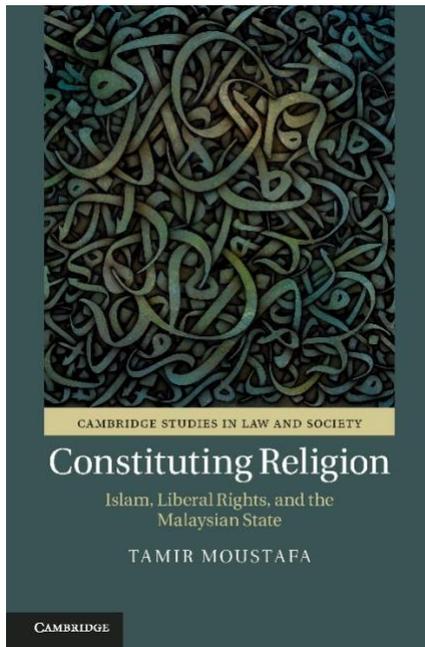


The Immanent Frame Book Forum on Tamir Moustafa's *Constituting Religion: Islam, Liberal Rights, and the Malaysian State* (Cambridge University Press, 2018)



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## [Tamir Moustafa, “Constituting Religion – An Introduction”](#)



Most Muslim-majority countries have legal systems that are meant to embed religion in state law. In many cases, the broad outlines of these legal frameworks are an enduring legacy of colonialism. In others, state regulation of religion is of more recent vintage. But in either instance, the co-constitution of law and religion is a trend that is not likely to end anytime soon. Take, for example, the fact that all the constitutions written in Muslim-majority countries since the turn of the millennium declare Islam the religion of the state. Or, consider the fact that personal status and family law frameworks are typically [regulated along religious lines](#).

These sorts of legal arrangements are not unique to Muslim-majority countries, but as a group they tend to regulate religion far more than the global average. Among the twenty-three countries in the “very high” category of the [Pew Government Restrictions on Religion Index](#), eighteen (78 percent) are Muslim-majority countries. This oversized share compares with only two of eighty-eight countries (2.3 percent) in the “low” category of the Index. Whether by way of constitutional proclamations or substantive laws, the leaders of most Muslim-majority states endeavor to “constitute” religion by way of state law.

At the same time, these legal systems typically contain provisions that one expects to see in a liberal legal order, including constitutional guarantees for civil liberties, religious freedom, and equal rights before the law. These dual commitments to religion and liberal rights are not inherently at odds. Nonetheless, they generate legal questions, present legal conundrums, and afford legal and symbolic resources for those who wish to advance contending visions for their states and societies.

[Constituting Religion](#) examines these issues through an in-depth treatment of the Malaysian case. I focus on Malaysia for three reasons. First, Malaysia is home to one of the most tightly regulated religious spheres in the world. It therefore provides a textbook example of how many Muslim-majority states have sought to define and regulate religion

through state law. Second, Malaysia provides a striking example of how, under certain conditions, efforts to constitute religion catalyze the “judicialization of religion,” a circumstance wherein courts are made to adjudicate questions and controversies touching on religion. Finally, the Malaysian case provides a vibrant example of how judicialization can (re)constitute religion and liberal rights as binary opposites in the public imagination. Here, I examine the [radiating effects of courts](#) on popular religious consciousness.

\* \* \*

Long defined by its ethnic cleavages, Malaysian politics is increasingly polarized around religious difference. This polarization is in no small part due to a recent series of high-profile cases concerning the jurisdiction of the federal civil courts vis-à-vis state-level syariah courts. The cases carried significant legal implications, but their collective impact was felt most strongly in the court of public opinion. The cases generated a flood of media attention and they became focal points for political mobilization outside of the courts. *Constituting Religion* examines the institutional origins of these cases and traces their radiating effects on Malaysian political life.

[Shamala v. Jeyaganesh](#) is among the dozens of cases examined in the book. It provides a striking example of how legal controversies that are ostensibly about religion are better understood as pathologies of state law. The case concerned a Hindu couple who had married under the Marriage and Divorce Act, the statute that regulates non-Muslim marriages in Malaysia. A few years into the marriage, the husband, Jeyaganesh, left Shamala and converted to Islam. As a Muslim, he was now subject to the jurisdiction of the syariah courts. As a non-Muslim, Shamala remained subject to the jurisdiction of the civil courts. Each managed to secure interim custody orders for their two young children from these two different jurisdictions, but the court orders came to opposite conclusions: the Syariah court awarded custody of the children to Jeyaganesh, while the civil court awarded custody to Shamala. To make matters worse, because official religious status determines which court one can access, neither parent could directly contest the competing court order. This absurd situation was the beginning of an epic legal battle that remained in the courts—and in the press—for years. The case turned on technical issues of court jurisdiction, rules of standing, and other features of Malaysian judicial process. But they were widely understood by the public as a zero-sum conflict between religious law and secular law.

As a direct result of *Shamala v. Jeyaganesh*, liberal rights groups formed [a coalition](#) to “ensure that Malaysia does not become a theocratic state.” Not long after, a broad array of over fifty conservative NGOs united in a countervailing coalition calling itself Muslim Organizations for the Defense of Islam (*Pertubuhan-Pertubuhan Pembela Islam*). *Pembela* announced that it was mobilizing to defend “the position of Islam in the Constitution and the legal system of this country.” Both coalitions worked tirelessly to lobby the government and to shape public understanding of what was at stake in *Shamala*

*v. Jeyaganesh* and dozens of other cases. The two sides found agreement only in the proposition that Malaysia faced a stark choice between secularism and Islam, between rights and rites.

*Constituting Religion* traces the work of activists in the court of law (litigation, submission of *amicus curiae* briefs) and in the court of public opinion (impromptu statements on courthouse steps, press conferences at NGO headquarters, petitions, digital advocacy campaigns, public rallies, vigils, and more). Given that court cases typically involve multiple hearings and appeals, a single case can generate a continuous stream of press coverage for upwards of a decade. For instance, *Indira Gandhi v. Muhammad Ridzuan Abdullah* is a child custody/conversion dispute that first went to court when I began fieldwork for this project in 2009. By the time *Constituting Religion* went to press, the case had produced eighteen separate court decisions and thirty-five “newsworthy” court appearances. The case finally concluded a decade later (yet Indira is still [not reunited](#) with her daughter). Along the way, each hearing was covered as a distinct media event—the next installment in a politically charged and emotive drama. With each court decision, dozens of NGOs mobilized on opposite sides of a “rights-versus-rites binary.”

*Constituting Religion* examines how, through these mobilizations, each side derived legitimacy, purpose, and power from an oppositional stance vis-à-vis the other. Liberal rights activists rallied supporters by sounding the alarm that secularism was under siege and that Malaysia was on the way to becoming an Islamic state. On the other side, conservative organizations rallied support by contending that liberal rights groups wished to undermine the autonomy of the syariah courts and that they worked in cooperation with foreign interests intent on weakening Islam. Both groups maintained that Islamic law and liberal rights were incompatible and that Malaysians must stand for one or the other. These efforts worked to (re)constitute popular understandings of Islam, liberal rights, and their imagined relationship to one another in starkly adversarial terms.

A remarkable aspect of all this mobilization is that the cases provided a prominent platform for a variety of actors with little or no expertise in matters of religion. *Constituting Religion* traces the claims and counter-claims that were fielded by litigants, lawyers, judges, journalists, political parties, NGOs, and government officials. Most of these actors had no specialized knowledge of *fiqh* (Islamic jurisprudence) or *usul al-fiqh* (Islamic legal theory). And yet judicialization positioned them as central agents in the production of new religious knowledge – displacing, or at least competing alongside “traditional” religious authorities. What is striking in the Malaysian case is that most of these actors defined Islam vis-à-vis liberalism, or, more to the point, against liberalism.

\* \* \*

In Malaysia and elsewhere, courts often stand at the center of heated debates involving religion. Conventional accounts tend to frame these legal struggles as the product of a

collision between ascendant religious movements and liberal legal orders. In other words, legal conflict is understood as originating from *outside* the legal system. This understanding of the root problem (religion) and what is at stake (liberty) comes easily because it aligns with the prevailing notion that courts are in the business of conflict resolution and courts serve as defenders of fundamental liberties and strongholds of secularism.

In contrast with this expectation, *Constituting Religion* shows that, far from consistently resolving disputes, legal institutions can generate conflict and exacerbate ideological polarization. Explanations that start and end with the “problem” of religion, without examining the intervening work of law and courts, will fail to appreciate these conflict-generative functions. And simplified explanations that lay blame on a reified “religion” will also fail to grasp the myriad ways that the state is itself implicated in the politics of religion and in modern constructions of religion more generally. Law and courts do not simply stand above religion and politics. Instead, they enable and catalyze ideological conflict.

*Constituting Religion* builds on recent and foundational scholarship concerned with legal mobilization, legal consciousness, legal pluralism, social movements, political Islamism, and the genealogies of secularism. As a result, the book draws on diverse approaches from sociolegal studies, religious studies, comparative judicial politics, and religion and politics. Each of these literatures and approaches is rich with insights, yet some of these bodies of scholarship are not in conversation nearly as much as they could be.

The focus on legal institutions and their role in the judicialization of religion is not meant to minimize the ideological cleavages that have gripped many Muslim-majority countries over the place of religion in the legal and political order. But one of the goals of *Constituting Religion* is to better understand the role of modern law in fueling those struggles. In other words, an important objective of the book is to make visible the role of law and courts in helping to constitute the very ideological conflicts that courts are charged with resolving. This aim encourages reflection on deeply held assumptions about religion as a perennial troublemaker and deeply rooted expectations about the normative role of law vis-à-vis religion.

## [Asli Bali, “Liberal Rights and Religious Rights”](#)



How do Muslim-majority countries manage dual commitments to constitutional protections for liberal rights and Islamic personal status law? Tamir Moustafa offers a rich and nuanced study of the Malaysian case to address this question in that context and develop broader insights. Focusing on the roles played by courts and lawyers in producing a popular understanding of an opposition between liberal rights and religious provisions or, as Moustafa helpfully frames it, a “rights-versus-rites binary,” he provides a deeply textured account of how and why legal institutions play a role in bringing these commitments into conflict. Moustafa notes that in many Muslim-majority contexts, courts increasingly adjudicate questions and controversies over religion, which he calls the “judicialization of religion.” In cases where courts play a preeminent role in determining how the state regulates religion, he argues that legal institutions serve to *constitute* the struggle over religion rather than merely offering a forum for dispute resolution.

While [Constituting Religion](#) provides a detailed case study of Malaysia, the argument Moustafa develops has important implications for much of the Muslim world. There is an extensive literature across disciplines—from [comparative law](#) to [political science](#) to [sociology of religion](#)—making the case that there is no intrinsic conflict between Islam and liberal rights protections (and more broadly Islam and democracy). While Moustafa agrees with this, in practice he notes that the constitutional and legal controversies that have roiled the Muslim-majority world from Egypt to Pakistan have often centered on tensions between secular and religious interpretations of rights. His close reading of such controversies in the Malaysian context builds a theory about the role of courts as a focal point for social movements, legal mobilizations, and contestations over religion that has applicability beyond Malaysia.

Moustafa's argument concerning the judicialization of religion is an important counterpoint to recent scholarship arguing that courts play a moderating role in countries where a trend of greater religiosity has put pressure on liberal constitutional commitments. [Ran Hirschl](#) has argued that in countries with a dual commitment to religion as a/the source of legislation and modern constitutionalism as a guarantor of individual rights, constitutional courts serve as a moderating force that helps constrain religious claims in the legal domain. But many of the countries of interest to Hirschl have systems of legal pluralism that accord religious courts jurisdiction over what are considered personal status or family law cases. As Moustafa demonstrates, legal institutions and courts in these contexts become the central arena for contestation over the status of religion, often enabling activists to advance a religious agenda through strategic engagement with religious courts. Shifting attention from constitutional courts to religious courts provides a different lens on how legal institutions may moderate or amplify specific religious agendas. In particular, where there is jurisdictional bifurcation between religious and civil courts—that is, where there is no appellate mechanism for civil review of decisions taken by religious courts—Moustafa highlights that constitutional courts will seldom play the moderating role envisioned by Hirschl.

Critical to Moustafa's account of how legal institutions may serve to intensify controversies over religion and augment polarization is the question of bifurcated jurisdiction. In the Malaysian case, the absence of an appellate mechanism for civil courts to review decisions by Malaysia's "syariah courts" generates critical legal lacunae for individuals seeking recognition for conversion, divorce or child custody in circumstances that involve cross-communal identities. As Moustafa notes, "a bifurcated legal system hardwires complex institutional dilemmas," especially in a multi-religious society in which Muslims and non-Muslims are likely to become legally entangled. The rigid legal categories imposed by the state in defining the religious identity of its citizens are in tension with the fluidity of such identities in practice. As Moustafa shows, one result is that for those categorized as Muslim, there is no legal mechanism available for conversion. Deemed by civil courts to be a matter for syariah courts, conversion is foreclosed because syariah courts decline to adjudicate these cases. For those in mixed marriages the challenges multiply further. With no means of having mixed marriages recognized by the state, Moustafa outlines countless cases where couples have opted for paper conversion or unregistered marriages and then find themselves grappling with complex legal and custody issues that often end up assigned to syariah courts over the objection of the non-Muslim spouse or parent.

