

Constituting Religion: Islam, Liberal Rights, and the Malaysian State: A Book Review

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Introduction

The concept of the modern Islamic state has sparked significant academic and politico-legal debate across Muslim-majority states around the world. This debate is difficult to resolve, being influenced by various strands of thought in political philosophy as well as theology. The debate has transformed itself into that of secularism versus fundamentalism – two extreme opposite ends of the scale of political Islam. Should the state not interfere in private, religious matters, and restrict its scope to creating positive law that facilitates the rights of the people against the state, including the right to religious freedom? Or should the state actively propagate and enforce a vision of Islam through a codified and enforceable *sharia*? There have been several models in place in different jurisdictions: Saudi Arabia is notorious for its rigid, fundamentalist approach to *sharia* and its enforceability, whereas Turkey is the most significant example of a secular, Muslim-majority state.

The diverse interpretations of the role of Islam in law and governance have resulted in conflicting, often hostile, relations between non-Muslim and Muslim-majority states in the new globalised world. Indeed, foreign relations between countries are paramount to maintaining peace and facilitating mutual economic growth; however, such relations have been hampered by opposing views of religious influence in politics. The need to create organisations such as the Organisation of Islamic Cooperation (OIC) is a testament to the need for a homogenous understanding of the role of religion in governance.

In his book *Constituting Religion: Islam, Liberal Rights, and the Malaysian State*, Tamir Moustafa expresses his apprehensions towards the role of Islam in a religiously diverse state.¹ With a focus on Malaysia, Moustafa explains the role of the law in propagating religious matters

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¹ Tamir Moustafa, *Constituting Religion: Islam, Liberal Rights, and the Malaysian State* (Cambridge University Press 2018).

more proactively within governance. His analysis pre-empts the need for a more fluid and flexible understanding of the core principles of Islamic faith in shaping a state's positive law. In this review, I conduct a critical analysis of the main arguments in his book, while attempting my own comparative analysis of the state structure and the laws in place between Malaysia and Pakistan.

Book Review

In the first chapter, Moustafa challenges the widely assumed notion that courts play important role in resolving conflict, defending fundamental freedoms, and sustaining secularism (13). Instead, he claims that law and courts 'constitute' political struggle in four important ways: by delineating categories of meaning (such as secular and religious); by shaping the identity of variously situated actors; by providing an institutional framework that enables and even encourages legal conflict, and by providing a focal point for political mobilisation outside the courts (13). The court system in Malaysia is divided into common law courts and *sharia* courts, hierarchies that run parallel to each other. The common law courts decide cases based on the positive law passed by the federal and state legislatures, while the *sharia* courts decide cases that fall under the ambit of Islamic law. The division allows for disputes to be categorically decided with a clear demarcation of jurisdiction facilitating a citizen's access to the justice system. Moustafa argues that the sharp dichotomy between what is defined as 'Islamic' and 'secular' is a construction which does not encapsulate a holistic picture of the various mechanisms that are in play behind *sharia* and civil laws, particularly due to the narrow definitions attributed to these categories of law.

Moustafa then moves to an empirical analysis where he traces the legal construction of religious authority in Malaysia from the colonial era to the present. He traces the core principles in the Islamic legal tradition, including the position of human agency mechanisms of evolution and a pluralist orientation. The chapter further develops the argument that secular and Islamic laws are not polar opposites as they are conceived to be in public discourse, but rather are parallel formations of state law. He mentions the state monopoly on religious interpretations (32) and how that has led to the codification of a type of Islamic law that is a state-sanctioned understanding of Islam (46). There is a greater crossover of positive law and *sharia* law, with state sovereignty being directly

influenced by notions of Islamic law, such as Islamised penal codes that enforce *hudood* punishments. By combining state power and Islamic law, there results a greater blurring of the boundaries between positive law and Islamic law.

