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Governing Religion: Colonial Legality, State, and The Case of Hijab in India

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Abstract

In March 2022, India's Karnataka High Court ruled that the wearing of hijab by Muslim students was not an 'essential religious practice' under Islam. This raised a question of authority to interpret Islamic law, as the judges effectively decided what constitutes Islam legitimately and what does not. To trace the genealogy of these modes of governing religion, the paper examines three connected moments—the Karnataka hijab case, the Indian Constituent Assembly debates of 1946-1949, and the codification of Islamic law by the British colonial government—as instances in which the authority of the state emerges in judicial, constitutional, and colonial registers respectively. Across these sites, using genealogical method, this article shows how the state has continuously reorganized Islamic legal and ethical traditions into *manageable* forms, producing self-organizing Muslim subjects. I argue that the court's capacity to define and limit Islamic norms is structurally embedded in the grammar of the modern state and its logic of governance, inherited and reconfigured from colonial techniques of defining and regulating religion.

Key Words: State, Islamic law, hijab, governmentality, colonialism

Introduction

In March 2022, India's Karnataka High Court ruled that the wearing of the hijab by Muslim students in public educational institutions was not an 'essential religious practice' under Islam.[1] The judgment, grounded in the doctrine developed by Indian constitutional courts to regulate religion, did more than adjudicate a dress code. It claimed for the state the authority to interpret religion and to define what constitutes Islam, inadvertently assuming the role of a *faqih* or *mufti*. Approaching law as a political technology that enables the state to regulate religious difference and manage religious subjects, I consider the verdict as not only a legal dispute but also symptomatic of a deeper political problem of how modern nation-states acquire a form of discursive power, hermeneutic control, and definitional authority over religious life.

While the judgment can certainly be read as discriminatory, as several scholars[2] have argued, I redirect attention to the state's structural and secular techniques of governing religion. The verdict of the Karnataka High Court, in this sense, necessitates a genealogical inquiry into the historical processes through which the modern state came to acquire a distinct authority to determine what constitutes 'Islamic'. For this purpose, this paper turns to three distinct yet connected moments: the hijab ban in Karnataka, the Constituent Assembly debates of 1946-1949, and the British colonial codification of Islamic law. The hijab judgement and the court's justifications point to how the state has come to determine the content, scope, and legitimacy of Islamic practices, thereby subordinating religious meaning to categories such as 'public order', 'discipline', and 'essentiality'. The Constituent Assembly debates reveal an earlier instance of institutionalisation of a regulatory logic in which religious difference, particularly Muslim legal autonomy, was framed as

[1] For details about the controversy surrounding the hijab ban in Karnataka, see Yasir (2022), Frayer (2022), and Anand (2023).

[2] See, for instance, Ahmed (2022), Ahmad and Zulkiffle (2022), and Acharya (2025).

something to be tolerated but supervized and regulated by the state. Likewise, the colonial formation of Islamic law had already dislocated it from its plural interpretive traditions, embedding them within the bureaucratic rationality of colonial governance.

Taken together, these three moments represent the judicial, constitutional, and colonial portraits of the emergence of law itself as a site of production of governable religious subjects in India, while enabling the state to become the arbiter of sharia. Across these sites, genealogy allows us to trace how the authority to define Islam has enabled the state to determine which practices are legally permissible and which forms of religious life are intelligible, legitimate, and admissible in the public sphere. The argument, therefore, foregrounds the modern state's constitutive colonial rationale, locating the production of particular shifts in the state's authority to define religion.

Hijab and the Secular Problem

In January 2022, a government-run Pre-University College in Udupi, Karnataka, barred Muslim students from wearing the hijab, citing it violated the institution's uniform policy. Muslim girls were stopped at the gates of their college and were asked to remove their hijab to enter the college. Muslim students protested, asserting that wearing the hijab was both an integral part of their faith and a constitutional right. As the incident gained attention, some Hindu students in nearby institutions began protesting by wearing saffron shawls, arguing that if the hijab is allowed, they too should be permitted to use 'religious attire'. This escalated into widespread protests using saffron shawl across institutions in South Karnataka in districts such as Dakshina Kannada and Udupi.[3]

[3] For details of various incidents, see India Today (2022), The Quint (2022a), The Telegraph India (2022), The Quint (2022b), The Guardian (2022), and The New York Times (2022).

College administrations, in the name of defusing tensions, enforced stricter uniform policies, barring both hijab and saffron shawls.

