

MUSLIM WOMEN IN INDIA: HISTORY, MINORITY AND DIFFERENCE

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This article addresses the question of minority differences within modern nation-states with reference to Indian Muslims, especially Muslim women. Using a cross-comparative historical lens the parallels between minority exclusion in Europe and in post-colonial India, and the limits of legal equality as a sufficient protection for minorities, are highlighted. Partition's lasting influence on the Othering of Indian Muslims in modern India is emphasised as is the elision of Muslim women's histories of struggle and achievement during the colonial period. In conclusion, this article suggests that India's history of diversity and difference could possibly form the basis of a new historically anchored national imagination wherein the modern principle of Constitutional equality coexists with the right to historically inherited difference.

TABLE OF CONTENTS

| | |
|--|----|
| Introduction | 39 |
| Difference: Majority, Minority | 40 |
| Europe: Legal Equality, Jewish Difference | 42 |
| Muslim in Modern India: History, Difference, Minority | 46 |
| Muslims in India: Constitutional Equality, Muslim Inequality | 48 |
| Muslim Women in India: Gender, Culture, Difference | 51 |
| Muslim Women in Colonial India: A Brief History | 53 |
| Shaheen Bagh: A Struggle for Equality of Difference | 63 |
| Conclusion | 66 |

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MUSLIM WOMEN IN INDIA: HISTORY, MINORITY AND DIFFERENCE

INTRODUCTION

This article focuses on minorities in general and on Muslims, especially Muslim women in post-colonial² India. More specifically, it is a critical reflection on the historical production of Muslim minority differences in modern India and its intersection with the question of gender³ and women's rights in Muslim communities. The contemporary conditions and concerns of Muslim women (and men) in modern India are historically determined. In other words, an appreciation of the particular burdens and challenges imposed by *history* on Muslims in India in general, and on Muslim women in India, in particular, is essential towards developing a deeper and more nuanced understanding of the contemporary challenges confronting both constituencies. In keeping with the emphasis on history, this article discards conventional post-1947 frames of analysis. The discussion encompasses the colonial *and* post-colonial periods.

The discussion is divided into three sections. The *first* section focuses on the majority-minority binary within modern nation-states in the 20th century and the production of the Jewish minority in modern Europe, and of the Muslim minority in post-colonial India. Using critical interdisciplinary literature, the historical parallels between Jewish and Muslim social exclusion in 20th century Europe and in modern India, respectively, are highlighted. The intent here is *not* to equate the mass crime of the Holocaust with minority rights in modern India. Rather, it is to employ a comparative frame of analysis to foreground (a) cross-national historical parallels between the production and exclusion of minority difference within modern nation-states, and (b) the limits of legal/constitutional equality as sufficient protection for minority difference.

² The author uses the terms postcolonial and modern India interchangeably; both connote post-1947 India.

³ In addition to its social meanings, the term gender simultaneously connotes meanings ascribed to Muslim women by virtue of their Muslim identity.

The *second* section focuses on women from Muslim communities in colonial India. Using critical gender scholarship on Muslim women⁴ during this period, it offers a brief overview of Muslim women's history of modest *albeit* significant progress in the fields of education, civic participation, literary production, social debate and legal reform within Muslim law in colonial India. Moving on to post-colonial India, the discussion highlights the partition's Hindu-Muslim legacy that in turn reinforced ahistorical public perceptions of Indian Muslims and Indian Muslim women as an undifferentiated 'Other' with lives and choices determined primarily by Islam.

The *third* section focuses on the 2020-2021 Muslim women-led protest movement at Shaheen Bagh. This section contests secular-liberal representations of Shaheen Bagh and demonstrates that the movement (a) dismantles dominant representations and perceptions of Muslim women as culturally inferior, unmodern subjects beyond history, agency or politics; (b) foregrounds the constitutive contradiction between ahistorical abstract secular equality, and postcolonial elision of the historically-determined religion-based power imbalance between Muslim citizens and the Indian state; and (c) epitomises Muslim women (and men) as moral and political subjects, united in struggle and aspiration for social and legal equality as Muslim citizens in modern India.

DIFFERENCE: MAJORITY, MINORITY

In a prescient critique of nationalism in the early 20th century, poet-philosopher Rabindranath Tagore wrote of India's great challenges in the 20th century, among which he forewarned of the challenge of dealing with diversity and difference.⁵ Tagore's thoughts on difference in India presaged the erasure of Jewish difference in Europe and the emergence of international law with the protection of 'different' minorities as one of its

⁴ GAIL MINAULT, *SECLUDED SCHOLARS WOMEN'S EDUCATION AND MUSLIM SOCIAL REFORM IN COLONIAL INDIA* (Oxford University Press, 1st ed., 1998); SHAHIDA LATEEF, *MUSLIM WOMEN IN INDIA: POLITICAL AND PRIVATE REALITIES 1890s - 1980s* (Kalifor Women, 1st ed., 1990); BARBARA METCALFE, *ISLAMIC CONTESTATIONS: ESSAYS ON MUSLIMS IN INDIA AND PAKISTAN* (Oxford University Press, 1st ed., 2004); BARBARA METCALFE, *MORAL CONDUCT AND AUTHORITY: THE PLACE OF ADAB IN SOUTH ASIAN ISLAM* (University of California Press, 1st ed., 1992).

⁵ RABINDRANATH TAGORE, *NATIONALISM* 76-77 (Penguin, 1st ed., 2009).

MUSLIM WOMEN IN INDIA: HISTORY, MINORITY AND DIFFERENCE

core concerns.⁶ States, however, differed on the concept, identification and rights of minorities.⁷ Addressing the ambiguity, the United Nations (UN) defined a minority as:

*“An ethnic, religious or linguistic minority is any group of persons which constitutes less than half of the population in the entire territory of a State whose members share common characteristics of culture, religion or language, or a combination of any of these.”*⁸

The UN further clarified that *“numbers or numerical presence is a principal benchmark for the identification of a minority.”*⁹ Accordingly, the concept of minority as a demographically smaller social group, ‘different’ from the majority emerged as part of the normative understanding of the term in international law. Majority (universal) words were the norm; minority (particular) an exception to the norm.

From a historical perspective, however, the concept of minority was not merely an abstraction related to numbers or demography. Rather, as the following discussion demonstrates, minorities were products of history and historical forces. Of particular interest to this discussion is the historical

⁶ Aftab Alam, *Minority Rights under International Law*, 57(3) J. IND. L. INST. 37 (2015).

⁷ According to the United Nations, States held *“diverging views...both in terms of who minorities are as right-holders and the nature and extent of their rights”* [U.N. General Assembly, Report of the Special Rapporteur on minority issues, *Effective Promotion of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, U.N. Doc. A/74/160 (15 Jul. 2019).]. As a result *“some minorities are excluded because they are not the ‘right kind’ of minority according to different parties”* (UN OFFICE OF THE HIGH COMMISSIONER ON HUMAN RIGHTS, *Concept of a minority: mandate definition*, available at <https://www.ohchr.org/en/special-procedures/sr-minority-issues/concept-minority-mandate-definition>).

⁸ *“One of the objective criteria, if not the main one, for determining whether a group is a minority in a State is a numerical one. A minority in the territory of a State means it is not the majority. Objectively, that means that an ethnic, religious or linguistic group makes up less than half the population of a country.”* (U.N. General Assembly, Report of the Special Rapporteur on minority issues, *Effective Promotion of the Declaration of the Rights of Person Belonging to National, Ethnic, Religious and Linguistic Minorities*, U.N. Doc. A/74/160, ¶ 18, 15 July 2019.).

⁹ *Id.*

production of minorities within modern nation-states, Europe being one such case.

The European concept of the modern territorial nation-state was premised on the principle of congruence between state (territory) and nation (people) welded together by the principle of equality; all members within a nation-state were equal citizens. States were protectors of nation and national identity; citizens pledged loyalty to the state. This particular concept of citizenship, however, did not take into account the difference or inequality *between* citizens; it also placed the question of ethnic-religious difference within the legal framework of equal citizenship.¹⁰ The assumption was that “*the state can treat large numbers of people equally by efficient application of the law through the bureaucratic machinery of the state.*”¹¹

The history and empirical reality of modern nation-states, however, is far more complex. With the exception of Iceland and Japan, all nation-states are historically home to different religious, ethnic or racial social groups.¹² The assumption that legal/constitutional equality is sufficient to deal with historically constituted differences between citizens, or power differentials between majority and minority is, as we shall see, at odds with empirical evidence.

Adding to the challenge were emergent nationalisms that tended to be influenced or shaped by dominant majorities whose perception of smaller, “*different religious-ethnic minorities was as relatively closed and fixed ‘different’ Others.*”¹³ Jewish experience in modern Europe is particularly instructive in this regard.

EUROPE: LEGAL EQUALITY, JEWISH DIFFERENCE

Historically, Jews were a transnational European people scattered across Europe “*with their own religion, their own communities, their own schools and*

¹⁰ Dhirubhai L. Sheth, *The Nation-State and Minority Rights*, in D.L. SHETH AND GURPREET MAHAJAN (eds.) *MINORITY RIGHTS AND THE NATION-STATE* 23 (Oxford University Press, 1st ed., 2015).

¹¹ Gordon L. Anderson, *The idea of the Nation-state is an obstacle to Peace*, 33(1) *INT. J. WORLD PEACE* 75, (2006).