In these cases, the rigidity of the law and the absence of appellate review by civil courts generates gaps in the legal order for individuals whose identities and relationships place them at the blurred boundary between Muslim and non-Muslim. In this sense, the law literally constitutes the dispute (with categories that render claims non-cognizable and erase claimants' identities) and produces jurisdictional limitations that deny recourse to rights protections. Weaving his argument through cases involving birth, child custody,

marriage, divorce, conversion, and burial, Moustafa illustrates in vivid and often disturbing detail the personal stakes for litigants, the complex strategies deployed by lawyers, and the ways in which third party actors and social movements use dramatic cases to produce narrow and polarizing framings of the issues. Moustafa argues that the narratives mobilized by political entrepreneurs around controversial cases—and their use of mass media to target specific ethnolinguistic communities with their preferred framing of the issues—is a channel by which court opinions have radiating (and polarizing) effects on popular legal and religious consciousness.

Moustafa's central theoretical claim is that law and courts constitute (and fuel) struggles over religion. In the Malaysian case, he shows that courts have in the process often served to advance religious agendas rather than play a secularizing role. Where religious courts are the exclusive arbiter of disputes at the boundary of their jurisdiction, it is perhaps not entirely surprising that they give greater weight to religious rites than liberal rights. Moustafa's insights on this point are generalizable to all other contexts in which jurisdiction is bifurcated in a manner comparable to the Malaysian case, either *de jure* or as a *de facto* matter with civil courts reluctant to review syariah court decisions.

Moustafa draws on a broad interdisciplinary literature to develop several other important arguments. He argues that British colonial rule effectively entrenched an illiberal vision of Islam—producing a distinctive Anglo-Muslim law. Moustafa cites the work of anthropologists, historians, and Islamic law scholars—from [Hussein Agrama](#) to [Shahab Ahmed](#) to [Khaled Abou El Fadl](#)—to demonstrate that colonial codification of Islamic law advanced a selective reading of an otherwise heterogeneous and pluralist legal tradition. Moreover, identity categories that were once porous and permeable were demarcated by sharp boundary lines through the fixity of codification in the colonial period, contributing to the contemporary controversies that he examines. Though there may not be intrinsic tension between Islamic law and liberal rights, the colonial legacy version of shariah is, on his account, at odds with liberal rights. His fascinating discussion tracing the tight regulation of religion in Malaysia to the colonial context helps explain precisely how and why the negotiation of religious identity boundaries has been channeled to the courts in Malaysia.

The distinctiveness of courts as a forum for negotiating religious conflict comes into focus against this backdrop. As Moustafa notes, the institutional arrangements provided by the Malaysian state provide no arbiter when individuals subject to different legal regimes are embroiled in a single legal dispute. The *adversarial* context through which courts operate then amplifies contestation by framing parties as advancing *opposing* claims that are religious versus individual rights-protective. The critical role of institutional design in exacerbating religious conflict and producing the rights-versus-rites binary is further magnified by Malaysia's structure of bifurcated jurisdiction. Formal rules of jurisdiction become the focal point for disputes over religious identity, and activists—including litigants and third parties—develop advocacy and media strategies to

dramatize the stakes of adversarial cases shaped by those rules. Moustafa's argument concerning the ways institutional complexity incentivizes actors to frame disputes in polarizing ways has several interesting implications. First, it suggests that the judicialization of religion may not have the secularizing effect theorized by Hirschl and others *even* in cases where jurisdiction is not bifurcated. Making courts the focal point of disputes over religion-state relations produces strategic opportunities for political entrepreneurs to capture the public imagination through stark us-versus-them presentations framed in adversarial terms. The use of courts to construct the binary of secular and religious, or rights-versus-rites, is not unique to Malaysia or even the Muslim-majority world. Indeed, Moustafa discusses examples of ideological mobilization over religious issues through litigation in the United States, particularly in debates about abortion and same-sex marriage.

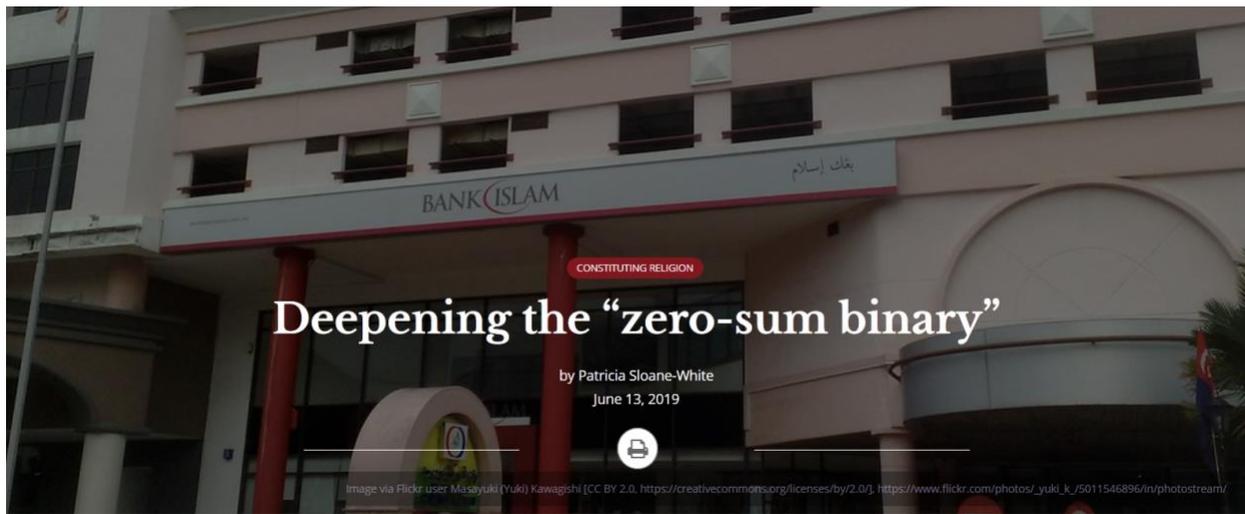
A second interesting implication is the jurisgenerative potential of the strategic litigation that Moustafa describes. As he notes, "efforts to legislate Islam open new fields of contestation that draw new participants into the production of religious knowledge." On the one hand, the codification of Anglo-Muslim law reduced the pluralism of Islamic law in ways that are illiberal and authoritarian on Moustafa's account. On the other hand, the cases he examines in Malaysia demonstrate the ways in which litigants and advocacy groups are exercising agency in seeking to influence and shape the forum, meaning, and interpretation of sharia in the Malaysian context. Islamic law in Malaysia is far from static, despite the fixity of legal categories. Rather, the volume offers a dynamic account of actors navigating institutional complexity to reshape the legal order by advancing their religious agenda.

Moustafa concludes the volume with a brief chapter that offers some comparative reflections on the contrast between the Malaysian and Egyptian cases. He notes that judicialization of religion need not provoke the same degree of polarization everywhere—in Egypt, he finds that giving constitutional status to Islam as the religion of the state has resulted in a constitutional jurisprudence that has "bolstered liberal rights more often than an Islamist agenda" without generating much media coverage or social mobilization. The absence of jurisdictional conflict between civil and religious courts and Egyptian judges who avoided framing questions in terms of a secular/religious binary explains this difference on Moustafa's account. One question raised by this comparison is whether Moustafa's theory concerning the judicialization of religion is equally applicable in contexts where debates about the secular/religious divide occur largely *within* a single religious community. In his brief discussion of the Egypt comparison Moustafa argues that the case demonstrates the degree to which sociopolitical context and legal institutions matter to the impact of judicializing religion. This raises but does not fully address the question of whether the Malaysian case—where contestation takes place across sectarian lines and in the context of bifurcated jurisdiction—is distinctive in ways that limit the applicability of his insights about how courts may exacerbate divisions. Many of the principal debates about the secular/religious divide in the broader Muslim world find

members of the same religious community on opposing sides when considering dual commitments to liberal and religious rights (the same is also true in non-Muslim countries like Israel where religion is judicialized). How do the implications of Moustafa's argument differ in these contexts?

Moustafa explicitly notes that while he shares [Ayelet Shachar](#)'s view that there is no inevitable conflict between religious accommodation and liberal rights, he believes optimism on that score should be tempered by careful attention to institutional design and path dependent religious doctrine. In short, the combination of a commitment to an illiberal version of sharia (derived from Anglo-Muslim law) and institutional complexity in Malaysia do not bode well for a favorable balance between rights and rites. The comparison with Egypt suggests that institutional complexity and the cross-sectarian character of the divisions over liberal and religious rights may have been more significant in Malaysia than anything intrinsic to the particular version of religious doctrine. Moreover, the evident significance of activists' roles in using legal institutions to shape popular religious and legal consciousness in Malaysia speaks to the possibility of revising understandings of the role of religion in the legal order. Perhaps this suggests room for greater optimism, leaving open the possibility that similar revisions might be deployed in future to privilege less repressive interpretations.

## [Patricia Sloane-White, “Deepening the Zero-Sum Binary”](#)



Tamir Moustafa’s book *Constituting Religion: Islam, Liberal Rights, and the Malaysian State* provides a historical and theoretical explanation for how a series of never-ending and endlessly written-about jurisdictional battles in Malaysia concerning religious conversion, custody, and “body snatching” came to be. (Decades old, some of these cases remain contemporary as the courts—and scholars—continue to revisit them.) Moustafa provides a comprehensive and, to my mind, definitive explanation for what he calls the “fault line down the middle of the Malaysia judiciary”—a crisis in jurisdiction brought about by “the judicialization of religion,” that is, when courts increasingly adjudicate questions and controversies over religion in a setting ripe for legal complexity. He speculates—and this is a key contribution of his book—why and where such fissures might happen. That they happen in Malaysia has “little to do with religion itself” and “everything to do with the regulation of religion (as a state project).” Tracing that project from the colonial era to Malaysian Independence and to a bifurcated legal regime and constitution that, in distinguishing Muslims from non-Muslims, “sowed the seeds for protracted legal battles later,” Moustafa describes the bitter fruit those seeds ultimately bore with the passage of Article 121(1A) in 1988.

This constitutional amendment, meant to clarify matters of jurisdiction between civil and syariah courts, had the opposite effect. It not only increased legal ambiguities, but also stirred up social and public discord as it produced a series of highly publicized, controversial, and emotionally fraught court cases dealing with personal status law for Muslims and those non-Muslims ensnared by it. At the same time, increasingly illiberal adjudications involving Muslim personal status law in Malaysia has widened the dichotomy between sharia and civil law, leaving the debates over these domains, and the dilemmas—often heartbreaking—of petitioners unresolved. These controversies and legal debates have made Malaysians more keenly aware of sharia’s legal machinery and status, and have generated heated debates over sharia’s reach and role, polarizing Islamist-

leaning activists and their more or less more secular counterparts into what Moustafa calls a “zero-sum binary between rights and rites.” His book ends on a troubling note: “once this process starts, it tends to feed upon itself.”

Moustafa briefly mentions another space where judicialization of religion in Malaysia is taking place. He notes: “Recently, the civil courts have ceded jurisdiction in areas outside the domain of personal status law. A good example of this concerns the authority of the Sharia Advisory Council of the Central Bank of Malaysia vis-à-vis the civil courts.” This is where [my own work](#) on Malaysia’s Islamic economy and its religious/legal “gatekeepers” begins—and where, I argue, Islam’s “rites” increasingly—but with much less public drama and scrutiny than high-profile Article 121(1A) cases—become legally institutionalized Islamic rights. Some background is necessary on this point.

As Moustafa notes, sharia jurisdiction in much of the Muslim world concerns personal status law, that is, *munakahat*. *Munakahat* is merely one domain of sharia; there are four in total. Commercial law in Islam concerns the sharia domain known as *muamalat*. (The others are *ibadat* [the rituals and practices of worship and belief] and *jinayat* [rules that state penalties for crimes and offences]). Malaysian commerce officially entered the realm of *muamalat* when it ratified its first [Islamic Banking Act in 1983](#). This paved the way for the development of Malaysian Islamic finance. It meant that certain banks and financial institutions were licensed to transact in sharia-compliant business and products, while somewhat perplexingly, Islamic commercial law remained in the jurisdiction of civil, not syariah, courts. However dissatisfying this was to the growing community of Islamic bankers, the reasons for maintaining civil jurisdiction over *muamalat* were manifold: syariah courts dealt with Muslim persons and the personal status of non-Muslim others connected to them, as the Article 121(1A) cases demonstrate, while Islamic banks theoretically could and in practice do transact business with non-Muslims. Many Islamic financial operations, although their financial practices were premised in sharia, thus still fell under civil laws pertaining to contracts, incorporation, and bankruptcy. Finally, syariah courts lacked the necessary procedural rules to engage with the complex nature of business cases. Therefore, when inevitable conflicts emerged between Islamic financial institutions and litigants, civil courts heard the cases, uniformly applied civil and common laws in settling them, and rendered secular, not Islamically-based, decisions.

But in 2009, after a series of problematic court cases involving customers of Islamic banks in which civil judges reversed or ignored *fiqh al-muamalat* principles that theoretically governed Islamic contracts in Malaysia, Parliament passed the Central Bank of Malaysia Act 701. The new law stated that the legal opinions or *fatwas* issued by the [elite members of the Sharia Advisory Council \(SAC\)](#) of the Central Bank were the final and *sole authority* concerning “the Islamic law on any financial matter” (Laws of Malaysia, Central Bank of Malaysia 2009, [Act 701](#)). Any court or arbitrator was then bound to apply sharia rulings made by the SAC or required to refer any question

concerning Islamic business to it for a *fatwa*. Like the earlier move in 1988 when the Constitution of Malaysia was amended by Article 121(1A) to establish that civil courts had no jurisdiction over syariah courts, this act granted members of the SAC (all of them Islamic scholars)—and their sharia opinions—unprecedented legal status in Malaysia (even though the Sharia Advisory Council is not a judicial body).