In response, the Karnataka government issued an order mandating a uniform dress code prescribed by the state or management of schools. In the absence of a prescribed dress code, the order directs that "clothes that *do not threaten equality, unity, and public order must be worn*" (Karnataka Education Department, 2022; emphasis mine). This directive led to stricter enforcement of uniform policies, even in colleges, which had previously allowed hijab, and Muslim girls suddenly found themselves barred from classes. The hijab ban resulted in over 400 Muslim girl students being suspended, dropping out, or denied entry to college.[4] An incident at Mandya on 10 February 2022 further inflamed tensions when a Muslim student, Muskan Khan, was heckled by a group of male students chanting *Jai Shri Ram*. Her defiant response, shouting *Allahu Akbar*, with her fists raised, went viral, drawing national and international attention.[5]

Following this, Muslim students approached the Karnataka High Court and argued that the Karnataka government's order and the school management's actions violated Articles 14, 19, and 25 of the Indian Constitution, which ensure equality before law, freedom of speech and expression, and freedom of religion, respectively. While the case was pending, the Karnataka government issued an order restraining students from wearing "saffron shawls (*bhagwa*), scarfs, hijab, religious flags or the like within the classroom".[6]

Under the Constitution of India, even though Article 25 ensures "freedom of conscience and free profession, practice and propagation of religion", subclauses (a) and (b) of Article 25(2) empower the State to make any law restricting or regulating the religious practice in the interest

[4] See, People's Union for Civil Liberties – Karnataka (PUCL) (2023, 61).

[5] See, Qureshi (2022).

[6] Circular No. MWD 02 MDS 2022 dated 16-02-2022 issued by the Ministry of Welfare, Hajj and Waqfs Department, Government of Karnataka.

of social welfare and reform (Constitution of India, 2024). Following this, the Karnataka High Court emphasized that "the free exercise of religion under Article 25 is subject to restrictions imposed by the State on the grounds of public order, morality and health" (*Aishat Shifa v. State of Karnataka & Ors.,* 2022, 48). Thus, the court used the provisions within the Constitution to restrict religious expression, even without clearly pointing out the threats caused by the hijab to the public order and morality.

While the Court used the subclause in Article 25 to impose restriction on the right to exercise religion, the verdict positioned the Court as the arbiter of belief/conscience by stating that "there is no evidence that the petitioners chose to wear their headscarf as a means of conveying any thought or belief on their part or as a means of symbolic expression" (*Aishat Shifa* 2022, 80-81). Thus, the court clearly seeks evidence and proof for belief and conscience, making belief a matter of public contention. As Asad (2023) proposes, while the modern idea of a secular society pushed religion into a matter of the private domain, it simultaneously translated the individual's ability to believe into a legal right, the right to practice religion, making religion a matter of the public domain.

Moreover, the Court was quick to distinguish the individual from society and to privilege the latter over individual rights. It argued that in balancing individual rights against the interests of the community, restrictions could be imposed even on fundamental rights. The 'community' invoked here is not a religious collectivity such as the Muslim community, but the broader entity of society, where the individual is addressed not as a member of a religious community but as a citizen. In this formulation, the only relationship recognized between individual and state is that of citizenship, while religion is relegated to a subordinated position within this new relational order. This citizenship-based framing authorizes the state to regulate religious expression in the name of the civic community.

Yet, the state cannot entirely dissolve the tension that emerges when confronted with religious claims. It is precisely here that the practice of secularism in India reveals both its complexity and its ambivalence. On the one hand, it insists on citizenship as the singular mode of relation to the state, while on the other, it cannot prevent religion from re-entering the domain of the state as a site of contestation. Within this tension, the category of minority acquires its force as a critical and contested marker in state discourses. For instance, we could see that the hijab has been redefined as a constitutional choice as part of personal liberty instead of a religious obligation.[7] However, the court forces the Muslims to reaffirm the religious argument rather than a claim of personal liberty. In other words, Muslims could not become citizens enough to have personal liberty, and are instead perceived merely as a religious community.

In this way, Muslims are simultaneously marked as religious and yet are demanded to shed their religiosity and become citizens. I consider this paradox as inherent to the secular state in a liberal democracy. This problem becomes more evident in the Karnataka High Court's anchoring on secularism, where it reiterated the doctrine of 'positive secularism', portraying it not as an antithesis of religious devotion but as an expression of religious tolerance. It affirmed that the state does not discriminate on the basis of religious identity. However, it has also made religious expression subject to regulation under the concepts of public order and morality. Further, the Court emphasized the non-sectarian character of the school uniform, claiming it to be 'religion-neutral', and thereby treating all students as a homogenous class within the framework of constitutional secularism (*Aishat Shifa*, 2022, 96). Since the dress code applies equally to all students irrespective of faith, the Court argued, it cannot be regarded as sectarian. Equal applicability thus became the benchmark for maintaining secularism. But this reasoning presupposes a

[7] For a detailed analysis of the such reorientations in the Muslim discourse after 1990s, see Kiliyamannil (2022; 2023).

pre-defined, equal, and homogenous citizen-body upon which such uniformity can be imposed.