¹² *Id.* at 77.

¹³ ANDERSON, *supra* note 11, at 24.

MUSLIM WOMEN IN INDIA: HISTORY, MINORITY AND DIFFERENCE

occupations, and they dressed, wrote and spoke differently from the Christian majority."¹⁴ The establishment of modern nation-states across Europe reduced a transcontinental Jewish presence to a minority status within new national borders. With the emergence of nation-states and national constitutions, came the demand for Europe's Jews to relinquish group markers of religious and cultural distinctiveness and become individual (equal) citizens. Large numbers of Jews in Western Europe accepted and embraced the principle of equal citizenship.¹⁵ Yet, even "*those who carved out successful careers in politics and government met with discriminatory treatment: the state considered them as members of a close-knit group, not full-fledged citizens.*"¹⁶ Legal equality, in other words, was not necessarily coterminous with social equality. As Jewish scholar Monika Richarz wrote, "*when analysing the situation of a minority, it is not enough to consider their legal status... Emancipation does not work if society does not accept a minority as equal.*"¹⁷

The relationship between the modern, *albeit* ahistorical, abstract concept of equal citizenship and historically crafted Jewish particularity in Europe was tense and paradoxical.¹⁸ Jewish particularity unsettled European national culture narratives anchored in Christian majorities' self-identification and self-perception of continuity with an authentic national past free of

¹⁴ Monica Richarz, *The History of the Jews in Europe during the Nineteenth and Early Twentieth Century* in *The Holocaust and the United Nations Outreach Programme*, Discussion Papers Journ., 80 (2008).

¹⁵ France was the first state to affirm citizenship rights for Jews. Acceptance of Jews varied across nation-states even as pogroms in Russia, Romania and Poland deepened anti-Jewish sentiment across the continent.

¹⁶ JOAN SCOTT, *THE POLITICS OF THE VEIL* 76 (Princeton University Press, 1st ed., 2007). In her history of French Jews, Esther Benbassa notes that "*In 1791, all the Jews of France became citizens on the condition that they will renounce their communal status*" ESTHER BENBASSA, *THE JEWS OF FRANCE - A HISTORY FROM ANTIQUITY TO THE PRESENT* 82 (Princeton University Press, 1st ed., 1999).

¹⁷ RICHARZ, *supra* note 14 at 79.

¹⁸ In their critique of the Enlightenment, Adorno and Horkheimer note: "*Liberal theory assumed that unity among men is already in principle established...adherence to their own order of life has brought the Jews into an uncertain relationship with the dominant order. They expected to be protected without themselves being in command.*" THEODOR ADORNO AND MAX HORKHEIMER, *DIALECTIC OF ENLIGHTENMENT* 169 (Verso, 1st ed., 1997). They further noted that "*Anti-Semitism as a national movement was always based on an urge which its instigators held against the Social Democrats: the urge for equality.*"

different (minority) Jewish presence/Judaism; it contradicted liberal nation-states' own claims to universality. Jewish historical presence in Europe also raised the question as to whether or not Jewish difference and distinctiveness were constitutive of the national (read majority's) self-image as a repository of (Christian) universality.¹⁹

Europe's unresolved tension between universality and particularity persisted. The idea of cultural nationalism anchored in the concept of homogeneity, with the Jew as an outsider and threat emerged as a response²⁰ to the dilemma. Its implications for Europe's Jewish citizens were grave. European cultural nationalism drew Jewish communities into a relationship of ambiguity and uncertainty within dominant Christian national orders fearful of particularist Jewish fusion with Christian universality. Jews were viewed as "*an opposing race, the embodiment of the negative principle.*"²¹ Even for assimilated Jews, such as those in Germany, the rise of cultural nationalism meant that "*the harmony of society which the liberal Jews believed in turned against them in the form of the harmony of a national community.*"²² In practical terms, this meant that the Jew could no longer be "*a sign of himself in his difference*":²³

*"Signs of Jewishness in physical appearance, observance of the Sabbath, dress, cuisine, etc. became signifiers of Jewish cultural...insularity from 'enlightened' Christian culture, an impediment to modernity, and to the creation of modern, national community."*²⁴

Jews were equal citizens in law yet denied legal protection *as Jews* (emphasis added); their negation mirrored dominant/majority perceptions of the Jew

¹⁹AAMIR MUFTI, ENLIGHTENMENT IN THE COLONY: THE JEWISH QUESTION AND THE CRISIS OF POSTCOLONIAL CULTURE 55 (Princeton University Press, 1st ed., 2007).

²⁰In Berlin, in 1879, Heinrich von Treitschke, an eminent German liberal, set the cultural-intellectual tone for anti-Jewish narrative within the German nation-state: "*What we have to demand from our Jewish fellow-citizens is simple: that they become Germans, regardless of their faith and their old sacred memories...for we do not want thousands of years of Germanic civilisation to be followed by an era of German-Jewish mixed culture,*" Marcel Stoetzler, in *The State, the Nation and the Jews: Liberalism and the Anti-semitism Dispute* in BISMARCK'S GERMANY (University of Nebraska Press, 1st ed., 2008).

²¹MUFTI, *supra* note 19 at 169.

²²*Id.* at 169-170.

²³STOETZLER, *supra* note 20 at 47.

²⁴*Id.*

MUSLIM WOMEN IN INDIA: HISTORY, MINORITY AND DIFFERENCE

as ‘Other,’ undeserving of inclusion within the registers of nation and citizen. Aamir Mufti sums up the paradox of (in)equality undergirding the liberal nation-state:

“The ‘political emancipation’ of the Jews is...caught in a contradiction it cannot overcome. It can only conceive of granting rights to individuals as a solution to the corporate denial of rights to the Jews as Jews, and keeps reverting in its treatment of the Jews to precisely the methods and forms it seeks to eliminate.”²⁵

Denied equality, residence or protection by nation-states, Europe’s Jews transformed into stateless people, killed in camps. Out of Europe’s 9.5 million Jews, only 3.8 million survived.²⁶ Europe’s Jewish tragedy underscored the limits of legal/constitutional equality as a sufficient protection for Jewish difference within modern (liberal) nation-states. As Nathan Sznajder, a Jewish cultural studies scholar, observes: “*Europe is distinguished by its failure to come to terms with difference, which was facilitated by ... eliminating the primary ‘Other’.*”²⁷

Ahistorical concepts of the universal equal citizen were, as the above discussion demonstrates, in constant conflict with Jewish difference anchored in particularity, subjectivity and self-identification, shaped through history, religion and ethnicity. Liberal universality “*respects others as equals in principle yet for that very reason it neglects what makes others different.*”²⁸ Europe’s universal equality centred on sameness failed to acknowledge or accommodate ethnic-religious differences; hence also its insistence on the dissolution/assimilation of (minority) particularity within (majority) universality.

Can secular-liberal universality coexist with the particularity of difference? There is no easy answer to the dilemma. A possible alternative from a comparative constitutional perspective emerged in the post-revolution

²⁵ *Id.* at 60.

²⁶ Michael Lipka, *The continuing decline of Europe’s Jewish population*, PEW RESEARCH CENTRE, (Feb. 9, 2015), <https://www.pewresearch.org/fact-tank/2015/02/09/europes-jewish-population/>.

²⁷ Natan Sznajder, *Hannah Arendt: Jew and Cosmopolitan*, 4 SOCIO. 218 (2015).

²⁸ *Id.* at 203.

United States, whose Constitution blended the historical and empirical fact of ethnic plurality and difference among citizens with the universal value of equality and liberty. For Hannah Arendt, such a framing enabled “*Jews ... [to] be citizens without ceasing to be Jews. Universalism and particularism could exist side by side*”²⁹ thereby allowing minority ‘Others’ to survive universality’s prescribed route for emancipation through assimilation/erasure of difference. The question of minority difference did not remain restricted to Europe. On the contrary, as Hannah Arendt predicted, the problem of ‘Jewish difference’ morphed into a modern problem with enormous political consequences in later centuries.³⁰ There are, as the following discussion demonstrates, disquieting parallels between the exclusion of Jewish difference in Europe, and the Othering of Muslim differences in modern, post-colonial India.

MUSLIM IN MODERN INDIA: HISTORY, DIFFERENCE, MINORITY

Three decades before India’s independence in 1947, Rabindranath Tagore observed:

*“Our real problem in India is not political, it is social... Diversity is a fact from the beginning of India’s history. India is too diverse in its races. It is many countries packed into one geographic receptacle. It is just the opposite of what Europe is, namely, one country made into many.”*³¹

Much like the historically shaped presence of Jews across continental Europe, Muslims constituted a historically determined sub-continental presence across British India. There were approximately 95 million Muslims strewn across the Indian sub-continent.³² Indian nationalists

²⁹ *Id.* at 211.

³⁰ *Id.* at 207.

³¹ ALAM, *supra* note 6 at 64, 76. *See also* AINSLEE T EMBREE, *UTOPIAS IN CONFLICT RELIGION AND NATIONALISM IN MODERN INDIA* 61 (University of California Press, 1st ed., 1990).

³² In the provinces of Punjab and Bengal, Muslims constituted a majority; in Sindh, Baluchistan and the Northwest Frontier Province Muslims were a smaller majority, while in the United Provinces Muslims were a significant minority. AYESHA JALAL, *JINNAH THE SOLE SPOKESMAN: JINNAH, THE MUSLIM LEAGUE AND THE DEMAND FOR PAKISTAN* (Sange-e-Meel Publications, 1st ed., 1992).

