



Master of Philosophy in Law

Of constituent assemblies and constitutional courts: Kashmir and the contesting of Indian sovereignty

August 8, 2023

Submitted by: Zaid Deva

Supervised by: Professor Tarunabh Khaitan

Word count: 28,601

Abstract

While there is significant scholarly work on the question of Kashmir in international law, constitutional law treatment of the question has remained minimal. The existing constitutional law discourse imagines the Indian union to be the sole bearer of sovereignty and therefore, Kashmir as an internal and hence, a federal question for India.

My thesis project challenges this discourse by arguing that Indian sovereignty over Kashmir came to be constructed, and not inherited from the outgoing colonial state. As a consequence, it was exposed to contestations by the Kashmir government headed by Sheikh Abdullah who offered a distinct imagination of sovereignty and statehood based on the separateness of Kashmir's constitutional order. On the other hand, Jawaharlal Nehru, independent India' first prime minister, imagined sovereignty to be unified and absolutely vested in the Indian union, and therefore any claim to an autonomous status had to be on the terms set by the Indian constitution. I map these contestations across three negotiations on Kashmir-India constitutional relationship that take place between the two sides in between 1949 and 1952. I also show how the case of Kashmir speaks to the other traditions where constitutional authority has come to be shared between two entities.

From the two governments and the constituent assemblies, I shift my focus to the constitutional courts in Kashmir and India, and how they imagine Kashmir's status in the early 1950s. I argue that both of the constitutional courts are more receptive to the claims of constitutional pluralism than the other central institutions and actors. I situate the Kashmir cases in the federal jurisprudence of the Indian constitutional court in its early years, as well as the wider socio-political context in which these cases were decided.

Table of Contents

Table of Abbreviations 4

Table of Primary Sources 5

Introduction 7

The central claim 12

Indian constituent assembly v. Kashmiri constituent assembly: State sovereignty in the aftermath of empire 15

Introduction 15

Sovereignty and constituent power 17

Sovereignty and constitutional pluralism in the European union 20

Sovereignty and federalism 24

Sharing of constitutional authority and sovereignty 29

The language of sovereignty and the British colonial state in the Indian subcontinent 31

Of founding moments, constituent assemblies, and a three-way partition 34

Indian constituent power and popular sovereignty 35

Popular sovereignty and Kashmiri constituent assembly 40

The three phases of contestations 46

Conclusion 57

Constitutional courts and the Kashmiri constituent power 63

Introduction 63

Courts and competing claims of constitutionalism 64

Sub-state national minorities and constitutional courts 65

Constitutional pluralism and the courts 69

Federalism and the Indian Supreme Court 74

The Supreme Court and the Kashmir High Court on Kashmir's sovereignty 79

The first contestation and the absoluteness of sovereignty 79

The fading away of contestations and the demands of sovereignty 85

Conclusion 93

Conclusion 95

Bibliography 97

Table of Abbreviations

EU	European Union
IOA	Instrument of Accession
TEU	Treaty on European Union
SCI	Supreme Court of India
HC	Jammu & Kashmir High Court
ECJ	European Court of Justice

Table of Primary Sources

Cases:

Babulal Parate v. State of Maharashtra And Others 1961 AIR 884	76, 78
Ch. Tika Ramji & Others v. The State of Uttar Pradesh & Others 1956 AIR 676	76
Costa v. Ente Nazionale per L'Energia Elettrica (ENBL), ECJ Case 6/64 [1964] ECR 585.	72
Kuldip Nayyar v. Union of India, AIR 2006 SC 3127	79
Maghar Singh and others v. Principal Secretary, Jammu and Kashmir Government A.I.R. 1953 J&K 25(3).	87
Marbury v. Madison 5 U.S. 137 (1803).	72
Mullaperiyar Environmental Protection Forum v. Union of India, (2006) 3 SCC 643	79
Naga People's Movement of Human Rights v. Union of India	79
Prem Nath Kaul v State of Jammu & Kashmir (1959) Supp (2) SCR 270.	88, 92, 92, 94
Reference by the Lord Advocate of devolution issues under paragraph 34 of Schedule 6 to the Scotland Act 1998, [2022] UKSC 31.	70
Rehman Shagoo And Ors. v. The State Of Jammu And Kashmir 1958 CriLJ 885.	80, 94
Rehman Shagoo And Others v. State Of Jammu And Kashmir 1960 SCR (1) 680.	93. 92
Sir Kameshwar Singh v.Province of Bihar AIR 1951 Pat. 246	86
State Bank of India v. Santosh Gupta & Others (2017) 2 SCC 538.	364
State of West Bengal v. Union of India 1963 AIR 1241	76, 78, 79, 97
The State of Bombay and Another v. F. N. Balsara 1951 AIR 318	76, 77, 78
The State of West Bengal v. Mrs. Bela Banerjee and Others 1954 SCR 558.	86
Van Gend en Loos v. Nederlandse Administratie Belastingen, ECJ Case 26/62, [1963] ECR 1.	71, 73

