Introduction

In 1995, a group of veiled Muslim women took to the streets carrying market scales to protest the Indian government's failure to protect Muslim minorities (see Figure 1).[1] The immediate context was the third anniversary of Hindu extremists tearing down the Babri Masjid, a Mughal-era mosque. Yet the women's protest brought into a common frame two seemingly timeless and powerful symbols – scales of justice and veils. Scales of justice convey the neutrality of secular law.[2] As tools of commercial calculation, scales are also associated with the economy. The protesters' veils, in contrast, suggest Muslim piety, traditional gender roles, and communal identity. By linking Islamic veils and market scales to secular justice, these women brought into dialogue ethical discourses – about culture and economy, religion and secular law – that are often kept apart and figured as oppositional.

The women's protest was so striking because it ran against the current of contemporary coverage, which typically portrays Muslim religiosity as a barrier to secular law. These sentiments were fueled by a series of legal controversies in the 1980s, including the passage of the Muslim Women (Protection of Rights on Divorce) Act and the ban on Salman Rushdie's *Satanic Verses*. A review of the editorial pages of the *Times of India*, India's largest English-language daily, provides a snapshot of how coverage of these events opposed Islam and secularism. In 1986 the ominous title

[1] "Liberhan Report on Babri Demolition," photo 7 of 7, *NDTV.com*, accessed April 7, 2015, www.ndtv.com/photos/news/liberhan-report-on-babri-demolition-1039/slide/7. The use of the common balance to invoke symbolic scales of justice has reappeared as a trope in protests marking the anniversary of the destruction of the Babri Masjid. For images of this practice in other protests, see "India in Pictures," image 6 of 9, *The Wall Street Journal*, December 7, 2011, accessed April 7, 2015, www.wsj.com/ articles/SB10 001424052970204770404577083283971161516; "Revisiting Ayodhya," image 8 of 14, *Hindustan Times*, December 6, 2012, accessed April 7, 2015, www. hindustantimes.com/ photos/india/ayodhya/Article4-969382.aspx.

[2] Of course scales of justice also have been associated with images of divine justice, but today are more likely to evoke secular imaginaries. Dennis E. Curtis and Judith Resnik, "Images of Justice," *The Yale Law Journal* 96, no. 8 (July 1, 1987): 1727–72.

Figure 1. On December 6, 1995 in New Delhi Muslim women carried scales of justice to demand compensation for the victims of the riots that occurred after the destruction of the Babri Masjid in 1992. Photograph courtesy of Doug Curran and Getty Images.

of an editorial warned: "After the Muslim Bill: The Secular State in Peril."[3] In another article Girilal Jain, the editor of the *Times of India* from 1978 to 1988, lamented: "The reality … is that liberalism does not command too many customers among the more articulate Muslims, with the result that fanatics manage to carry the community with them."[4] The destruction of the Babri Masjid by a crowd of Hindu activists in 1992 did nothing to dampen commentary singling out Muslims as especially prone to religious prejudice and resistant to legal reform. A year later Amulya Ganguli, in an article titled "Bigotry of Islam," proclaimed that, "the iron law of fundamentalism still has the community in its grip."[5]

[3] Prem Shankar Jha, "After the Muslim Bill: The Secular State in Peril," *Times of India* [hereafter *TOI*], May 20, 1986, 8.
[4] Girilal Jain, "Plight of Muslim Liberals: Implications for India's Future," *TOI*, May 7, 1992, 12.
[5] Amulya Ganguli, "Bigotry in Islam: The Silent Majority's Surrender," *TOI*, January 3, 1994, 14.

