

*Constituting Religion: Islam, Liberal Rights, and the Malaysian State.* By Tamir Moustafa. Cambridge: Cambridge University Press, 2018. Pp. 325; \$99.99 (cloth); \$ 24.00 (digital). ISBN: 9781108423946.

With *Constituting Religion*, Tamir Moustafa presents an innovative, insightful, and well-written study of the judicialization of religion in Malaysia, the “circumstances wherein courts increasingly adjudicate questions and controversies over religion” (2). Moustafa analyzes the construction of legal and religious authority in the Malay Peninsula from colonial intervention to the contemporary period, in the process examining how British colonialism shaped law in the Malaysian Peninsula, constitutional developments, adjudication of religious controversies, how the media and civil society actors mobilize around these court cases, and popular opinions about Islamic law and controversial court judgments.

Moustafa argues that the judicialization of religion is most pronounced in states like Malaysia where religion is tightly regulated, different personal status laws apply to different (religious) communities, the constitution guarantees religious and liberal rights, and courts are “relatively empowered” with broad public access (63). He states that rather than resolving religious conflict and defending personal liberties, adjudication contributes to the intensification of conflict and polarization that in turn leads to the emergence of what he calls the “rights-versus-rites binary,” a sharp dichotomy between liberal rights and Islamic law (4–6). Moustafa explains this dichotomy of individual versus collective rights and secularism versus religion as resulting from institutional configurations and political agency (6), and he explains when, why, and how this ideological binary emerges. His central argument is that law and courts shape religious conflict by shaping the identity of actors and by creating an institutional framework that enables and even encourages legal conflict—in part by triggering the creation of interest groups, and by providing a space for political mobilization outside the court room (10).

Building on Talal Asad’s *Formations of the Secular*, he defines the “religious” and the “secular” as legal categories that have been defined in relation to one another: they constitute one another and vary depending on time and place.<sup>1</sup> The more states regulate religion and determine what the “religious” and thereby the “nonreligious” mean, as in Malaysia, the more they increase the potential for polarization along the religious–nonreligious divide (14–15). Islamic law and liberalism are pitted against each other because they are linked to different projects of state law and thereby power relations grounded in these two court systems that were established during the period of colonial rule. Similarly, Iza Hussin finds that during the colonial period, Islamic law became a contested space because expanding or limiting the scope of Islamic law meant an increase or decrease in the power of local elites whose authority had been limited to religious and cultural issues.<sup>2</sup>

Moustafa first provides the necessary historical background to explain the structures that shape the judicialization of religion by analyzing how British colonial intervention in the legal system brought about normative as well as institutional changes and by looking at the constitution-making process. The Treaty of Pangkor of 1874 restricted local rulers’ authority to religion and customary law, while English common law governed commercial and criminal law. The British issued the Mohammedan Marriage Ordinance in 1880. In 1900, special courts for Muslims were established

<sup>1</sup> Talal Asad, *Formations of the Secular: Christianity, Islam, Modernity* (Stanford: Stanford University Press, 2003).

<sup>2</sup> Iza R. Hussin, *The Politics of Islamic Law: Local Elites, Colonial Authority, and the Making of the Muslim State* (Chicago: University of Chicago Press, 2016).

and the judiciary was thereby divided into state-level shariah courts that apply Anglo-Muslim law for Muslims in matters like family law and federal civil courts that apply common law for everyone (37). During the colonial period, racial and religious categories were merged: a Malay person was defined as a Muslim who habitually speaks the Malay language and conforms to Malay custom.

Moustafa then goes on to provide a rich contextualization of how the Federal Constitution was adopted and outlines three different, potentially conflicting commitments embodied in the constitution. Article 3 of the constitution stipulates that Islam is the religion of the Federation; Article 11 of the constitution guarantees the right of an individual to practice in accordance with his or her religious conviction, while also guaranteeing the right of each community to govern its religious affairs. These three commitments—to liberal rights, communal rights, and Islam as the official state religion—allow different actors with different ideological projects to use the constitution in support of their objectives. The ability of actors to take advantage of the indeterminacy of the constitution also becomes evident with respect to Article 121 of the constitution, which regulates the jurisdiction of courts. The amendment of Article 121 in 1988 states that the High Courts have no jurisdiction with respect to any matter that falls within the jurisdiction of the sharia courts. However, as it does not clarify what exactly falls under the jurisdiction of the sharia courts, Article 121 (1A) exacerbates legal ambiguities, producing new legal tensions. Because the jurisdiction of the sharia courts remains vaguely defined, activist lawyers were able to argue, in combination with Article 3, for the all-encompassing nature of Islamic law and thereby for expanding its applicability. Given that Article 3 stipulates that Islam is the religion of the Federation, these lawyers could argue that the state had the duty to promote Islam as a religion. As a result, legal matters that could previously fall under the jurisdiction of either the sharia or the civil courts—such as the status of the dead, issues related to conversion, and religious freedom—became increasingly seen as falling under the jurisdiction of the sharia courts. Thus, the ambiguity enabled “Islamist lawyers” to expand the jurisdiction of the sharia courts and therefore successfully push for Islamization through the courts (141–43).