Moreover, a further adjustment to federal law stated that members of the SAC would henceforth be appointed by the *Yang Di Pertuan Agong* (king), after consulting with the Conference of Rulers and the Prime Minister. This procedure not only meant that sharia advisors on the SAC were appointed via the same federal-level mechanism applied to civil court judges, it also distinguished them from sharia judges, who hear cases related to Islamic personal-status law and infractions of certain Islamic criminal laws in Malaysia's individual states and, who are, by contrast, appointed by the sultans of their individual states. This meant many firsts for Malaysia's judicial system—and by implication, a much greater binary between “rights and rites” than Malaysia has yet seen.

For the first time in Malaysia's history, sharia interpretations made by sharia advisors regarding *muamalat* could have an impact in the realm of civil law. For the first time in Malaysia's history, their sharia interpretations could be applied to non-Muslim persons who were litigants in cases concerning *muamalat*, thereby binding people, regardless of their religion (such as the Malaysian Chinese, who are the primary retail customers of Islamic finance), to Islamic law. For the first time in Malaysia's history, sharia advisors' precepts concerning sharia could be applied to legal entities—that is, corporate, public, and private institutions—which were not persons and therefore constitutionally did not have a religion. For the first time in Malaysia's history, a constitutional premise was in doubt, as the Federal Constitution states that no other body can make a decision in a legal dispute except a court and that any law authorizing or conferring such power to any body other than a court of law to decide a legal dispute is unconstitutional.

But unlike Article 121(1A) which established that civil courts had no jurisdiction over syariah courts and generated decades of controversy about the personal statuses of Muslim and non-Muslim litigants in Malaysia, no Islamist or secular activists spoke out about this Act; no public alarms were raised. Not only were these parliamentary adjustments with significant constitutional implications made without public debate or knowledge, now sharia had enforceability in civil law sectors. The changes seemed largely to escape the notice of critics and NGOs concerned with the Malaysian government's efforts to widen the scope of sharia over civil and federal law and the secular rights defended by the 1957 Malaysian Constitution. Finally, at the very moment I write this, sharia's position concerning *muamalat* over civil law has been confirmed. On April 10, 2019, the nine-member Federal Court Bench handed down a landmark majority judgement stating that any decision by the SAC (again, comprised of a set of sharia experts but *not* a judicial body) is “constitutional and binding on civil courts” and supersedes them on sharia matters. Citing Sections 56 and 57 of the Central Bank of

Malaysia Act 701, which granted total finality to the SAC's decisions, the Federal Court determined that these sections were constitutional. Via Islamic finance, "rites" have increased their power over "rights" in Malaysia.

What are the possible outcomes of moves of this kind? Few critics of the Islamization of the Malaysian state have noticed these incremental but possibly monumental legal adjustments. It seems generally true that the advancement of sharia in Malaysia's Islamic economy, where financial products focus on global commerce, market expansion, and profit, rarely implies the conservative, repressive, illiberal, and intrusive premises that sharia over persons does to critics in Malaysia and elsewhere who worry about its imposition. To many observers, Islamic economics is clearly the most acceptable of religious judicializations, allowing Muslims to operate adroitly within (and profit from) capitalism. Moustafa warns that when the "rights-versus-rites-binary" is seen as a zero-sum game, "it tends to feed upon itself." To his statement I add the words of one of my interlocutors, who serves now in the role of "judge" on the Central Bank's empowered and elite SAC, who told me that the ease with which Malaysians have accepted advancing the sharia of *muamalat* over civil law will pave the way for further and broader Islamic regulation; to him, it was the thin end of the wedge to advance the cause of sharia in *all* aspects of Malaysian life. To echo what Moustafa says about the legal consequence of such "zero-sum" polemics, "once the process starts" who knows where it will end.

## Winnifred Fallers Sullivan, “Mansplaining Religion”



One of the lies modernity pedals is that you can and should choose your own religion, your own religious tradition, and your own version of that tradition. Virtually every country in the world now formally subscribes to the necessity of legally-protected freedom of choice in matters of religion. And much has been written to show how the law that encoded and encodes these guarantees, what Tamir Moustafa, in his terrific new book, terms the “constituting” of religion, was and is founded on poorly considered and ideologically-indebted assumptions about what counts as religion, assumptions that are dependent on a peculiar conjunction of notions of the modern self with identity politics. (See, e.g., Benjamin Berger, *Law’s Religion* (2015); Cécile Laborde, *Liberalism’s Religion* (2017); Jolyon Thomas, *Faking Liberties* (2019); and Winnifred Fallers Sullivan, et al., eds., *Politics of Religious Freedom* (2015).) Many of us have argued that the widening gap between law’s religion and the religion of actual people has become fatal to the project of legally protecting religious freedom. But I am not sure that our effort at exposing these lies has been entirely successful. Among other things, as I will discuss below, after engaging Moustafa’s work, in making these arguments we have often found ourselves in the troubling position of explaining to litigants and to their supporters that they do not understand their own religion and that they are victims of the false consciousness produced by the modern state. Doing this exposes us to the just criticism that we ourselves are advocating for a kind of religious orthodoxy.

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In his wonderful and wonderfully concise new book, [\*Constituting Religion: Islam, Liberal Rights, and the Malaysian State\*](#), Tamir Moustafa makes an important contribution to this literature. Setting his study in the context of socio-legal scholarship more broadly, Moustafa shows how the judicialization of religion has worked in Malaysia in particular. But the lesson of his book is a much broader one. This is a book that should be read by all who are interested in how religious freedom works, legally speaking, particularly, perhaps, by Americanists.

Moustafa describes several recent Malaysian cases and the play that they have received in the press, the “court of public opinion,” as he terms it, in order to illustrate the paradoxes and contradictions produced by the extensive laws regulating religion in Malaysia and the litigation generated by them. Employing ethnographic, survey, and archival methods, Moustafa shows how modern law has had the unintended effect, not of defusing, but of ratchetting up, religious tensions. As he further shows, while Malaysian law today is widely regarded as one of most complete instantiations of an effort to codify and enforce Islamic norms through state law, both the British colonial and post-independence legal regimes have been and are largely run by people who know little of Islam.

Malaysia is a religiously and ethnically diverse country; slightly more than 50 percent are Malay (mostly Muslim), 25 percent are ethnically Chinese (of whom 75 percent are Buddhist, and the rest principally Taoist or Christian), and 8 percent Indian (mostly Hindu). Religion and personal law matters are governed in Malaysia today through a two-tier court system, a system of Syariah courts at the state level for Muslim Malaysians, and civil courts at the state and federal levels for non-Muslims. Both sets of courts enforce a state-produced code, one significantly indebted to British colonial era law. All judges are trained in common law style. Over the last decade, jurisdictional disputes between the two court systems have increasingly led to a deferral of issues concerning religious status to the Syariah courts, even in the case of mixed marriage, conversion, child custody, and inheritance, where one of the parties is not Muslim. Appeals to constitutional norms of religious freedom are more and more falling on deaf ears in the face of claims by some Muslims who express concern about an existential threat to the Muslim community from what is characterized as liberal secularism. In the media-saturated and stoked environment of what he calls the rights versus rites controversies surrounding these cases, Moustafa carefully traces the ways in which an earlier legal and religious pluralism of interpretation has given way to an often simple-minded and dogmatic orthodoxy.

While the hot cases differ in their details from those in the United States, the structure of the story is familiar. A clash between communalist and individualist versions of religious freedom creates an impossible bind. A polarized public discourse exacerbates tensions.

Speaking of the illusions of religious freedom in the United States, [Courtney Bender has shown](#) how faith in pluralism combined with legally guaranteed freedom in matters of religion has over time come to be understood according to a market model. While earlier

mid-twentieth century sociological versions of pluralism were understood to generate a kind of benign convergence in a tolerant religion of Americanism, today pluralism is understood by researchers and by the public to generate a free market in religion, one that, as with other consumer products, produces better versions of each religion. Yet, as Bender explains, if sociologists of religion were to take the market metaphor seriously they would also have to take seriously the ways in which markets make their consumers: “Various regulations and norms operate within and at the boundaries of fields, and have the effect of shaping (or demanding) some measure of conformity by all actors who participate within them.”

We see in Moustafa’s account a similar shaping process, disciplining the participants into the state’s discourse about religion. But these new streamlined illiberal versions of religion are not solving the Malaysian state’s governance problems. They are only producing more judicialized religion.

As in many other places, legal regulation, litigation, and media together have produced in Malaysia a discourse which pits secular liberalism against a particular anti-modernist version of religion in a zero-sum game, one understood to be natural. As Moustafa [says](#), “Islam and liberal rights are increasingly co-constitutive.” Yet the Islam of this familiar now global discourse is unrecognizable to scholars of Islam, particularly to those who celebrate its complex and varied history. Earlier pluralist accounts of Islamic law and of its varied accommodations across space and time of the diverse populations of Malaysia are no longer recognizable to many Malaysians.

While there are aspects of the Malaysian case that are particular to its history and its mix of population, the dynamic Moustafa describes, as he himself notes, can be found elsewhere, including in the United States. While marriage, custody, and inheritance laws in the United States are not explicitly tied, as they are in Malaysia, to identification with religious communities encoded on state ID cards, litigation on other issues, particularly with respect to abortion, accommodation of religious conscience, and schools, produces a familiar pattern of simplified opposition between secular liberals and religious conservatives, with various media fanning the flames.

A by-product of the whole modern religious freedom regime, as Moustafa notes, is the production of expertise on religion. On the one hand, governments since colonial times have designed laws and produced regulations and handbooks designed to foster legal religion, laws and processes based in selective and narrowing appropriations of the tradition. On the other, academics and liberal pundits scurry around explaining that good religion is not like that. Good religion, they say, is rich, capacious, and forgiving.

Another by-product of the modern legal regulation of religion is that the state’s efforts are remarkably effective at converting subjectivities. People’s own understandings of their religion have in fact been changed by the new legal and media environment. While

scholars show how the religious authority constituted by the Syariah courts is invented by the state, and is not essential to Islam, which boasts a much more nuanced and sophisticated legal history, Moustafa cites surveys that show that most Malaysians now believe that Islam is properly understood as dogmatic and inflexible. This Islam is a product of the modern state, characteristic of what Shahab Ahmed [called](#) the legal-supremacist model of Islam, and yet it has taken on the aura of a timely essence. (An analogous shift in south east Asian religio-legal consciousness is well documented by David and Jarawan Engel in the case of Northern Thai Buddhism in their [Tort, Custom and Karma](#).)

The culture wars within religions then, as Moustafa shows so well, are not native to those traditions but are in fact generated by the very law that is supposed to prevent them, in Malaysia and elsewhere. Liberal academics—and liberal Muslims—cry foul, just as do liberal Christians in the United States—when presented with a version of religion that they argue is inconsistent with its history. Christians, many American academics say, have not always been defined by sexual morality. Reducing Christianity to these positions misrepresents what Christianity is, they say. Religious freedom laws, they imply, should protect good liberal religion, not these distortions of its teachings.

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I would argue that now is a good moment to step back from the valiant efforts of legal and religious historians, sociologists and anthropologists to describe the effects of modern law on religion; we are now in a position to ask whether we are not also, like the modern state we so relentlessly criticize, victims of unintended consequences. We might see ourselves, not as well-meaning reformers, but as liberal mansplainers telling people that they don't understand their own religion. Indeed, an entire segment of the media, low-brow and high-brow, is devoted to this work, from the spirituality sections of airport bookstores and public radio to immensely learned books like Shahab Ahmed's *What is Islam?*, cited by Moustafa. A large part of projects on fostering religious literacy and improving journalism about religion is also devoted to this work. But we also do it in our classrooms.

Rereading Moustafa's *Constituting Religion* in the same week in which I was re-reading Ahmed's *What is Islam?*, both fascinating and important works, has dramatized for me the challenges faced by those of us who would teach religion today—under the flag of religious freedom—because I think most of religious studies does understand itself to fly under such a banner. I want particularly to note the effort of many in the academy today, notwithstanding the thorough critique of the category, to stabilize religion in service of liberal norms. (Those who would teach outside those norms are also captive in many ways to the same legal logic, given the dominance of law's religion today.) There is a sense in which many of us in religious studies today conceive our job to be to teach people that Shahab Ahmed rather than the Malaysian court has got it right when it comes

to Islam—with parallel oppositions relevant in other national and religious contexts. Is it our job to do that? Why should people listen to us? Have we carefully considered what exactly is at stake in this effort? Do we understand why—and if—religious choices are being made, whether by Malaysians or by Americans?

One of the many frustrating paradoxes of religious freedom as a liberal project is that having promised people religious choice, liberals cannot now, in good conscience, dictate to them what they should choose. (See my post on the [Hobby Lobby](#) decision.) Unless we are willing to start listening and speaking theologically, that is, unless we are willing to listen carefully and speak directly of the existential realities that we all face, rather than using religion as a proxy for our differences, I fear that our efforts at explanation will fall on deaf ears.