This rhetoric reflected the ascent of the Hindu Right in mainstream Indian politics from the 1980s onwards, culminating in the election of Narendra Modi as prime minister in 2014 after he openly engaged in anti-Muslim polemics. As this book will show, however, this pattern of opposing Islam and secularism draws on a much longer history. Almost two centuries ago, while deliberating on legal reforms in India in the early 1830s, a Select Committee of the British Parliament described Islamic law as "inconsistent with the views of enlightened Europeans." The report went on to define Islamic law as everything that nineteenth-century British legal modernizers were struggling against: fraught with "difficulties and uncertainties"; "manifestly unjust and absurd"; "inefficient"; "venal and corrupt" – rhetoric which would not be surprising to encounter today.[6]

The idea of Islam as antithetical to secular, modern, and liberal legal regimes has persisted despite the fact that South Asian Muslims, like the women protesting after the destruction of the Babri Masjid, have repeatedly refused such oppositions. Muslims, from eminent legal scholars to crowds gathered outside courts, have since the nineteenth century produced an alternative outpouring of legal commentary. In their own writings, Muslims have pushed back against colonial portrayals of Islamic law as irrational and retrogressive. For example, Maulana Rashid Ahmad Gangohi (1826–1905) defended the juristic device of *taqlid* – which Muslim modernists and Orientalists alike dismissed as "blind imitation."[7] Gangohi explained that *taqlid* "is beneficial, is the people's form of *intizam* [government], and ameliorates disorder and *fasad o fitna* [discord]."[8] For him, *taqlid* ensured much the same as what secular law promised: reasoned, ordered justice.

How are we to make sense of these two archives, one of which suppressed the internal logics of Islamic law by casting it as the "Other" of secular law, and another which vociferously contested this view? This question animates this book. Studies of colonial encounters often privilege one of these narratives over the other, focusing on either the

[6] Report from the Select Committee of the House of Commons on the Affairs of the East India Company, vol. IV, Judicial, 695, House of Commons Parliamentary Papers [hereafter HCPP], 1831–2 (735-IV).

[7] I prefer to translate *taqlid* as following an established authority. Indira Falk Gesink has argued that the Muslim modernist Sayyid Jamal al-Din "al-Afghani" (1839–97) was responsible for popularizing the idea that *taqlid* was "blind" following or imitation, a translation of the term which elided the juridical rationale for the practice. "'Chaos on the Earth': Subjective Truths versus Communal Unity in Islamic Law and the Rise of Militant Islam," *The American Historical Review* 108, no. 3 (2003): 723–5.

[8] Rashid Ahmad Gangohi, *Fatawa-yi-Rashidiyah (Kamil)* (Karachi: Muhammad Ali Karkhanah yi-Islami Kutub, 1987), 57.

powerful transformations wrought by colonial rule or the opportunities for native agency made possible by the limits of colonial control. In contrast, I do not present an account of native agency triumphing over the colonial state, or vice versa. Instead I show how Indians' engagements with and subversions of law co-existed in dynamic tension with a profoundly transformative, and deeply coercive, colonial legal project.

In the following pages, I unpack this puzzle by telling two interwoven narratives. The first traces the evolution of what the book terms colonial secular governance. By this I mean the constellation of legal institutions and normative discourse of law which the British used to govern Indian religions. In particular, I focus on how colonial secular governance operated through a series of parallel binaries that pitted family against economy, religion against reason, and community against the state. While British officials themselves rarely used the terms "secular," my use of the term aims at capturing the cumulative effects of their approach to governing Indian religions, including their unintended consequences.

Alongside this history, the book also traces the continuous subversions that disrupted colonial secular governance's dominant logics – seeking out historical precedents for the work done by the women's protest in 1995. I focus on Muslims' and women's encounters with the law because they were often treated by colonial officials as particularly irrational, prejudiced, and communal. Forced into the position of secularism's "Other," these subjects were exposed to its most aggressive antagonisms. This position, however, also provided unique opportunities to challenge secularism's animating oppositions. To capture these dynamics, I follow into court women like Mussammat Dowla, who sued in the early 1880s to recover the property of her fellow prostitute and adopted daughter on the grounds that the court had wrongly awarded the estate to a man under Islamic law.[9] I also step outside the courts to engage the stories of women (mostly unnamed) who looked for alternative legal remedies beyond the state by asking independent Muslim legal scholars to produce *fatwas* dissolving their marriage ties to abusive husbands.[10] While these women often did not get what they wanted, either from the courts or from the scholars, their engagements with law put new pressures on colonial patterns of secular governance. Bringing together these stories requires moving between different archives, some of which are obviously

[9] *Murad Baksh* v. *Mussammat Dowla* [1884] Punjab Record 19 249. This case is discussed in Chapter 3.