MUSLIM WOMEN IN INDIA: HISTORY, MINORITY AND DIFFERENCE

chose to adopt a European nation-state template at odds with Tagore's empirically accurate characterisation of India as a mosaic of ethnic, religious and linguistic diversity and difference.³³ Thus, a singular, centralised template was ill-suited towards accommodation and representation of the interests of diverse and different social groups including those of the subcontinent's Muslims. Constructs of the postcolonial Indian nation were for this reason imbued with ambiguity.

The ambiguity was mirrored in elite anxiety regarding Muslim particularity perceived as 'external' and by extension insufficiently loyal to the yet-to-emerge independent Indian nation-state-in-the-making.³⁴ A perception of the Muslim as a negative 'Other' suffused elite imaginations. More particularly, the prospect of Muslim-led provinces in independent India where history had bequeathed a Muslim demographic majority was viewed with unease by anti-colonial elites, for whom "*powerful Muslim-dominated enclaves (where Muslims constituted a numerical majority) would threaten [majority] power at the centre.*"³⁵ Majority (read national-liberal) universality was disinclined at the prospect of political co-existence with Muslim difference and particularity.³⁶ As the possibility of a constitutional power-sharing

³³ Concurring with Tagore, Ainslee Embree wrote: "*Clearly, India possessed none of the prerequisites of nationhood, if the standards were to come from the classic nineteenth-century models of Great Britain and France, for a common language, a proudly shared historical experience, a common religious tradition, and racial homogeneity are all conspicuously lacking in India.*" AINSLEE T. EMBREE, *UTOPIAS IN CONFLICT RELIGION AND NATIONALISM IN MODERN INDIA* 61 (University of California Press, 1st ed., 1990).

³⁴ STOETZLER, *supra* note 20 at 135-136.

³⁵ Victoria Schofield, *Wavell and the 'High Politics' of his Replacement as Viceroy in March 1947* in IAN TALBOT (ED.) *THE INDEPENDENCE OF INDIA AND PAKISTAN: NEW APPROACHES AND REFLECTIONS* 150 (Oxford University Press, 1st ed., 2013). Endorsing Schofield's observation, historian Joya Chatterji writes: "*There had been a time when the idea of tearing the seamless web of the Indian nation had been anathema to every Congressman. By 1947 however, the Congress was amenable to giving away those parts of the country that they could never hope to control and which in turn threatened their power at the centre...Bengal and Punjab inevitably would have to be partitioned.*" JOYA CHATTERJI, *BENGAL DIVIDED: HINDU COMMUNALISM AND PARTITION 1932-1947* 225 (Cambridge University Press, 1st ed., 1994).

³⁶ The British Cabinet Mission Plan proposed a united India with a central government responsible for defence, foreign affairs and communication, and power devolved to Hindu-majority and Muslim-majority groups of provinces.

agreement between the Indian National Congress and the Muslim League³⁷ receded, partition of the Indian subcontinent became inevitable.

MUSLIMS IN INDIA: CONSTITUTIONAL EQUALITY, MUSLIM INEQUALITY

In the wake of the 1947 partition,³⁸ out of the 95 million Indian Muslims some 60 million became Pakistani citizens; another 35 million remained in India.³⁹ Among the multiple challenges confronting Muslims in independent India, was the historical burden of a public perception equating Muslims with India's partition and as disloyal fifth columnists for Pakistan.⁴⁰ Sensing the divide, India's post-colonial leadership sought to amalgamate India's diversity and heterogeneity through the modern symbols of a nation-state, a national identity, and equal citizenship. None, however, including the constitutional clause of legal equality, could bridge, much less mend, the partition's Hindu-Muslim majority-minority binary. On the contrary, as Sinha-Kerckhoff notes in her ethnography of minorities in postcolonial India, the physical/territorial partition of India created non-physical "*new narrative regimes*" and symbolic "*mental borders*" anchored on ethnic-religious lines.⁴¹ Such borders, Ranabir Samaddar further maintains, constitute a "*permanent division of the nation into majorities and minorities.*"⁴²

³⁷ The Indian National Congress claimed to represent all Indians. The All-India Muslim League claimed to represent the interests of India's Muslims.

³⁸ Partition created 10 million refugees, over a million deaths and the rape and abduction of approximately 75,000 women. MUSHIRUL HASAN (ED.) *INVENTING BOUNDARIES: GENDER, POLITICS AND THE PARTITION OF INDIA* 30 (Oxford University Press).

³⁹ SZNAIDER, *supra* note 27.

⁴⁰ Latent pre-partition anxiety at the prospect of a constitutional power-sharing arrangement between the Congress and Muslims morphed into post-partition hostility: soon after independence, powerful public figures in India called for the withdrawal of state protections to Muslim citizens. SUNIL KHILNANI, *THE IDEA OF INDIA* 31 (Hamish Hamilton, 1st ed., 1987); *See also* BALRAJ PURI, *MUSLIMS OF INDIA SINCE PARTITION* (Gyan Publishing House, 1st ed., 2009).

⁴¹ KATHINKA SINHA-KERCKHOFF, *TYRANNY OF PARTITION: HINDUS IN BANGLADESH AND MUSLIMS IN INDIA* 24, 31 (Gyan Publishing House, 1st ed., 2006).

⁴² Ranabir Samaddar, *'The Last Hurrah that Continues,'* in GHISLAINE G DESCHAUMES AND RADA IVEKOVICH (eds.) *DIVIDED COUNTRIES, SEPARATED CITIES: THE MODERN LEGACY OF PARTITION* 22 (Oxford University Press, 1st ed., 2003).

MUSLIM WOMEN IN INDIA: HISTORY, MINORITY AND DIFFERENCE

The majority-minority divide deepened. So did an unresolved national (read majority) anxiety regarding Muslim minority differences in modern India. In a throwback to early 20th century European narratives of cultural nationalism, the construct of India as a quintessentially Hindu nation and civilisation whose decline coincided with a period of non-indigenous/foreign Muslim rule emerged as an influential strand within Indian nationalist historiography.⁴³ This particular narrative effaced diverse, overlapping histories; it reduced India's historical complexity and diversity to “*a single source of Indian tradition, viz. ancient Hindu civilisation.*” By placing “*Islam...as the history of foreign conquest*” and equating India's Muslim past with “*subjection*”⁴⁴ and “*trauma to the nation,*”⁴⁵ India's Muslim history and identity was recast as disputed and illegitimate.⁴⁶

In addition to history, the question of Muslim differences pervaded cultural and political domains. Tropes of Muslim otherness served to justify stereotypes of the culturally inferior, traditional/obscurantist Muslim.⁴⁷ The projection of negativity onto Muslim collectivity exiled the latter into a category and condition of permanent otherness within the nation. Markers of Muslim distinctiveness in food,⁴⁸ dress,⁴⁹ worship,⁵⁰ and

⁴³ Two well-known works on this theme are by V.D. Savarkar, *We or Our Nationhood Defined* (1939) and M.S. Golwalker, *Bunch of Thoughts* (1966).

⁴⁴ Partha Chatterjee, ‘*History and the Nationalisation of Hinduism*’ Occasional Paper, CENTRE FOR STUD. IN SOC. SCI. 200 (2014).

⁴⁵ Aamir Mufti, *Secularity and Minority: Elements of a Critique*, SOC. TEXT 88 (1995).

⁴⁶ CHATTERJEE, *supra* note 44, at 217.

⁴⁷ For a fuller discussion on the subject see RANA KABBANI, *IMPERIAL FICTIONS EUROPE'S MYTHS OF ORIENT* (Pandora, 1st ed., 1994).

⁴⁸ In July 2017, before being lynched by a mob in a train Mohammed Junaid was termed a ‘beef-eater.’ Anand Kochukudy, *Blood-stained tickets and bewilderment are what remain of a train ride aborted by hate*, THE WIRE (Jul. 1, 2017) <https://thewire.in/communalism/as-fear-grips-junaid-village-family-recalls-horror-of-lynching>.

⁴⁹ In 2015, the Supreme Court of India barred candidates wearing headscarves from appearing for a medical school examination. For a fuller discussion *see* Ratna Kapur, ‘*Unveiling the politics of the veil*’, THE WIRE (Jul. 25, 2015) <https://thewire.in/education/unveiling-the-politics-of-the-veil>.

⁵⁰ According to the Delhi police eight Muslim mosques were damaged or burnt during riots in Delhi during January 2020. The Waqf Board quoted a figure of 19 damaged mosques. Aditya Menon and Shadab Moizee, *Delhi Riots, 11 Muslim, 2 Hindu places of worship damaged say cops*, THE QUINT (Jan. 29, 2020)

historical heritage⁵¹ transformed into targets of violence and erasure mirroring Christian hostility *vis-a-vis* Jewish particularity during interwar Europe.

The logic of social exclusion also made subtle use of reason to serve its ends. Narratives of cultural inferiority merged with public perceptions of Muslim particularity as irretrievably incompatible with a universal, enlightened secular-liberal Indian polity.⁵² Both worked to “*implicitly exclude certain categories of people from true citizenship, among them those relegated to the category of traditional or obscurantist.*”⁵³ Indian Muslim citizens were equal in law yet, like Europe’s Jewish citizens, legal equality would not erase social perceptions of Muslims as essentially *Muslim*, and therefore undeserving of equality.⁵⁴ In a disquieting parallel, historian Joan Scott notes that well after World War II, the French state perceived “*Jewishness as a... religious trait that disqualified [Jews] for the kind of equality espoused by Republicans.*”⁵⁵

<https://www.thequint.com/news/india/northeast-delhi-riots-mosques-temple-dargah-damaged-police-rti>.