Constituent/Legislative Assembly Debates:

Dr B. R. Ambedkar, Indian Constituent Assembly Debates vol VII (4 November 1948).	59
Gopalaswami Ayyangar Constituent Assembly of India Debates vol X (17 October 1949).	17
Interim Report of the Basic Principles Committee, Jammu and Kashmir Constituent Assembly Debates vol I (10 June 1952).	42, 55
Jawaharlal Nehru Lok Sabha/House of the People vol I (7 July 1952)	41
Jawaharlal Nehru Lok Sabha/House of the People vol II (7 August 1952)	42

Report of the Land Reforms Committee Jammu & Kashmir Constituent Assembly Debates vol I (27 March 1952).	87
Sheikh Abdullah, Jammu & Kashmir Constituent Assembly Debates vol I (5 November 1951).	17

Constitutions:

Constitution (Application to Jammu & Kashmir) Order, 1950	50
Constitution Act of 1939, Jammu & Kashmir	55, 81
Constitution of India, 1950	48, 49
Constitution of Jammu & Kashmir, 1956	86

Statutes:

Enemy Agents Ordinance 2005 (1948) (Ordinance No. VIII of Samvat 2005)	80, 81
Indian Independence Act, 1947	44
The Jammu and Kashmir Big Landed Estates Abolition Act 1950 (Act 17 of 1950)	87

Treaties:

Instrument of Accession (26 October 1947)	10, 36, 47, 81, 82
Treaty of Amritsar (16 March 1846)	44

UNSC resolutions:

UNSC Res 47 (21 April 1948) UN Doc S/Res/726	45
UNSC Res 91 (30 March 1951) UN Doc S/Res/2017/Rev 1	94

Other primary/archival sources:

New Kashmir Manifesto, 1944,	43, 44
Report of the States Reorganisation Commission, 1955, Government of India.	59
White Paper on Indian States published by the Ministry of States, Government of India (1950).	16, 38, 39, 40
File No. 1(2)-K/60, National Archives of India	51

Introduction

Sovereignty has been regarded as a central feature of modern nation-states, so much so that it has become synonymous with the nation-state.[1] While federalism was envisaged to be a tool for dividing sovereign authority and accommodating diversity, the inevitable centralising and uniformising character of the nation-state has rendered federalism of little appeal and consequently made the union the sole bearer of state sovereignty.[2] However, developments in international law after the second world war and the establishment of the European union have complicated the concept of sovereignty with many today claiming that Europe is witnessing a 'post-sovereign'[3] or 'late-sovereign'[4] paradigm.[5] This has also been accompanied with a certain exhaustion with the nation-state and state sovereignty, and therefore calls have been made to set the two apart.[6]

---

[1] Michael Keating, *Plurinational Democracy: Stateless Nations in a Post-Sovereignty Era* (Oxford University Press 2001) 1-28; Duncan Kelly, 'Popular Sovereignty as State Theory in the Nineteenth Century' in Richard Bourke and Quentin Skinner (eds.), *Popular Sovereignty in Historical Perspective* (Cambridge University Press 2016) 270-296; Hent Kalmo and Quentin Skinner, 'Introduction: a Concept in Fragments' in Hent Kalmo and Quentin Skinner (eds.), *Sovereignty in Fragments: The Past, Present and Future of a Contested Concept* (Cambridge University Press 2010) 1-25. For a classical account on sovereignty, see, Jean Bodin, O*n Sovereignty: Four Chapters on Sovereignty* (Julian Franklin ed., Cambridge University Press 1992) 1-46.