The Court was reluctant to recognize the hijab as a form of reasonable accommodation, unlike the Sikh kirpan, which is constitutionally protected as a fundamental right. Instead, the judges opined that permitting the hijab would create two categories of students: those who wear the uniform *with* the hijab and those *without*. In a rather cursory observation, the Court claimed that this would "establish a sense of 'social-separateness'" and "offends the feel of uniformity which the dress-code is designed to bring about amongst all the students regardless of their religion & faiths" (*Aishat Shifa*, 2022, 106). Based on this reasoning, the Court subordinated fundamental rights to the logic of reasonable restriction rather than extending them through reasonable accommodation. Individual liberty was confined to the domain of the home, while in what the Court described as "qualified public spaces", religious freedom was curtailed in the interest of "discipline & decorum and function & purpose" (*Aishat Shifa*, 2022, 104).[8] Secularism, in this formulation, not only regulates religion but also enforces uniformity. As Asad (2006) and Mahmood (2017) note, secularism gives the modern state the power to refashion the religious life, laying down conditions on how religion is to be understood and practiced.

The Court's verdict also underscores the authority the Court arrogates to itself, not only in delineating the spatial boundaries of religion, but in defining religion itself. In the next section, I turn to a closer analysis of the case to further unpack this problem.

[8] On 15 March 2022, the High Court upheld the ban, ruling that the hijab was not an essential religious practice in Islam. The case went to the Supreme Court of India, which declined urgent hearings of appeals challenging the High Court's decision. In October 2022, a two-judge bench delivered a split verdict, in which one Judge upheld the High Court ruling, while the other argued it was erroneous. The matter was submitted to the Chief Justice to refer it to a larger bench, which is still pending.

Interpreting Religion: The Problem of Authority

In adjudicating whether the hijab constitutes a fundamental right, the Court quickly shifted the discussion to whether it qualifies as an 'essential practice' of Islam. According to its verdict, five conditions must be satisfied for a practice to be deemed essential to a religion:

> (i) Practice should be fundamental to religion and it should be from the time immemorial. (ii) Foundation of the practice must precede the religion itself or should be co-founded at the origin of the religion. (iii) Such practice must form the cornerstone of religion itself. If that practice is not observed or followed, it would result in the change of religion itself and, (iv) Such practice must be binding nature of the religion itself and it must be compelling (*Aishat Shifa*, 2022, 55).

These five conditions did not arise from the reading of any Islamic jurisprudential texts, which classify the human action as *fard* (obligatory), *haram* (prohibited), *mubah* (permissible), *makruh* (discouraged), etc. On the contrary, by stipulating these criteria, the Court constructs a narrow bottleneck through which religious subjects must pass in order to secure legitimacy for their practices. Consequently, the Court does not merely adjudicate disputes but effectively sets the conditions of religion itself. The authority to define what counts as religious, and what does not, is thereby displaced from the community and scholars of religion to the apparatus of the state, binding religious subjects not only to the tenets of their faith but to the state's juridical framework for seeking legitimacy.

This highlights the predicament of the contemporary Muslim subject, whose religiosity is disciplined and increasingly requires validation from the state. As Sethi (2019, 110) notes, there is an "increasing fetishization and reification of law", which renders legal

claims essential not only for belonging but also for legitimizing the very existence. In this grammar of belonging, religious subjects are forced to seek validation not only from God, but also from courts, to legitimize their belonging and to establish whether a practice is deemed essential to their faith.

During the hearing of the case, the petitioners submitted different Quranic commentaries to argue that the hijab is an essential practice as ordained by the God. However, the High Court specifically chose the interpretation from *The Holy Quran: Text, Translation and Commentary* by Abdullah Yusuf Ali, which interprets the hijab as a contextual necessity rather than a universal obligation. It is crucial to understand that the judges chose a particular commentary of the Quran over others. By its conclusion that the wearing of hijab is at best 'recommendatory' and not mandated (*Aishat Shifa*, 2022, 65), the Court *de facto* enters into a terrain of interpreting sharia and issuing religious edicts. This judicial intervention transforms a contested field of religious interpretation into an exercise of state power, where secular courts could codify and limit religious meanings so as to determine their legitimacy in public life. In other words, by interpreting Islam *for* Muslims, secular judges effectively assume the role of 'modern muftis' in determining what Islam ought to be!

Such a move is part of organizing and regulating religious practices by the state by embedding them within the test of essential religious practices. By declaring that "a practice claimed to be essential must be such that the nature of the religion would be altered in the absence of that practice" (*Aishat Shifa* 2022, 68), the judgment sets the criteria by which religion itself is recognized by law. Further, by arguing that hijab is a cultural practice and distinguishing cultural from religious (*Aishat Shifa*, 2022, 70), the Court concludes that hijab is not an essential religious practice in the Islamic faith. Thus, the Court ventures into stipulating what are the mandates, permissibility, and prohibitions in Islam. By relocating hijab from faith to culture, the secular power of Court is fundamentally

involved in defining religion, delimiting its public presence, restricting minorities, and espousing majoritarian values.[9]

While arguing against the petitioners, the Advocate General rebutted the claim that hijab is an essential Islamic practice by stating that some Muslim women do not cover their heads. Accordingly, an optional practice cannot be considered obligatory and, therefore, cannot be deemed essential. The Advocate General contended that recognising the hijab as an essential practice would impose it on non-covering Muslim women, thereby infringing on their right to practice religion as they choose. Heterogeneity of practices and opinions within the Muslim community was instrumentalized as an argument against the opinion of considering hijab as essential. Acknowledgement of the multiplicity of opinions was interpreted not as theological and jurisprudential differences, but as an assertion of the non-obligatory nature of the hijab. This recurring use of heterogeneity has long served as a rhetorical trope for the state – and some scholars – to justify interventions in Islam, as though Islam lacks an ontic manifestation. However, as Salman Sayyid asserts, "all the particular expressions of Islam exist as part of a singular Islam: at the most, we have rival projects to interpret a singular Islam" (Sayyid, 2014, 8). So, considering hijab as essential is equally, and prominently, an important legal verdict within Islamic jurisprudence, which the Karnataka hijab verdict bypassed.