⁵¹ In 2018, the historic Mughalsarai railway station was renamed after a Hindu right-wing ideologue. See Rizwan Ahmad, *Renaming India: Saffronisation of public spaces*, AL JAZEERA (Oct. 12, 2018) <https://www.aljazeera.com/opinions/2018/10/12/renaming-india-saffronisation-of-public-spaces>.

⁵² In an article in the *Indian Express*, one of India’s best known liberals asserted the *burqa* (veil) was a ‘weapon.’ He quoted a Dalit leader’s advice to Muslims: “*By all means come in large numbers to our rallies. But don’t come with your burqas and skull caps.*” Ramchandra Guha, ‘*Liberals, Sadly,*’ INDIAN EXPRESS (Mar. 24, 2018). Reminding Guha of the persistent marginalisation of Muslims in modern India and its disconnect with Muslim cultural markers, Shamsur Rahman Faruqi – among India’s best known Urdu poets wrote: “*The marginalisation of Muslims began soon after partition and has since been institutionalised by political parties and governments. Doing away with the burqa and the skull-cap will not end it.*” Shamsur Rahman Faruqi ‘*Agony of the Marginalised,*’ INDIAN EXPRESS (Apr. 5, 2018) <https://indianexpress.com/article/opinion/columns/muslim-personal-law-board-burka-hindu-agony-of-the-marginalised-5123615/>.

⁵³ BARBARA METCALFE, *ISLAMIC CONTESTATIONS: ESSAYS ON MUSLIMS IN INDIA AND PAKISTAN* 174 (Oxford University Press, 1st ed., 2006).

⁵⁴ PURI, *supra* note 40 at 31.

⁵⁵ SCOTT, *supra* note 16 at 76.

MUSLIM WOMEN IN INDIA: HISTORY, MINORITY AND DIFFERENCE

A 2006 Government of India report⁵⁶ on Muslims in India captures the paradox between constitutional/legal equality and the subjective, lived experiences of inequality and social exclusion for India's Muslim citizens:

“One of the major issues around the question of identity for Indian Muslims is about being ... ‘Muslim’ in public spaces... Markers of Muslim identity — the burqa [veil]...the beard, and the topi[Muslim skull cap]...have very often been a target for ridiculing the community as well as of looking upon them with suspicion. Muslim men donning a beard and a topi [skull cap] are often picked up for interrogation from public spaces like parks, railway stations and markets... Muslims fear for their safety and security... a feeling of vulnerability, and consequently a visible impact on mobility and education, especially of [Muslim] girls... Increasing ghettoisation...impacts Muslim women the most because they are reluctant to venture beyond the confines of ‘safe’ neighbourhoods to access these facilities from elsewhere...”⁵⁷

As demands for cultural homogenisation deepened so did the unresolved interface between national (universal) majority and Muslim (minority) particularity. Within this overarching context, the dilemma for Muslim women in modern India was particularly challenging.

MUSLIM WOMEN IN INDIA: GENDER, CULTURE, DIFFERENCE

Among the damaging outcomes of the singular national culture narratives was the reduction of India's Muslims into a reified, negative ‘Other’. Within this frame, the figure of the veiled Muslim woman in particular symbolised multiple postcolonial anxieties: Muslim difference, Islamic misogyny, Muslim women's oppression, Muslim cultural inferiority, and in general, the hindrance posed by Islam and its followers to an emancipated national majority.⁵⁸

⁵⁶ MINISTRY OF MINORITY AFFAIRS, SOCIAL, ECONOMIC AND EDUCATIONAL STATUS OF MUSLIM COMMUNITY IN INDIA: A REPORT (2006) <https://www.minorityaffairs.gov.in/WriteReadData/RTF1984/7830578798.pdf>.

⁵⁷ *Id.* at 11–20.

⁵⁸ STOETZLER, *supra* note 20 at 182-187.

Critical gender scholarship however contests reductive representations of women in Muslim communities in India.⁵⁹ For instance, Barbara Metcalfe and Gail Minault's scholarship on Muslim women in India during the early 20th century notes that the concept of *adab* – a cultural code of conduct for women in Muslim communities – including the practice of veiling, derived from women's own subjective understanding of appropriate feminine moral and ethical conduct in public spaces; it was not evidence of enforced femininity or subordination.⁶⁰ On similar lines, Saba Mahmood's scholarship on Muslim women in Egypt's Islamist movement contests representations of Muslim women as subjects bound inextricably by religious and patriarchal oppression. Mahmood demonstrates that assertions of Muslim women's agency do not necessarily fit liberal/feminist registers of autonomy, self-expression and resistance; her research further demonstrates that women's agential consciousness for change in Muslim societies is context-specific and “*profoundly mediated by cultural and historical conditions*” by “*different bodies, knowledges and subjectivities*” whose trajectories do not necessarily map on to the liberal feminist binary of repression and resistance.⁶¹

Such scholarship opens up the wider question of women in Muslim cultures. Lila Abu-Lughod's suggestion foregrounding the salience of history and critical self-reflexivity as a method towards engaging with religious/ethnic difference is an important one:

*“When I talk about accepting differences, I am not implying that we should resign ourselves to being cultural relativists who respect whatever goes on elsewhere as ‘just their culture.’ Rather, what I am advocating is the hard work involved in recognizing and respecting differences – precisely as products of different histories, as expressions of different circumstances, and as manifestations of differently structured desires.”*⁶²

⁵⁹ SABA MAHMOOD, *POLITICS OF PIETY: THE ISLAMIC REVIVAL AND FEMINIST SUBJECT* (Princeton: Princeton University Press, 1st ed., 2005).

⁶⁰ METCLAFE, *supra* note 3. See also MINAULT, *supra* note 3, at 66.

⁶¹ MAHMOOD, *supra* note 59, at 14.

⁶² Lila Abu-Lughod, *Do Muslim Women Really Need Saving, Anthropological Reflections on Cultural Relativism and its Others*, 787 *AMERICAN ANTHROPOLOGIST* 104 (2002).

MUSLIM WOMEN IN INDIA: HISTORY, MINORITY AND DIFFERENCE

Muslim women's challenges in modern India have likewise been shaped by history and historical forces. India's partition disrupted in great measure a momentum of modest *albeit* significant progress in the emergence of Muslim women as civic, social and political subjects during the colonial period – an often neglected dimension in post-colonial literature. It is useful, therefore, to begin with a brief historical overview of the same.

MUSLIM WOMEN IN COLONIAL INDIA: A BRIEF HISTORY

A. EDUCATION

The subject of education for Muslim girls and women was first raised at the all-male All-India Muslim Educational Congress (MEC). Sayyid Karamat Husain,⁶³ from the United Provinces, British India, was among the early advocates of education for Muslim women and girls during the late 19th and early 20th centuries. He established⁶⁴ the *Zenana Madarsa* (a girls' school) at Aligarh in 1906. The school transformed into a girls boarding school in 1914; by 1925 Aligarh Girls School was known as Aligarh Women's College offering undergraduate and postgraduate degrees.⁶⁵ A parallel impetus for Muslim women's primary and secondary education in British India emerged from the *Anjumans* or voluntary Muslim associations for social and educational reform in India - during the late 19th century. For instance, in Punjab⁶⁶, *Anjumans*, the *Anjuman-i-Himayat-i-Islam* established several primary schools for girls in Lahore in 1885, followed by middle schools in 1925, and the establishment of Islamiya College for Women in

⁶³ Sayyid Karamat Husain (1854-1917) – an Islamic scholar, jurist and educationist was an early advocate of Muslim women's education.

⁶⁴ In contrast to the MEC annual meeting in Allahabad (1890) where Karamat Husain's proposal for a resolution in favour of women's education was rejected, the Lahore MEC 'agreed in principle that Muslims should open schools for Muslim girls.' In Aligarh, the MEC led by Syed Karamat Husain and concerned students (1891), passed a resolution to the effect that it 'is necessary to make efforts for the education of women as well as for men.' *Supra* note 4, at 191, 220.

⁶⁵ *Id.* at 241-248.

⁶⁶ Muslims constituted a slender majority in pre-partition Punjab and were part of the provincial landed and professional elite, many of whom initiated or supported Muslim girls and women's education. For this reason, Muslim primary girls' education in Punjab during the 1880s and 1890s was more advanced than in Delhi or Aligarh. MINAULT, *supra* note 4.

Lahore in 1939. In Bombay, civic efforts at the representation of Muslim women's common interests, most notably by the Tyabji⁶⁷ family, contributed to the establishment of *Anjuman-e-Islam* (1876) that, in turn, established primary and secondary schools for Muslim girls in the city during the 1920s and 1930s.⁶⁸ Similar developments emerged in southern India. In Hyderabad for example, where secular education for Muslim girls was almost non-existent, efforts by Muslim upper-class elites such as Salar Jung,⁶⁹ his daughter Nurunissa Begum Syeda and Begum Shujaat Ali facilitated the establishment of the Nampalli Girls School (1890) subsequently known as the Women's College, Osmania University.⁷⁰

Although female education in Hyderabad during the early decades of the 20th century was largely urban and restricted to elite Muslim women, Muslim female students were twice as numerous as their non-Muslim counterparts.⁷¹

Likewise, in Bengal, efforts by the *Anjuman-e-Khawatim-i-Islam* to promote literacy and education for underprivileged Muslim women were supported by Rokeya Sakhavat Husain⁷² – an advocate of women's education and founder of the Sakhavat Memorial Girls School in the Calcutta; Khujista Akhtar Banu Suhrawardy from the Suhrawardy family of Calcutta and Midnapore⁷³ established primary schools for girls in Bengal.

