

# The Making of Colonial and Postcolonial Law by South Asian Muslims

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KATHERINE LEMONS. *Divorcing Traditions: Islamic Marriage Law and the Making of Indian Secularism*. Ithaca, NY: Cornell University Press, 2019.

ELIZABETH LHOST. *Everyday Islamic Law and the Making of Modern South Asia*. Chapel Hill, NC: University of North Carolina Press, 2022.

Traversing nearly 250 years of South Asian law together, Katherine Lemons's and Elizabeth Lhost's recent monographs on Islamic legal actors and South Asian governance are major contributions to the fields of legal anthropology, legal history, and Islamic legal studies. Given the acceleration of Hindu nationalism in contemporary India, Lemons's and Lhost's works are eminently timely. But they are also timeless in their exploration of robust Islamic legal traditions shaped by and shaping Indian and South Asian governance across multiple centuries and regimes both political and epistemic. For years to come, scholars, students, and other commentators will grapple with, deploy, and contest the case studies, analyses, and conclusions of these two ambitious and innovative books.

This essay summarizes the structure and major arguments first of Lhost's exploration of how Indian Islamic legality changed with and influenced the dawn, climax, and decline of British sovereignty in South Asia and, then, of Lemons's multisited investigation of the role played by diverse Islamic legal practices in independent India's secular ambitions. Following this overview, the essay then highlights two points of synergy between these books but also two points of equally apparent tension. Both of these kinds of mutual entanglement represent launching points for future scholarly investigations of the complex operations of Islamic legality persisting in India irrespective of fleeting Delhi regimes.

## EVERYDAY ISLAMIC LAW

Lhost's monograph takes us into the everyday experiences of family, finances, and finitude and the Islamic legal systems utilized by South Asian Muslims to help resolve moral and legal uncertainties arising when divorce, debts, and death occurred in

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confusing ways from the late eighteenth century to the mid-twentieth century. This period of more than 150 years saw great transitions in how vast areas of South Asia (including present-day India) were governed, witnessing Muslim Mughal sovereignty, British imperial Christian rule, and also Hindu-majority rule in a post-Partition and independent India.

Across these various periods and regimes, Muslims had “everyday” concerns about how to move through a world involving—as Lhost aptly describes it—“quotidian contexts and banal practices.” Muslims also had “everyday” means of investigating “how one would live, work, and play in the world.” These investigations were often oriented toward “conversations, inquiries, dialogues, and debates” (5). If discerning the contents of everyday multitudinous Islamic law sounds complicated, it is. Lhost reminds us at multiple points in her book that everyday lived law is “messy” (71) and often does not provide “the sense of definitiveness that discussions of the law tend to demand” (13).

Fortunately, Lhost’s monograph is itself organized. The first part on “Professionals” encompasses three chapters focusing on the changing dynamics over time of one particularly knotty legal and political problem confronting British authorities soon after their 1772 announcement that they would respect “the Laws of the Koran with respect to *Mahometans*” (23) in a recently subjugated eastern India. This British plan also contemplated using local Islamic legal personnel—including the established and well-known figure of the *qazi* (Islamic judge)—to elucidate Islamic law for governed Muslim populations. This framework was ultimately adopted (with continuing tweaks) across Britain’s Indian possessions. Utilizing dense, rich, and illuminating mid-nineteenth-century *qazi* controversies from the Bombay presidency, Lhost abundantly conveys the tensions evident in the British desire “to benefit from existing connections without giving away too much control” thus making “the early colonial history of *qazis* messy” (34). Anticipating later discussions, Lhost bitingly observes: “Had the [British] made a clean break with the past . . . the history of *qazis* in British India would have been simpler . . . Rather than creating its own *qazi* corps de novo, the [British] employed a ramshackle cohort of inherited officeholders” (36, citation omitted).<sup>1</sup>

After the 1857 Rebellion, the British convinced themselves that they should (and could) govern Indian subjects directly through the Crown rather than indirectly through the British East India Company and indigenous actors. One result was Act No. XI of 1864, an “Act to repeal the Laws relating to the offices of Hindoo and Mahomedan Law Officers, and to the offices of Cazeer-ool-Cozaat and of Cazeer; and to abolish the former offices.” As Lhost tells it, however, this Act was not as important as many historians contend. Indeed, Lhost characterizes it as effecting only “a minor regime change” (92). Moreover, the British soon regretted their decision as one key responsibility of *qazis* had been to document and record Muslim marriages. With the abolition of *qazis*, colonial court dockets became overwhelmed with confounding criminal and civil cases concerning people variously claiming that they were or were not