This debate echoes the question posed to Ismail Sahib in the Constituent Assembly, when he argued for Muslim personal law as a fundamental right. His position was countered on the grounds that not all Muslim communities desired to be governed by it. I analyze this Constituent Assembly debate in the following section to briefly situate

[9] Shajahan (2024) has shown how the uses of "culture" enables the judiciary to legitimize framing Hindus through both religious and non-religious vocabularies, and, at the same time, to reaffirm itself as a secular sovereign whose power extends asymmetrically over other religious traditions.

how such counter-arguments were mobilized historically to contest the demand for personal law protections.

Constituent Assembly Debates and the Self-Governing Muslim Subject

The Draft Constitution prepared under the chairmanship of B.R. Ambedkar was formally presented to the Constituent Assembly of India[10] on 4 November 1948. This draft provided the initial framework for discussion, with its provisions subjected to detailed scrutiny, amendment, and debate over the course of the following year. Central to these debates was the articulation of fundamental rights, including the scope of religious freedom and the status of personal laws, which have significantly affected the postcolonial minoritization of Muslims in India.[11] This section briefly analyzes the Constituent Assembly debates and their implications for Muslim minorities to highlight the specific ways in which the grammar of Muslim political thought has been articulated and reformulated in these contexts.

The Draft Constitution (1948) compiled a section titled Right of Equality under the Fundamental Rights. Article 13 in the Rights of Equality section, guaranteed citizens freedoms of speech, assembly, association, movement, residence, property, and profession. On 1 December 1948, Mohamed Ismail Sahib[12] moved an amendment to Article 13, demanding the addition of a sub-clause making the right "to follow the personal law of the group or community to which he belongs or professes to belong" as

[10] The Constituent Assembly of India sat between 1946 and 1950 and was entrusted with the task of framing the Constitution of independent India.

[11] For a detailed history of the making of the Indian constitution, development of constitutional institutions and concepts, and its formative stages in the colonial history, see Keith (1935), Pylee (1967) Austin (2021), Jois (2004), Singh (2005), Tejani (2007), and Bajpai (2011).

[12] Muhammad Ismail Sahib (1896 - 1972) was the leader of All India Muslim League, and after the formation of Pakistan, he became the first president of the Indian Union Muslim League in March 1948. He served as a member of Constituent Assembly from 1948-1952, being elected from Madras.

a fundamental right (Constituent Assembly Debates [CAD], Vol. 7, 721). In support of the amendment, he argued that:

> Personal law is part of the religion of a community or section of people which professes this law. Anything which interferes with personal law will be taken by that community and also by the general public, who will judge this question with some common sense, as a matter of interference with religion. (CAD, Vol. 7, 722)

Ismail's demand framed personal law as integral to religion and religious freedom as a fundamental right. According to the Draft Constitution, instituting a right under fundamental right would protect it from unhindered state intervention of making any law into it.

Maulana Hasrat Mohani, a Muslim socialist, ferociously supported the amendment introduced by Ismail. He said:

> There are three fundamentals in their [Muslim] personal law, namely, religion, language, and culture which have not been ordained by human agency. Their personal law regarding divorce, marriage and inheritance has been derived from the Qoran [Quran] and its interpretation is recorded therein... Mussalmans [Muslims] will never submit to any interference in their personal law, and they will have to face an iron wall of Muslim determination to oppose them in every way. (CAD, Vol. 7, 759-760)

Mohani's forceful argument against intervention in personal law followed the logic articulated by Ismail, insisting that that Islamic law derives its authority from the Quran rather than from the decisions of a ruler or the legal mechanisms of the modern state. Another Assembly member, Kazi Syed Karimuddin, likewise defended the right to abide by personal law, arguing that personal law forms an integral part of religion

(CAD, Vol. 7, 756-57). More broadly, Muslim members of the Constituent Assembly repeatedly demanded freedom from the state's interference in their religious affairs.

Mohani's statement implies that religion, language, and culture constitute the crux of personal law, with marriage, divorce, and inheritance emerging as the primary practices governed by it. The particular circumscription of these domains indicates that the demand was not to secure the application of sharia in its full juridical and ethical amplitude, rather to preserve the domain of personal law with its limited autonomy, securing it from outside intervention. However, it is clear that, as Hirschkind (1997) notes, even personal activities are conditioned on modern politics and its forms of power. Sharia is, thus, effectively relocated from its broader ethical-juridical ecosystem and rearticulated within the grammar of the modern nation-state, compromising its boundaries, limiting it to the personal domain of marriage, divorce and inheritance.