## [Kristen Stilt, “Conversion and Demographic Anxieties”](#)



With vivid and compelling writing, Tamir Moustafa in *Constituting Religion* takes us into the Malaysian state’s creation and management of law that is purportedly Islamic. Following in the line of Talal Asad, Hussein Agrama, and others, Moustafa reminds us that calling this law “Islamic law” is problematic on many levels. Such a naming also plays into the hand of the Malaysian state, which wants Malaysian citizens, and indeed Muslims worldwide, to believe that this state-created law is indeed “Islamic law” with all of the claims to authority that come with such a label. And as Moustafa shows, Malaysia has adopted a vast range of these so-called Islamic laws, covering just about every aspect of life. For readers interested in Islamic law and society, and especially for those who might not have thought that Malaysia is in the company of Iran and Saudi Arabia in terms of the state’s efforts to define and control Islam, *Constituting Religion* is essential reading.

The central character of *Constituting Religion* is a provision of the Malaysian Constitution, Article 121 (1A). Adopted as an amendment in 1988, it specifies that the High Courts “shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts.” The amendment meant that “Muslims would henceforth be subject to the exclusive jurisdiction of the Syariah courts in matters of religion.”

Moustafa is the first to my knowledge to attempt to provide a history of the amendment, linking it to the lawyer Ahmad Mohamed Ibrahim. Ibrahim became an advocate for a greater place for Islamic law in the state after he represented a Muslim family in Singapore that was fighting for the return of their adopted daughter from her Dutch biological parents. Before 1988, civil courts rarely exercised jurisdiction in matters related to the syariah courts, and Moustafa provides some examples of those early cases.

But Ibrahim and others sought a constitutional change to “prevent the federal civil courts from overturning state-level shariah court decisions.” Citing Prime Minister Mahatir Mohamed’s expressed need to address the feeling of dissatisfaction among Muslims when a civil court cancels a decision made by a syariah court, Moustafa shows that there was no evidence at the time for such a concern for the feelings of Malaysian Muslims. Rather, it seems fair to say that its advocates were anticipating that conflicts between the civil and syariah courts would develop and thus the amendment was a preemptive move, not a corrective one. And as a preemptive move, it had tremendous consequences.

Once in place, clause 1A served as the basis for significant decisions, and Moustafa carefully covers all or at least most of them in Chapter 4. Reading all of these cases together in Chapter 4 reveals an intriguing pattern: all of them involve conversion, either non-Muslims who convert to Islam and then they (or their relatives on behalf of deceased individuals) want to revert back to their prior religion or Muslims who want to convert out of Islam. These conversion cases are heartbreaking because the state refuses to recognize an individual’s ability to determine his or her own religion. What these cases indicate is that from the perspective of the Malaysian governing institutions, keeping these individuals on the Muslim tally is paramount. It is not even about actual behavior, since some of these individuals practice other religions (such as a man named Maniam who, while officially Muslim as a result of a conversion, continued to practice Hinduism but was not able to convert back to Hinduism and be recognized by the state as such).

The question that arises from all of these cases is why conversion? Why are conversions at the heart of all or most of the clause 1A cases? And why are other types of volatile legal issues, such as the implementation of the *hadd* criminal penalties, not appearing in clause 1A cases?

On one level, there has been a tension between states restricting conversion, or more specifically, conversion from Islam to another religion, and a general human rights principle of the freedom to change one’s religious belief, dating at least back to the formation of the Universal Declaration of Human Rights in 1948. But the Malaysian case has its own very specific reasons for treating conversion as a highly sensitive issue, and Moustafa provides some clues in the demographics he cites. “Malays, who constitute just over half of the country’s population of 31 million, are defined as Muslim by way of the Federal Constitution.” Chinese are about 25 percent of the population and Indian are about 8 percent of the population. “The overall breakdown of the population by religion is approximately 60 percent Muslim, 19 percent Buddhist, 9 percent Christian, 6 percent Hindu, and 4 percent other faiths.”

At the time of the adoption of the Malaysian constitution in 1958, Malays were also at best only 50 percent of the population, and were concerned about holding onto their power in a multiracial and multireligious federation. The constitution included privileges and benefits for ethnic Malays. It also included an establishment clause in Article 3,

which reads in part, “Islam is the religion of the Federation; but other religions may be practiced in peace and harmony in any part of the Federation.” Scholarly work has focused on the drafting history of this clause. As [I have noted](#), “The ruling United Malays National Organization (UMNO) did not seek to include the establishment clause as an expression of the religion of the majority of the citizenry, but rather UMNO and Malays in general sought it so desperately because they were *not* the majority, at least not a comfortable majority, and feared what the democratic process might bring in the future.” Because constitutionally Malays are Muslim, a benefit for Muslims was basically also a benefit for Malays.

In the contemporary period, as Moustafa notes, “Religious cleavages have arguably eclipsed race, class, and other bases of political solidarity. In a broader sense, Islam has been instrumentalized in the service of the Malay ‘race’.” The concern for those holding onto power has shifted from seeking the highest percentage of Malays possible in the country to seeking the highest percentage of Muslims, all in the service of maintaining and expanding political power.

The seriousness with which the government takes the issue of conversion is reflected in the response to the famous Lina Joy decision, which saw the government adding “religion” to the national identity cards. Moustafa says that “additional regulations were introduced to shore up religious and racial compartmentalization.” If conversion is seen as a threat to the existence of the ruling party, then it is to be expected that additional measures were added to force Muslims to stay Muslims. And it is also to be expected that “most state enactments provide no viable avenue for official conversion out of Islam.”

Seeing the clause 1A cases through the lens of conversion amplifies all of Moustafa’s findings, including in Chapter 5, where he traces these cases through the courts of public opinion. Given that conversion cases by definition create the kind of zero-sum result that Moustafa criticizes—either the state recognizes an individual by the religion he or she (or his or her relatives) claims to be or it does not—it is not surprising that “these cases became the focal points for contestation over a great number of issues, including the appropriate place for Islam in the legal and political order, the secular versus religious foundations of the state, the rights of Muslim and non-Malay communities, individual rights and duties rights in Islam, and perennial questions around religious authority—that is, who has the right to speak for Islam.” The issue of conversion and the legal jurisdiction created by clause 1A serve to mutually reinforce one another and in doing so heighten the stakes for the individuals involved in the case and the public’s reaction to the decision.

## Matthew Nelson, “Constituting Religion: From South Asia to Malaysia”



At the start of his outstanding new book, *Constituting Religion: Islam, Liberal Rights, and the Malaysian State*, Tamir Moustafa explains that initially his ambition extended beyond Malaysia to a comparison of Malaysia, Pakistan, and Egypt. As one with an interest in both Malaysia and Pakistan, I read his book with that ambition in mind. Specifically, I read Moustafa’s new book as an account of the ways in which a particular country’s constitutional tension between “individual” and “group-based” religious freedoms has been legally and politically operationalized. In my reading, Moustafa’s account is not limited to Malaysia; the experience of Malaysia is also tied to the constitutional experience of South Asia.

### **From South Asia to Malaysia**

The *Constitution of Malaysia* (1957) defines both individual and group-based religious freedoms in Article 11, noting that “every *person* has the right to profess and practice his religion” (11-1) and, further, that “every religious *group* has the right . . . to manage its own affairs” (11-3). Like Malaysia, Pakistan lifted similar constitutional provisions from India (*Pakistan 1956*: 10 and 11; *1973*: 20-A and 20-B; *India 1950*: 25 and 26). In fact, this constitutional migration from South Asia to Malaysia is not surprising given the role that Indian and Pakistani judges played in the five-member Reid Commission that drafted postcolonial Malaysia’s constitution. Within the Reid Commission, it was actually Abdul Hamid from Pakistan who insisted that, notwithstanding references to individual and group-based religious freedoms (Article 11), Malaysia’s constitution should also recognize Islam as “the religion of the Federation” (Article 3).

Even apart from this South Asian constitutional lineage, the influence of South Asia appears in the realm of Muslim law. Moustafa notes that, in Malaysia, British colonial rule shifted the locus of Muslim legal authority away from diverse interpretations of sharia offered by individual Muslim scholar-jurists (*muftis*) in favor of a codified law—what Moustafa calls a less “polyvocal” law—known as “Anglo-Muslim” law. This Anglo-Muslim law, however, grew out of the so-called “Anglo-Mohammadan law” enforced in British India. In fact, Malaysia’s Anglo-Muslim law—forged in colonial South Asia—came to underpin what many Malaysians now associate with the “Islamic” law operating in their own country’s state-level syariah courts.

Both the individual and group-based religious freedoms outlined in Malaysia’s constitution and the Anglo-Muslim law operating in Malaysia’s syariah courts are thus closely tied to patterns that first took shape in South Asia.

Further, Moustafa notes that the *group*-based rules governing Muslims as per the Malaysian constitution are often contrasted with—even pitted against—that constitution’s *individual* freedoms, with conservative Muslim activists frequently describing the latter as an unwelcome “colonial imposition.” But, of course, the individual rights enshrined in Malaysia’s constitution did not originate in imperial Britain. Instead they traveled from anti-colonial Ireland, via India, then Pakistan, as provisions explicitly *opposed* to a British constitutional tradition in which enumerated and enforceable rights were thought to infringe on the absolute sovereignty of parliament.

The views articulated by conservative Muslim activists in Malaysia are, thus, largely upside down. The Anglo-Muslim laws underpinning a defense of what Moustafa calls group-based Muslim “rites” in Malaysia’s state-level syariah courts are, in many ways, a “colonial imposition.” The constitutional protections underpinning what Moustafa describes as a defense of individual religious “rights” in Malaysia’s civil courts reflects a more explicitly “anti-colonial” commitment.

Again, the group-based religious freedoms that traveled from South Asia to Malaysia arrived in South Asia from [Ireland](#) (1937: Article 44-2[5]), which borrowed them from the constitution of [Poland](#) (1921: Article 113). These provisions were introduced to protect the rights of religious minorities. But, since the mid-1970s in Pakistan and, then, the mid-1980s in Malaysia, these provisions have been taken up and reinterpreted to champion the rites of each country’s Muslim majority. In Malaysia, Moustafa points to a shift of emphasis within the terms of Article 11, pulling away from 11-1, focusing on individuals, in favor of 11-3, focusing on religious groups. From a comparative perspective, however, what we see is also a “Pakistani” reading of Article 11-3. Whereas in the past, this article was read as protecting religious minorities, it is now read as protecting a particular (Muslim) majority.

## **Malaysia: Beyond South Asia**

Reading Moustafa's account of the tension between individual and group-based rights from a comparative perspective is illuminating. But, having said this, it would be a mistake to read Moustafa's account of Malaysia as historically or politically derivative. In fact, Moustafa clearly outlines what sets Malaysia apart.

Unlike in South Asia, Moustafa explains that the regional sultans who enjoyed a measure of colonial-era sovereignty vis-à-vis Muslim religious affairs retained their position in Malaysia's postcolonial constitutional bargain. Specifically, regional sultans retained their authority vis-à-vis state-level syariah courts, with a crucial constitutional amendment in 1988 (Article 121-1A) stating that these courts would enjoy exclusive jurisdiction over any Muslim religious matter outlined in the constitution's allocation of state-level powers (Ninth Schedule, List II, Paragraph 1). This approach—what might be described as Malaysia's *Muslim religious federalism*—differs from the constitutional experience of religion-state relations in South Asia.

Explicit state-level legislation was expected to outline the ways in which Muslim religious matters would be handled by Malaysia's state-level syariah courts. But, since 1999, the jurisdiction of these state-level courts has been seen as "implied" (by Malaysia's Federal Court) even without any such covering legislation. In fact, much of the tension between individual and group-based rights in Moustafa's account grows out of what might be described as federal and state-level jurisdictional gaps. This is often related to so-called "121-1A cases," in which individuals are sent to state-level syariah courts because they are legally defined as "Muslims" (by birth or conversion) even though, for various reasons, they do not actually identify as Muslims—either because they wish to leave Islam or because, as children, their religious identity was "mixed" (for example, they were unilaterally converted to Islam without the consent of both parents or they were raised as non-Muslims by mixed-religion couples who married informally, registering neither their marriage nor the birth of their children). Some of these "legal Muslims" wish to have their individual religious "choice" protected by the civil courts (as per Article 11-1). But, insofar as they are officially defined as Muslims, they have generally been required to follow the legal procedures outlined for Muslims as a group in state-level syariah courts.

Again, the jurisdiction of state-level syariah courts has been assumed even when explicit statutes outlining the procedures governing a particular Muslim issue do not (yet) exist. In fact, several 121-1A cases involve a Catch-22 in which, so long as a particular state-level legislature fails to create a covering law for Muslim issue X (say, a politically sensitive issue like Muslim apostasy involving competing commitments to individual religious choice and the notion that each religious group should "manage its own affairs" including entry and exit procedures), the individual is caught in legal limbo. Specifically, the individual is unable to obtain relief from the syariah courts (because s/he cannot complete, and the court cannot enforce, procedures that remain undefined). And, owing to an appreciation for the "separation of powers," neither the syariah courts nor the civil

courts have sought to “legislate from the bench” to fill up the legislative lacunæ. Malaysia’s civil courts have consistently failed to defend the individual rights of “legal Muslims” precisely insofar as they have seen such efforts as an encroachment on the constitutional domain of state-level sultans and, therein, Malaysia’s principle of federalism vis-à-vis Muslim religious affairs. There is, of course, no empirical analogue for this pattern of constitutional, institutional, and political “Muslim religious federalism” in South Asia.