Scholars of Islamic law have been interested in the question of how codification projects and the overall integration of Islamic law into state law have changed the Islamic legal tradition. Wael Hallaq has prominently argued that the essence of the sharia and the essence of the modern state are incompatible, rendering any attempt to integrate Islamic law into the modern state impossible.<sup>3</sup> Moustafa is also interested in the *impact* of the state on Islamic law, but he is not concerned with making essentialist claims about how state policies have changed the nature of Islamic law. Instead he demonstrates how state regulation of Islamic law has an impact on the lived reality of people and gives rise to certain types of claim making. Court cases do not simply reflect religious tensions within society—they also create them, for lived realities cannot simply be mapped onto legal categories as defined by the state. Moustafa shows that legal conflicts often arise because of how states regulate religion in areas like burial practices, family law, and apostasy. State regulation takes several forms. Interreligious marriage, for example, is forbidden in Malaysia. Thus, a Muslim Malay who wants to marry a Christian would need to convert if the Christian partner does not do so. However, six out of thirteen states in the Federation do not outline any pathway to conversion, five states criminalize conversion out of Islam, and in three states a judge can impose mandatory counseling for a potential convert for six to thirty-six months (70). The case of Lina Joy, a Malay Muslim woman, who tried to convert to Christianity in order to marry her Christian partner, provides a notable example of how state regulation can lead to the judicialization of religion.

3 Wael B. Hallaq, *The Impossible State: Islam, Politics, and Modernity's Moral Predicament* (New York: Columbia University Press, 2014).

The High Court ruled in 2001 that as a Muslim Malay citizen, Joy cannot renounce her religion, cementing a claim dating back to the colonial era: a Malay citizen by definition is Muslim. According to the High Court, her fundamental freedoms were not violated because Article 11 of the constitution guarantees religious communities the right to practice their religion freely rather than individuals to choose their religion freely (72). If the state did not tightly regulate who can marry whom and prevent or hamper conversion, arguably no legal action would have been required in this case.

Moustafa's design and methodology are sophisticated. He builds on an impressive variety of different types of data, including surveys; 170 semistructured interviews with legal professionals, politicians, and journalists, among others; 100 interviews with ordinary citizens; and multiple focus groups conducted by a multi-ethnic research team. Written sources include court decisions and newspaper articles in the Malay, Tamil, and Chinese languages. Triangulation allowed Moustafa to check the validity of his findings and avoid systemic biases. Through the variety of methods and sources, he succeeds in constructing a multilayered picture of the judicialization of religion in Malaysia.

Process tracing allows Moustafa to track the development of both legal institutions and individual cases over time and thereby to assess whether institutional change has an impact on the judicialization of religion. He examines the full life cycle of each case from court through media coverage, mobilization of interest groups, and the everyday discussion and debate of these cases among Malaysians. Analyzing the full life cycle of a case allows Moustafa to assess differences and similarities between arguments and the logic used inside and outside the courtroom (10). This approach allows taking structural factors that shape judicialization into consideration without being deterministic and losing sight of agency. Moustafa finds that legal consciousness—the way ordinary people think about law and legality—closely aligns with the rights-versus-rites dichotomy pushed by interest groups and in the media (125). Everyday Malaysians find that Islam and liberal rights are greatly at odds; popular understandings of Islamic law are often at odds with Islamic legal theory. Most ordinary Malay Muslims understand Islamic law as a fixed codified system rather than as a fluid tradition that allows for multiple opinions. Anglo-Muhammadan law, codified during British colonial rule, is perceived to be a faithful implementation of Islamic law. These popular opinions are one of the reasons why Sisters in Islam, a women's rights group, tries to break the rights-versus-rites dichotomy and to advance women's rights within an Islamic framework (133). Because adjudication produces effects even when it does not produce legal change, the impact of litigation cannot be reduced to the logic of the court case or the judgment itself. Activists who focus on the outcome of cases help to bring the case to the public sphere and thereby shape attitudes and the legal consciousness of everyday Malaysians. This observation is particularly poignant as it breaks open what it means to win and lose a case. Litigants might well lose a case in the court of law but win in the court of public opinion.