In response to the amendment proposal by Ismail and others, then-Minister of Law Ambedkar argued that protecting personal law "would disable the legislatures in India from enacting any social measure" and, thereby, would obstruct social progress (CAD, Vol. 7, 781). It is evident that Ambedkar and Ismail were arguing from different premises, where the former's stance was driven by the need for reforms in Hindu personal law due to its discriminatory practices, while latter's concern was about the state's excessive authority to legislate in matters of Islamic practices. Countering Ismail's amendment, Ambedkar stated that the definition of religion must be limited to specific beliefs, rituals, and ceremonials, and should not be accorded an 'expansive jurisdiction' covering the whole of life, such as laws relating to succession (CAD, Vol. 7, 781). While Ambedkar's inhibition to the European model of secularism, where religion is more or less concerned with ceremonials and rituals alone, is explicit, one of the central tensions here is the state's authority to legislate.

Ambedkar opined it would be an unwise and tyrannical political action to not consult the Muslim community on reforming the personal law. Yet, he affirmed the power of the state to 'legislate' and 'regulate' (Ambedkar, 2014, 1169). He argued that the deliberation is limited in the context of the 'exercise of the power' and not in the power of the state to legislate. Thus, he stressed that what "the State is claiming in this matter is a power to legislate" (CAD, Vol. 7, 781). In contrast, the Muslim demand was critical of the legislative power itself than merely of its exercise. Mamdani has rightly pointed out this particular problem with modern democracies, where "members of the permanent minority may vote, but they cannot exercise sovereignty" (Mamdani, 2020, 329). This occurs precisely because the minority rights are perceived as a goodwill or concession of the permanent majority. This moment recalls the problem discussed in the Karnataka hijab verdict, regarding the authority to regulate and interpret religion.

Ismail's amendment was not adopted, so on 6 December 1948, he proposed a similar amendment to Article 19 under the section Rights Relating to Religion in the Draft Constitution. Placed under the Fundamental Rights, Article 19 guarantees freedom of conscience and the right to profess, practise, and propagate religion, but subject to public order, morality, and health. Clause 2 under Article authorizes the state to make any law to regulate or restrict "any economic, financial, political or other secular activity which may be associated with religious practice" (Constitution of India, 1948). Here, a clear distinction is made between the 'secular' and 'religious' aspects of religion. It points to the state's two modes of relationship with religion: a strict separationist conception of the state-religion relationship, and a model that combines equal respect with regulatory intervention.

While Assembly members such as K. T Shah and Tajamul Hussain advocated a 'no-concern' theory, which squarely distinguishes between religion and secularism, the majority of the members in the Assembly favoured a principled state engagement with religion. Public order,

morality, reform, and equality emerged as the principles on which the state can engage in religion. This was marked not by the formal adoption of the term 'secular' but by the institutionalisation of the state's power to regulate religion based on these principles. As a matter of course, when religious beliefs and practices supposedly engaged with any of these principles, they were categorized as 'secular aspects of religion,' making them open to legislative intervention. This reflects what Talal Asad (2003) called "a secular formula for privatising religion". The freedom in question pertains to the religious aspect, while the secular aspect is already under the control of the state.

Ismail's proposed amendment demanded adding a new clause, which would state that "nothing in Clause 2 of this article shall affect the right of any citizen to follow the personal law of the group or the community to which he belongs or professes to belong" (CAD, Vol. 7, 830). While making his argument in favour of the amendment, Ismail explained that personal law is confined to the limits of families and communities:

> It is a family practice and in such cases as succession, inheritance and disposal of properties by way of *wakf* and will, the personal law operates. It is only with such matters that we are concerned under personal law. In other matters, such as evidence, transfer of property, contracts and in innumerable other questions of this sort, the civil code will operate and will apply to every citizen of the land, to whatever community he may belong. (CAD, Vol. 7, 830)

Ismail divided the law into civil law and personal law, with sharia applicable only in the latter. As noted above, Ismail's arguments in the Constituent Assembly reflected an attempt to preserve a limited domain of personal law within the corpus of sharia, in matters regarding marriage, divorce, and inheritance.

Ismail represented the paradox of minority Muslim subjects in the modern nation-state contexts. On the one hand, he followed the division of secular and religious aspects of religion, as prescribed in the Draft Constitution.[13] He expressed the willingness of Muslims to accept the general civil code in matters of evidence, property transfer, contracts, and so on, unlinking them from sharia. On the other hand, Ismail sought to exempt personal law from being categorized as a 'secular' aspect of religion, and thereby preventing state interference (CAD, Vol. 7, 831). The arguments of Ismail and Mohani represent efforts to preserve the last vestiges of sharia, particularly in family matters. These attempts gesture towards moments where the theological resurfaces within the legal and political domains, representing efforts to reclaim Muslim autonomy. In this sense, the demand to secure personal law constitutes a political act that disrupts the secular ordering of the nation-state.