⁶⁷ Badruddin Tyabji was an eminent Muslim of the Bohra clan. He was the first Indian Muslim barrister in India, a champion of Muslim women's education and a member of the Indian National Congress.

⁶⁸ *Supra* note 4, at 176-183.

⁶⁹ Salar Jung was the Nizam of Hyderabad's Prime Minister.

⁷⁰ Both women were upper-class elites who wanted Muslim women sharing their class to be educated in *purdah* (veil). *See supra* note 4, at 205.

⁷¹ This was because Muslim female students belonged to Hyderabad's administrative and professional elite and therefore more inclined to educate their daughters. "*Muslim backwardness*' was a concept that did not apply in their particular milieu." *Supra* note 4, at 207-208. In 1932, out of a total of 45,300 girl students across 696 schools in Hyderabad, there were 26,847 Muslim girls and 15,507 Hindu girls. *Id.* at 207.

⁷² Rokeya was author of *Sultana's Dream* – a well-known feminist utopian classic.

⁷³ Khujista Banu Suhrawardy belonged to the politically and culturally eminent Suhrawardy family of Calcutta and Midnapore. Her father Maulana Ubaidullah Suhrawardy was a principal of Dhaka Madarsa.

MUSLIM WOMEN IN INDIA: HISTORY, MINORITY AND DIFFERENCE

While the impetus and resources for Muslim women's and girls' education in colonial India emerged primarily from Muslim professional and landed elites, its beneficiaries, as the above discussion indicates, were Muslim women and girls across classes. Despite regional disparities in levels of Muslim female education across the subcontinent, the level of school education for Muslim girls in British India was not conspicuously lower relative to non-Muslim girls.⁷⁴ During the 1916-26 decade, the percentage of Muslim male and female pupils registered a rise in all regions.⁷⁵

By 1937, "*the all-India average for Muslim girls had surpassed the national average (emphasis added) and Muslim women could be considered within the mainstream of women's education of the time...on an all-India basis.*"⁷⁶

This gradual *albeit* notable trajectory of progress in Muslim women's education in British India was arrested in the wake of the partition's upheaval.⁷⁷ The exodus of Muslim urban professionals, leading industrial and trading groups, political personalities, administrators, public figures and intelligentsia, especially members of the community-based *Anjumans*, whose contribution to Muslim women's education in British India was

⁷⁴ In 1902, in the United Provinces for instance, there were 28 Muslim girls attending secondary schools compared to four Hindu girls – a trend attributable to Muslims being part of the landed professional elite. In Bengal and Punjab, where Muslims were largely peasants or cultivators, Muslim girls lagged behind their Hindu counterparts. *Fourth Quinquennial Review of Education, India 1897-1902* in SHAHIDA LATEEF, *MUSLIM WOMEN IN INDIA: POLITICAL AND PRIVATE REALITIES 1890S – 1980S*, 49 & 76 (Kali for Women, 1st ed., 1998). This pattern was confirmed by the Hartog Committee study on Education in British India, 1929 which noted that "*in provinces where Muslims were a minority, they consistently had a higher percentage of in school than their percentage in the population, whereas in Punjab and Bengal, where they were in a slight majority, their percentage in school was proportionately less. This is consistent with an urban, administrative minority (as in Hyderabad) vs. a rural, peasant majority.*" HARTOG COMMITTEE REPORT, BRITISH COLONIAL GOVERNMENT, 1929.

⁷⁵ GEORGE ANDERSON, *PROGRESS OF EDUCATION IN INDIA, 1937-32*, Tenth Quinquennial Review 76 (The Government Central Press, 1st ed., 1932).

⁷⁶ *Id.* "*The prejudice which has hindered its [Muslim women's] educational progress in the past appears to be dying away?*"

⁷⁷ The bulk of Muslim migrants from India to Pakistan were urban, young and educated intelligentsia. Their departure stripped the traditional Muslim urban centres. In Delhi for instance, by 1951, 329,000 Muslims left for Pakistan, reducing the Muslim population of the metropolis from 33.22 percent to 5.71 percent in 1961. MUSHIRUL HASAN, *LEGACY OF A DIVIDED NATION 173-175* (Oxford University Press, 1st ed., 1997).

considerable - left behind a socially fragmented, economically depressed, and politically marginalised community lacking the resources, social capital or intellectual momentum to advance women's education as was the case prior to partition.⁷⁸

Eliding Muslim women's pre-partition history of progress and achievement in the field of education in post-colonial narrative frames strengthened statist, post-colonial public perceptions regarding Muslim women's educational backwardness. A somewhat similar elision shaped post-colonial public perceptions regarding the question of women's rights in Muslim communities. It is useful therefore to briefly consider histories of social change and reform among Muslims in British India, especially those relating to women's rights.

B. MUSLIM WOMEN AND SOCIAL REFORM

Early 20th century modernist impulses influenced the emergence of a nascent Muslim women's movement towards social change. Progress in Muslim women's education in late colonial India – in which Aligarh Women's College played a stellar role – led to a growth in the number of educated women even as gender segregation was still observed. Education facilitated women's entry towards publication of women's journals in English and the vernacular that addressed, among others, social issues as well as literary production.⁷⁹ Among others, Rokeya Sakhawat Hossain from Bengal wrote against female seclusion. Rashid Jahan Begum became part of the Urdu Progressive Writers Movement; she was an advocate of women's rights. So was Ismat Chughtai, educated at Karamat Husain's school in Lucknow and subsequently at Aligarh Women's College;

⁷⁸ A Muslim survivor in Delhi observed: "*Partition was a total catastrophe. Those who are left behind are in misery. Those who are uprooted are in misery.*" Muslim urban centres such as Delhi, United Provinces, Bihar and Hyderabad were racked by riots and witnessed large-scale exodus of Muslim members from professional classes, defence services, the police, universities, the law courts, and the central secretariat. Muslim presence and influence in government, business, trade and professions declined. Less than five Muslim Indian Civil Services officers remained in India; less than 300 Muslim army officers opted to stay in India. OMAR KHALIDI, *INDIAN MUSLIMS SINCE INDEPENDENCE* 341 (Vikas Publishing House, 1st ed., 1995).

⁷⁹ *Supra* note 4, at 248-249.

MUSLIM WOMEN IN INDIA: HISTORY, MINORITY AND DIFFERENCE

Chughtai's short stories centred on women's oppression and female sexuality established her as a literary icon in her own right.⁸⁰

Using the newly available print medium, Muslim men like Khwaja Altaf Husain Hali (Chup ki Dad) and Maulana Ashraf Thanavi (Beheshti Zavar) blended a modernist spirit of gender equality with conventional gender mores; both affirmed female education *albeit* within domestic confines and within an Islamic religious reformist perspective. Historian Barbara Metcalfe notes that both texts "*implicitly posit a single notion of the person and of personal capacity for both women and men with no separate standard for women, but rather a common model of humanity for both.*"⁸¹..."*In terms of essential nature and potential, women and men were regarded as one...Girls, like boys, had to study...Girls should ...read the same texts as boys.*"⁸²

In addition to education, writing, publication and literary production, there was an increased awareness regarding gender issues and women's rights, best symbolised by Attiya Begum – a participant at the Muhammedan Educational Conference (MEC) held at Aligarh in 1926 where she "*came up openly and got up on the dais unveiled and delivered a strong speech demanding equal rights with men to go about God's earth freely and openly. Another lady also delivered a strong speech and the poorSecretary of the Conference did his best to send those suffragettes back into their place screened up for them. Failing in his efforts he left the ball himself.*"⁸³ Muslim women's writing and civic activism, paralleled discussion regarding reform in Muslim law.

C. LEGAL REFORM

Historically, Muslim family law has been a contested marker of Muslim identity and Muslim difference; it is widely regarded as incompatible with women's rights. Conventional understanding of an immutably misogynist Muslim law however overlooks the diversity and complexity within the Islamic legal canon characterised by the existence of four major schools of

⁸⁰ *Id.* at 274–279.

⁸¹ METCALFE, *supra* note 4, at 106.

⁸² *Id.* at 105, 107.

⁸³ Gail Minault, *Coming Out: Decisions to Leave Purdah*, 23(3) IND. INT. CENT. QUART. 93 (1996).

jurisprudence.⁸⁴ As we shall see, this point bears great significance with regard to the provisions of the Dissolution of Muslim Marriages Act, (1939).

In 1937, the Shariat Act legislation overrode customary practice and sought uniform application of Muslim *Hanafi*⁸⁵ law to Muslim women in British India⁸⁶ including the Islamic rights to inheritance, divorce and property.