### **South Asia, Malaysia, and the World**

Throughout his book, Moustafa expertly traces the polarization of public discourse (pitting the advocates of individual religious rights against the advocates of religious group rites) to Malaysia’s Muslim religious federalism and, especially, its system of parallel and competing civil and syariah courts. To explain this polarizing “judicialization of religion” he focuses on four key elements in particular, namely (a) a simultaneous constitutional commitment to “religious rites” and “liberal rights,” (b) the state’s robust regulation of religion, (c) explicit recognition of legal pluralism (i.e., different laws for different religious groups), and (d) strong but accessible courts.

These four elements, however, do not automatically produce high-intensity religious-cum-political polarization. In his conclusion, for instance, Moustafa turns to Egypt, where despite the presence of all four elements, the pattern of rights versus rites polarization is less intense. It is less intense because, returning to the centrality of Malaysia’s two-part system of civil and syariah courts, Egyptian religious litigation unfolds within what Moustafa calls a “unified” civil judiciary led by superior court judges with a consistently “liberal” orientation.

Still, my comparative perspective focusing on South Asia left me with an underlying question: what accounts for the emergence of high-intensity polarization (pitting the supporters of liberal individual rights against the supporters of ostensibly religious group rites)—similar to that in Malaysia—where (a) several of Moustafa’s four key elements are missing or (b) a bifurcation of civil and syariah court jurisdiction is absent? In [Pakistan](#), for instance, the courts are famously weak and inaccessible, state regulation of religion is anæmic (extensive state involvement notwithstanding), and until quite recently, postcolonial recognition of Hindu personal laws was technically nonexistent. In [India](#), the courts are somewhat stronger, formal state regulation is somewhat more far-reaching, and the presence of differentiated personal laws is historically well entrenched. But, in both countries, as noted above, there is no federalization of the courts’ religious jurisdiction. Nevertheless, both India and Pakistan are deeply familiar with the high-intensity rights versus rites polarization that Moustafa describes in Malaysia.

Perhaps, pulling away from explicit forms of legal pluralism, strong/weak courts, and the federalization of religious jurisdiction, the polarization Moustafa describes could be

traced to a different set of tensions—a more general set of tensions involving, simply, constitutional protections for parochial religious attachments and whatever a given state might describe, at a particular moment in time, as an overarching but countervailing public interest. In democratic and authoritarian contexts around the world this tension is actually quite familiar: religious practice X (e.g., Ahmadi provocation) versus public order; religious practice Y (Native American peyote) versus public health; religious practice Z (Sikh turbans) versus public safety; and so on.

It may be that Egypt’s liberal judges have been better able to navigate this generic tension. It may be that, with or without “liberal” judges, some of the legal strategies used to resolve this tension—typically by restricting this or that religious practice to serve the so-called (often majoritarian) “public good”—are simply more effective when it comes to stifling high-intensity public polarization. Restrictions on religious practice offset by “proportional” public benefits, for instance, may be more effective than [the imposition of allegedly “reasonable” administrative burdens](#) on selected religious actors or, following the courts in South Asia, [the application of a formal distinction between so-called “essential” religious practices](#) (protected from state interference) and so-called “non-essential” practices (subject to state intervention for the sake of social reform). In fact, returning once again to the transnational influence of South Asia, the latter strategy migrated from India to Pakistan, then Malaysia, with consistently polarizing effects.

Moustafa’s book is filled with analytical provocations and empirical insights. And, in keeping with Moustafa’s original intention, it is also filled with cross-national comparative reach: India, Pakistan, Egypt, and beyond. Indeed, toward the end of Moustafa’s book I found myself asking: if the federalization of religious-cum-legal jurisdiction (e.g., state-level syariah courts) drives high-intensity political polarization, should we expect a similar pattern of polarization owing to analogous federal legal structures in Nigeria? And, if not, what are the factors that might prevent this: “liberal” judges, patterns of jurisprudence offsetting religious claims with persuasive notions of the “public good,” a certain “margin of appreciation” for local variation vis-à-vis ostensibly overarching rights, or something else?

It remains to be seen which strategies aiming to conciliate “parochial” religious attachments with invocations of the “public” interest might actually avoid the patterns of polarization Moustafa describes. But, thanks to Moustafa’s book, it is clear that scholars and practitioners with an interest in the relationship between religious freedom and political conflict will be in a much better position to look.

## Jaclyn L. Neo, “Constituting Religion, Contesting Constitutional Identity”



It is a truth universally acknowledged that religion, in the possession of man, causes division, conflict, and even war. Well, not quite, says Tamir Moustafa. In his new book, *Constituting Religion: Islam, Liberal Rights, and the Malaysian State*, he points to the role of law and courts in enabling and catalyzing such conflict by creating the conditions and forum for contestations over religion. In the course of adjudication, courts constitute those very contestations.

The book intersects with recent scholarship on how constitutional design choices lead to contestations over religion (e.g., [Asli Bâli and Hanna Lerner \(2017\)](#); [Benjamin Schonthal \(2016\)](#); [Dian A. H. Shah \(2017\)](#)). Moustafa’s focus is different, however, as it focuses on what happens after constitutionalization. “Judicialization of religion,” he argues, is a distinctive phenomenon that should be differentiated from the judicialization of politics, conventionally understood as the way in which courts and judges increasingly dominate the making of public policies. For Moustafa, judicialization of religion refers to the condition where courts increasingly adjudicate questions and controversies over religion, thereby entrenching the idea of an official religion, and/or rendering judgment on the appropriate place for religion in the legal political order. Moustafa’s definition is aligned with a broader idea of judicialization as the increased presence of judicial processes and court rulings in political and social life.

The book’s focus on judicialization builds upon Moustafa’s earlier work on the subject and indeed deepens it. However, unlike his [earlier works](#) that examine how and why authoritarian regimes coopt courts to ensure regime-preservation, this current book

interrogates the process of how judicialization comes about and how judicialization could exacerbate political and social conflict. Judicialization is seen as an outcome of social contestation in which the state is implicated but not necessarily the main driver of such contestations. Certain segments of government appear to be captured by—or at least lean toward—one position over another, yet Moustafa’s extensive fieldwork research supports the idea that judicialization is not a one-dimensional phenomenon. Rather, it is constituted by a variety of actors and shaped by multiple interests. Accordingly, he suggests that it would be too simplistic to see the many constitutional law cases concerning the role of Islam in Malaysia, and the public discourse arising from these cases, as a straightforward collision between ascendant religious movements and liberal legal order. Instead, in a country with a strong tradition of judicial review and a fairly independent bar, like in Malaysia, judicialization should be seen as a multidimensional phenomenon arising from sociopolitical contestation of a multitude of actors, some in government, over the role of Islam in the Malaysian state.

In examining a range of cases arising from the interpretation of the constitutional provision delineating the jurisdictions between the Syariah and the civil courts (Article 121(1A)), as well as provision designating Islam as the religion of the Federation (Article 3(1)), Moustafa’s book challenges oft-made assumptions about the actors involved in championing particular ideas about Islam/religion in any state. In the Malaysian case, there is often an assumption of a clear divide between Muslims (supposedly in favor of a more muscular role for Islam) and non-Muslims. Indeed, judicial decisions in Malaysia appear to also conform to this divide, as Muslim judges tend to interpret the constitution to give Islam a more robust position in the constitutional order, whereas non-Muslim judges appear to favor individual freedoms and a narrower position for Islam. However, a Muslim/non-Muslim divide would be far too simplistic. For instance, the Federal Court judgment in *Indira Gandhi Mutho v Pengarah Jabatan Agama Islam Perak* was written by a Malay-Muslim judge for a bench composed mainly of Malay-Muslim judges. This case contains the [strongest reassertions of the civil courts’ judicial power](#) and affirmed their higher status as a courts of inherent jurisdiction as opposed to the religious courts that are mere creatures of statute. This was a highly anticipated case about whether the constitution requires the consent of both parents (and not just one parent) for conversion of minors. The Federal Court asserted, for the first time since 1999, that it retains jurisdiction to determine legal questions concerning Islam.

However, a limitation of a book like Moustafa’s that employs the lens of religion to examine a complex jurisdiction like Malaysia is a propensity to under-value other sources of identity that contribute to the contestation over religion. Here, I discuss two —race and language. First, the divisions arising from religion—Muslim/secular; Muslim/non-Muslim; state/non-state, etc.—are furthermore complicated when we introduce the element of race-based (or ethnic-based) nationalism. While Moustafa acknowledges that, overall, the intertwining of race and religion is a crucial phenomenon in Malaysia, the role of race is given rather short shrift in the book. He explains that this is because the

ascendant political cleavage is articulated in terms of religion more than race. That might be so in some instances, but race is never far behind in public discourse over Islam. In Malaysia, Muslims continue to be referred to as “Malay-Muslim.” The Malaysian Federal Constitution defines a Malay as, inter alia, one who professes Islam. Indeed, one of the most telling phrases articulated in the infamous [Lina Joy v Majlis Agama Islam Wilayah](#) apostasy case discussed in Moustafa’s book is this: “As a Malay, the plaintiff remains in the Islamic faith until her dying days.” There are many more instances of race being the dominant frame of contestation in Malaysia, including the recent brouhaha over the new Malaysian government’s [failed attempt](#) to ratify the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) which further demonstrates that race continues to be a strong social cleavage in Malaysia. The 2018 shock election of Pakatan Harapan, a new multiethnic coalition that broke the stranglehold of the previous Barisan Nasional alliance dominated by the Malay nationalist party (UMNO) may propel race further into the [center of the debate](#).

Secondly, language. The choice of language in communication reflects not only the perspective of the speaker but also the speaker’s targeted audience. In Malaysia, different language is used in different cases and mediums when discussing religion. Moustafa alludes to this when he mentions that his fieldwork focused not just on press coverage in major English language newspapers but also in newspapers in other languages, especially in the Malay language. However, more could have been done with this. He could have also engaged with the choice of language in judicial decisions. Fascinatingly, several crucial decisions concerning the role of Islam in Malaysia have been written in Malay, the most significant being the majority judgments in the Federal Court case of *Lina Joy*. There, the majority judgments denying the appeal to have Lina Joy’s conversion recognized were written in the Malay language, while the dissenting judgment in support of the appeal was written in the English language.

Even more fascinating is the case of [Meor Atiqulrahman bin Ishak & Ors v Fatimah bte Sihi & Ors](#), a seemingly obscure High Court case, which essentially overruled established precedent giving Islam a limited role within the constitutional order. This is one of the earliest and most radical attempts to establish a broad role for Islam in the Malaysian constitutional landscape, but interestingly has not been given as much attention in [academic writings](#). This is even though the High Court’s interpretation of Article 3(1) was [crucial in shifting the jurisprudence](#) on what it means to declare Islam to be the religion of the Federation. In *Meor*, the High Court declared that Islam is superior over all other religions in Malaysia and further that Article 3(1) imposes obligations on the government to promote Islam so as to maintain its superior place in Malaysian society. The lack of attention given to the case could be because of its status as a High Court case whose ruling was ultimately overruled by the Court of Appeal and the Federal Court of Malaysia. However, another possibility is that it was written only in the Malay language. Only the headnotes were written in English, and they do not reflect the radical jurisprudential shift in the judgement. Interestingly, the High Court’s reasoning has

become the basis for an expansive view of Islam in public law in subsequent cases, including *Lina Joy*.

Language has also become an important area of contestation in Malaysia, exemplified by the case of *Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri*, where the court upheld a government prohibition on the Catholic Church in using the word “Allah” in their Malay language publications. The judgment endorses the view that the government can restrict the use of certain Malay words to only Muslims. This is a highly problematic position since Malay is the constitutionally-designated “national” language. This decision is often analyzed from the perspective of religious freedom, but it also throws up difficult questions about equal citizenship and the right to use a national language. Since the Malay language is traditionally seen as the language of the Malay community, this intertwining of language with religion reflects an ideology that the Malaysian state is to be defined in terms of one race (Malay), one language (Malay), and one religion (Islam).

Accordingly, a more holistic examination of the contestations in Malaysia concerning the place of Islam requires also an understanding that this is a competition between those who champion the idea of an ethnic nation based on one language, one race, one religion, and those who affirm a civic nation able to accommodate a plurality of languages, races, and religions. I have previously [argued](#) that it is important to also understand that the contestation over religion is shaped by opposing ideologies about the Malaysian “nation.” This goes beyond personal identity; indeed, there are Malay-Muslims who strongly support a limited interpretation of the place of Islam in the Malaysian constitutional state, just as there are non-Malay-Muslims who agree with an expansive space for Islam. The struggle is ultimately one for the constitutional identity of the Malaysian state.

Moustafa’s book provides vital insights into understanding the contestation over Islam in Malaysia as being driven by multiple actors and their strategies. Any limitations on its case study are perhaps understandable considering that it seeks to engage in a broader conversation about judicialization of religion. The book thus should be seen as containing important, even if incomplete, pieces of the puzzle to understand the judicialization of religion, both in Malaysia and in general.

## [Shanmuga Kanesalingam, “Judges, Lawyers, Politics: Religion Still Divides Malaysia”](#)



The plight of Indira Gandhi, a Hindu mother of three children whose estranged husband had converted from Hinduism to Islam and tried to “convert” the couple’s three children, plays a central role in Tamir Moustafa’s *Constituting Religion*. Whilst a number of legal challenges had been filed by Indira, the most far-reaching constitutional issues arose in a case challenging the conversion of her children. On January 29, 2018, a five-member all-Muslim panel of Malaysia’s apex court, the Federal Court, unanimously quashed the Certificates of Conversion to Islam issued by the Perak Islamic Religious Affairs Authority as evidence of the religious identity of the three children of Indira Gandhi. Two of the children were with Indira at the time of this decision, but the youngest, taken away when just eleven months old, was still with the father who had disappeared. At the time of writing, Indira has still not seen her youngest daughter. (A summary of the entire case, and the Federal Court decision, by Ida Lim of the *Malay Mail*, can be found [here](#).)