Put differently, it is through claims to personal law, which is already a constrained articulation of Muslimness, that the Muslim political has found expression in postcolonial contexts. Ismail and Mohani challenged the state, yet they did so by employing the state's own legal vocabularies and confining to the limits outlined by the state. In this interplay, the state and the minority claims affirm each other while simultaneously negating each other's claims, creating a predicament of mutual affirmation and cancellation. This tension, thereby, expands the very notions of democracy and citizenship.

As mentioned above, the state's capacity to interfere in the so-called secular domains of religious faith and practice invoked the problem of public order, morality, and health. Following this logic, Muslim personal law was excluded from the purview of fundamental rights. In the same way, in the Karnataka hijab case, the Muslim claim for a distinct dress code,

[13] To read the constituent Assembly's separation of secular and religious aspects of religion through the lens of Sherman Jackson's (2024) idea of 'Islamic secular' would be compelling, but beyond the scope of this paper.

without explicitly mentioning hijab, is framed as a threat to equality, unity, and public order. It states that "the government reserves the right to issue appropriate directions to schools and colleges *to ensure maintenance of public order*" (Karnataka Education Department, 2022; emphasis mine). Here, the state claims its authority to make law to maintain public order, ostensibly aimed at diffusing communal tensions stemming from the hijab and saffron shawl controversy.[14] In this way, the rhetoric of public order and good governance becomes a mechanism for disciplining minorities. Consequently, the state defines the parameters of order, and, in doing so, orders the Muslim.

Following a genealogical inquiry, I identify the invocation of public order and good governance to restrict certain religious practices as a colonial problem inscribed in the body politic of the Indian nation-state. Further, as many scholars have noted, the attempts to delineate the boundaries of religion, confining the practice of sharia to the domain of 'family law', were introduced by the British legality in the nineteenth century in India. The codification of Islamic law texts, combined with the colonial belief in European civilisational superiority and interpretative authority, enabled the British to use legal reforms as a tool for governing populations. The postcolonial nation-state perpetuates the same strategy to govern its citizen-subjects, as we see in the Karnataka High Court hijab verdict. Hence, in the next section, I will briefly address colonial intervention in law in general and Islamic law in particular.

Colonial Legality: Governmentality as Arbitrations of Law

The British considered it their rightful authority to establish their courts of justice where they had acquired the territory. During the rule of King George II, the Act for the Better Administration of Justice at Calcutta,

[14] The very act of wearing a saffron shawl by certain students was intended to incite tension and was used as a means of protest against hijab. Kiliyamannil (2024) has analysed how the disruption of public order works as a strategy of Hindutva.

Madras, and Bombay was passed in 1790. This was the inauguration of a new system of law and judiciary in India. However, there were some exclusions under the Act:

> Nevertheless, their inheritance and succession to lands, rents, and goods, and all matters of contract and dealing between party and party, shall be determined, in the case of Mahomedans [Muslims], by the laws and usages of the Mahomedans, and where the parties are Gentoos [Hindus], by the laws and usages of the Gentoos... and where one of the parties shall be a Mahomedan or Gentoo, by the laws and usages of the defendant. (*The Law Relating to India and the East-India Company*, 1855, 118)

The Act clearly sketches the nature of law followed by the British, which regularizes the application of different codes and laws for different religious groups. However, the distinction in the law was limited to "inheritance and succession to lands, rents, and goods, and all matters of contract and dealing between party and party". This points to the early attempts to limit the sphere of influence of religious, specifically to what was later called the private sphere.

The British attempts to preserve the traditional practices among the natives did not arise from their consideration for the native culture. The British appraised the importance of customary laws in the everyday lives of the natives, in which a better practice of government was possible not by eliminating the customary laws but by re-instituting them. As a clear validation of such a strategy, Hamilton, who is known for his English translation of *Al-Hidayah*,[15] suggests that to help the permanency of

[15] *Al-Hidayah fi Sharḥ Bidayat al-Mubtadi*, the jurisprudential text written by twelfth-century scholar Burhan al-Din al-Marghinani, has become one of the most influential texts in the Hanafi school of jurisprudence. The text was translated into Persian and then to English by Charles Hamilton. Published in 1791, it remained the primary book of law for interpretation of *shariah* by the British colonial judges.

effective foreign dominion, the British should preserve the native's "ancient established practices, civil and religious" and protect the natives "in the exercise of their own institutions" (Hamilton, 1791, iv). He argued that:

> For however defective or absurd these may in many instances appear, still they must be infinitely more acceptable than any which *we* could offer; since they are supported by the accumulated prejudice of ages, and, in the opinion of their followers, derive their origin from the Divinity himself. (Hamilton, 1791, iv)

Following this rationale, the British East India Company adopted separate rules for governing the private domains of Muslims and Hindus. Warren Hastings Regulation of 1772[16] ensured the validity of such a system of law and justice. It was re-enacted in the Regulation of 1780, which prescribed the use of laws of the Quran for Muslims and the Shastras (Hindu scriptures) for Hindus "in all suits regarding inheritance, marriage, and caste, and other religious usages or institutions" (in Fyzee, 1963, 412). By permitting Islamic law in this limited domain, the British also stated that Islamic law was not applicable "except in the matters to which it is declared applicable" (Mulla, 1905, 1). Through these maneuvers, the British produced a procedural code for the conduct of the law of religious communities, and controlled the limits of applicability of religious law.

