
Book Reviews

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Constituting Religion: Islam, Liberal Rights, and the Malaysian State.
By Tamir Moustafa. Cambridge: Cambridge University
Press, 2018.

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In this elegantly concise, tightly packed, and powerfully argued new book, Tamir Moustafa closely examines the “judicialization of religion” and its radiating effects on political life and popular legal consciousness in modern Malaysia. Contra Ran Hirschl’s *Constitutional Theocracy* (Hirschl 2011)—claiming judicial review provides a secular bulwark protecting individual rights and freedoms from the global rise of conservative religiosity—Moustafa instead forcefully and convincingly argues that “legal institutions play important roles in *constituting* struggle over religion [and] far from consistently resolving disputes and defending liberties, legal institutions can intensify controversy and augment ideological polarization” (2). He does not assume an inevitable clash exists between liberalism and religion, pitting “rights versus rites” in eternal conflict, but rather drills deep in the history of the Malay peninsula, from British colonialism to the contemporary Malaysian state, tracing “*when, why, and how* a sharp rights-versus-religion binary emerged first within the legal system, and subsequently radiating outward through political discourse and popular legal consciousness” (6).

Drawing on recent work in sociolegal studies, religious studies, and comparative judicial politics, the book is intended as an intervention in two fields of work: First, scholarship on contemporary Islamist mobilization, which Moustafa finds to be too focused on “electoral politics,” rarely pays attention to the work of courts, and typically assumes that ideological splits between Islamists and Liberals occur “prior to (and exogenous from) engagement with legal institutions” (4). The second field in which the book intervenes concerns legal studies at the intersection of law and religion, which by turn Moustafa finds typically focused on the proliferation of constitutional clauses declaring Islam the “official religion” of Muslim-

majority countries, and ignores the radiating effects of such clauses, while this book aims “to make visible the role of courts in constituting the very ideological conflicts they are charged with resolving” (3).

As such, this is a book concerned with “theory generation” above all—namely that “legal institutions catalyze ideological contestation” (10). The example of Malaysia as a single-study cannot be better to illustrate this argument: To begin with, the country ranks at the very top of several global indexes of state restrictions on religion (Malaysia ranks sixth out of 198 countries worldwide, overtaking even Saudi Arabia). Yet Malaysia also ranks at 30 out of 102 on the rule of law index, with a relatively robust legal system and broad public access to courts. The Malaysian constitution includes clauses that both recognize Islam as the country’s official religion *and* commit government to the protection of individual rights and freedoms. And finally, those clauses are interpreted and applied by a bifurcated judicial system, with state shariah courts adjudicating Muslim family law disputes, and federal civil courts handling all other ethno-religious communities (Christian, Buddhist, Sikh, etc.).

The above four conditions when combined make Malaysia a very acute example of Moustafa’s theoretical take on the judicialization of religion—which he unpacks in the first three chapters of the book (there are seven in total). He starts by offering a primer on the power of law and courts in constituting the very binary structures splitting litigants between Islam and liberalism, elucidating in detail how what we call “Islamic law” in Malaysia today is itself a secular invention from a historically situated colonial context. To drive that point through, Moustafa intentionally uses the now discredited term “Anglo-Muslim law” to tell the story of how selective codifications of Islamic *fiqh* in British Malaya were responsible for silencing shariah’s historically multivocal pluralism, creating new religious institutions, forming new lines of ethno-religious identities, and all culminating in the inscription of both liberal rights and Islamic law in the country’s postcolonial normative order.