[2] Stephen Tierney, *The Federal Contract: A Constitutional Theory of Federalism* (Oxford University Press 2022) 201.

[3] Michael A Wilkinson, *Authoritarian Liberalism and the Transformation of Modern Europe* (Oxford University Press 2021) 163.

[4] See Neil Walker, 'Late Sovereignty in the European Union' in Neil Walker (ed.), *Sovereignty in Transition* (Hart Publishing 2006) 3-32.

[5] This has been accompanied by the rise of constitutional pluralism as the dominant constitutional theory of organising states, internally as well as externally (for instance, in the case of the EU), see, Neil Walker, 'The Idea of Constitutional Pluralism' (2002) 65 The Modern Law Review 317-359. Also see, Neil MacCormick, 'Beyond the Sovereign State' (1993) 56 The Modern Law Review 1-18.

[6] Walker ibid 341.

While this has been the discourse on sovereignty in the global north, countries in the global south emerging out of centuries of colonial rule, have sought to deploy sovereignty to build strong and centralising national states.[7] In many cases, this is done with a view to build a developmental state that is charged with not only transforming the political relations with the newly constituted citizens, but also social relations of the citizens inter se.[8] Written constitutions drafted by a body such as a national/constitutional convention or constituent assembly, which provide for a bill of civil rights, socio-economic rights, organisation of the state and demarcation of state power, remain central to this vision.[9] These bodies and through them the constitutions they draft, become an embodiment and bearer of state sovereignty.[10] Each and every part of the constitution becomes a site for enforcing and contesting sovereignty.[11] The rights that a constitution provides for, for instance, far from being a limitation on the sovereign powers of the state, become an expression of sovereignty and therefore become susceptible to contestation from a rival sovereign power seeking a union.[12]

This is where the question of Kashmir arises, which is the central focus of this thesis, and which lies somewhat in between of these two discourses. The reason I say that the question of Kashmir

---

[7] Karuna Mantena, 'Popular Sovereignty and Anti-Colonialism' in Richard Bourke and Quentin Skinner (eds), *Popular Sovereignty in Historical Perspective* (n 1) 308; Clapham has argued that postcolonial states were overwhelmingly concerned with the protection of the Westphalian model of state sovereignty rather than subverting it, see, Christopher Clapham, 'Sovereignty and the Third World State' (1999) 47(3) Political Studies 522–23.

[8] See Priyasha Saksena, *Sovereignty, International Law, and the Princely States of Colonial South Asia* (Oxford University Press 2023) 17. Also see, Gautam Bhatia, *The Transformative Constitution: A Radical Biography in Nine Acts* (HarperCollins 2019) chapter 1.

[9] Therefore, the state is not merely concerned with its relations with citizens but also in using of sovereignty for building social unity, see, Madhav Khosla, *India's Founding Moment: The Constitution of a most surprising democracy* (Harvard University Press 2020) 83.

[10] See Shruti Kapila, *Violent Fraternity: Indian Political Thought in the Global Age* (Princeton University Press 2021) 266.

[11] The written Indian constitution is used to build a unified legal order where territorial and demotic pluralism gets extinguished, see ibid.

[12] Martin Loughlin, *The Idea of Public Law* (Oxford University Press 2004) 73.

in the early years after the partition of India lies at the intersection of these two discourses is because the Kashmir question is as much about nationalism as it is about sovereignty.[13] While the Kashmir government was eager to build a centralising and a developmental state to pursue its socio-economic goals, this vision was severely inhibited by the need to share sovereignty with the Indian dominion. As soon as war starts in Kashmir and it gets thrown in the yoke of India by a colonial legal instrument,[14] it becomes clear to the Kashmir government that it must share legal authority with India to keep Pakistan and other international forces at bay.[15] But the Hobbesian question of 'who decides'[16] and in this case, who decides which party gets authority over what, brings into sharp relief the two contrasting visions of sovereignty that two governments embody at the culmination of the anti-colonial struggle. These contestations between the two states and the sites on which these contestations are expressed complicate our understanding of sovereignty and legal ordering, because far from displacing the state, the contestations bring the state back to the centre stage as I show in the next chapter.

