COUNCIL ANNUAL REPORT—ANNUAL GENERAL MEETING 243.

<sup>133</sup> *See Whiting, supra* note 37, at 23-34.

<sup>134</sup> Bridget Welsh, *New Identities, New Politics: Malaysia's Muslim Professionals*, 18 NAT'L BUREAU ASIAN RES. ANALYSIS 35, 41 (2008).

why members of the Muslim Lawyers Association are also members of the Bar. But the Malaysian Bar thought I was breaking up the Bar and was politically motivated. I did not get much support and resigned after three years.<sup>135</sup>

There was indeed some hostility and mutual distrust expressed between members of the Bar and the Muslim Lawyers Association, but also instances of cooperation and mutual coexistence.<sup>136</sup> Membership of the Muslim Lawyers Association has remained small for most of its existence. Currently, it has around 200 members, whereas Muslim lawyers comprise between 38% to 40% of the Malaysian Bar's more than 13,000 members.<sup>137</sup> Members of the organization have emphasized its importance in continuing legal education and Syariah legal awareness for its members, as well as the significant role it has played in fostering self-confidence and professional networking amongst Muslim lawyers in both Syariah and civil law jurisdictions.<sup>138</sup>

The PGSM was formed more recently, in 2000. Its primary objective is to lobby the state and federal governments to establish state Syariah Bar associations or, alternatively and preferably, a single national Syariah Bar with similar authority, independence, authority, and status to the Malaysian Bar. It engages in public debates about the status and authority of Islamic law in Malaysia, issuing press statements and giving media interviews on contentious issues such as the inter-jurisdictional conflicts between Syariah and the civil system.<sup>139</sup>

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<sup>135</sup> Zaid Ibrahim, *Open reply to Imran Imtiaz Shah Yacob*, Zaid Untuk Rakyat [Zaid for the People] (Sept. 3, 2010), [www.zaiduntukrakyat.com](http://www.zaiduntukrakyat.com).

<sup>136</sup> For example, at the 1991 Annual General Meeting, some members of the Bar expressed considerable suspicion of the motives and behavior of the Muslim Lawyers Association, while others defended the right to freedom of association, and the Vice President reported that the Bar had in fact sent representatives to a Muslim Lawyers Association seminar. See *Report of the Syariah and Hudud Laws Committee*, 1995 MALAYSIAN BAR COUNCIL ANNUAL REPORT—ANNUAL GENERAL MEETING 4.

<sup>137</sup> *Statistics*, MALAYSIAN BAR, <http://www.malaysianbar.org.my/legaldirectory/statistics.php> (last visited Nov. 18, 2011). See also OFFICE OF THE PRIME MINISTER, THIRD OUTLINE PERSPECTIVE PLAN 2001-2010: ECONOMIC AND PLANNING UNIT (2001); OFFICE OF THE PRIME MINISTER, NINTH MALAYSIAN PLAN 2006-2010: ECONOMIC AND PLANNING UNIT (2006); Welsh, *supra* note 134, at 35-51.

<sup>138</sup> Interviews with Muslim lawyers, anonymous, in Kuala Lumpur (July 29, 2010); Interviews with Muslim lawyers, anonymous, in Selangor (July 29, 2010).

<sup>139</sup> See Whiting, *supra* note 37, at 21-34.