[10] See for example Aziz-ul-Rahman Usmani, *Fatawa Dar-ul-Ulum Deoband*, 14 vols., ed. Muhammad Zafir-ul-Din (Karachi: Shakil Press, 2002–9), 9: 64. For further discussion of similar *fatwas* see Chapter 2.

legal, others of which are not. By pointing to the ambiguity and malleability of colonial law, these braided narratives stretch our understanding of what makes law powerful. My hope is also that understanding how law operates opens up possibilities for subverting its power, and with it, the enduring legacies of colonial governance.

Colonial Secular Governance: Religion, State, Family, and Economy

The book focuses on how religion emerged as a distinct social sphere, a process that was both global in scope and had unique, South Asian trajectories. Inspired by the work of Talal Asad, my work joins recent scholarship on Europe, the Middle East, Asia, and Africa in showing how contemporary understandings of religion emerged in dynamic opposition to new conceptions of secular governance and rationality.[11] Like these studies, I demonstrate how the modern state drove these transformations.[12]

This book also highlights the emergence of the economy as a distinct social sphere alongside and often in opposition to religion. While recent accounts of secularism have shown how modern forms of governance produced the family as the core site for preserving religious tradition, scholars have paid surprisingly little attention to the ways in which this process was entwined with concurrent economic changes. Historians of South Asia have, meanwhile, produced rich accounts of how transformations in the family were linked to changing modes of labor extraction and regimes of property control.[13] From the angle of legal history,

[11] Talal Asad, *Genealogies of Religion: Discipline and Reasons of Power in Christianity and Islam* (Baltimore: Johns Hopkins University Press, 1993); Talal Asad, *Formations of the Secular: Christianity, Islam, Modernity* (Stanford: Stanford University Press, 2003).

[12] For examples of recent work influenced by Asad, see Shabnum Tejani, *Indian Secularism: A Social and Intellectual History, 1890–1950* (Bloomington: Indiana University Press, 2008); Nandini Chatterjee, *The Making of Indian Secularism: Empire, Law and Christianity, 1830–1960* (Basingstoke: Palgrave Macmillan, 2011); Humeira Iqtidar, *Secularizing Islamists?: Jama'at-e-Islami and Jama'at-ud-Da'wa in Urban Pakistan* (Chicago: University of Chicago Press, 2011); Hussein Ali Agrama, *Questioning Secularism: Islam, Sovereignty, and the Rule of Law in Modern Egypt* (Chicago: University of Chicago Press, 2012); C.S. Adcock, *The Limits of Tolerance: Indian Secularism and the Politics of Religious Freedom* (New York: Oxford University Press, 2014); Mayanthi L. Fernando, *The Republic Unsettled: Muslim French and the Contradictions of Secularism* (Durham: Duke University Press, 2014); Saba Mahmood, *Religious Difference in a Secular Age: A Minority Report* (Princeton: Princeton University Press, 2015). For examples of an older, but still relevant, discussion of debates about secularism in the Indian context, see Rajeev Bhargava, ed., *Secularism and Its Critics* (New Delhi: Oxford University Press, 1998).

[13] Radhika Singha, "Making the Domestic More Domestic: Criminal Law and the 'Head of the Household', 1772–1843," *Indian Economic and Social History Review*

transformations in South Asia in the nineteenth century unfolded as part of a wider global emergence of what Janet Halley and Kerry Rittich have termed "family-law exceptionalism." In both colonial and metropolitan contexts, legal reforms in the nineteenth and early twentieth centuries segregated laws of market production, covering labor and contract, from laws of familial reproduction, covering marriage and in some cases inheritance.[14] Working at the intersection of these different literatures, this book shows how the laws governing religion, family, and economy evolved in tandem, mutually enveloped in transformations in state sovereignty. By focusing on how these shifts played out in South Asia, the book shows how British colonialism fostered particular mutations of these wider global revolutions.

The early chapters of the book trace these entanglements by focusing on the particular historical forces that drove the emergence in the middle decades of the nineteenth century of personal law – the structural pivot of secular legal governance in colonial India. Scholars of South Asia have long recognized the critical role of personal law as a conceptual category. Understandings of its genealogy, however, remain surprisingly blurry. Studies alternatively describe it as dating to early-modern South Asia or to the advent of East India Company rule in Bengal. Such genealogies, I argue, are either centuries or decades premature.