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1. Stephens (2018, 12) also makes this point when describing British colonial authorities “for whom ruling on the cheap often mattered more than ideological coherence” and the British deployment of “local elites to accomplish many of the day-to-day tasks of maintaining social order.”

married to each other (93–94). Just sixteen years after the 1864 Act, then, the British reversed themselves and reauthorized with the Kazis Act (Act XII of 1880) an official role for *qazis*. However, the exact function that *qazis* would play in articulating and enforcing Islamic family law (or Muslim personal law) in India was unsettled then (105) as it remains today (Redding 2020).

The imperial inability of the British to dictate clear or abiding norms in their South Asian possessions, and the enduring power of Muslim practices of soliciting and settling everyday Islamic law for everyday Muslims across various time periods, are strong themes of Lhost's work. These themes continue into the second part of Lhost's monograph concerning "Paperwork," again encompassing three chapters. Lhost explores how the medium of *fatwas* contributed to formalistic yet "bottom up" (119) and community-sited Islamic law across the latter half of the nineteenth century. Importantly, *fatwas* and their curation did not embrace colonial understandings about the proper scope of religiosity (135). Lhost then turns to the everyday reality of *fatwas* albeit in the context of late-nineteenth- and early-twentieth-century Hyderabad and the governmental *dar ul ifta* operating in this independent southern Indian princely state. While Lhost's shift to the "unique" (139) milieu of Hyderabad is abrupt, her exploration and explanation of the officers and forms comprising the *dar ul ifta*'s bureaucratic and complex *fatwa*-making aptly sets the stage for an investigation in this part's last chapter of the legal forms importantly utilized by the quasi-nonstate *qazis* given new life by the 1880 Kazis Act. Lhost creatively examines the "elaborate forms and detailed records" (166) kept by *qazis* recording Muslim marriages in the northern town of Meerut and the western town of Bharuch both before and after 1880. Lhost deploys her rare examination of quotidian and bureaucratic marriage-registration forms to open up for the reader a rich world of everyday Muslim life but also an extraordinary Muslim agency and reach. Indeed, "marriage sat at the heart of law-and-society relations . . . [T]he qazi's work intersected, overlapped with, and at times replaced other forms of legal activity that belonged to the colonial state" (170).

Lhost's concludes the book with an examination of "Possibilities" present in the early and mid-twentieth century when the issue of state versus nonstate jurisdiction over Islamic law continued to vex commentators, lawyers, and judges right up to and beyond 1947's partitioning of British India into independent India and Pakistan. For Lhost, this knotty legality could result from Islamic organizations and personalities "follow[ing] models provided by the colonial state and ma[king] their day-to-day operations resemble those of government offices" (202). To my mind, it is not clear who the copycat is here and more caution is also needed when characterizing Islamic actors as strategically embracing similitude given recent fraught circumstances for Muslims hit with this charge.<sup>2</sup> Nonetheless Lhost also attributes vexatious legality to the colonial state's littering "confusion" over the law everywhere (220). By the last chapter, this state has left the scene—in ruins—and Lhost reminds us of Islamic legality's long *durée* and "to consider not only what remained the same [over time] but also what historical moments felt like for those who were less fortunate" (225).

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2. See *Abdur Rahman v. Secretary to Government, Home Department, Govt. of Tamil Nadu* (2017).

## DIVORCING TRADITIONS

Taking the historical baton from Lhost, Lemons's monograph situates the reader in the complex and rich terrain of peri-state and nonstate adjudication of Muslim divorce in twenty-first-century north India. Utilizing a wide array of case studies drawn from diverse and multisited fieldwork in Delhi and beyond, Lemons aims to resituate secularism as a shared project between the state and nonstate.