Moustafa opens up the debate that Islamic and secular laws do not have to be put on opposite ends of the spectrum; rather they are more similar than what is assumed. His arguments revealing that one should not only take laws at their face values are noteworthy as they establish that the content of Islamic law is not limited solely to what the state claims it to be. The extensive research and empirical data that he has collected reflect a well-rounded theory of how the ‘religiously conservative’ and the ‘ideologically liberal’ can be reconciled. However, he does not provide any viable solution that can be implemented to reconcile the two contrasting schools of thought; given the sensitive and significant nature of the argument, this weakens his overall claim. He highlights the problems that are present in the Malaysian legal system regarding this strong dichotomy, which is further increased due to public opinion, but he fails to provide micro-level solutions to a problem that is of such a macro-level, and hence, not easy to resolve.

The author further elaborates on the relationship between the *sharia* courts and the civil courts in the second half of the book. He supplements his opinions and helps the reader understand underlying problems in the Malaysian state through the extensive use of case laws. The use of case law throughout the book strengthens the veracity of his claims. By highlighting real case law examples, Moustafa allows for a more coherent and concrete understanding of the very foundations of the issue itself.

One main issue identified in the book is Article 121(1), which became “the primary focal point of tension concerning the “religious vs secular” identity of the Malaysian state” (62). This article demarcates the separate jurisdictional authority of the parallel court systems – the civil courts can only adjudicate on legal disputes based on laws passed by the legislatures but have no jurisdiction to hear matters under *sharia* law. The *Dalip Kaur* case is described in detail as an example of how the division of jurisdiction created a problematic structure for interfaith couples. The case concerned the conversion of a Sikh man to Islam for the purpose of marriage to a Muslim girl. However, he died before the marriage. After his

death, his mother initiated legal proceedings requesting burial rights according to Sikh traditions, claiming his conversion was null as he was still a ‘practicing Sikh’ at the time of his death. The case sought to identify what is required for conversion out of Islam: according to the Fatwa Committee of Kedah, a Muslim is required to do the following in order to convert out of Islam: to declare the conversion through a poll, to pray or perform any act of worship at congregation of the religion he believes in, and to get a proper judgement approval from the Sharia Committee. According to the author, Article 121(1) gave “the Sharia courts exclusive jurisdiction to determine the religious status of the deceased.” The *Dalip Kaur* case proved this statement as the case was originally heard by the High Court; the appeal made by Dalip Kaur was sent to the Supreme Court after which it was referred to the Fatwa Committee of Kedah due to issue of jurisdiction.

Moustafa also writes about how the issue of freedom of religion was also seen to be challenged in Malaysia. Article 11(3) in the Constitution allows religious communities to practice their religion and to be able to freely enter or exit religions. However, this right was seen to hold true only on paper. The *Lina Joy* case was a significant case discussed by the author with regards to this issue. Joy was an ethnic Malay, whereas previous cases were of non-ethnic Malays. In *Lina Joy*’s case, the courts held that the plaintiff shall remain in the Islamic faith until ‘her dying days’, showing the extreme rigidity of the Sharia Court and the Fatwa Committee in dealing with ethnic Malays when it came to religious renunciation (75). In the case of *Siti Fatimah Tan Abdullah*, “the case confirmed that there was no avenue for Muslims to legally convert out of Islam in the state of Penang. Only if the original conversion to Islam was found to be faulty could one be declared non-Muslim under the Administration of Islam Enactment” (79-80).

The author further elaborates upon the growing tensions within the country because of the aforementioned judgments. The issue of civil courts versus *sharia* courts is broadly highlighted to build upon previous arguments regarding the issues of Article 121(1) and 11(3) respectively. These are supplemented with the liberal rights movements and parties arising in Malaysia, particularly in matters relating to child custody and divorce. *Chan Ah Mee v Islamic Religious Affairs Department* was an early child custody case regarding the conversion of faith of the children

performed by the father. The case argued that both parents are required to make such decisions for minors. It held, “To allow just the father or the mother to choose the religion would invariably deprive the other of the constitutional rights under Article 12 (4)” (84). The High Court ruled the conversion null and void. This case, along with others such as *Subashini v Saravanan*, showed the inability of the civil courts to remedy the disputes over jurisdiction that was within the bounds of the *sharia* courts.