Equating personal law with pre-colonial legal practices has been particularly common among scholars who emphasize the "indigenous" roots of Indian secularism by tracing its origins to Mughal policies of religious toleration.[15] This narrative has been politically important for defending the legitimacy of Indian secularism, but from the perspective of legal history, it is largely anachronistic. While research on Mughal law remains

33, no. 3 (1996): 309–43; Indrani Chatterjee, *Gender, Slavery, and Law in Colonial India* (Oxford: Oxford University Press, 1999); Mytheli Sreenivas, *Wives, Widows, and Concubines: The Conjugal Family Ideal in Colonial India* (Bloomington: Indiana University Press, 2008); Rochona Majumdar, *Marriage and Modernity: Family Values in Colonial Bengal* (Durham: Duke University Press, 2009); Rachel Sturman, *The Government of Social Life in Colonial India: Liberalism, Religious Law, and Women's Rights* (Cambridge: Cambridge University Press, 2012); Eleanor Newbigin, *The Hindu Family and the Emergence of Modern India: Law, Citizenship and Community* (Cambridge: Cambridge University Press, 2013). While these works take the family as their core focus, Ritu Birla has taken the opposite approach, focusing on the emergence of market governance, but with attention to its implications for the family: *Stages of Capital: Law, Culture, and Market Governance in Late Colonial India* (Durham: Duke University Press, 2009).

[14] Janet Halley and Kerry Rittich, "Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism," *The American Journal of Comparative Law* 58, no. 4 (October 2010): 753–75.

[15] Iqtidar Alam Khan, "Medieval Indian Notions of Secular Statecraft in Retrospect," *Social Scientist* 14, no. 1 (January 1986): 3–15.

underdeveloped, in part due to fragmentary archival sources, recent work has emphasized critical discontinuities between how early-modern and colonial law governed religious difference. Such scholarship describes a pattern of what Nandini Chatterjee has termed "permissive inclusion," in which state courts were one of many venues of legal adjudication.[16] When Mughal subjects, regardless of their religion, approached Mughal *qazis*, or judges, they often applied legal norms that they understood to be Islamic, although not necessarily drawing from orthodox Islamic jurisprudence or *fiqh*. At the same time, the Mughals recognized the existence of law-like forums which operated outside the control of the state, in which different Indian communities adjudicated disputes according to their own legal norms, religious or otherwise. Based on this recent, albeit still preliminary scholarship, legal pluralism in the Mughal Empire is best understood as revolving around the co-existence of different forums of state and non-state law, which drew flexibly from different normative references, ranging from Islam to local custom. In contrast, colonial courts from the mid-nineteenth century onwards treated religious laws as circumscribed normative codes, which they applied to different religious communities in select categories of cases. These preliminary conclusions echo findings by scholars working on other early-modern Muslim empires. As one historian of the Ottoman Empire has lamented, accounts of early-modern approaches to religious diversity need to avoid the powerful "tendency to telescope time present into time past."[17]

This book, however, does not reach back to the pre-colonial past to argue for the novelty of colonial patterns of secular governance. Instead it shows how the framework of personal law represented a rupture within colonial law itself. In contrast to scholars who have dated personal law to the advent of East India Company rule in the late eighteenth century, the book shows how, during this earlier period, colonial officials referenced religious laws in a wide range of areas, from criminal law to contract.[18]

[16] Farhat Hasan, *State and Locality in Mughal India: Power Relations in Western India, c. 1572–1730* (Cambridge: Cambridge University Press, 2004), 72–6; Nandini Chatterjee, "Reflections on Religious Difference and Permissive Inclusion in Mughal Law," *Journal of Law and Religion* 29, no. 3 (October 2014): 396–415.

[17] Benjamin Braude, "Foundation Myths of the Millet System," in *Christians and Jews in the Ottoman Empire: The Functioning of a Plural Society*, vol. 1 (New York: Holmes & Meier, 1982), 69; Najwa Al-Qattan, "Dhimmis in the Muslim Court: Legal Autonomy and Religious Discrimination," *International Journal of Middle East Studies* 31, no. 3 (August 1999): 429–44.