*“The legislation evoked considerable public interest and the Muslim community by urging support of the bill was perceived to have furthered the interests of women.”*⁸⁷

A subsequent legislation, the Dissolution of Muslim Marriages Act, 1939 (“**DMMA**”) utilised Islamic jurisprudential diversity to advance Muslim women’s divorce rights. Acknowledging the restricted grounds for divorce available to Muslim women in colonial India under *Hanafi* law,⁸⁸ the DMMA⁸⁹ extended the grounds for divorce available to Muslim women in

⁸⁴ The four *Sunni* schools of law are viz., *Hanafi*, *Shafi*, *Maliki* and *Hanbali*. While all schools agree on core religious doctrine, there is jurisprudential divergence in legal interpretations and positions including matters related to women and gender relation).

⁸⁵ A majority of Muslims in India follow the *Hanafi* school of Islamic jurisprudence.

⁸⁶ The 1937 Shariat Act aimed at uniformity of law among Muslims throughout British India in all their social and personal relations. Among others, it clarified questions regarding marriage, divorce, maintenance, succession and guardianship. METCALFE, *supra* note 4 at 68.

⁸⁷ The passage of the Bill prompted Dr. G.V. Deshmukh, a member of the Central Legislative Assembly from Bombay to opine that the provisions of the Shariat Act set a positive precedent for Hindu women. Hindu members who met with little success while proposing Hindu women’s right to property felt that the Shariat Act could facilitate similar measures within their own community (Legislative Assembly Debates 1939, *Id.* at 68–69, 45–46 and 73.

⁸⁸ *Hanafi* law offered limited grounds for divorce to Muslim women. Minault notes that “the *Hanafi* school of jurisprudence, followed by a majority of Muslims in the subcontinent, is the strictest in matters of divorce and gives a wife almost no grounds for initiating the dissolution of her marriage. In the early twentieth century, the number of Muslim women who resorted to the device of renouncing Islam in order to secure judicial divorces increased alarmingly.” MINAULT, *supra* note 4, at 303.

⁸⁹ “The Statement of Objects of the Bill justified the application of *Maliki* law by noting that ‘*Hanafi* jurists have laid down that in cases in which the application of *Hanafi* law causes hardship it is permissible to apply the provisions of *Maliki*, *Shafi* or *Hanbali* law.’” Rohit De, *Mumtaz Bibi’s Broken Heart: Personal Law, Identity Politics and Civil Society in Colonial South Asia*, 46(1) IND. ECON. & SOC. HIST. REV. 117 (2009).

MUSLIM WOMEN IN INDIA: HISTORY, MINORITY AND DIFFERENCE

British India under *Hanafi* law, by incorporating and extending the provisions of the more liberal *Maliki*⁹⁰ school of jurisprudence into *Hanafi* law.⁹¹ The outcome of this legislation for Muslim women's divorce rights was noteworthy. As Rohit De observes:

*“The Act was a radical piece of social legislation that gave South Asian Muslim women greater rights for divorce than those enjoyed by other women in India and Britain. Instead of placing women's rights and Islamic law as opposed to each other, the legislation ... guaranteed women's rights by applying Islamic law.”*⁹²

The DMMA challenged stereotypes of an immutably, misogynist Muslim law beyond human agency or intervention; it mirrored Muslim modernity wherein Muslim identity is in consonance with gender equality.⁹³ Postcolonial elision of histories of difference and contestation around Muslim law or the fact of Muslim consent for legislation affirming women's rights in Muslim law bolstered post-colonial assumptions of a static, misogynist Muslim law beyond history or human agency.

Adding to the historical burden, was the partition's continuing majority-minority legacy that had the effect of politicising Muslim difference and identity in modern India. The Muslim came to symbolise a negative distinction defined by Islam⁹⁴—a difference undergirding national borders, territory, politics and culture.⁹⁵ The pre-partition Muslim question acquired

⁹⁰ The Maliki school of Islamic jurisprudence is widely followed in North Africa.

⁹¹ A Muslim woman could ask her marriage to be dissolved on grounds of cruelty, including mental and physical cruelty, denial of property or prevention of the wife's legal rights, immorality, obstruction of religious practices and failure on the part of the husband to treat all his wives equally. *Id.* at 115.

⁹² *Id.*

⁹³ *Id.* at 105.

⁹⁴ The Muslim as outsider/foreigner construct is epitomised by 'Babar, a foreigner and invader, and with him all Indian Muslims as progeny of that invader (*Babar ki aulad*)' was further buttressed further by a narrative of 1200 years of slavery of India encompassing the Mughal and British colonial period, and postcolonial rule by India's westernised elites. See Gyanendra Pandey, *Modes of History Writing: New Hindu History of Ayodhya* 29 (25) EPW (Jun. 18, 1995).

⁹⁵ Markha Valenta, 'The Muslim as Victim, the Muslim as Agent: On Islam as a Category of Analysis' in ABDUL SHABAN (ED.) LIVES OF MUSLIMS IN INDIA: POLITICS, EXCLUSION AND VIOLENCE 36-42 (Routledge, 1st ed., 2018).

a newer insistence in postcolonial India where, as Abdul Shaban writes: “*the Muslim question still remains as alive as it was during the partition of the country in 1947 and there are those who still ask ‘Can a Muslim be an Indian?’*”⁹⁶ “*It is, as Barbara Metcalfe wrote, as if ‘Islam’ puts [Muslim women] not only outside the national community but also outside intelligible human behaviour, choices, responses, and life experiences.*”⁹⁷ Critical gender perspectives in modern India were not always an exception to this trend.

D. (POST)COLONIAL CONTINUITY

Among the first comprehensive reports on women in modern India to emerge in the public domain was the landmark Government of India ‘*Towards Equality*’ Report authored by the Committee on the Status of Women in India (1974). The findings of the Report laid the basis for gender-inclusive development and policymaking, academic scholarship, and women’s activism. The Report replicates partition’s (post)colonial binary to characterise Muslim women in modern India as a homogenous, undifferentiated constituency with lives and choices shaped primarily by Islam.⁹⁸ There is little acknowledgement of Muslim women’s socio-economic complexity across class, sect or region; or of the differential influence of social, economic and political conditions on Muslim women across these rubrics. In her book on Muslim women in India, Shahida Lateef notes that the Report’s “*analytic separation between the status of Muslim women and other women is a continuation of the distinction made between the rise of ethnic politicization between the Muslim and other communities. By this separation, it has been possible to attribute the blame for the social, political and economic problems of Muslim women on Islam.*”⁹⁹

⁹⁶ *Id.* at xxvii.

⁹⁷ METCALFE, *supra* note 4, at 20.

⁹⁸ According to the Report on the Survey of the Status of Women in India: ‘81.11% of the respondents belonged to the Hindu religion followed by the Muslims’ (sic) 393-394. *Towards Equality: Report of the Committee on the Status of Women in India*, Government of India, Ministry of Education and Social Welfare, Department of Social Welfare, (New Delhi, December 1974).

⁹⁹ LATEEF, *supra* note 4, at 104–105.

MUSLIM WOMEN IN INDIA: HISTORY, MINORITY AND DIFFERENCE

A more contemporary variation of the same is reflected in a chapter titled ‘Muslim Women Organise’ by scholar-activist Sadhna Arya in her book¹⁰⁰ on the post-1990s women’s movements in India. Without an introduction to the historically constituted challenges confronting Muslim women in contemporary India, or Muslim women’s differentiation across region, class, ethnicity etc. The chapter focuses on Muslim women’s mobilisations around Muslim law – a contested domain and as we have seen, a source of Muslim exclusion and Othering in modern India. Arya’s chapter opens with a discussion on the Uniform Civil Code (UCC), moves on to Muslim women’s mobilisation around Muslim Personal Law and the UCC, followed by a discussion on triple *talaq* (verbal divorce, each of which reinforces the trope of Muslimness (read ‘Muslim law’) as an impediment to Muslim women’s emancipation. Muslim men’s recourse to unilateral verbal divorce (triple *talaq*)¹⁰¹ in modern India has been inferred as irrefutable evidence of Muslim legal and, by extension, cultural incompatibility with secular modernity. The practice of triple *talaq* dovetails into a wider perception, which as Saba Mahmood writes, is widely “*regarded as indexical of ... a lesser unenlightened form of religiosity [and] also of social and political backwardness of the community, rendering it incapable of inhabiting the norms of a modern polity.*”¹⁰² The practice of triple *talaq* does indeed exist to the great detriment of Muslim women’s rights and welfare. However, court judgements by Indian jurists affirm that triple *talaq* is a practice, not constitutive of Islamic legal canon.¹⁰³ In a case judgement on divorce in Muslim law, Justice V.R. Krishna Iyer noted that:

“The view that the Muslim husband enjoys an arbitrary, unilateral power to inflict instant divorce does not accord with Islamic injunctions...Indeed a deeper

¹⁰⁰ SADHNA ARYA, *GAINING GROUND: THE CHANGING CONTOURS OF FEMINIST ORGANISING IN POST-1990S INDIA* (Women Unlimited, 1st ed., 2020).

¹⁰¹ Presently, triple *talaq* is a criminal offence. Muslim men convicted for the same are subject to a jail term. ‘It is a popular fallacy that the Muslim male enjoys, under the Quranic Law, unbridled authority to liquidate the marriage.’ Judgement by Justice Baharul Islam Rukia Khatun v. Abdul Khaliq Laskar, 1979 SCC OnLineGau 41.

¹⁰² DE, *supra* note 60.

¹⁰³ A.G. Noorani, ‘*A Monstrous Wrong*,’ FRONTLINE, (Dec. 21, 2016).