As the Kashmir region continues to be disputed, with the Indian side of Kashmir being the highest militarised zone in the world, there has been a spate of scholarship on it across a range of disciplines. While international law scholarship,[17] and anthropological and sociological work on

[13] For a recent account of nationalism in Kashmir, see, Idreas Khandy, 'No place for "Kashmiri" in Kashmiri nationalism' (2021) 27 Nations and Nationalism 260–278.

[14] For the Instrument of Accession see, Venkatesh Nayak, 'The Backstory of Article 370: A True Copy of J&K's Instrument of Accession' (*The Wire*, 5 August 2019) <https://thewire.in/history/public-first-time-jammu-kashmirs-instrument-accession-india> accessed 20 July 2023.

[15] For an account of the 1947-1949 war in Kashmir see, Victoria Schofield, *Kashmir in Conflict: India, Pakistan, and the Unending War* (IB Tauris Publishing 2000) 27-49.

[16] Murray Forsyth, *Unions of States: The Theory and Practice of Confederation* (Leicester University Press 1981) 70.

[17] Fozia Lone, *Historical Title, Self-determination, and the Kashmir question* (Brill Nijhoff 2018) 3-48.

Kashmir uses occupation as the framework to study the Kashmir question,[18] scholarship in disciplines like history and political science have focussed on the politics of Kashmir through the middle of the 19th century and early 20th century leading to the events of partition.[19] Both these strains of scholarship have largely ignored the role that constitutional law,[20] legal debates on sovereignty, constituent assembly and other constitutional actors have played in the larger question of Kashmir. Indian constitutional law scholarship has focussed on some of these questions, but it has done it in a way that presents Kashmir as India's internal and therefore a federal question (federalism as understood in the Indian imagination).[21] This strain of scholarship therefore reinforces and justifies the Indian state's position on Kashmir.

This is the gap that my thesis seeks to fill on the scholarship on Kashmir. The focus of this thesis is the period between 1947 and 1953, which I regard as the first phase of the Kashmir-India constitutional relationship.[22] During this period the Indian state sovereignty is sought to be extended to Kashmir using constitutional law, while Kashmir uses its constitutional law to 1) contest Indian sovereignty and 2) reinforce its own sovereignty over the region. By carefully

[18] See generally, Mona Bhan, Haley Duschinski, Deepti Misri (ed.), *Routledge Handbook of Critical Kashmir Studies* (Routledge 2022). Also see, Haley Duschinski, Mona Bhan, Ather Zia, and Cynthia Mahmood (ed.), *Resisting Occupation in Kashmir* (University of Pennsylvania Press 2018).

[19] See Shahla Hussain, *Kashmir in the Aftermath of Partition* (Cambridge University Press 2021); Mridu Rai, *Hindu Rulers, Muslim Subjects: Islam, Rights, and the History of Kashmir* (Princeton University Press 2004); Chitralekha Zutshi, *Kashmir's Contested Pasts: Narratives, Sacred Geographies, and the Historical Imagination* (Oxford University Press 2018).

[20] Exception to this remain the work of A G Noorani, Shrimoyee Ghosh, and Haley Duschinski. See A G Noorani, *Article 370: A Constitutional History of Jammu & Kashmir* (Oxford University Press 2008) and Haley Duschinski & Shrimoyee Nandini Ghosh, 'Constituting the occupation: preventive detention and permanent emergency in Kashmir' (2017) 49(3) The Journal of Legal Pluralism and Unofficial Law 314-337.

[21] See for example, Louise Tillin, 'Asymmetric Federalism' in Sujit Choudhry, Madhav Khosla and Pratap B Mehta (eds.), *Oxford Handbook of the Indian Constitution* (Oxford University Press 2017) 576-78; See also Madhav Khosla, *The Indian Constitution* (Oxford University Press 2012) 74.