In the latter part of the book, Moustafa goes on to discuss the fundamental issues with the legal framework in connection with the religious inclination of the state structure. There is great emphasis on the role of the media as a state institution in propagating politico-religious sentiments, such as the 1Malaysia movement which was an attempt to mend rifts across racial and religious lines after the 2008 elections. Similarly, the ruling in the *Indira Gandhi v Muhammad Ridzuan Abdullah* case provided a legal mechanism to bypass all civil law frameworks and legal barriers to conveniently gain custody of children by one changing their child’s religious status in multi-religious couples. This case in particular gained intense media coverage owing to the translation of racial and religious differences in the media itself. It served as a gold mine for politicians who wanted to serve the ethnic Indian community. The controversy then shifted towards Prime Minister Najib, who claimed that the religious status of the child can only be changed if both parents consented, providing a more rationally founded argument for the issue; this view was rejected by conservative Islamic movements. The ethnolinguistic divide already present in Malaysia was exacerbated by the use of the media to propagate certain views, often biased towards the Islamic and local majority.

The predicament of having separate family law for different ethnolinguistic groups often became more problematic with interracial couples and couples with varying religious identities. The distinction between civil and *sharia* courts exacerbated the complexity of how such cases were to be resolved, such as the *Tan Cheow Hong v Fatimah Fong Abdullah* case, in which Fong converted to Islam during a period of separation from her husband. The child was in the possession of the father, but Fatimah, during a period of temporary possession of the child, converted to Islam and made her possession permanent. Such issues could not be solved in civil courts because the issue was inherently religious.

The structure of the legal system made resolution of complex family legal issues much more difficult than had the system been secular *ab initio*. Further polarisation of Muslims and non-Muslims occurred during Friday *khutbahs*; indeed, these served as centres for fundamentalist propagation. Certain *khutbahs* promoted the burning of churches across Malaysia as a means of *jihad*. Moustafa's multi-faceted argument claims that the state structure necessarily compromised on delivering true justice. By citing precedent and examples of initiatives and attempts of civil society to eradicate inequality, and the consequent exacerbation of such issues, he portrays a holistic argument showing the negative effects that the codification of Islam as the religion of the federation has had on minority groups and inter-religious relations.

Moustafa further highlights how the courts played a crucial yet controversial role in interpreting Article 3 of the Malaysian Constitution. He highlights three major profile cases – the Borders bookstore case, the *Catholic Herald* case, and the *Mak Nyah* transgender case (152) – and discusses the role of interpretation of various statutory law in line with Article 3. These three cases established the main controversy between the secular and the religious. They highlight how certain constructions of the modern state, such as multinational corporations, as well as inherent characteristics of any state – i.e. various religious groups and the transgender community – are often robbed of basic rights due to stringent interpretation of the law, in line with the vague and controversial Article 3. The structure of his arguments provides a succinct and coherent analysis of the stark injustice imposed upon certain groups due to the construction of certain terminology embodied within legislation. Moustafa writes “Litigation can produce legal precedents that are exactly the opposite of the liberal protections that liberal rights advocates aim to secure” (152). The paradox is that the justice system can often be counterintuitive due to the institutionalised discrimination that is facilitated by vague construction of religiously-influence legislation. The quandary lies within the fundamental structure of the system, which Moustafa argues must be eradicated to ensure a greater system of justice within the liberal.

Moustafa's thesis applied to Pakistan

Moustafa presents the argument that the modern Islamic state does not warrant a substantive distinction between ‘secular’ and religious’. With a state structure that facilitates both positive law and Islamic law through

parallel court systems and a legislature that creates laws that abide by the limitations set by Islamic injunctions, Malaysia exemplifies how the 'religious versus secular' debate does not consist of two polar opposite philosophies, but rather a spectrum of how influential religion is to the state ideology. It is evident that *sharia* is not an overwhelming force in governing the country as compared to places such as Saudi Arabia and Iran; nor is it an almost absent consideration, as in the majority of Europe. However, there are certain faults within the system that Moustafa has highlighted that could be potential grounds for structural reform, such as Islam being the state religion in an extremely ethnically diverse country.