*study of the subject discloses a surprisingly rational, realistic and modern law of divorce.*¹⁰⁴

Also overlooked by Arya in her discussion on Muslim law is the colonial-era 1939 DMMA legislation, that as Rohit De notes, was used as a foil by post-colonial elites to thwart changes in the Hindu Code Bill:

*“the construction of Muslim Personal Law as backward is ironic, given that Hindu conservatives in the 1950s had attacked the ‘progressive’ Hindu Code Bill on the grounds that the draft code was ‘90 per cent Muhammedan law.’”*¹⁰⁵

Whether intended or not, Arya’s framing of Muslim law as a major, if not principal challenge confronting Muslim women serves to resurrect old colonial tropes of unmodern, inferior Islamic law and culture – a difference that renders Muslim inclusion in modern India impossible. Arya’s prescribed remedy for Muslim women’s legal emancipation by way of a UCC mirrors national (read majority) anxiety *vis-a-vis* a ‘different’ Muslim law undergirded by an implicit message of assimilation within a project of national emancipation, defined and determined by an ‘enlightened’ majority.¹⁰⁶ Viewed this way, the UCC is not as much about legal justice for Muslim women as it is about crafting a universal Indian identity opposed to, and assimilative of Muslim particularity defined by “*the culture and subject position of the majority coded as the standpoint of [secular modernity].*”¹⁰⁷

This is not to deny the fact of gender discrimination in Muslim law but rather, to foreground how triple *talaq* becomes an inflection point that works to accentuate Muslim difference, resurrect the majority-minority divide, and reinforce Muslim exclusion. Such a frame reflects what gender

¹⁰⁴ Justice V.R. Krishna Iyer, *A. Yousuf Rather vs Sowramma*, AIR 1971 ker 261. In their judgement *Must. Rukia Khatun vs Abdul Khalique Laskar*, Justice Baharul Islam and Justice D. Pathak held that “*In our opinion the correct law of ‘talaq’ as ordained by the Quran is: (i) talaq must be for a reasonable cause and (ii) that it must be preceded by an attempt at reconciliation between the husband and wife by two arbiters, one chosen by the wife from her family and the other by the husband from his. If their attempts fail, ‘talaq’ may be affected. It is a popular fallacy that the Muslim male enjoys, under the Quranic law, unbridled authority to liquidate the marriage.*” Judgement by Justice Baharul Islam *Rukia Khatun v. Abdul Khalique Laskar*, 1979 SCC OnLineGau 41.

¹⁰⁵ DE, *supra* note 60, at 127.

¹⁰⁶ MUFTI, *supra* note 19, at 55.

¹⁰⁷ *Id.*

MUSLIM WOMEN IN INDIA: HISTORY, MINORITY AND DIFFERENCE

historian Joan Scott terms as “*the mutually constitutive nature of gender and politics*,”¹⁰⁸ that in this case, forecloses the possibility of historically-grounded, empirically anchored, nuanced understandings of Muslim women’s multiple including legal challenges in modern India.

While the UCC centres on Muslim legal differences, there emerged another inflection point positioning Muslim differences as a basis for legislatively-sanctioned exclusion of Muslims from the registers of Indian citizenship. An extraordinary public mobilisation by Muslim women at Shaheen Bagh against the legislation illuminated the hitherto unacknowledged, unexamined and unaddressed dilemma between ahistorical constitutional-secular equality, and historically determined Muslim social inequality in modern India.

SHAHEEN BAGH: A STRUGGLE FOR EQUALITY OF DIFFERENCE

In December 2019, women from Shaheen Bagh, an underprivileged, working-class largely Muslim suburb in New Delhi embarked on a sit-in against two government bills using religion as a benchmark to deny citizenship to Muslims.¹⁰⁹ Large numbers of underprivileged Muslim

¹⁰⁸ “*To put it another way*,” Scott maintains, “*gender and politics were co-constitutive, the one establishing the meaning of the other*.” JOAN SCOTT, *SEX AND SECULARISM* 22-25 (Princeton University Press, 2018).

¹⁰⁹ The 2019 National Register for Citizens (NRC) declares a passport or voter identity insufficient proof of nationality. Instead, NRC mandates the possession of unavailable or hard to access legal documents in order to claim Indian citizenship. Those unable to furnish the same may be stripped of citizenship and/or deported. In the state of Assam, the only state so far where NRC was implemented over two million people were denied citizenship. Anna Payton, *Legalised Discrimination: India’s NRC and CAA*, BERKELEY POLITICAL REVIEW, (Feb. 6, 2020) <https://bpr.studentorg.berkeley.edu/2020/02/06/legalized-discrimination-indias-nrc-and-caa/>. The Citizenship Amendment Act (CAA) allows non-Muslim refugees from Pakistan, Bangladesh and Afghanistan to claim Indian citizenship. The key provision excluding Muslims violates the Constitutional principle of religious equity, in particular Articles 14 and 15. See ‘*CAA, NRC may affect status of India’s Muslim minority: Congressional Research Service*’ The Hindu (Dec. 27, 2019), <https://www.thehindu.com/news/international/caa-nrc-may-affect-status-of-indias-muslim-minority-congressional-research-service/article30409109.ece>.

women, many wearing the *burqa*¹¹⁰(veil) and *hijab* (headscarf) held peaceful protests at Shaheen Bagh from December 2019 – March 2020. The protests transformed into a civic resistance movement led by subaltern Muslim women – one of India’s most disenfranchised groups.¹¹¹ In their book on Muslim women in the Shaheen Bagh movement, Salam and Ausaf write:

“The protests in the capital’s Shaheen Bagh neighbourhood became an enduring symbol of the demonstrations that have swept India over the new law...Most of the women are homemakers, many in hijabs...the Shaheen Bagh women came out; first only a handful, then hundreds, at times even thousands.”

Shaheen Bagh received much support from civil society whose members emphasised the constitutional value of equality. For several writers, Shaheen Bagh’s protesting Muslim women symbolised a reclaim of threatened constitutional rights embodied in the right to equal citizenship.¹¹² For instance, for an academic, the protests were “*affirmation of Indian secularism, constitutionalism and democracy.*”¹¹³ Likewise, for a journalist, Shaheen Bagh symbolised the return of “a targeted and pilloried community” back into “India’s secular and democratic mainstream.”¹¹⁴ In a somewhat similar *albeit* more laudatory vein, liberal social media applauded a hitherto much-stereotyped and relatively invisible constituency for its spirited, feisty protest. The social media news outlet, The Wire, exulted: “*Shaheen Bagh’s women are now seen as the torchbearers of the protest to save the Indian constitution from neo-fascist forces.*”¹¹⁵

¹¹⁰ A *burqa* is an outer garment covering the body and at times, the face.

¹¹¹ Gem Fletcher, *A Multilayered Document of the Shaheen Bagh Protest Site*, BRIT. J. PHOTOGRAPHY (2022).

¹¹² Nayantara Sahgal, *The Message*, in SEEMA MUSTAFA (ED.), SHAHEEN BAGH AND THE IDEA OF INDIA: WRITINGS ON A MOVEMENT FOR JUSTICE, LIBERTY AND EQUALITY (Speaking Tiger, 1st ed., 2020); Nandita Haksar, *Who is Afraid of the Indian Citizen* in SEEMA MUSTAFA (ED.), SHAHEEN BAGH AND THE IDEA OF INDIA: WRITINGS ON A MOVEMENT FOR JUSTICE, LIBERTY AND EQUALITY (Speaking Tiger, 1st ed., 2020).

¹¹³ *Id.* at 171–172.

¹¹⁴ *Id.* at 19–20.

¹¹⁵ Rafia Kazim, *At Shaheen Bagh Muslim women take their place as heroes of the movement*, THE WIRE (Jan. 30, 2020), <https://thewire.in/women/shaheen-bagh-muslim-women>.

MUSLIM WOMEN IN INDIA: HISTORY, MINORITY AND DIFFERENCE

The seamless transformation of Shaheen Bagh's *burqa* and headscarf-wearing Muslim women – signs of inherently misogynistic, unmodern Islam and symbol[s] of a difference that could never be integrated – into doughty defenders of modern constitutional values was not without paradox. Uniting diverse civic constituencies in solidarity with Shaheen Bagh's Muslim women was the government's violation of the constitutional principle of legal equality. Yet, civil society's valorisation of Shaheen Bagh's Muslim women as “*icons of secular resistance against the violation of the constitutional value of legal equality*” deflected attention away from the constitutive contradiction undergirding an equal rights constitutionalism whose persistent elision of the religion-based power imbalance between Muslims and the Indian state has served to mask the real basis of Muslim minority exclusion in post-colonial India.¹¹⁶ This relationship of power and dominance - exemplified in this instance by the CAA and NRC - placed Muslim minority particularity beyond the life of the state and postcolonial nation.¹¹⁷

Precisely this equation of power, dominance and inequality was the subject of ninety-year-old *dadi* (grandmother) Asma Khatoon's – an underprivileged Shaheen Bagh protestor – anguish. Asma Khatoon was not knowledgeable about the Indian Constitution. She was however keenly aware of the *historical* register of inequality, discrimination and exclusion of Muslim citizens as *Muslims* in modern India that she accurately pinpointed as the basis for collective Muslim exclusion from the CAA and NRC

¹¹⁶ Albert Memmi, a Tunisian Jew, writes of the excessive loyalty and fealty of French intellectuals to the ideals of republicanism, secularism, political and civic freedom blinding liberals to the nationalist and culturally exclusivist character of the Tunisian nationalism. See SUSIE LINFIELD, *THE LION'S DEN: ZIONISM AND THE LEFT FROM HANNAH ARENDT TO NOAM CHOMSKY* 170 (Yale University Press, 2019). Memmi's critique may apply into India where secular celebration of Asma Khatoon as a civic icon is rooted in secular blindness to the majoritarian, culturally exclusive dimensions of Indian nationalism. In her analysis on Muslims in India, Markha Valenta suggests an alternative approach that would “read ...the majority as ‘deficient’ and ‘backward,’ lacking in this case a democratic commitment to equality and confidence in its own security...In approaching the Muslim (minority) through the lens of deficiency without addressing the deficiency of majority... the dynamic persistence of Muslims – as Muslims [emphasis added] in post-colonial India after ...years of public discrimination, caricature and erasure, constitutes not a sign of backwardness but of resourceful social, cultural and religious ‘development’ under...the twin pressures of religious nationalism and global fast-capitalism” Valenta, *supra* note 109, at 55.