This gave the British the authority to interpret Islamic law, in the interest of better execution, substantially reducing the authority of the *mufti* and the *qadi*. In effect, the East India Company became the administrators of Islamic law, assuming legitimacy from a superior sense of justice. The British maintained that they could administer any religious

[16] Warren Hastings's judicial reforms of 1772, also known as the Plan of 1772, included the establishment of Mofussil Diwani Adalats in each district of Bengal, Bihar, and Orissa, which were aimed at reforming the justice system in India.

laws by merely studying their texts.[17] For the British, text was a synonym of the tradition. It gradually led to the formation of Anglo-Mohammedan law and the stagnation of sharia. To administer in this mode is also to exert authority. As Kugle (2001) argues, by the rhetoric of Muslims being governed by Islamic law, the British actually governed Muslims. This strategic deployment of legal mechanisms, on the one hand, established and normalized British sovereignty in India, while on the other hand, helped the British to introduce European rationale and reasoning into the everyday lives of Muslims.

What was distinctive about colonial codification was not only the subordination of Islamic law to state authority, but also the reduction of a historically plural and dialogical tradition into fixed rules. As Hallaq (2009) contends, the practice of law in Islamic history maintained interpretive diversity, with the *ulama* and *qadi* offering divergent – and sometimes conflicting – opinions and context-sensitive rulings that allowed for flexibility and debate. This plurality, internal to Islamic law, by no means implied an absence of attempts by scholars to codify the corpus of Islamic law.[18] However, as Kooria (2025) notes, the codified authoritative rules were not consistently enforced or followed. On the other hand, colonial administrators considered such interpretive multiplicity as inconsistency and as lacking modern standards. They applied the law uniformly, giving less weight to the context, through selective translation, extraction, and standardisation.[19]

Through British colonial legality, Islamic law was constrained, if not suspended. Islamic law was restricted in its application as Muslims had to

[17] Kozlowski (1997) and Kugle (2001) pointed to the nature of the translation of Islamic law and system into the British vocabulary, which was incapable of understanding the philosophy underlying Islamic law in its own terms.

[18] For instance, as Kooria (2025) argues, Abu Ḥamid al-Ghazali (d. 505/1111) attempted to codify the Shafi school of jurisprudence by presenting concise, structured and authoritative rules on various matters.

[19] For details about the changes in the legal practices, particularly in Islamic law, after British conquest of Indian subcontinent, see Anderson (1993), Ivermee (2014), and Siddiqui (2025).

resort to civil and customary law. Even in matters related to the supposed domains of personal law, civil, and customary law was enforced as the issue had implications in other domains of civil or criminal law. That is to say, the withdrawal and dissolution of Islamic law was primary to what scholars apprehended as the formation of Muslim personal law. In other words, the very formation of the domain of personal law was, in fact, a withdrawal of Islamic law from other domains and, by implication, from the personal domain as well. This withdrawal is implicated in the political as a loss of sovereign power to interpret and enforce laws and adjudicate and arbitrate the judicial process. Thus, the emergence of personal law is the process of governing the Muslim political, effectively constraining the sovereign pronouncements.

These changes in the legal regime in the late eighteenth and nineteenth centuries created certain modes of governmentality, which became the preconditions for the Indian nation-state in the later period. In the Constituent Assembly, we saw the reemergence of the issue of the state's authority in defining the boundaries of religion. I consider this to be an extension of the British practice of 'define and rule'.[20] It categorized and distinguished the religious, civil, political, and secular domains. This act of differentiation, definition, and ultimate restriction facilitated the Constituent Assembly's construction of a Muslim subject who is self-disciplined and conforms to the norms of the state.

Hence, an understanding of the colonial redefinition of sharia – its restriction to the personal domain and its alignment with the colonial idiom of 'good governance' – is crucial for situating the Constituent Assembly debates on the division between the secular and the religious within religion, as well as the emergence of public order and morality as governing principles of this division. Within this colonial predicament, which continues to override and shape the modern nation-state today, Ismail's attempt to secure personal law as a Fundamental Right was

[20] I borrow the usage from Mamdani (2012).

already inscribed within the grammar of governing religious subjects. These very debates and anxieties re-emerged, in a transformed juridical idiom, during the arguments in the Karnataka hijab case. The genealogical emergence of the Karnataka High Court's verdict on the Hijab Case can therefore be situated within the grammar of colonial governance, structured through the language rights and citizenship in the modern nation-state.

