Law & Social Inquiry
Volume 47, Issue 4, 1321–1326, November 2022

Constituting Religious Conflict in a Multicultural State

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TAMIR MOUSTAFA. *Constituting Religion: Islam, Liberal Rights, and the Malaysian State*. Cambridge, UK: Cambridge University Press, 2018.

Tamir Moustafa's slim, densely packed, and elegantly written volume offers Malaysia's seemingly intractable jurisdictional, political, and social conflicts over the relationship of its national, secular, civil (i.e., common law–style) legal system with Islamic law (*syariah*) as a "cautionary tale" of the unintended consequences of state regulation of religion for the benefit of other Muslim majority nations whose religious establishment clauses also jostle for priority with liberal bills of rights (4). His project, then, invites comparison although he does not systematically perform it, leaving it to his readers to take up the elements of the Malaysian case study as the building blocks of a theory that could be tested in other national settings (63n2, 155–57). In this, as in his multilayered methodology, he is true to the spirit of Scheppele's (2004, 391–92, 400) vision for "constitutional ethnography" as a scholarly practice that, rather than impose theory from the outset, aims to build it as an outcome of richly detailed research that is attentive to the historical and current relationships between society, culture, law, and governance in a single state.

Much has been written about Malaysian Islamization (sometimes rendered as "desecularization"), treating it in several broad and often overlapping ways. First, as a sociocultural process with political consequences, originating in the 1970s global Islamic missionary (*dakwah*) movement (for example, Liow 2009). Second, as a bureaucratic, centralizing project of legal and institutional reform, modernizing and rationalizing syariah statutes, enhancing the status of syariah courts through education and accreditation of lawyers and judges, and expanding Islamic religious bureaucracies and think tanks, which was fostered in the 1980s by Prime Minister Mahathir Mohamad's United Malays National Organization (UMNO)-led government to create a modern and economically progressive Muslim nation (for example, Hamayotsu 2003). Or as the result of longer-standing political and electoral rivalries between UMNO and Islamic opposition party PAS (Islamic Party of Malaysia) in their contest for Malay-Muslim votes (for example, Liow 2004; Liew 2007).

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https://doi.org/10.1017/lsi.2022.31 Published online by Cambridge University Press

RADIATING, HARDWIRING, AND CONSTITUTING THE JUDICIALIZATION OF RELIGION

In *Constituting Religion*, Moustafa takes a different approach, while acknowledging these bodies of scholarship as necessary background. He places national courts and the constitutional and statutory law they interpret at the center of his analysis. He examines how what courts do when they make inevitably controversial decisions about the boundaries between Islamic law and civil law in fact *constitutes*, and over time exacerbates, the ideologically freighted conflicts they purport to resolve. This is so, he argues, for several overlapping reasons.

One is the "radiating effect of courts" (3), a concept borrowed from Marc Galanter that looks to the "centrifugal flow of influence outwards from courts to the wider world" where information about decisions and judicial reasoning becomes a resource to be interpreted and deployed by diverse audiences according to their conflicting interests and goals (Galanter 1983, 118, 123–26). In Malaysia, the intensity of this ideological conflict, pitting activist syariah lawyers, Islamist NGOs, and Islamic bureaucrats against secular, liberal rights advocates, results in what Moustafa (Chapters 5 and 6) terms a "rites-versus-rights" binary that further polarizes public opinion, thus pushing meaningful resolution further out of reach.

A second reason is institutional design. Moustafa contends that insoluble legal struggles over the border between, and the relative priority of, secular and Islamic laws and legal institutions are "hardwired" to occur (11, 21, 101, 155). This happens because although the original Westminster-style constitution, promulgated in 1957, envisaged a democratic, secular federation (the religious establishment clause, article 3, was not intended to install a theocracy (Fernando 2006)) with more or less liberal civil and political rights guarantees (Part II, articles 5–13) and a very limited role for the operation of state-based Islamic courts (9th Schedule, List II, clause 1), it also enabled and protected Malay-Muslim political hegemony by constitutionally uniting Malay ethnicity with Islamic religious status (article 160), embedding the role and prestige of the state Malay sultans as guardians of Malay culture and Islamic law (article 38), and entrenching race-based preferential treatment for Malays in certain fields of employment, education, and business (article 153). Over time, through the sociocultural, political, and state-sponsored processes of Islamization mentioned above, the bifurcated syariah–civil law arrangements have become more politically and legally intricate and entangled, despite a constitutional amendment in 1988 (article 121(1A)) intended to clarify the jurisdictional boundaries.

