

Lawyers in Malaysia: Religious Orientation and Legal Professional Practice

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Funding Proposal

Project outline

This project will investigate whether, and if so, how, the religious orientation of Malaysian lawyers influences their professional lives, and their capacity or desire to respect and promote the rule of law and the moderate state. By ‘religious orientation’ I mean both personal religious belief and also religious observation or practice. This is a timely project, because at present there is lively debate in multi-cultural and multi-faith Malaysia about whether Malaysia is, or should become, an Islamic state; or, alternatively, whether it is, or should remain, a secular state. An aspect of this debate that directly touches lawyers and the practice of law is the issue of whether Islamic legal precepts and values are being imported into the secular legal system by Muslim judges and lawyers who, it has been suggested, have begun to interpret the common law through the lens of their faith.¹ Hence I believe that it is important to investigate closely the attitudes of lawyers, judges and legal academics to the questions of law and faith.

Background

The Malaysian legal system is bifurcated, as is the legal profession. The national legal system is based on the English common law, supplemented by national, and some state, statutes. This system is often locally referred to as the ‘civil law’ when it is being differentiated from Islamic law, however it is more correct to refer to it as a common law system to avoid confusion with European civil law. It is administered through national courts, presided over by judges who are usually now appointed from the civil service, but were until two decades ago appointed from amongst the elite of the legal profession.

The Malaysian legal profession is multi-cultural and multi-faith. Social demographic figures are difficult to come by, but it seems that 38% of lawyers are Malay-Muslim, 37% are Chinese and 24% are Indian.² In order to practice in this legal system, lawyers (and judges) must have the equivalent of an LLB from a national university or a international university (typically in the UK, Australia or New Zealand) and also be admitted to practice with in High Court of Malaya (or Sabah and Sarawak) and be members of the (national) Malaysia Bar or the local Bar Associations of Sabah and Sarawak.³ Malaysian lawyers, regardless of their ethnicity or faith, are thus schooled

¹ Amanda Whiting, ‘Desecularising Malaysian Law?’ in Pip Nicholson and Sarah Biddulph (eds) (2008) *Examining Practice, Interrogating Theory: Comparative Legal Studies in Asia* (Leiden, Martinus Nijhoff): 223-266.

² Government of Malaysia, Economic and Planning Unit, *Ninth Malaysia Plan* (2005), table 16.5; Bridget Welsh (2008) ‘New Identities, New Politics: Malaysia’s Muslim Professionals’ 1893 (March 2008) *National Bureau of Asian Research Analysis*: 35-51.

³ The rules governing legal qualifications and admission to practice are set out in the *Legal Profession Act* 1976.

in the common law tradition and share a broadly similar legal education and are thus exposed to a broadly similar set of legal values and principles.⁴

Islamic personal and religious law is a matter for the state-based *syariah* courts, which have jurisdiction only over persons professing Islam (all Malays, currently around 60% of the national population, and those other Malaysians who are Muslims). Only qualified Islamic lawyers – *peguam syarie* – may appear in the *syariah* courts. These lawyers are trained and accredited through a different system from that which regulates admission to practice in the national, common-law system⁵ and of course deal in a completely different set of legal rules and principles. The Administration of *Islamic Law (Federal Territories) Act 1993* is typical: section 59(1) defines a *peguam syarie* as a person acknowledged by the Majlis (religious affairs council) as ‘having sufficient knowledge in Islamic law’. This definition is intentionally vague; however with the professionalization of *syariah* instruction in Malaysian law faculties, particularly at the International Islamic University of Malaysia, a degree or diploma in *syariah* is accepted as evidence of sufficient knowledge. Importantly for my study, member of the Malaysian Bar who can also demonstrate sufficient knowledge of Islam can qualify to practice in *syariah* courts; however the converse is not true, and *peguam syarie* will not meet the requirements for admission to practice in the national courts set out in the *Legal Profession Act 1976* unless they have a recognised LLB and any other requirements.

In summary then it is clear that lawyers of any faith can and do practice in the ‘secular’ system, but that only Muslims may practice in the Islamic legal system, and so while there is no way that the religious values or habits of non-Muslims can influence the practice of *syariah*,⁶ there is both scope for, and positive evidence that, Muslim lawyers can and do seek to influence the secular system in order to harmonise the common law with *syariah*. It is also quite possible, although there has been no public discussion of this, that the religious values of non-Muslim lawyers provide motivation for their involvement in particular legal issues or debates. This is particularly likely to be relevant when the issue involves, for example, protection of a Hindu temple from demolition, or the current litigation about the Catholic Church’s use of the term Allah to refer to the Christian God in its weekly publication (both issues currently before the courts in Malaysia and not yet resolved). However religion may also be a motivating factor in general human rights and social justice activism by lawyers or the legally-trained; yet this motivation has not been investigated in the legal or social science literature.

The project aims and outcome.

⁴ Johan Sabaruddin and Grace Xavier (2005) ‘Legal ethics, taught and practiced – A Malaysian perspective’ LawAsia conference, March 21-24, 2005, Gold Coast, Australia.

⁵ Administration of *syariah* law is a matter for the states (and the federal government in respect of the federal territory of Kuala Lumpur), and the sphere of operation of *syariah* is confined to matters to do with the religion of Islam (such as religious observance and the maintenance of mosques) and the family law and inheritance of Muslims: see Federal Constitution, schedule 9, List II. State enactments about Islamic law are broadly similar.