The certificates of conversion, if left unchallenged, were by Malaysian law conclusive evidence that the children were Muslim for all time and thus subject to the Anglo-Muslim law that applies to Muslims in Malaysia. Thus, the children, despite professing themselves to be Hindus, would not have been able to marry a Hindu. They would commit criminal offenses for acts that were only criminal for Muslims in Malaysia, for example, if they ate in public during the Muslim fasting month of Ramadan.

The High Court had earlier ruled in Indira’s favor, but two of the three judges in the Court of Appeal had reversed the High Court. They neatly sidestepped the core constitutional issues by stating that the civil courts had no jurisdiction to hear any matter that touched on Islamic law. This was the state of the case at the time *Constituting Religion* was written.

The lead judgment in the Federal Court was authored by Justice Zainun Ali, the sole woman judge on the panel. She held that not only did the civil courts have exclusive jurisdiction to hear disputes of this nature, but that Malaysia's Federal Constitution required *both* parents to consent before their minor children could be recognized by the state as having been converted to Islam. This had been a key concern of religious minorities in Malaysia, afraid of the increasingly politicized Muslim community using their control of most state institutions to convert their children by unethical means.

I was one of Indira's lawyers, all of us acting for her *pro bono* except for some very limited funding to cover out-of-pocket expenses and court filing fees. Human rights lawyers in Malaysia are generally, like me, attorneys who do mostly corporate, commercial, or other fee-paying work and act for victims of human rights abuses on a *pro bono* basis. I also work with the [Malaysian Centre for Constitutionalism and Human Rights](#), of which I am a founding director, to [advance human rights](#) through a mix of strategic litigation, [blogging](#), and [training](#) other lawyers.

The decision by the Federal Court marked a sea change in the way the courts dealt with religion and religious freedom issues. To understand why, we must first backtrack a little.

### **Impact of Indira Gandhi**

Practitioners in Malaysia rarely delve into academic texts, and hardly ever delve into research by non-lawyers on the impact of the law on society. Thus, "Anglo-Muslim law" is a term I first came across when reading Moustafa's book, although it is clearly a term that has some history in academic literature. The term describes laws enacted by legislatures modeled on Britain's Parliament, relics of colonial rule, but that are administered to regulate Muslims or the practice of Islam. Under Malaysia's Federal Constitution, Islamic law and the personal law of persons professing the religion of Islam are matters to be legislated by the ordinary legislatures of the state (where both Muslim and non-Muslim members can participate in the law making).

Moustafa conducted research for the first time (to my knowledge) on the views and perceptions of ordinary Muslims in Malaysia on the "Islamic" or "Syariah" law that is administered by the state and that regulates them. His research finds that what is in fact Anglo-Muslim law was viewed by a majority of Muslims in Malaysia as the embodiment of the Syariah itself. Vast numbers of the persons surveyed consider that state Islamic laws derive exclusively from the Syariah (see Chapter 6 of *Constituting Religion*). This is despite the clear inconsistencies between the Syariah in its traditional form and as understood by most scholars of the religion, and Anglo-Muslim law as applied in Malaysia.

Until Indira Gandhi's case appeared in the Federal Court, only a handful of lower court judges had recognized the reality that the Syariah courts were in fact merely applying Anglo-Muslim law through state-level legislation. Here, in the Federal Court, five

Muslim judges unanimously held that it was in fact the civil courts who had jurisdiction to interpret the legality and constitutionality of state-level “Islamic” laws and the actions of state-level “Islamic” authorities.

In the drive to further the regulation of religion (as a state project), the “liberal” voices had apparently won a major victory. Or had they?

### **Apostasy Is a Different Matter**

Just weeks after the Gandhi decision, however, two of the same judges were sitting in an appeal in the state of Sarawak, on the island of Borneo. This time, the appeal involved four adults classified as Muslim by the state who sought constitutional relief to recognize their professed faith of Christianity—a so-called apostasy case. (I say “so-called” because in many of these cases the person seeking relief has never really professed and practiced Islam, but converted to Islam or was deemed Muslim for a variety of reasons, not always as a result of a sincere belief in the faith.)

In that decision, the appeal was summarily dealt with and dismissed. The court ruled that the state Syariah courts had “implied” jurisdiction to determine if a person had left Islam, even though Sarawak state legislation did not expressly provide for apostasy applications to be made to the state Syariah courts. The apex court ruled therefore that the civil courts had no jurisdiction to deal with the applications.

The reasoning is clearly flawed—the Federal Court in *Indira Gandhi* had made it clear that the Syariah courts could not derive jurisdiction by implication. A clear and express provision was required in the law before the civil courts could say they had no jurisdiction to hear a particular dispute. A simple application of the law the court had set out in *Indira Gandhi* just weeks before would have given the four applicants relief.

Alas, no reasoned written grounds of judgment were ever given by the panel to explain this inconsistency. We are left with news reports about the decision, including these from the [Borneo Post](#) and [Free Malaysia Today](#). And the applicants will continue to be dealt with as if they were Muslim, notwithstanding the religion they each actually profess.

### **A Rocky Path Ahead**

In this contrast of judicial decisions, we see some of the problems faced when religion becomes entangled with the business of the state. This is set to continue despite the electoral tsunami in Malaysia after the Fourteenth General Elections on May 9, 2018, which saw Malaysia’s ruling coalition losing power at the federal level for the first time since independence in 1957.

The new government appointed non-Muslims to the powerful positions of attorney general and chief justice shortly after gaining power. This was lauded by proponents as a welcome move to meritocracy, but decried by [opponents](#) primarily on grounds of race and religion.

Tensions continued with a massive rally cosponsored by the opposition Islamist party PAS and its former rival, UMNO, calling for a defense of Malay rights and the position of Islam. This was in opposition to the new government expressing its intention to accede to the International Convention on the Elimination of Racial Discrimination ([ICERD](#)). Although [many](#) argued ICERD would not in any way detract from the role of Islam and the privileges ethnic Malays enjoyed in Malaysia, the government was [embarrassingly](#) forced to resile from their decision, succumbing to pressure not to appear to be against Islam.

These developments in the political sphere also saw reverberations in the legal fraternity. For the first time, in Bar Council elections held at the height of the tensions regarding ICERD, a record number of Muslim lawyers who advocate for a greater role for Islam in governance were [elected](#) into office. Many of them had [campaigned](#) as a group, echoing the fallacious arguments that ICERD was a threat to Malaysia's constitutional protections of Islam and Malay "rights."

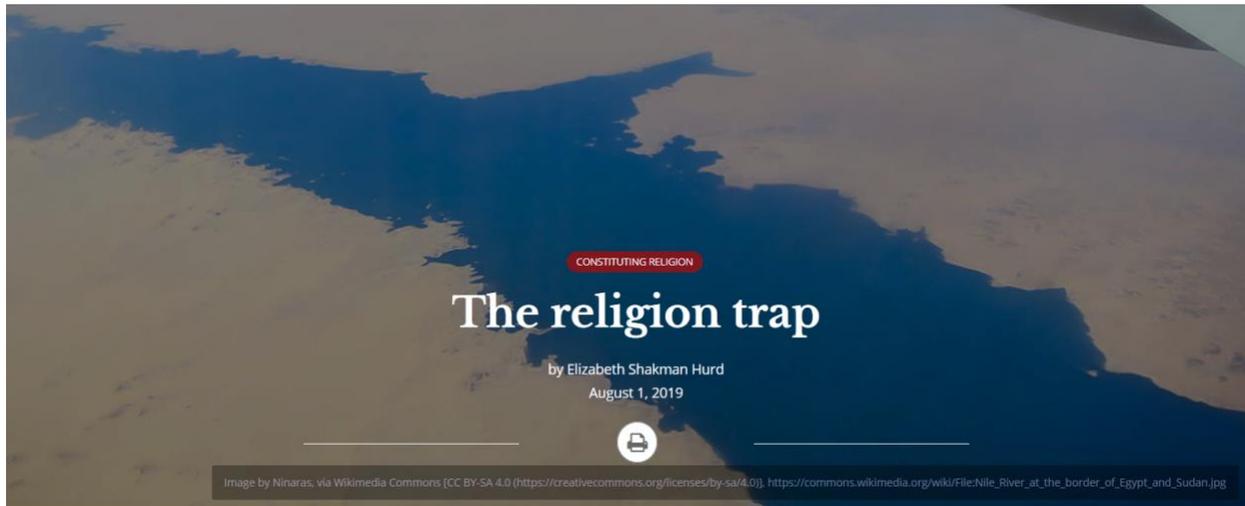
Again, we see in action Moustafa's acute observation of how pluralism, secularism, and liberalism are positioned in Malaysia as somehow inimical to Islam, when many would argue that this is not necessarily the case. These events show that the rights versus rites binary is set to continue for the time being, even in "new" Malaysia.

## **Conclusion**

*Constituting Religion* is an immensely valuable work, as it shows the extent to which the Malaysian state apparatus has contributed to a warped conception of Islam amongst its adherents and places the court cases that have shaped the national discourse in its proper context. To me, it provides evidence for long-standing suspicions about how religion has been abused by an authoritarian state to impose control over its population.

The perceptive analysis by Moustafa on our work as lawyers, in particular on the unintended consequences of what we think is "strategic" litigation, is a valuable addition to scholarship on public interest or cause lawyering. I have no doubt that lawyers from both sides of the divide will be religiously studying this book and formulating new strategies in how to advance their respective views on the place of Islam in governance in Malaysia. I understand a Malay translation of the work is in the pipeline, and I am greatly encouraged by this. The lessons gleaned from this valuable book must be shared to a wider audience in Malaysia.

## [Elizabeth Shakman Hurd, “The Religion Trap”](#)



There is a trap in the study of religion and politics. All traditions are equally susceptible to it, but as Tamir Moustafa suggests in his new book, *Constituting Religion*, the temptation may be especially strong when it comes to contemporary state politics surrounding Islam and Islamic law. The trap is to conflate Islam as a fluid and diverse set of traditions with specific forms of state Islam and projects of Islamization. This conflation is so common that it can be difficult to see. After all, few Islamization projects present themselves as departing from the “real” Islam.

Moustafa teaches us to avoid this trap. Malaysia has two parallel legal systems: one understood to be secular or civil and the other Islamic. This binary does not reflect a pre-existing Malaysian religio-legal landscape: it constructs it. Describing the historical processes associated with the creation and entrenchment of this binary, as this book does, makes it possible to see that what constitutes “Islamic law” and who participates in “Islam” are simultaneously theological, legal, and political questions. Iza Hussin’s powerful book *The Politics of Islamic Law* also does this difficult yet crucial work.

In Malaysia, there is a polarization between liberal rights and Islamic rites. The legal system continually breathes new life into this distinction, as religion is judicialized. This binary between rights and rites polices the boundaries of legal possibility and casts alternatives below the threshold of socio-legal legibility. It is not only a state project. NGOs, the media, advocacy groups, and ordinary citizens are all swept up in a legal and discursive storm. All perpetuate the binary.

Easily submerged in this tsunami of litigation and popular mobilization is the distinction between Islam and projects of state Islamization. Islam comprises a fluid set of traditions, of ways of being Muslim that are [both contingent and coherent](#), which can be reduced to a single interpretation only through extraordinary interpretive license and, some would say, violence. Nowhere is this collapse more evident than in popular interpretations of Islam and Islamic law. A particular understanding of the latter has captured the Malaysian legal imaginary:

The finding that most lay Muslims understand Islamic law as a legal code yielding only one correct answer to any given question is a testament to how the modern state, with its codified and uniform body of laws and procedures, has left its imprint on popular legal consciousness . . . Whereas Islamic jurisprudence is diverse and fluid, it is understood by most Malaysians as singular and fixed. Implementation of a codified version of Islamic law through the shariah courts is assumed to be a religious duty of the state. And, indeed, it appears that most Malaysians believe that the shariah courts apply God’s law directly, unmediated by human agency.

All survey results are partial and over-simplified, but Moustafa’s are convincing in suggesting that this capture runs deep. The distinction between Islamic law, in all of its diversity and internal complexity, and specific state projects of Islamization has crumbled not only for scholars and public authorities but also in the eyes of ordinary Malaysians. This means that criticism of a legal initiative that is understood as “Islamic” is seen as an attack on Islam in general. As a result, conventional readings of Article 3(1) of the Malaysian Constitution (“Islam is the religion of the Federation”), which emphasize its ceremonial and symbolic meaning, are “not only pronounced unfaithful to the Federal Constitution; they are said to ‘challenge Islam’ itself.”

Nowhere is the centripetal force of the religion trap more evident than in the landmark [Lina Joy case](#). Joy, a Malay Muslim convert to Christianity, sought not to have her religion listed as Islam on her national identity card. But the Syariah Court refused to recognize her conversion out of Islam, and when the Federal Court rejected her appeal Joy fell into a jurisdictional abyss. In a nationwide survey conducted at the time, 96.5 percent of Muslim respondents said that the Malaysian government should regulate apostasy because Islam forbids it. Faced with these statistics, many analysts would tumble head first into the religion trap, attributing the result to “Muslim intransigence” surrounding apostasy. Moustafa, to his credit, steps around the trap, concluding that “rather than drawing popular attention to the variety of possible positions concerning apostasy in the Islamic legal tradition, the polarized framing around the case appears to have strengthened a view that the state is obliged to prevent apostasy.”