¹¹⁷ MUFTI, *supra* note 19, at 68.

legislation. Asma Khatoon said, “*the Act was to deny citizenship only [emphasis added] to the Muslim [emphasis added] community in the country.*”¹¹⁸ Her words encapsulate Muslim women’s (and men’s) struggle for equality in their ethnic difference as *Muslims* – a struggle shaped by history, memory and collective subjective awareness of a historically-determined context of domination that as Saba Mahmood insightfully notes, can “*be understood only from within the discourses and structures of subordination that create the condition of [their] enactment.*”¹¹⁹

The persistent shadow of partition, the ‘Pakistanisation of Indian Muslim identity, religiosity, institutions and neighbourhoods,’¹²⁰ the perception of the Muslim as a disloyal citizen, and the norms of India’s post-colonial secular, democratic politics are among the structures of subordination that make it difficult for Muslims to legitimately organise *as Muslims* to counter discrimination.¹²¹ The Muslim women of Shaheen Bagh however did precisely this. In so doing, they drew attention to how the axis of Muslim difference mediates rights and claims to (equal) citizenship. In effect, Asma Khatoon’s words at Shaheen Bagh epitomise what cultural studies scholar Aamir Mufti aptly sums up as “*the real classic dilemma of [Muslim] minority existence in India: how to remain distinct and at the same time enter into the fullness of political experience as citizens.*”¹²²

CONCLUSION

A comparative historical frame illuminates the troubled interface between minority differences and universal/majoritarian constructs of nation and national modernity in the contemporary world. The social experience of religious/ethnic difference with regard to Europe’s Jews, and Muslims in post-colonial India is historically conditioned and divided across time and space. Yet, as we have seen, both are not entirely dissimilar. Through war, genocide, expulsion and partition, modern (liberal) nation-states reduced

¹¹⁸ *Dadi of Shaheen Bagh in Kerala says CAA singles out Muslim community*, NEW INDIAN EXPRESS (Feb. 25, 2020).

¹¹⁹ MAHMOOD, *supra* note 59, at 15.

¹²⁰ For a greater explication of this point see VALENTA, *supra* note 95, at 38-39.

¹²¹ TAYLOR SHERMAN, MUSLIM BELONGING IN SECULAR INDIA: NEGOTIATING CITIZENSHIP IN POSTCOLONIAL HYDERABAD 17 (Cambridge University Press, 1st ed., 2015).

¹²² MUFTI, *supra* note 19, at 68.

MUSLIM WOMEN IN INDIA: HISTORY, MINORITY AND DIFFERENCE

the Jews of Europe and the Muslims of India into minorities. Both groups were subsequently subject to social exclusion, discrimination and the targeting of markers of religious/cultural difference and distinctiveness.

Further, the experiences of both groups foreground the limits of legal/constitutional equality wherein the putative distinction between the universal rights-bearing citizen and his/her (private, historically determined) ethnic/religious particularity lies perennially blurred, if not entirely non-existent.¹²³ In the case of India, the principle of constitutional equality – an abiding marker of modern Indian nationhood – could neither bridge the majority-minority divide nor preempt Muslim minority exclusion and discrimination in postcolonial India.¹²⁴ Shaheen Bagh underscored this limitation; the protest also foregrounded the unstable, unsettled and contingent character of postcolonial constructs of nation and citizen – among the core markers of Indian modernity – and the struggle of Muslim women (and men) for inclusion and belonging within both.

Furthermore, the above discussion draws attention to the importance of history, in particular the histories of Indian Muslims contesting their post-colonial characterisation as subjects with lives and choices circumscribed by religion. Shaheen Bagh reaffirmed *burqa* and *hijab*-clad Muslim women

¹²³ Marcel Stoetzler captured liberalism's perennial contradiction: "if you declare you are not different from your fellow citizens, someone will show you are different... if you declare yourself different, someone will tell you that you ought to grow up and become an equal member of society." Marcel Stoetzler, *The State, the Nation and the Jews: Liberalism and the Antisemitism Dispute in BISMARCK'S GERMANY*307 (University of Nebraska Press, 1st ed., 2008).

¹²⁴ Recent scholarship foregrounds parallels between the 1938 Kristallnacht anti-Jewish pogrom in Nazi Germany and the 2002 anti-Muslim pogrom in the state of Gujarat. See Baijayanti Roy, *The Long Shadow of Kristallnacht on the 'Gujarat Pogrom' in India? A Comparative Analysis* in WOLF GRUNER, STEVEN J. ROSS (EDS.), *NEW PERSPECTIVES ON KRISTALLNACHT: AFTER 80 YEARS THE NAZI POGROM IN GLOBAL COMPARISON* (Purdue University Press, 1st ed., 2019). See also PARVIS GHASSEM-FACHANDI, *2002 POGROM IN GUJARAT: HINDU NATIONALISM AND ANTI-MUSLIM VIOLENCE IN INDIA*, (Princeton University Press, 1st ed., 2019); In 2022, Gregory Stanton, President, Genocide Watch warned that genocide against Muslims in India could occur. India Genocide Warning, GENOCIDE WATCH (Mar. 1, 2022), <https://www.genocidewatch.com/single-post/india-genocide-emergency>; See also Debashish Roy Chowdhury, *Is India Headed for an Anti-Muslim Genocide?* TIME (Oct. 4, 2021), <https://time.com/6103284/india-hindu-supremacy-extremism-genocide-bjp-modi>.

and indeed all Muslim women as self-aware moral and political subjects possessing voice, agency and critical political understanding. In effect, Shaheen Bagh was an emphatic riposte to what Aamir Mufti appropriately terms as “*the ‘torments’¹²⁵ of a postcolonial Indian modernity with the Muslim as the default negative Other.*”

Finally, Shaheen Bagh’s Muslim women demonstrated the limits of a reified secular imagination anchored in homogeneity (sameness, abstract equality) and a refusal to engage with, much less accept (Muslim) difference. It suggests a need for re-imagining national, civic and constitutional imaginaries in ways where (minority) difference is *not* synonymous with exclusion, discrimination or domination; where, as Marcel Stoetzler, a Jewish scholar writes, “*people can be different without fear.*”¹²⁶

Can there be a new image of India where Muslim, citizen, and modernity are not mutually irreconcilable categories? In order to answer this question, it may be useful to recall Tagore’s words regarding India’s fateful replication of European history: “*We in India must make up our minds that we cannot borrow other people’s history and that if we stifle our own we are committing suicide...Europe...simplified her problem [of difference] by almost exterminating the original population...But India tolerated difference...and that spirit of toleration has acted all through her history.*”¹²⁷ Modern India’s attempt to superimpose homogeneity on diversity and difference was, as Parasher-Sen maintains, at odds with India’s historical experience of “*multi-lingual, multi-ethnic, multi-religious dialoguing...in the performances of everyday life.*”¹²⁸

Indeed, India’s history of diversity and plurality can arguably constitute the basis of a new non-national Indian civic and constitutional imaginary – one that blends the modern principle of constitutional equality with historically inherited and empirically lived ‘different’ identities – in this case a Muslim minority identity - where a Muslim is not shunned for being Muslim but is accepted as a Muslim and as a citizen. This would necessarily mean

¹²⁵ MUFTI, *supra* note 19, at 78.

¹²⁶ STOETZLER, *supra* note 20, at 308.

¹²⁷ TAGORE, *supra* note 5, at 71 & 144.

¹²⁸ Aloka Parasher-Sen, *The Whole and the Particular; Negotiating Difference in Indian Civilization*, in MOJTABA MAHDAVI AND W. ANDY KNIGHT (EDS.) IN TOWARDS THE DIGNITY OF DIFFERENCE? NEITHER ‘END OF HISTORY’ NOR ‘CLASH OF CIVILISATIONS’ (Routledge, 1st ed., 2016).

MUSLIM WOMEN IN INDIA: HISTORY, MINORITY AND DIFFERENCE

discarding Eurocentric liberal-feminist emancipation-through-sameness narratives and affirmation of an *Indian* imaginary of India as a plural mosaic that “does not need an underlying unity...to hold people together. It needs mechanisms to make integration possible without denying those characteristics that define the essential life of its [diverse] component groups.”¹²⁹

¹²⁹ EMBREE, *supra* note 31, at 64-65.