Furthermore, these legal arrangements are superimposed upon an ethnically and religiously plural society—slightly more than 50 percent Malay, around 24 percent Chinese, and approximately 8 percent Indian (7)—where actual social interactions and relationships exceed what the legal categories imagine. For example, when a Muslim woman claims to have converted to Christianity in order to marry, should she be prosecuted in a state syariah court for the offense of apostasy, or may she argue, in exercise of her constitutional freedom of religion, that as a Christian she is no longer subject to syariah jurisdiction? (the *Lina Joy* case, discussed at 19–20, 71–76). When a father secretly converts to Islam and unilaterally converts his young children, without the mother's knowledge and without the participation or consent of the children, has the children's

https://doi.org/10.1017/lsi.2022.31 Published online by Cambridge University Press

religious status been validly changed? Does the non-Muslim mother have any custodial rights? Who can initiate divorce? (the *Shamala*, *Subashini*, and *Indira Gandhi* cases, discussed at 86–89). Are these questions for civil or syariah courts? Which legal principles, from which sources of law, should apply? Which court should decide the fundamental jurisdiction question? What happens next when national civil courts cannot decide and refer the matter to a state syariah court for one of several reasons: judicial timidity when confronted with "sensitive" religious issues ("sensitive" being a Malaysian code word for "liable to cause public disorder"); the dubious quality of judicial reasoning; or a good faith and principled recognition that there are no doctrinal legal resources with which to craft a solution? Or when, by delivering judgment on these contentious issues, the civil courts anger interest groups supporting the losing party?

Moustafa's third explanation for how the courts create—*constitute*—rather than finally resolve these kinds of conflicts is his theory of the "judicialization of religion." Distinct from both Habermas's concern about the "juridification" of social life worlds (Sieder 2020) and from the widely studied process of the "judicialization of politics" (Hirschl 2008) where courts, rather than democratically elected legislatures, make law about policy and decide political questions, Moustafa's theory of the "judicialization of religion" encompasses the processes of "radiating," "hardwiring," and "constituting" and their particular result in Malaysia, the "rites-versus-rights" binary that polarizes opinion and precludes rational resolution. Moustafa describes it as "a circumstance wherein courts assume the function of religious authorities, thereby authorizing an 'official' religion, and/or rendering judgment on the appropriate place for religion in the legal and political order"; and an outcome of, and a spur for further, activist litigation and related civil society action that repeatedly invites courts to decide these questions and then protests the result (2, 4, 28, chap. 4). It is thus a description of what courts do, and *also* of social and political processes external to courts concerning what courts have done and should have done. "Judicialization," Moustafa concludes (154) "fuelled profound shifts in the broader political climate. Each successive case became a new focal point in debates over the place of Islam in the legal and political order. They inspired formation of entirely new NGOs as well as coalitions of civil society groups on opposite sides of a polarizing rights-versus-rites binary."

CATALYZING OR RESOLVING CONFLICT THROUGH LAW AND COURTS?

Constituting Religion draws together and extends a suite of Moustafa's earlier writings as he presents his mature thinking on a very impressive array of data woven into a single volume. The book opens with Moustafa's central theme on the constitutive power of law and courts to catalyze, rather than resolve, conflicts where Islam is concerned. In addition, and building on scholarship of Talal Asad (2003), Shahab Ahmed (2016), and others about the historical construction of the religious-secular binary, Moustafa sets out the manner in which colonial and postcolonial codification of "Islam" and "Islamic law" in state law effaced "complex and multivocal" Islamic jurisprudential traditions with totalizing and illiberal statutes. The result for Malaysia, Moustafa shows, is not in reality the creation of parallel "secular" and "Islamic" legal

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systems, but rather "two formations of state law" with the one termed "Islamic" carrying for Malay-Muslims—who are taught to accept this proposition—the symbolic authority of "the religion of Islam." It is, writes Moustafa, "the 'legal-supremacist' conceptualization of 'Islam as law'" (17, citing Ahmed 2016, 116). The argument about the historical expansion of Malaysian state "Islamic law" through the subordination of centuries of intricate Islamic jurisprudential theory and practice is further and thoroughly developed in Chapter 2 ("The Secular Roots of Islamic Law in Malaysia"). Both chapters warrant close attention. Even scholars who think they know this subject matter tolerably well (as I did) will find they learn much from careful and attentive reading (as I did).

Turning to "Islam and Liberal Rights in the Federal Constitution" (Chapter 3), Moustafa traces the drafting history of the constitution in terms that will be familiar to Malaysian lawyers and constitutional scholars. Treatment of the insertion of article 121(1A) in the legal and political context of 1988 as a (failed) attempt to prevent jurisdictional conflict between the civil and syariah systems is particularly well done, as is the discussion of personalities and interests involved.

In the central chapters of *Constituting Religion* Moustafa elaborates his key concepts and tests out his judicialization theory through painstaking reading of case law and analysis of the immensely rich data he has gathered through interviews, focus groups, opinion polling, and content analysis of mass media reporting and self-published documents of NGOs, Islamist and human rights lawyers, and jurists and other civil society actors in the "rights-versus-rites" debates, as he terms them.

He performs in Chapter 4 a careful reading of each of the article 121(1A) cases reported between 1988, the date of the amendment, and the finalization of the book. Case summaries by lawyers tend to assume too much legal knowledge and be written in impenetrable legalese, whereas case summaries by nonlawyers can miss or misunderstand aspects that are legally salient and make no sense to the legally trained. Moustafa deftly avoids these two pitfalls and accurately conveys the essence and significance of each of these increasingly important and often heart-wrenching cases. His fine work here amply illustrates and supports the main contentions of his intricate thesis, while making complex legal arguments accessible to nonspecialist readers.