The conflation of a state-centric, racialized, and ethnicized set of legal interpretations of Islam (Malay=Muslim) with Islam in its entirety is troublesome. It renders certain forms of solidarity unimaginable, certain ways of relating unfathomable, and certain

understandings of both Islam and liberalism unthinkable. It sits at the troubled core of contemporary misunderstandings of religion and state in Malaysia and elsewhere. It shapes popular consciousness, media accounts, international advocacy, scholarly production, educational policy, and legal discourse. It closes off positions that defy the liberalism-Islam binary.

It was not always this way. As one elderly ethnic Indian man told Moustafa, “Thirty-five years back, we didn’t have these issues. Everyone was happy. I went to school with the Chinese and Bumis. We really mingled around. There was no problem. But now come a lot of issues. They are segregating the people. It is government policy that they’re segregating us.”

Moustafa suggests a way out of this impasse. Anglo-Muslim law, he explains, is not the “full and exclusive embodiment of the Islamic legal tradition.” Liberal secularism, too, is not an unchanging monolith that exists outside of particular legal and political contexts. Neither Islam nor liberalism exists as an autonomous, pure, or coherent formation. Rather, “binary forms emerge as a function of the institutional environment in which Islam and liberalism are represented.”

Though perhaps underplayed by the author, there are important comparative applications of this argument. I read *Constituting Religion* while cruising the Nile as faculty host on a Northwestern alumni tour. It got me thinking about the situation in counterrevolutionary Egypt, where it has been over five years since Sisi declared the Muslim Brotherhood (MB) a terrorist group. Egypt has since been in the grips of what Atef Said [calls](#) “anti-MB hysteria.” Conspiracy theories abound. One of our guides claimed that the Brotherhood is indistinguishable from ISIS and that former President Mursi was never elected. Another insisted that Mursi tried to give away the Sinai to the Palestinians and that tunnels full of terrorists linked Gaza and Egypt until Sisi blew them up. Emergency courts are jailing dissidents of all stripes on a daily basis. It is forbidden to celebrate the anniversary of the 2011 revolution. Posters praising Sisi adorn every dusty intersection and half-finished construction site.

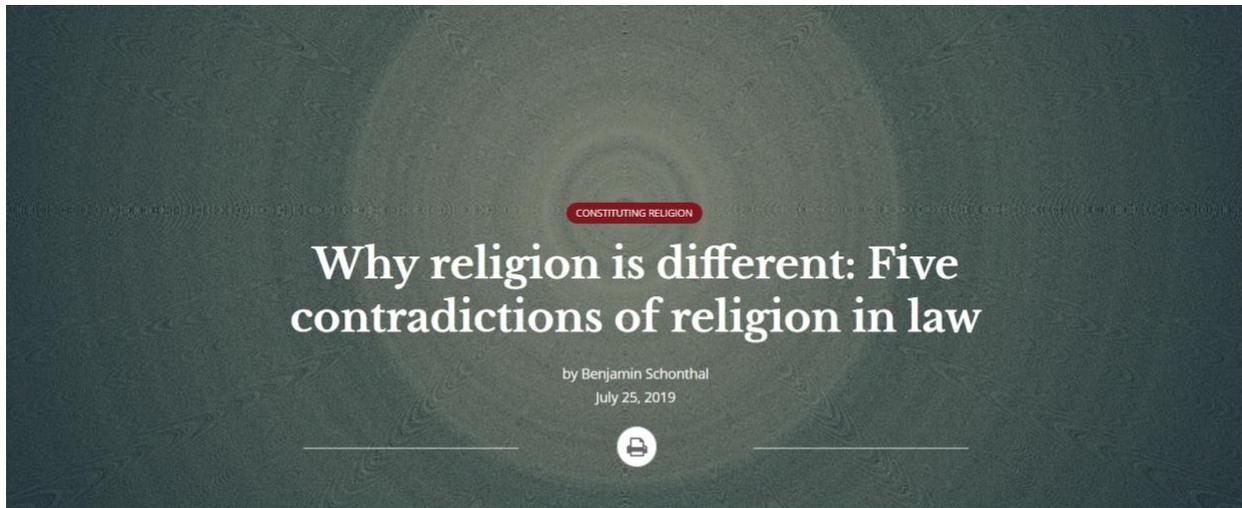
The repression extends beyond Egypt. In February of this year former *New York Times* Cairo bureau chief David Kirkpatrick was denied entry into Egypt and detained for seven hours incommunicado without food or water before being escorted to a London-bound plane without explanation. None of this is surprising given the Trump administration’s proud complicity in Sisi’s repression. American journalists and others are paying a price for a US administration that joins Sisi in celebrating the [death of Egyptian politics](#), all politics, but perhaps especially those politics with an oppositional flavor designated as “Islamic.”

In Sisi’s “with us or against us” [mentality](#), opposing the regime makes one a disloyal Egyptian and a terrorist. On this violent landscape, the “moderate” Islam that is tolerated

is that which supports the regime. That state-sanctioned Islam, or so the regime hopes, will eventually extend its coercive reach to occupy all social, legal, and political spaces. It will encompass and stifle not only the MB but also a vast array of dissident Islams that support neither the MB nor the regime, as anthropologist Yasmin Moll [explained](#) compellingly after Mursi's ouster. The religion trap tightens its grip.

Anand Vivek Taneja is surely right that in the face of these developments one of our jobs as scholars is to “[challenge and expand established ideas of what constitutes \(and who participates\) in the discursive tradition of Islam.](#)” Moustafa's nuanced account of the Malaysian legal and religious field helps us along this path by alerting us to a fatal trap in the study of religion and politics. The stakes are high. If we fail, the temptation to collapse Islam into a particular project of Islamization, Christianity into some version of [Christian nationalism](#), or—as the [debate rages](#) over American support for Israel—Judaism with a particular [project of Zionism](#), may prove irresistible.

## [Benjamin Schonthal, “Why Religion is Different: Five Contradictions of Religion in Law”](#)



Tamir Moustafa’s *Constituting Religion* incisively reveals both the enduring and disturbing impacts of constitutional law on the ways Malaysians imagine and manage religion. It demonstrates how a constitutional system designed to protect Islam and guarantee religious freedom ended up undermining each while, at the same time, making the two goals appear incompatible.

I am very persuaded by Moustafa’s arguments; and I have found [similar dynamics at work in Sri Lanka](#). Nevertheless, Moustafa’s book raises for me two questions about the broader links between law, religion, and social conflict, questions with which I have also struggled. First, precisely how blameworthy is law, itself, in these stories of acrimony and contestation? Don’t these disputes occur even in the absence of law? Second, why is religion special? Shouldn’t the dynamics of polarization and exacerbation, which Moustafa observes, happen with other legal rubrics as well?

Moustafa is aware of these questions and he points to them in his conclusion. His response to the first is definitive. No, he insists, the “rites versus rights” binary could not have emerged in the absence of constitutions and courts because that binary depends upon notions of jurisdiction and authority that arise neither from Islam nor from liberal rights, themselves. Those binaries are produced, instead, by the legal “finger trap” of Article 121(1A) and its “radiating effects” in politics and the media.

The second question—about whether religion is special—is harder to handle, and Moustafa’s book gives a less direct answer: religion is special, he argues, because of “the

multivocality and indeterminacy of religious traditions themselves” and the “instability” of religion as a category of law. This makes sense. Nevertheless, why precisely, is the “judicialization of religion” more problematic than the judicialization of other multivocal and unstable categories such as race, or custom, or culture?

This question is vitally important for scholars because it flickers dimly in the background of so much academic writing on the legal regulation of religion. In this article, I want to add to Moustafa’s response: Yes, I will argue, religion does pose special challenges as a category of law; and these challenges arise not simply because religion is difficult, if not impossible, to define nor because legal agents deploy the category in strategic, prejudicial, or inconsistent ways. Religion is a uniquely thorny category of law, I will insist, because the use of that category—in legislatures, courtrooms, and mediascapes—evokes (at least) five distinct *discursive contradictions*, opposing ways of representing and understanding those things that are supposed to be protected or regulated by law: contradictions of communality, authority, acquisition, imagination, and independence.

## **I. Contradictions of Communality**

Striking in many of the cases that Moustafa describes is an ostensible clash between religious individuals and religious communities. On the one hand, these cases involve individuals seeking protection from the courts for their personal rights to observe or declare religion. On the other hand, they involve representatives of the “the Muslim community,” which (according to Malaysian case law) also has rights to uphold its own communal standards of entry and exit. Religious rights, as figured through the Malaysian legal system, therefore, apply not only to citizens but to groups. In fact, within the same article of the Malaysian Constitution (Article 11), sits subsection (1) guaranteeing “every *person* has the right to profess and practice his religion” *and* subsection (3) stating that “every religious *group* has the right to manage its own religious affairs.”

Malaysia’s constitution is not unique in this regard. The constitutions of many countries—for example, India, South Africa, Singapore—include similar religious rights guarantees for both individuals and groups. Yet tensions between individualistic and communalistic understandings of religion are also seen in jurisdictions that prescribe no explicit group rights. Think, for example, of the rights conferred to “churches” under the US “[ministerial exception](#)” or [UK marriage laws](#).

This tension, in other words, is baked into many legal protections for religion, meaning that the judicialization of religion, wherever it may occur, has the tendency to set in motion contests between individual “religious” people and the communities they claim (or, in the Malaysian case, disavow) being part. For this reason, religious rights cases also lend themselves to political and social mobilization: because judicializing religion implicates religious communities, even when it is addressing individuals, it also serves as

an invitation for activists, clerical organizations, and others to represent those communities and advance claims in their name.

## II. Contradictions of Authority

The tension between individual and community rights, described above, is not unique to religion. Similar tensions also appear in countries that grant rights and recognition to local customs, traditions, or indigenous laws. What happens, for example, when members of indigenous communities in Australia or Canada [advance diverging interpretations of customary law](#)? In most cases, federal courts make a group-based calculation: to the extent that the recognition of indigenous law is the (at least partial) recognition of indigenous sovereignty, state judges will tend to accept the fact that the interest of the groups (*qua* nations) [outweigh those of the individuals](#). Those with greater status or rank in the group, such as an elder or chief, will therefore be granted greater authority by the state than less-senior members.

What about in the case of religion? In the same way that rights to freedom of religion seem to empower both citizens and groups, so, too, do they seem to suggest both equality and inequality in the nature of claims made by them. As interpreted in most jurisdictions and in international law, religious rights are, [at their core, rights to believe what one likes](#), analogous to (or a species of) rights to freedom of conscience. Understood in this way, claims to religious freedom ought not to be assessed according to their authenticity or accuracy (even if they are sometimes evaluated in terms of their [sincerity](#)). On the other hand, legal and popular understandings of rights to religious freedom also imagine those rights in ways similar to indigenous law: that is, they are rights to follow and maintain a separate normative system, along with its distinctive rules and obligations. Imagined in this second way—especially in cases involving [exemptions and accommodations](#) to general laws—religious rights appear to be rights to submit oneself to non-state structures of authority, structures which are not (by their very nature) reducible to or dependent on the beliefs of the individual.

Built into religious rights, therefore, are contradictions of imagined authority. In courts and legislatures, religion appears, on the one hand, as a domain of dispersed or egalitarian authority, in which individuals alone determine the validity of their own religiosity, and, on the other hand, as a domain of hierarchical, structured power in which established texts and leaders have a greater say. This particular contradiction appears throughout *Constituting Religion* in the form of disputes between syariah court officials who, by virtue of their recognition by the state, are permitted to speak for Islam, and individual petitioners and civil society groups (such as Sisters in Islam) who speak as individual Muslims asserting their own power to study and interpret the faith.

## III. Contradictions of Acquisition

Also present in legal debates over religion are sharp divergences in how parties perceive and portray the acquisition of religion by individuals. Is religion something chosen willingly by persons or given to individuals by their families and communities? While this question pops up from time to time in court cases in the “secular” jurisdictions of North America and Europe, particularly in the context of children’s religious affiliations (as it relates to matters of [schooling](#) or [custody](#)), it comes up frequently in places like Malaysia or Sri Lanka, where one’s religious identity is determined by government officials at birth and recorded in official files. For the purposes of public [education in Sri Lanka](#), for example, legislation requires that (under normal circumstances) students study *their own* religion for ordinary-level exams. Yet a student’s religion is determined not by his or her declaration, but by parents’ official religious identities. In contexts such as this, where religious affiliation is a predetermined part of one’s legal identity (or public education), asserting a right to religious freedom naturally brings to the fore a clash between the two ways of determining or acquiring a religion: choice and parentage.

#### **IV. Contradictions of Imagination**

One of the most fascinating cases in *Constituting Religion* is the Allah case, in which Malaysia’s higher judiciary upheld an order forbidding a Catholic newspaper from using the word “Allah” to refer to (the Christian) God. While the case brings up all kinds of interesting questions about speech, censorship, and property, it also highlights another fundamental tension that makes the legal regulation of religion so complex. Religion, as deployed in law, is something both abstract and concrete. Thus, when invoked in the context of courts and legislatures, religion generates certain contradictions of imagination: some litigants and jurists imagine religion as having a small footprint in the world consisting of “[purely spiritual matters](#)” such as salvation, morality, or ritual; others, however, imagine religion as having a much larger *physical* presence, consisting variously of *objects* such as communities, churches, properties, texts, and, perhaps, even words. According to this second imaginary, religion is not just something that can be professed or observed, but an *object* that can be *acted upon* and therefore saved, protected, rehabilitated, or transgressed. There are few basic constitutional rights that evoke similar imaginative splits.