Moustafa's insightful analysis leaves the reader wondering whether pluri-legal family law systems, such as Malaysia, per se are ill equipped to guarantee liberal rights and whether polarization between Islamic law and liberal rights is a necessary outcome in such settings. The literature on multiculturalism and legal pluralism is divided on the issue, with some scholars arguing that divided jurisdictions can, under certain circumstances, uphold fundamental rights and liberties while at the same time accommodating religious communities,<sup>4</sup> whereas others<sup>5</sup> have raised doubts about this

4 See, for example, Ayelet Shachar, *Multicultural Jurisdictions* (Cambridge: Cambridge University Press, 2001).

5 See, for example, Yüksel Sezgin, *Human Rights under State-Enforced Religious Family Laws in Israel, Egypt and India* (Cambridge: Cambridge University Press, 2013).

possibility. Moustafa, while not taking a clear stance on this question, hints that he is skeptical about whether individual rights can be safeguarded in a pluri-legal system (158). However, the question remains: In what case, if at all, could divided legal systems effectively protect fundamental rights and liberties?

The reader also wonders whether the analysis risks overemphasizing the importance of state regulation of religion for polarization. Polarization around religious issues such as apostasy does not necessarily result from state intervention alone. Even if the state did not regulate, for instance, apostasy, apostasy would still in many instances be deemed a controversial topic, albeit one that is resolved in other fora than courts.

While the book focuses on Malaysia, many issues that are at stake there are also relevant in other jurisdictions, so that the Malaysian case lends itself to comparative inquiries. As Moustafa states, in most Muslim majority countries the constitution guarantees liberal rights while also making commitments to Islamic law, and in roughly one-third of all countries worldwide the applicable personal status law is determined based on the religious affiliation of the parties involved. In some countries, like in Malaysia, different courts apply different family laws, whereas in other countries state courts apply different family laws depending on the religious affiliation of the parties involved. Thus, the Malaysian case could provide valuable insights for other countries with pluri-legal family law systems. In the conclusion, Moustafa brings in a comparative angle sketching a brief comparison between the Malaysian and the Egyptian cases. Article 2 of the Egyptian constitution stipulates that Islam is the religion of the state and that the principles of Islamic sharia are the chief source of legislation. Moustafa states that the adjudication of Article 2 by the Egyptian Supreme Constitutional Court showed that judges strengthened liberal rights claims more frequently than Islamic claims. He argues that liberal interpretations of Quran and Islamic jurisprudence by Egyptian Supreme Court judges and the unified judiciary prevented the emergence of a rights-versus-rites binary in Egypt through the courts (156). One also wonders whether the religious and ethnic makeup of the population needs to be taken into consideration here—that is, in countries like Malaysia where no religious group makes up the absolute majority and ethnic cleavages are more prominent, polarization might be more likely than in Egypt where over 90 percent of the population is Sunni Muslim. One also wonders how authoritarian politics and the manipulation of religion fit in here. How do authoritarian politics influence which cases become controversial and how state institutions that enjoy limited autonomy like courts, the Ministry of Awqaf, and the Fatwa Department position themselves? Research in the future should expand the comparison and test Moustafa's assumptions.

With this book, Moustafa demonstrates that the study of the judicialization of religion provides a valuable angle to explore wider questions of the configuration of Islamic law within the framework of the state as well as ideological polarization that goes beyond Islamist mobilization and electoral politics. Phenomena that can be grouped under “judicialization of religion” have reached prominence in many parts of the world. In practice, courts often do not resolve conflict, constitute a bulwark of secularism, or protect fundamental rights; recent debates about the composition and jurisprudence of the American Supreme Court are a timely reminder of how legal institutions occupy an important position in political debates even in countries that do not share many of the characteristics of Malaysia. *Constituting Religion* provides a remarkable analytical model for how to study and make sense of this growing global phenomenon.

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