[18] For an example of this earlier colonial genealogy, see Elizabeth Kolsky, "Forum: Maneuvering the Personal Law System in Colonial India. Introduction," *Law and History Review* 28, no. 4 (2010): 975. A few other historians have emphasized the middle decades of the nineteenth century as crucial to the formation of personal law.

Officials were particularly interested in Islamic legal practices, which they referred to as "Muhammadan law," a potentially offensive Anglicization, which the book rephrases as "Muslim law" when flagging colonial interpretations of Islamic law.[19] Colonial officials believed that understanding Muslim law was crucial to governing India because Hindus and Muslims had both internalized many of its norms during centuries of Mughal rule.

During the middle decades of the nineteenth century, however, Britain embarked on legal reforms in India that eventually transformed Muslim law into a personal law applicable only to Muslims, and only in domestic and ritual matters. Initially appointed in 1833, the Indian Law Commission, which was tasked with writing new legal codes, gradually translated developments in European legal thought, including an emphasis on unitary, territorial sovereignty and legal historicism, into a new colonial legal order.[20] Debates about Indian law reform borrowed the framework of personal law from European scholars writing about legal evolutions between the fall of the Roman Empire and the rise of feudalism. Law, they insisted, then adhered to communities of persons rather than to territorial spaces. Projecting Europe's past onto India's present, colonial law redefined "personal law" to refer to laws that applied only to members of a particular religious community and only in a narrow field of familial and ritual matters. The Indian Law Commission solidified this new formula in 1864 when it declared that Hindu and Muslim law would henceforth only be applied

Ashwini Tambe, *Codes of Misconduct: Regulating Prostitution in Late Colonial Bombay* (Minneapolis: University of Minnesota Press, 2009), 8.

[19] When discussing legal thought and practice among Muslims, the book attempts to echo the range of language used by historical actors themselves, who sometimes used the colonial term "Muhammadan law," but also spoke of *fiqh*, or the science of Islamic jurisprudence, and *sharia*, which literally means way or path, but which often connoted a broader aspiration to live in accordance with God's will. The choice to use various different terms to refer to what today is more often simply translated as "Islamic law" aligns with the book's wider interest in tracing the multiple lives of law across state and non-state spheres of debate and adjudication.

[20] On the rise of territorial sovereignty, see Charles S. Maier, "Consigning the Twentieth Century to History: Alternative Narratives for the Modern Era," *The American Historical Review* 105, no. 3 (June 2000): 807–31; Lauren A. Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400–1900* (Cambridge: Cambridge University Press, 2002); and Lisa Ford, *Settler Sovereignty: Jurisdiction and Indigenous People in America and Australia, 1788–1836* (Cambridge: Harvard University Press, 2010). On the critical influence of legal historicism on nineteenth-century law, see Duncan Kennedy, "Three Globalizations of Law and Legal Thought: 1850–2000," in *The New Law and Economic Development: A Critical Appraisal*, ed. David M. Trubek and Alvaro Santos (Cambridge: Cambridge University Press, 2006); Duncan Kennedy, "Savigny's Family/Patrimony Distinction and Its Place in the Global Genealogy of Classical Legal Thought," *American Journal of Comparative Law* 58, no. 4 (2010): 811–41.

in cases of "succession, inheritance, marriage, and caste, and all religious usages and institutions."[21] The legal container of "personal law" empowered a new framework for understanding Indian religions as communal, domestic, and irrational.