[22] In the rest of the phases, the nature of the relationship is wholly transformed and is hence outside the scope of this thesis.

reading the negotiations, debates, and contestations between India and Kashmir, I show that in the first phase, the kind of claims that the Kashmir government was making, tilts its relationship with India towards a confederal model and not a federal one (as India had envisaged for itself).[23] This questions the extant constitutional law discourse on Kashmir that treats it as a federal question by regarding the Indian constitution as the sole bearer of sovereignty.[24] Therefore, any autonomy that Kashmir exercises is considered to be derived from this constitution. This, to a large extent is achieved by ignoring the role of and the claims made by the Kashmir government against the Indian government. By bringing the Kashmir government's claims to sovereignty to the centre stage in my thesis, I show how the relationship with India and the Indian claim to sovereignty over Kashmir was deeply contested from the very beginning.

By virtue of the two states sharing sovereignty with each other, each comes to be vested with the authority to make constitutional claims vis-à-vis each other. To explain the sharing of sovereignty better, I rely on two traditions where constitutional authority has been pluralised. I rely on the most recent writings in constitutional theory on constitutional pluralism in the EU,[25] and federalism in the contexts of sub-state national societies.[26] The reason I use these two traditions is because, the case of Kashmir has parallels to both, and using only one of these traditions might lead to mischaracterisation of the question. In the phase that I am focussed on (1947-53), while Kashmir is not strictly speaking an independent state like the member-states of the EU, but at the same time, it is also not a sub-state national minority like the examples I consider in Chapter 3. Further, the case of EU provides the most prominent example of constitutional pluralism where member-states continue to maintain their distinct national identities. As the Kashmir government

[23] For the features of a confederal state, see, Forsyth (n 16).

[24] See Tillin (n 21) and Khosla (n 21).

[25] See Walker (n 5) and MacCormick (n 5).

[26] Tierney (n 2).

in the first phase of the relationship is seeking something similar (even though the competences shared with the Indian union are different from those vested in the EU), the example of constitutional pluralism provides the most appropriate lens to study the contestations between the two states from.

The central claim

The core claim that I make this thesis is that sovereignty comes to be constructed by both India and Kashmir in the aftermath of the partition by using their respective constitutional orders.[27] Using their constitutions, both seek statehood externally and vis-à-vis each other.[28] While India initially accepts a separate constitution for Kashmir to the extent that recognises its subordinate nature to the Indian constitution, it seeks a single site of statehood in the Indian state. On the other hand, the Kashmir government uses its constitutional order to not only seek pluralism (that recognises both orders as coordinate) but also federalises the state, so that India performs state functions in certain subject-matters while Kashmir performs state functions in the reserved matters. I argue that this complicates the two traditions that I rely on since both make a strict and a definitive distinction between the state and the constitutional order, whereas in the Kashmir case, the postcolonial constitution and the state are co-constitutive. I also consider the role constitutional courts in the Kashmir-India relationship, and how they imagine sovereignty in the aftermath of partition. I show that both Kashmir's constitutional court and the Indian constitutional court take a Kashmir-centric view on sovereignty and the constitutional order in their early years. Therefore, the contestations that are a feature of the two governments'

[27] See Saksena (n 8).

[28] Neil MacCormick, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (Oxford University Press 1999) 17-26.

negotiations in the first phase, fade away when the same matters come before the constitutional courts.

The structure of this thesis is as follows: in Chapter 2, I will first show how the two discourses on constitutional pluralism and federalism make a strict delineation between the state and the constitutional order. Thereafter, I will argue that the Kashmir government's account of sovereignty rested on treating its constitutional order separate from the Indian constitutional order, and this separateness is justified by relying on the two states' relationship with the colonial legal order. Using a thick description of the contestations between the two states, I will show how the constitution becomes a site for enforcing and contesting state sovereignty. I will conclude by showing how the Kashmir case complicates the discourse on constitutional pluralism and federalism in constitutional theory. Chapter 3 shifts the narrative away from the two governments and their constituent assemblies to the constitutional courts in India and Kashmir. I will first show how courts in the context of the EU and sub-state national minorities deal with the question of sovereignty and the constitutional order. I will argue that there are various factors such as the history and institutional design of the state and the union that contributes to the approaches that the courts take in cases like these. Thereafter, I will show that the Indian Supreme Court had a balanced approach on federal questions in the early years of the constitution. I use this to situate contextually the two Kashmir cases I focus on in this chapter. I will argue that both the Kashmir constitutional court and the Indian Supreme Court provide a Kashmir-centric view on state sovereignty by separating the Indian constitutional order from the Kashmir constitutional order but on statehood both courts remain silent. I will conclude by explaining potential factors that contribute to the approach that these courts take in the early years. Chapter 4 concludes.