The state structure in Pakistan, with regards to the role of Islam, is similar in some ways while different in others. Both constitutional systems have declared their jurisdictions to have Islam as their state religion; Article 2 of the Pakistani Constitution is comparable to Article 3 of the Malaysian Constitution. The concept of having a state religion fundamentally differentiates the government structure from a typical liberal democracy commonly found in Western countries. By giving a particular religion a significant place in the basic law of the land, said religion automatically becomes a significant source and determinant of the positive law of that constitutional jurisdiction. In both Pakistan and Malaysia, Islamic law, or *fiqh*, becomes a determinant of the law, the government structure and accepted conduct and culture - the latter being an indirect product of the former. However, both countries have tried to adapt the role of Islamic law to one that coexists with positive law. Indeed, both countries give a certain level of importance to positive law by creating a pseudo-secular government. The legislatures create law which is ultimately subject to scrutiny under Islamic law, thus giving Islamic law more of a symbolic significance, while positive law is necessary for a more practical approach to national governance.

However, there is no concept of a parallel court hierarchy in Pakistan as there is in Malaysia. In Malaysia, the *sharia* courts run parallel to the civil courts, with a hierarchy of their own - subordinate, high and appellate. With an entirely separate branch of the judiciary responsible for adjudicating matters on Islamic law, there is a certain extent of separation enforced at the state - and constitutional - level of secular law and religious law. While 'Islam is the religion of the Federation', it is by no means the single source of law. The narrative of the Pakistani state is

otherwise: Article 227 of the Pakistani Constitution declares as invalid any law that is in contravention of the Injunctions of Islam. The law must be acceptable within the limitations of Islam to be considered enforceable. Furthermore, the only branch of the judiciary that overlooks the Islamic nature of the law is the Federal Shariat Court, which has limited original jurisdiction, and whose main role is to determine whether certain legislation is compatible with the Injunction of Islam. It employs a form of judicial review that is limited to Islamic interpretation of the law under the Constitution, a role that is given more weightage than its appellate jurisdiction in matters of Islamic law.

Conclusion

Moustafa's book provides a cohesive and coherent depiction of the fundamental issues of the 'religious versus secular state' argument. Reconciliation of religious anxieties and the need to provide certain basic rights in a legal positivist sense are almost impossible in a state structure that systematically and institutionally favours one religion over another in a state that has religious diversity. The argument that a state, such as Malaysia, should not have a codified state religion, such as Article 3, thus holds. The judicialisation of Islam has resulted in an ineffective judicial system, whereby certain parties are robbed of any true 'justice' that, on paper, is afforded to them, creating a very distinct dichotomy between 'formal equality' and 'substantive equality' in the Habermasian sense. Moustafa's take on the debate is very well structured and presented, with arguments continuously supported by facts and case laws, to depict the true complexity of this debate.

Upon a textual analysis of Moustafa's book, I posit the claim that the debate between whether a state should be strictly secular or religious is fundamentally flawed. Nation-states around the world are creating their own definition of what it means to be a religious state. A state does not have to be either completely secular or completely religious, bordering on fundamentalism. The way a state may govern its religious law in harmony with its secular law will depend on its demographic composition, cultural dynamics, style of governance and many other factors. Malaysia's population comprises of 61.3% Muslims, 19.8% Buddhists, 9.2% Christians, and 6.3% Hindus. While there is a clear Muslim majority in Malaysia, it is not as overwhelmingly dominant as is the 96.3% Muslim population in Pakistan. Thus, there is a greater division in secular and

religious law in Malaysia, as exemplified by the parallel civil and *sharia* court structures. In Pakistan, the judges within the singular existing court hierarchy are able to adjudicate on matters of Islamic jurisprudence.

However, both countries have been experiencing significant difficulties with guaranteeing equal protection to their religious minorities. Pakistan has witnessed growing religious and sectarian violence against the Shia Muslim community and the Ahmadi community, who are effectively disenfranchised from state representation. Moustafa highlights how *imams* in mosques in Malaysia would often incite anti-minority sentiments, and also highlights the intolerance of courts in accommodating religious conversion outside of Islam. Intolerance is a major issue in Islamic states, but whether secularism would be an effective answer, given the existing history of and sentiments towards Islamic governance, is an unnecessary debate. If countries are going to declare state religions, they must be equally willing to provide the necessary accommodation and representation for their religious minority communities.