#### **V. Contradictions of Independence**

Given all these other contradictions, it is perhaps unsurprising that lawyers and legislatures do not agree on the proper way to protect religion. But even if they could agree on how religion ought to be imagined, acquired, and authorized, the category of religion generates yet another discursive contradiction. This is because, in almost all jurisdictions, religious and legal elites imagine religion in its “liberated” condition as independent of the modern nation-state. Thus, as Moustafa skillfully points out, even in Malaysia, where Islam is highly regulated by the state, clerics and legal officials nonetheless speak and write about Islam as though it were (or should be) autonomous

from state power. The same could be said of religion in other jurisdictions. In the United States, for example, talk of disestablishment (or a wall of separation) is common in the very court decisions and legislation that limit what is considered [normal, acceptable, or licit forms of religiosity](#). In this contradiction lies the most ultimate rub: when it comes to the legal management of religion, the very measures that are designed to ensure the independence or autonomy of religion (e.g. Art. 121[1A]) end up also compromising and undermining that autonomy because they require state institutions (e.g., syariah courts, civil courts, parliaments) to first determine the proper boundaries and representatives of the religion with which they are pledging not to interfere. This applies as much to [religiously preferential legal](#) regimes as to “secular” ones.

These five discursive contradictions—and perhaps others—make the category of religion different from other categories of law. They work together and independently to make the legal regulation of religion uniquely challenging and troublesome. For this reason, the judicialization of religion has a greater likelihood of leading to tension, conflict, impasse and resentment than the judicialization of other legal categories such as race, custom, tradition, or language. Adding to all of this, and deepening the special challenges of religion as a category of law, is the fact that legal protections for religion are both [more widespread and deeply entrenched](#) than protections for categories such as custom or language: virtually all of the world’s basic laws mention religion and most of them treat religious freedom as a special or “core” type of right. All of this points even further to the broad importance and generalizability of Moustafa’s findings in *Constituting Religion*. This book is not just an important contribution to the study of Islam and Malaysia. It should be required reading for anyone interested in the dynamic entanglements of law and religion in the modern world.

## [Tamir Moustafa, “Constituting Religion – A Reply”](#)



The cover of my book *Constituting Religion* features an image from the Iranian artist [Kiarash Yaghoubi](#). I came across Yaghoubi’s exquisite, untitled painting on a visit to the [Islamic Arts Museum Malaysia](#). The museum holds the largest collection of Islamic art in Southeast Asia, brilliantly showcasing the beauty and diversity of fourteen centuries of Islamic civilization.

Amidst this celebration of Islamic eclecticism, one could easily miss the irony that was more subtly on display: If Yaghoubi were to visit Malaysia, he would not be able to practice Shia religious rites. To be clear, I know nothing of Yaghoubi’s religious practice and sensibilities, but it is a fact that Shia Islam is designated as a “deviant” faith in Malaysia. Indeed, state authorities criminalize dozens of so-called deviant religious practices, whilst mandating a state-sanctioned Islamic orthodoxy. (This recently came to the attention of over two hundred Iraqi nationals who [were arrested](#) for participating in a Shia religious ceremony to commemorate Ashura.)

In contrast with the legal straitjacket on religious practice in contemporary Malaysia, Yaghoubi’s artwork suggests the nearly limitless forms that any religious tradition can assume. The jumble of letters, stylized in Islamic calligraphy, is to me a metaphor for the myriad ideational formulations that are possible when these letters are alternately arranged to produce different words, phrases, texts, and meanings. Religious practice and understandings will always be diverse, complex, fluid, and contested, despite the wishes of a [jurispathic](#) state.

One of the meta-themes of *Constituting Religion* is how state efforts to define, regulate, and administer Anglo-Muslim law generate new legal questions and conundrums;

provide continuous fodder for activists; and serve as rocket-fuel for countervailing social movements. These developments in turn shape new understandings of religion—and not only for self-identified Muslims.

\* \* \*

I want to thank everyone who contributed to [this forum](#), along with the editor of *The Immanent Frame*, [Mona Oraby](#), who made all of this possible. It is an honor to have the sustained attention of so many impressive scholars from across so many different disciplines. From the start, this project was both exhilarating and humbling because the co-constitutive dynamics of law, religion, politics, and society are so complex. These essays—along with many conversations that I have had with many of the contributors over the years—have deepened my understanding and have helped me to see how this project is viewed from diverse disciplinary vantage points.

[Asli Bâli](#)'s contribution captures many of my core arguments concerning the link between institutional design, judicialization, and the radiating effects of law and courts on politics and religious consciousness. No doubt, her important book with [Hanna Lerner](#), *Constitution Writing, Religion and Democracy*, attunes her to the inextricable links between judicial institutions and their radiating effects. [Kristen Stilt](#)'s essay provides more details on the political anxieties that are wrapped up in Malaysia's demographic balance, both historically and right up to the present moment. [Matthew Nelson](#)'s detailed commentary alerts us to the ways that these issues have traveled, both historically and geographically, in the vein of [Iza Hussin](#)'s important work. And [Patricia Sloane-White](#) provides an eye-opening view onto what she sees as a deepening of a zero-sum binary by way of the otherwise celebrated Islamic banking and finance industries.

Given the space limitations for this response, I will focus the bulk of my reflections on the remaining essays. It is a particular honor that [Shanmuga Kanesalingam](#) contributed to this forum with his firsthand analysis of the Indira Gandhi case. It is hard to overstate the formative role that Shanmuga has played in cause lawyering when it comes to matters of religious freedom in Malaysia. For me, his participation in this forum is a reminder of how important it is for those activists who we write about to have the opportunity to respond and engage with our scholarship. It is important that his voice is heard directly, unmediated by my own writing and analysis. In retrospect, I realize that this was a missed opportunity to also invite one of Shanmuga's legal adversaries to join us for this exchange. Throughout my fieldwork, I always found it easier to relate to the views and positions of liberal rights lawyers and activists like Shanmuga. Yet I was mindful that a better understanding of the aims, concerns, and anxieties of conservative activists and their audiences is essential for a deeper appreciation of the complexity of the legal entanglements and their polarizing effects on popular consciousness.

[Winnifred Sullivan](#) raises important questions about whether “the efforts of legal and religious historians, sociologists and anthropologists to describe the effects of modern law on religion” are, in their own way, forms of “mansplaining religion.” While my own liberal inclinations may come through in passages of *Constituting Religion*, my principal aim is not to advocate for one side or another, but rather to examine the politics of claims-making by the government, the courts, advocacy groups, the religious establishment, and everyday citizens. Nonetheless, I agree with Sullivan that to write on law and religion is to navigate a minefield, whether one recognizes it or not. To use [Elizabeth Shakman Hurd](#)’s metaphor, it is as important as it is challenging to avoid “the religion trap” that would have us define, authorize, and reify alternate visions of religion that are used to advance political projects. Doing so may serve to “stabilize religion in the service of liberal norms” as Sullivan points out. Worse still (at least in my view) is when religion is stabilized in the service of authoritarianism. [Hurd](#) nicely illustrates this with the example of Abdel Fattah el-Sisi’s despotic rule in Egypt. Whether in Egypt or Malaysia, the construction of a “secular” versus “religious” cleavage (or “good religion” versus “bad religion”) can be a powerful device to advance authoritarian projects.

Ironically, the charge of mansplaining religion is one that the Malaysian women’s advocacy group [Sisters in Islam](#) faces regularly, albeit not with that specific turn of phrase. Sisters in Islam pushes for women’s rights from *within* the Islamic legal tradition rather than against it. Nonetheless, they are frequently chastised for challenging “[God’s law](#).” Their rejoinder is a powerful one: if Islam is invoked as the basis of public policy, then they, too, have the right to speak on Islam. This is a position that I respect wholeheartedly. As [Shanmuga](#) briefly references, I have shared my concern that many of the tactics liberal activists embrace (litigation, press campaigns, bringing foreign pressure to bear) risk reinforcing a counterproductive narrative that religion is under siege. The “within the tradition” approach of Sisters in Islam is perhaps best able to deactivate these binary constructions, even if it might be considered liberal mansplaining by some of their detractors.

Let me move now to address [Jaclyn Neo](#)’s concern that the book gave “short shrift” to matters of race and language. I am in full agreement with Neo that both race and language are crucially important in the construction of Malaysia’s constitutional identity. This is why a discussion of race informs every empirical chapter of the book, beginning with the legal formulation of race in British Malaya, to the discussion of how race-based politics gave rise to Article 3 (and others) in the Federal Constitution, to the variety of ways that religion is continually invoked in court and by social movements to advance notions of racial supremacy. The suggestion that “he could have also engaged with the choice of language in judicial decisions” is also puzzling. Neo provides the Lina Joy case as an example where language is used to communicate and construct constitutional identity, yet the choice of language (in the Lina Joy decision and others) is examined in the book in precisely this way. In my discussion of the Lina Joy case, for example, I note

that: “The decision provides a clear illustration of how law and the social imaginary conflate Malay racial and religious identity in contemporary Malaysia. In fact, it is worth noting that the majority opinion in *Lina Joy* was written in Bahasa Malaysia and not in English, as is conventional practice. This departure from standard convention was surely meant to deliver the message that matters concerning Islam and Malay identity are first and foremost Malay issues, as opposed to Malaysian issues” (p. 75).

In keeping with a decentered analysis of law, *Constituting Religion* also strives to underline the importance of language by comparing press coverage of court cases across Malaysia’s diverse media landscape, from the Malay-language newspapers *Utusan Malaysia*, *Berita Harian*, and *Harakah*, to the Tamil-language papers *Makkal Osai* and *Malaysia Nanban*, to the Chinese-language *Sin Chew*, and the English-language press. These comparisons suggest the extent to which Malaysia’s segmented ethnolinguistic media environment further refracts competing frames of understanding across ethnolinguistic groups. Neo’s instinct is correct that one of the challenges of writing this book was to do justice to the specificities and complexities of the Malaysian case, whilst pursuing a more general theory-building agenda. My earnest hope is that readers who are motivated by one or the other of these objectives will each find the analysis enriching.

[Benjamin Schonthal](#)’s contribution to this forum is characteristically sharp. He has taken some of the core observations that are presented in *Constituting Religion*, compared them against his own hard-earned insights on modern law and religion in Sri Lanka and elsewhere, and rendered these insights into lucid corollaries that address the question, “Why is religion different?” To be clear, this is not the question that I pose in the concluding chapter of the book, which is more along the lines of “Does law matter? (And if so, how?)” In any case, the book presents dozens of thorny examples that underline the instability (and contradictions) of religion as an object of law.

One of the well-known cases examined at length in the book is that of [Lina Joy v. Religious Council of the Federal Territories](#). In litigating Joy’s right to religious freedom, her attorneys argued that restrictions on conversion violated her right to religious freedom, a right enshrined in Article 11 of the Malaysian Constitution, which states (in part) that “*Every person* has the right to profess and practice his religion . . .” [emphasis added]. However, Joy’s opponents invoked another clause from the same Article, which states, “*Every religious group* has the right . . . to manage its own religious affairs . . .” [emphasis added]. This second set of attorneys also claimed the right to religious freedom, but they argued that Article 11 safeguards the ability of religious groups to craft their own rules and regulations (including rules of entry and exit) free from outside interference. Ironically, advocates on both sides of the controversy invoked “religious freedom.” Both sides grounded their claims in constitutional texts. And both sides called upon the state to secure their contrasting visions of Malaysian state and society. In this

single case, we can see *all five* contradictions that Schonthal enumerates (communality, authority, acquisition, imagination, and independence) at play, and all at once.

Whether “religion is different” and functions as a special object of law, with specific contradictions that are not shared by other categories such as race, custom, or culture, is a good question. It is also one that I am not presently equipped to answer with any degree of sophistication. Another way of approaching the question, however, is to affirm that religion does not operate as a solitary or stable category. Instead, religion is intertwined with other categories of identity and meaning, and it is always shaped by the push and pull of politics, society, and state. In Malaysia, this has meant that when questions around religion emerge in court, issues and anxieties around race often go hand in hand. This intertwining also means that religion is frequently employed as a proxy to advance other overlapping identities. So, litigation in pursuit of religious supremacy is often equally an effort to advance an agenda of racial supremacy.

Regardless of the contradictions that may distinguish religion as a special category of law, we must keep our eyes trained on variation in legal institutions. *Constituting Religion* endeavors to demonstrate how certain legal configurations exacerbate these contradictions. What may appear as conflict arising from the unique properties of religion as an object of law can often be traced back to specific legal configurations that hardwire and amplify these contradictions (e.g., Malaysia’s bifurcated judiciary, pluri-legal family law provisions, etc.). Recognizing problematic configurations of state law provides some hope that law and legal institutions might someday be reformed to mitigate conflict. Yet, as I elaborate in the book, fundamental institutional changes are unlikely due to political gridlock. In the meantime, perhaps the best we can do is to be clear about the source of the problem, which has little to do with religion (as a practice of faith) and far more to do with the regulation of religion (as a state project).

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