Before I proceed, a few caveats. This thesis is based on limited archival work due to paucity of time. Most of the literature that I have relied on is primary that has been published and is therefore

accessible to the public or I have accessed them through the archives of the Bodleian libraries and the digital repositories of UK's National Archives and the National Archives of India. Further, this thesis shows that the lines between external and the internal dimensions of sovereignty remain blurred in Kashmir, but the external dimension using an international law account has not been explored since it is complicated by Azad Kashmir's (Pakistan-Administered-Kashmir) declaration of independence in 1947.[29] This would go beyond the scope of an MPhil thesis and therefore it remains focussed on the constituent power conception of sovereignty. Finally, the thesis does not engage with the framework of occupational constitutionalism and international law for the same reason as above.[30]

[29] Javaid Hayat, *Azad Jammu & Kashmir: Polity, Politics, and Power-Sharing* (Oxford University Press 2020) 287-288.

[30] See Duschinski and Ghosh (n 20).

Indian constituent assembly v. Kashmiri constituent assembly: State sovereignty in the aftermath of empire

Introduction

How is the constituent assembly imagined in Indian legal and political thought, and what is its relationship with state sovereignty and the constitutional order? Constitution-making by a constituent assembly formed a central feature of the plans that were being laid down for Indian independence in the early 1940s.[31] Even though initially it was envisaged that a common constituent assembly would be established for all communities and states in the India subcontinent, the demand for an independent state of Pakistan by the Muslims complicated this plan.[32] Eventually, two constituent assemblies – one, in India and another in Pakistan were established under the Indian Independence Act of 1947.[33] By sending representatives from provinces and states to the two constituent assemblies, it was envisaged that these territories became merged in the new dominions.[34] Therefore, the constituent assemblies and the constitution-making projects became imbricated not just with independence of the two states but also with creating a unified territory and demos.[35] While some states within India sought their own constituent assemblies for

[31] See Draft statement of Britain's India policy prepared by Secretary of State for India for the British Ambassador in Washington, 20th February 1947 (FO 371/63529).

[32] See Gurmukh Nihal Singh, 'The idea of an Indian constituent assembly' (1941) 2(3) The Indian Journal of Political Science 255.

[33] See Indian Independence Act 1947, s. 19(3) <https://www.legislation.gov.uk/ukpga/Geo6/10-11/30> accessed 5 August 2022.

[34] See ibid s. 2(2)(c).

[35] Kapila (n 10).

framing a constitution within the Indian constitutional framework, these plans were soon aborted, and the Indian constitution was applied in these states thereby, bringing to an end their former distinct status.[36]

Yet, as the Indian constituent assembly was preparing to inaugurate its constitution, and as the Pakistani constituent assembly was still in the constitution-making process, a third constituent assembly was envisaged in the Indian subcontinent.[37] This constituent assembly was located in Kashmir, and it was envisaged that it would determine the future status of Kashmir.[38] What does a constituent assembly in Kashmir mean for sovereignty and the attempts by India to create a unified constitutional order? I explore this question in this chapter.

I will first address the question of sovereignty and constituent power, and their contingent character by using the examples of constitutional pluralism and federalism in recent scholarship. I will show that both traditions make a definitive distinction between state and the constitutional order (Section II). By relying on a thick description of contestations between India and Kashmir, I will show how sovereignty comes to be contested in the aftermath of the partition and the role that the constitution plays in these contestations (Section III). I argue that the Kashmiri articulation of sovereignty centred around the separateness of the Kashmiri constitutional order from the Indian order. This was premised on constituent power i.e., the power to create a constitutional order which was stated to be located in the Kashmiri subject and not shared with the Indian demos

[36] See generally White Paper on Indian States published by the Ministry of States, Government of India (1950). Also see, Rohit De and Ornit Shani, 'Assembling India's Constitution: Towards a New History' (2023) Past & Present 10-21.