Lemons begins with a granular and moving account of a "pious but poor" and illiterate (3–4) Muslim woman requesting a divorce for her daughter from a Delhi *dar ul qaza* operating in a south Delhi locale "dense with Muslim institutions" (4). Significant numbers of Muslims also live in this area now because, as Lemons notes, a pervasive anti-Muslim bias prevents them from living safely in many other parts of Delhi (5)—a situation replicated in many other parts of north India.<sup>3</sup> Highlighting the fraught and often dangerous realities of contemporary Muslim life from the outset, Lemons nonetheless boldly outlines her book's understanding of the Muslim role in India's articulation of secularism. For Lemons, "secularism [is] an ongoing project that aims to establish and maintain an appropriate relationship between religion and politics." Yet maintaining the right kind of relationship here is difficult. Thus, "[a] secular state . . . is engaged in a process that is never complete [and] always [failing] in its efforts to separate religion from politics." Ultimately then, "[t]he question raised by the study of secularism . . . is where this process of perpetual [state] intervention [into religion] takes place. My argument is that, in India, one of its principle locations is the adjudication of Muslim divorce" (7). Importantly, Muslim divorce and the issues arising from it are not just heard by state courts, but also nonstate actors like *qazis* and *mufitis*. As a result, for Lemons, these legal personalities are not just Islamic ones but secular ones too because "they undertake the labor of separating religion from law" and thereby "instantiate a system of secularism" (26). The rest of the book takes up various aspects of this nonstate secular work.

Contextualizing this work, Lemons's next chapter commences by discussing the most recent high-profile Indian judicial drama concerning India's Muslim minority population, namely the 2016 Supreme Court of India decision in *Shayara Bano*. This case attempted to restrict the ability of Muslim men to pronounce instantaneous divorces of their wives. While insightful, Lemons's analysis here would have benefited from taking a more nuanced approach to the intricate details of Supreme Court judgments, finding them not so much conclusive but rather (more often than not) confusing and confused.<sup>4</sup> Regardless, Lemons soon pivots in this chapter to the deliberations of a much more intimate kind of dispute resolution body—the *mahila panchayat*, or "women's court"—coordinated in an impoverished area of northeast Delhi by an antipoverty organization and functionally integrated into a broader governmental

3. See, for example, Chakrabarti and Ghosh's vivid description of the Muslim "ghetto" they studied in Kanpur, Uttar Pradesh, where they navigated "labyrinths of collective unemployment, underemployment, and poverty" (Chakrabarti and Ghosh 2017, 14).

4. I have argued elsewhere that *Shayara Bano* had no majority opinion and represented either a three-way, 2–1–2 split between the five Supreme Court justices sitting to decide this case or even a 2–0–2 split given Justice Joseph's wayward framing and answering of the question presented by the case. See Redding (2021, 69).

effort to make Delhi safer for women (49). The population of the area where this particular *mahila panchayat* operates is approximately 30 percent Muslim (43) and this *mahila panchayat* uniquely (for Delhi) served Muslim women primarily (44). Perhaps reflecting its (partial) integration into the state, Lemons describes the *mahila panchayat* as maintaining not only case-file records (46) but, moreover, patriarchy. Indeed, providing details about the experiences of different Muslim women appearing at the *mahila panchayat*, Lemons notes that this institution is on the one hand dedicated to women's empowerment and on the other hand wedded to a "marriage imperative" for women (47).

The next two chapters turn to *dar ul qazas*, including the one in south Delhi opening Lemons's book. Like the peri-state *mahila panchayat*, the nonstate *dar ul qazas* studied by Lemons also maintained detailed case-file records yet, ironically, often took a more feminist approach to the domestic troubles of persons appearing in front of them. Lemons notes the south Delhi *qazi* recounting that "he works to create a space within which vulnerable parties can articulate their grievances" (81). Lemons further observes that this *dar ul qaza* participates in the larger Indian cultural desire to maintain marriage but, confronted with situations involving domestic violence, "[t]he qazi was . . . ready to grant divorces when litigants presented clear and tight cases" (84). Ultimately, a compelling case for women's divorce arose when wives demonstrated to the *qazi* their marriage persistence despite being undermined, financially and otherwise, by their husbands (72). For Lemons, this renders the *dar ul qaza* an epicenter of the "economy of care" (71). By way of contrast, the state is imagined as the locus of property and other financial matters. In enforcing these jurisdictional constructs, then, *dar ul qazas* willingly separate religion from law (97) and "accept the secular premise that religious matters, and only religious matters, should be subject to religious authority" (101).