Legal reform in India, as well as the larger patterns of colonial secular governance, simultaneously drew on, and departed from, contemporary developments in Britain. In India, the authoritarian structures of colonial rule and the absence of entrenched common-law precedents allowed Britain to introduce more radical legal innovations than could be implemented in Britain itself.[22] This British willingness to innovate in certain areas, including the drafting of new penal, procedural, and commercial codes, co-existed with a colonial worldview that portrayed Indian society as resistant to change. This juxtaposition endowed colonial law with deep internal tensions.[23] These tensions were particularly acute in the convoluted logics that animated the colonial administration of personal laws. Colonial judges, armed with theoretically rational legal procedures, were meant to decide cases involving religious laws rooted in supposedly irrational religious beliefs. In contrast, starting in the 1850s, Britain transferred jurisdiction over divorce from the ecclesiastical courts and the Houses of Parliament to a new matrimonial causes court, which applied common civil laws to all parties. In subsequent decades, legal reforms in Britain liberalized access to divorce and gave women greater control over marital property and custody of children.[24] The creation of a newly distinct field of family law in both India and Britain reflected the common influence of "separate-spheres" domestic ideology. The consolidation of uniform, secular bodies of family law and their progressive reform in Britain, however, stands in marked contrast to the religious communalization and normative stagnation of personal law in India. These diverging patterns of legal reform created an exaggerated colonial parody of secular governance, in which

[21] "First Report of Her Majesty's Commissioners Appointed to Prepare A Body of Substantive Law for India," 60, HCPP, 1864 (3312) XVI.359.

[22] David Skuy, "Macaulay and the Indian Penal Code of 1862: The Myth of the Inherent Superiority and Modernity of the English Legal System Compared to India's Legal System in the Nineteenth Century," *Modern Asian Studies* 32, no. 3 (1998): 513–57.

[23] On the contradictory impulses within colonial law, see D.A. Washbrook, "Law, State and Agrarian Society in Colonial India," *Modern Asian Studies* 15 (1981): 649–721.

[24] Lee Holcombe, *Wives and Property: Reform of the Married Women's Property Law in Nineteenth-Century England* (Toronto: University of Toronto Press, 1983); Mary Poovey, "Covered but Not Bound: Caroline Norton and the 1857 Matrimonial Causes Act," *Feminist Studies* 14 (1988): 467–85; Danaya C. Wright, "The Crisis of Child Custody: A History of the Birth of Family Law in England," *Columbia Journal of Gender and Law* 11 (2002): 175–270.

religious and secular spheres were cast not just as separate, but mutually antagonistic.

In contrast, in Victorian Britain, distinct religious and secular spheres emerged more gradually and with more harmonious logics.[25] In the nineteenth century most Britons saw Christian belief and reason as mutually reinforcing.[26] Even after the Darwinian revolution, most Britons remained confident that science and Christianity were reconcilable.[27] The nineteenth-century campaign for the disestablishment of the Church of England progressed in fits and starts. More radical projects, including the movement that first coined the term secularism in the 1850s, emerged at the fringes rather than in mainstream currents of British political culture.[28] Thus as a colonizing power, Britain more aggressively secularized state power and marginalized religious authority in India than it did at home.

The Power of Instability: The "Rubber-Band" State

In tracing the history of colonial secular governance the book presents a double vision of how law operates. On the one hand, the book underlines the cumulative power of law's normative scripts in defining newly divided spheres of religious and secular governance. On the other hand, much of the book traces how, in the daily improvisations of legal practice, these divisions were plagued by incessant ambiguities and contradictions. The persistent instability of secular/religious binaries fostered a dynamic form of governance, which was strengthened through its continual contestation and reinforcement.

In the first view, a birds-eye perspective, colonial law mapped out a powerful pattern of mutually reinforcing oppositions. It aligned state law, rational governance, and the market economy by opposing them against religious tradition, irrational belief, and the domestic family. This pattern was elaborated in normative discourses articulated through legislative

[25] Peter van der Veer has also argued that colonial policies in India were more secular than their British counterparts. "The Secularity of the State," in *The State in India: Past and Present*, ed. Masaaki Kimura and Akio Tanabe (New Delhi: Oxford University Press, 2006), 257–69.

[26] John Wolffe, *God and Greater Britain: Religion and National Life in Britain and Ireland, 1843–1945* (London: Routledge, 1994).

[27] Ira Katznelson and Gareth Stedman Jones, "Introduction: Multiple Secularities," in *Religion and the Political Imagination* (Cambridge: Cambridge University Press, 2010), 15.

[28] Edward Royle, "Secularists and Rationalists, 1800–1940," in *A History of Religion in Britain: Practice and Belief from Pre-Roman Times to the Present*, ed. Sheridan Gilley and W.J. Sheils (Oxford: Blackwell, 1994), 406–22.