Conclusion

So far, I have examined the Karnataka High Court's verdict on the hijab and its implications in defining, regulating, and restricting Islamic practices. Since my intention is not to engage directly in the interpretive debates on hijab itself, I have refrained from entering into a sustained dialogue with the substantial scholarship on the subject, such as Ahmed (1992), El Guindi (1999), Göle (1996), Shirazi (2001), Scott (2007), Mahmood (2005), and Arafath & Arunima (2023).[21] Nevertheless, I acknowledge the importance of such works and the possibilities they open for further analysis. I also take the comparative potential of examining European debates on *laïcité*, public space, and Muslim belonging, with their attendant implications for human rights and international law, as articulated in the works of Bowen (2007), Brems (2014), and Rosenberger (2012).

The Karnataka hijab ban has also been analyzed by other scholars as a case of discriminatory treatment against Muslims in India (Ahmad and Zulkiffle, 2022) and as a problem of misconceptualizing public spaces as neutral rather than socially-constructed (Acharya, 2025). While Sinha and Dutta (2023) make a legal analysis of the case, discussing whether the

[21] In a special issue of *Café Dissensus* magazine (2015), a group of scholars (Varsha, Nazreen, Safiya, Noorunnida, Minu, Anila, Feba, Jenny, and Shah) has made an important intervention on "how they navigate the prying questions and inherent derision that entails the wearing of a hijab" (Basheer, 2015).

judges applied the thesis of essential religious practice correctly, Tella (2025) questions the Hindu majoritarian subversion of constitutional principles of secularism through pluralism. While I rely on these works, my primary aim is to make a genealogical inquiry of the Karnataka hijab ban, situating it within the problem of governing religion in modern nation-states.

The Karnataka hijab verdict reveals how the authority of the secular state is exercised through the judiciary's power to define religion, regulate its visibility, and discipline its subjects. By shifting the question from rights and liberties to the doctrine of essential practices, the Court displaced the interpretative authority of the Muslim community, conditional upon judicially sanctioned forms of religiosity. This not only entrenches a majoritarian logic of uniformity but also demonstrates how secularism in India operates less as a principle of neutrality than as a technology of governance, continuously redrawing the limits of religion. The result is a paradox where Muslims are simultaneously marked as religious and compelled to efface that religiosity in order to be recognized as citizens, a paradox that lies at the very heart of India's secular problem.

As I have shown through genealogical inquiry, the hijab verdict did not emerge abruptly but is embedded in the emergence of colonial modes of legality within the postcolonial body politic of the Indian nation-state. While the British effectively constrained the practice of sharia to matters of family – such as marriage, divorce, and inheritance – the postcolonial Indian state, in its formative stages, continued these processes. The separation between public and private spheres had already been established by the British, and within it, a division between the 'secular' and 'religious' aspects of religion was instituted by the Constituent Assembly.[22] In these three moments, the state is assuming the

[22] Islamic history, with its varied interpretative traditions, reflects its own modes of differentiating between spheres of life, but these distinctions operate on a different conceptual and political order unlike the modern secular division between public and private.

interpretative authority in defining what Islam ought to be. In other words, postcolonial sovereignty over religious subjects follows the colonial trajectory of recasting religion into legally *manageable*, and politically *malleable*, forms.

I contend that the political technology of the modern nation-state produces an *a priori* conception of religion that has to enter through the bottleneck of liberal-secular order. As this order of nation-state is entwined with the majoritarian Hindu sensibility,[23] Muslim religiosity is regulated, controlled, and disciplined, and the boundaries of religion are managed through secular-Hindu constituents of power. Further, modern nation-states grapple with a pressing contradiction, where political discourses promise freedom, choice, and rights, while they simultaneously expand mechanisms of control over individual lives. Communities are thus constituted and guaranteed but remain subject to regulation through governmentality. In such paradoxical contexts, to engage politically requires a simultaneous avowal and disavowal of the constitutional and political. The proclamations of *Allahu Akbar*, as in Muskan Khan's defiant response when confronted by saffron shawl-wearing protesters, exemplify this tension.[24] Like Ismail's arguments in the Constituent Assembly, they are constitutional in their mode of assertion, yet they simultaneously exceed the constitutional framework by reconstituting the political on the plane of the theological. That is to say, minorities navigate the governmentality of the state in managing, regulating, and controlling

[23] Talal Asad (2012) and Hussein Agrama (2012) have highlighted how secularism is inseparable from its religious counterpart, with the secular state privileging majority norms under the guise of universality. Asad argues that "the modern secular state is not simply the guardian of one's personal right to believe as one chooses; it confronts particular sensibilities and attitudes, and puts greater value on some than others." (Asad 2012, 53).

[24] To move out of the definitional power of the state is to remain outside the matrix of secular, and probably outside the order of the nation-state itself. Muskan Khan's proclamation of *Allahu Akbar* symbolize such a move out of the worldly entanglements, potentially revolting against any of the modern disciplinary powers. Her assertion represents a theological refiguration that exposes the limits of secular and securitarian articulations of the state, which are conditioned on the formation of a conscripted Muslim subject.

the religious expression through the art of resistance that are at once depoliticized, but yet deeply political.

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