The final part of the book focuses on the well-known office of the *mufti* across two distinct chapters. Particularly helpful is the first chapter's analysis of several *fatwas* written by a *mufti* at a mosque in Delhi's old historic north providing advice regarding different pronouncements of *triple talaq*, including the maintenance and other forms of support due women upon instantaneous divorce. Belying long-standing, often state-sponsored public uproar over *triple talaq*, Lemons argues that the Indian state is actually more interested in politicizing *triple talaq* than prohibiting it or, stated politely, "regulating the practice without banning it" (153). Lemons further predicts that this will be the case even in the aftermath of the *Shayara Bano* drama (165–66). The second chapter in this part is particularly interesting in its discussion of the "therapeutic practice" (170) also engaged in by Lemons's *mufti*-interlocutor and the way this *mufti*'s mystical cures—operating not only outside of "the state" but seemingly outside of "the law" itself—helped ordinary Muslims navigate life's many psychic and bodily troubles.

## SYNERGIES AND TENSIONS

The synergies between these two books are multiple. Delightfully, both are interested in the materiality of Islamic law's production. For example, Lhost takes great care to describe how the bureaucratic boxes used on Muslim marriage-registrar forms shifted in shape and size over time in response to changed social and political

understandings of marriage and the relevant array of individual and community interests present in it. This analysis is evocative of anthropologist Brinkley Messick's rich examination of spiral texts produced in British colonial Yemen.<sup>5</sup> Lemons herself provides the reader with a strong and palpable sense of the often dense case files maintained by *mahila panchayats* and *dar ul qazas* alike, belying distinctions between state and nonstate legal processes and undermining "informal" or otherwise dismissive descriptions of the latter.

Also important is the inclusion in both books of Islamic legal moments defying both traditional jurisprudence and stereotypes. Memorably, Lhost recounts that the British were confounded in the early days of colonialism when they encountered women and non-Muslims holding the position of *qazi*. As a potentially inheritable office with wealth and income attached to it (71, 88–89), the position-cum-property of *qazi* had been occasionally acquired by Hindus and women (69). Among other surprising situations, Lemons describes a husband's thoughtful pronouncement of *triple talaq*—undermining stereotypes about Muslim male caprice—after it had become apparent to all relevant parties (the wife included) that the marriage was an unhappy one (33). Conversely, Lemons also intriguingly recounts coming across a *fatwa* involving a woman pronouncing *triple talaq* on her husband (134–39). In refusing to bury these experiences deviating from common expectations, both books make clear that the day-to-day life of Islamic legal practice defies top-down scripting and must be studied from the bottom up.

Tensions too exist between Lemons and Lhost's analyses. Notably, Lhost's work sketches out a Muslim legal world where the (colonial) state is often peripheral and ineffectual in asserting its own sovereignty. Focusing on the postcolonial period, Lemons describes a far more awesome state, able to orchestrate a secular form of governance leaving Muslims with only bit, unsavory pieces of family law to directly administer—in the service of secularism itself (8). In Lhost's everyday world, however, *mufitis* and other nonstate Islamic legal actors opine on a very wide range of matters affecting not only marriage and divorce but also "[p]roperty, taxation, administration, and adjudication" (201).

Relatedly, in Lhost's world, everyday Islamic legal decisions have potency irrespective of state acknowledgment of them. Describing a key consequence of the 1857 Rebellion, Lhost writes: "[I]t shifted the site of shari'a from the seat of sovereign power onto the body of the community, reinvigorating Islam as a discursive tradition in the public sphere" (119). In Lemons's India, however, the power and reach of the state and nonstate substantially differ. This is a world where "state courts . . . unlike the *dar ul-qazas* themselves, do have enforcement mechanisms" (100) and, more broadly, "Islamic judgments are not legally binding" (6).

The two books' canvassing of different historical periods and sovereigns—one largely dominated by a colonial Christianity and the other by a majoritarian Hinduism—is partly to account for these differences. Future scholars writing on the making of law by Muslim South Asia will also indubitably work in and between eras and regimes. These two books will prove to be crucial intellectual resources and guides for that invaluable ongoing work.

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5. See Messick (1993, 231–50).

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