⁶ Note that this is separate from the question of how the common law system, in its modern, bureaucratic manifestation, can influence the form of *syariah* law (eg rules of procedure and evidence etc) through the modernisation of *syariah* and the tools of parliamentary statutes. On this question see both Donald Horowitz ‘The Qur’an and the Common Law: Islamic Law Reform and the Theory of Legal Change’ (1994) 42 *American Journal of Comparative Law* Pt I (pp233-294) and Pt II (pp543-580) and Whiting, ‘Desecularising Malaysian Law’ above, note 1.

This study will investigate the religious identity and ethical values of a cross-section of Malaysian legal actors, both Muslim and non-Muslim, common law and syariah practitioners, and inquire about the role of belief in individual legal actor's professional lives, as well as the connections between religious organisations and affiliations and legal and political activism or, conversely, quiescence.

In the existing scholarship on lawyers⁷ there is virtual silence about questions of religion, even though religious belief and behaviour legitimated by religion have emerged as urgent contemporary issues.⁸ Furthermore, the legal and political analysis of jurisdictional conflicts between *syariah* and common law in Malaysia examines technical jurisprudence, not the beliefs and desires of legal actors.⁹ In his "bracing new agenda" for legal profession research, Halliday notes the pressing need to "rectify the frequently secularist orientation of social scientists" and to integrate this into a "motivational theory of action" ie, proper identification and analysis of "the interests, orientations, and impulses that drive lawyers behaviour" and careful analysis of how and where "these motivations are inculcated and how they are sustained or attenuated."¹⁰ Accordingly, and building on my earlier work, I will bring issues of both religion and ethnicity into the centre of the analysis. This is not only important but in fact unavoidable in Malaysia, where ethnic identity and religious affiliation (which are legally linked for Malay-Muslims) are powerful social categories with political and legal consequences.

Coming at the question of religious faith and legal practice from a different angle, this project will also investigate how lawyers in the religious jurisdiction of the *syariah* courts understand and apply the concept of the 'rule of law'. It will do this by asking them, for example, how they understand the role of defence lawyers, and what they understand to be the obligations a lawyer has to the court, to justice, and to the client. This is an important and under-explored area of legal scholarship, where academic writers focus more on postulates of classical Islamic law than upon what happens in the court room, and how *syariah* lawyers carry out their legal duties.

I will travel to Malaysia during 2010 to conduct in-depth interviews with Malaysian legal practitioners, judges and legal educators. In these interviews I will ask them about their faith and the practice of their religion; participation in religious organisations or religiously affiliated organisations; their legal practice; and probe how their religious values might influence the way that they understand the law and the way that they practice, teach, or decide the law. I will seek interviews with

⁷ There is a huge body of scholarship on the history, sociology and politics of the legal profession, particularly close studies of Bar Associations and space prevents me from listing it here. A key modern work is Terence Halliday and Lucien Karpik (eds) (1997), *Lawyers and the Rise of Western Political Liberalism: Europe and North America from the Eighteenth to Twentieth Centuries* (Oxford: Clarendon Press)

⁸ Peter Berger (1999) *The Desecularisation of the World* (Washington DC: Ethics and Public Policy Centre); Whiting, 'Desecularising Malaysian Law?' above note 1. There are, of course, studies of the syariah legal system in Malaysia: see, for eg, Michael Peletz (2002) *Islamic Modern: Religious Courts and Cultural Politics in Malaysia* (Princeton: Princeton University Press) and the on-going research projects of Mark Cammack, Clark Lombardi and Mike Feener on syariah judiciaries and courts in Malaysia, Singapore and Indonesia (Asia Research Institute, National University of Singapore) and the current ARC project of Professor Tim Lindsey on *syariah* in Malaysia, Singapore and Brunei (ARC DP 0556932)

⁹ See Whiting, 'Desecularising Malaysian Law?' above note 1; also Thio Li-ann (2007), 'Jurisdictional Imbroglia: Civil and Religious Courts, Turf Wars and Article 121(1A) of the Federal Constitution' in Andrew Harding and HP Lee (eds) *Constitutional Landmarks in Malaysia: The First Fifty Years: 1957-2007* (KL:LexisNexis): 197-226.

¹⁰ Terence Halliday (1999), 'Politics and Civil Professionalism: Legal Elites and Cause Lawyering' 24(4) *Law and Social Inquiry* 1013-1060

lawyers who are already publicly identified with particular faith groups (eg membership of the Muslim Lawyers Association and the Association of Syariah Lawyers, the Catholic Lawyers Association etc) as well as 'ordinary' legal actors who do not belong to such faith-based organisations. Interviews will be conducted in the capital city (Kuala Lumpur), and in regional cities: Georgetown (Penang), Ipoh (Perak), Kota Baru (Kelantan), Melaka (Melaka), Kuching (Sarawak) and Kota Kinabalu (Sabah). This study will be particularly innovative as it will be the first to investigate the legal profession in the East Malaysian states of Sabah and Sarawak.

It is anticipated that the research results will be published separately in a refereed journal in the year following the completion of the research, and also be integrated into the larger monograph study of the legal profession in Malaysia.