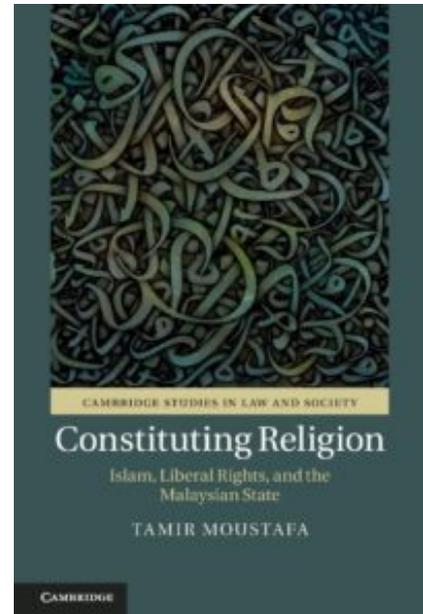


Constituting religion: From South Asia to Malaysia

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By Matthew Nelson

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-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.