Moustafa circles back in Chapter 7 to analyze how the Islamist lawyers' and judges' successful push in the article 121(1A) cases to expand the syariah jurisdiction at the expense of non-Muslim and dissenting or liberal Muslims who sought relief, and were denied it, in the civil courts, enabled an assault on the hitherto accepted meaning of the article 3 religious establishment clause. In 1988 the apex court (reluctantly) interpreted the text of article 3—"Islam is the religion of the Federation; but other religions may be practised in peace and harmony in any part of the Federation"—to mean, as the constitutional drafters intended, that Islam had a purely ceremonial function in the political life of the nation and found that the article was not intended to install a theocracy or promote Islam as a source of law, nor did it promote Muslims over other faith communities (the case of *Che Omar bin Che Soh*, discussed by Moustafa at 133–41). As Moustafa explains, in a series of cases that rapidly escalated in number and urgency from about 2004, activist lawyers and Islamist legal scholars tried strenuously, with a degree of success, to persuade the civil courts that the fundamental rights and liberties in the Federal Constitution must be read subject to any restrictions imposed by contrary Islamic law statutes. Alarmingly, strategic litigation initiated by liberal rights lawyers

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and resisted by Islamist officials and activist lawyers sometimes backfired. For example, in the case of *ZI Publications* Ezra Zaid, the Malaysian publisher and translator of Canadian Muslim educator and reformer Irshad Manji's book *Allah, Liberty and Love*, was charged under section 16 of the Selangor state Syariah Criminal Offences Enactment with "publishing a book contrary to Islamic Law." Ezra asked the Federal Court, Malaysia's apex civil court, to declare that section 16 of the syariah enactment was invalid because it conflicted with his article 10 constitutional right to freedom of expression and, according to basic constitutional principles, a statute cannot contradict a constitutional provision unless the constitution so permits. In this case, using reasoning Moustafa (I believe correctly) characterizes as "upside down," the civil court ruled effectively that the constitution did permit this curtailment, on the basis that the proper meaning of the article 3 religious establishment provision, contrary to the precedent of *Che Omar bin Che Soh*, is that Islam is a source of law that guides interpretation of the constitution and statutory law (145–47).

In "Constructing the Political Spectacle: Liberal Rights versus Religion in the Court of Public Opinion" (Chapter 5) and "The Rights-versus-Rites Binary in Popular Legal Consciousness" (Chapter 6), Moustafa traces the "radiating effects of courts" through an enormous amount of data. Some of this information will be familiar to Malaysians and scholars of Malaysian law and politics who followed these events in the mass media; yet it is still confronting and enlightening to see it assembled in this way. Layering the alarmingly polarized and uninformed responses to the national survey questions about the content of syariah or obligations to abide by the opinions of Islamic jurists or officials (Chapter 6) upon the extensive and painstakingly accumulated evidence of contending civil society voices (Chapter 5), it is difficult to resist Moustafa's conclusion that informed opinion and nuanced argument by elite contenders in either "liberal" or "Islamist" quarters was submerged in a tidal wave of strategic simplification and increasingly strident retaliation as each side mobilized in what he describes as a "zero-sum game"(123, 129, 131, 156).

HOPEFUL SIGNS OR A "FINGER TRAP"?

Since *Constituting Religion* was published there have been some hopeful signals from the civil courts suggesting that the impasse created by aggressive article 121(1A) litigation may be resolving. For example, in early 2018 the Federal Court ruled that one parent's conversion of children to Islam without the consent of the other parent is unconstitutional and that the civil courts retain supervisory jurisdiction over the constitutionality of syariah courts.[1] Yet there are contrary signs too. As recently as March 2022 the Minister for Religious Affairs stated that the Federal Court's ruling was merely "an interpretation" and that questions of Islamic law remained exclusively with the syariah courts.[2] Moustafa (158) concluded his book by comparing Malaysia's

1. *Indira Gandhi Mutho v Penghara Jabatan Agama Islam Perak & Ors and Other Appeals* [2018] 3 CLJ 145.

2. "Federal Court Ruling on Unilateral Conversions an 'Interpretation', Says Minister," *Free Malaysia Today*, March 18, 2022. https://www.freemalaysiatoday.com/category/nation/2022/03/17/federal-court-ruling-on-unilateral-conversions-an-interpretation-says-minister/.

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judicialization of religion problem to the children's toy, a "Chinese finger trap": "the moment a person attempts to remove her fingers from the trap, the bamboo spiral contracts around her fingers, and grows tighter still the more she tries to break free." Four years later, this analogy still appears to hold true, and *Constituting Religion* is not only a compelling analysis of a recent phase of Malaysian legal history; it remains relevant, and urgently so. It deserves to be studied and debated not only by scholars and students across the many disciplines it addresses but also by citizens and policy makers wherever constitutionalism, courts, and religion come into conjunction.

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