Chapters 4, 5, and 6 ripple out to first examine the judicialization of religion in Malaysian case law, followed by the media “spectacle” surrounding controversial cases, and finally to question the effect of all this on popular legal consciousness. Those are by far the book’s thickest chapters, immensely rich in detail and analysis. At the heart of it all lies article 121 (1A) of the Malaysian Constitution, stating that the High Courts of the Federation “shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts.” Introduced in a 1988 constitutional amendment intended to streamline litigation (and shore up the government’s Islamic credentials), the article had the reverse effect of increasing court dockets with new and

controversial high level cases, while courts had rarely intervened in shariah court matters before the amendment. Moustafa groups these cases under three distinct types of “vexing conundrums”—religious conversion, divorce, and child custody—each pitting “Liberals” against “Conservatives,” the one side mobilizing around Article 11 (freedom of religion) and framing such cases as a threat by *dakwah* (religious revival) movement to civil courts jurisdiction, and the other framing exactly the same cases as a threat to shariah courts and Islam’s dominant religio-ethnic position in Malaysia generally.

The cases are fascinating (and heartbreaking) to read, perhaps the most famous of which became Lina Joy’s, garnering wide international human rights interest and press coverage in newspapers like the New York Times and the Economist, as competing political parties, NGOs, and lawyers sought out media attention—all at a time when social media was just exploding on the scene. Hope for international pressure in aid of Malaysian human rights backfired however, and Moustafa judges it as a “strategic misstep” that further split “the court of public opinion” (105). The end result at the level of popular legal consciousness was the reification of the binaries Liberalism/Islam as rights/rites as inevitably in eternal opposition—with some major exceptions such as Sisters in Islam, a Malaysian NGO seeking to challenge the binary but from within the language of Islam.

The last chapter of the book takes us back to Article 3 of the constitution (Islam is the religion of the Federation) and shows how Article 121 (1A) opened up litigation using Article 3 to push for a more robust place for Islamic law as “the new *grundnorm* in the Malaysian legal system” (138). Famous cases here include the Borders bookstore raids (leaving its manager and the book publisher indicted under the Shariah Criminal Offenses Act), and the prohibition on using the word “Allah” by the *Herald* (Malaysian Catholic newspaper).

Moustafa closes the book with a conclusion that questions his very methodology and what if he had got it all wrong? I certainly think not, and am grateful our sociolegal toolbox has been enriched by it. In Moustafa’s words, his method is a consciously “diachronic, context-rich, process-tracing approach”—the latter proceeding at two levels: tracing the development of legal institutions over time, and the flow of individual cases through the courts. Behind the book lies a very great deal of fieldwork that started in 2009 and continued well into 2015, including 170 semi-structured interviews with lawyers judges, activists, journalists, politicians, and state officials, plus 100 more interviews with “everyday Malaysians” conducted by a multiethnic legal team that also examined press coverage of major cases across Malaysia’s fragmented ethnolinguistic media landscape

(Malay, Tamil, Chinese, and English language press). And if all that was not enough, add to it a “nationwide stratified survey of popular understandings of the Islamic legal tradition” (10).

As for the obligatory book-review quibble, I have only one to share: The book starts with Moustafa cautioning his readers not to conflate the “judicialization of religion” with your run of the mill “judicialization of politics.” I am not sure if the distinction is convincing, and he elaborates on it only briefly in an immediate footnote (2. fn 5). I would have loved to learn more why he thought the distinction useful to begin with?

So do not let the small size of this book fool you. At 158 pages, the scope of work behind it is as meticulous as it is immense (the footnotes alone are a gold mine to pilfer and embezzle). And for such a serious often heavy subject, the book is laced with a subtle sense of humor to belie it all. On Islamic law for example, Moustafa wryly observes that the “shariah courts did not drop from the heavens. Rather they are creatures of state law” (15). Appropriately, the book closes with the ironic observation that liberal litigation may itself be responsible for the expansion of illiberal legal precedents—a predicament for progressive activists who are “damned if they do and they are damned if they do not” (154).

References

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Gender, Alterity and Human Rights: Freedom in a Fishbowl. By Ratna Kapur. Edward Elgar Publishing, 2018.

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This book begins and ends with stories—parables of the trapped “other” and the opening of previously unimagined “windows”