[37] See Gopalaswami Ayyangar, Constituent Assembly of India Debates, vol X (17 October 1949). Also see the Kashmir-India negotiations over Article 370 in Noorani (n 20) 51-76.

[38] Sheikh Abdullah, Jammu & Kashmir Constituent Assembly Debates, vol I (5 November 1951). Also see, Ayyangar ibid.

nor derivable from the Indian constitution. That is, the Kashmiri subject was treated as a separate category from the Indian subject. In contrast to the two traditions I rely on at the beginning of this chapter, I will show that for Kashmir-India constitutional relationship in the first phase, both not only seek statehood using the constitutional order but also seek to define the normative goals of the state using the constitutional text (Section IV). Therefore, the state and the constitution become co-constitutive.

Sovereignty and constituent power

The concept of sovereignty continues to remain deeply contested in legal and political theory.[39] Many attempts have been made at demystifying the concept, but sovereignty as an idea has continued to remain ambiguous, with the ambiguity conditioned by its centrality.[40] The concept has been complicated by the advent of modern written constitutions premised on a constituent power of the people.[41] This has been complemented by the establishment of the European union and the theory of constitutional pluralism gaining currency as a framework to understand the claims made by the union against the member-states.[42]

While this discourse on sovereignty has become emblematic of pluralism and non-hierarchical legal ordering of states vis-à-vis the European union, within the states to a large extent, sovereignty continues to be understood from a monist perspective.[43] This implies that there is a single source of authority within the states, premised on a unified conception of demos and constituent power. That is to say, the pluralism that has become the mainstay of the discourse on the European union

[39] Kalmo and Skinner (n 1).

[40] Jens Bartelson, *A Genealogy of Sovereignty* (Cambridge University Press 1995) 237.

[41] See Loughlin (n 12) 99.

[42] See Walker (n 5) and MacCormick (n 5).

[43] Tierney (n 2) 6.

has not been extended to the states internally for a similar reimagination of federalism.[44] This discourse (or lack thereof) has also been plagued by the treatment of the American federal model as the polestar of federalism studies, focussing on what became of the American federation instead of what was envisaged and the paths that were not taken.[45] The case of Kashmir allows for both the discourses to speak to each other while raising critical questions for both.

There are multiple ways of approaching the question of sovereignty depending on the contexts one is seeking to understand. International law and legal theory have identified and worked with frameworks such as internal/external, absolute/limited, unitary/divided, political/legal sovereignties.[46] While the external and internal dimensions of sovereignty legally enact the boundary between what might be referred to as domestic authority and sovereignty in the international law sense, the distinction between the two is not always so neat.[47] External sovereignty here is used to denote that authority which allows a state to interact with other sovereign states. This essentially includes authority over subjects like defence, foreign affairs, citizenship, trade, and internal and external communications. On the other hand, internal sovereignty refers to the authority that reigns supreme with respect to the internal affairs of the state. But, as many have pointed out the two forms of sovereignty might be conceptually distinct but not so much logically, for one is contingent on the other.[48] If there is no internal sovereignty, it's unlikely that the state will possess external sovereignty, and if there is no external sovereignty, having internal sovereignty has little value.

---

[44] Robert Schütze, 'Federalism as Constitutional Pluralism: "Letter from America"' in Matej Avbelj and Jan Komárek (eds.), *Constitutional Pluralism in the European Union and Beyond* (Hart Publishing 2012) 210.

[45] Tierney (n 2) 13.

[46] Samantha Besson, 'Sovereignty' Max Planck Encyclopaedia of Public International Law <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1472> accessed 22 June 2023.

[47] ibid.

[48] ibid.

Another dimension of sovereignty that has linkages to both the external and the internal conception of sovereignty is the Schmittian articulation of the concept. The power to decide the state of exception i.e., suspension of the juridical order, for Schmitt is reflects the most absolute form of sovereignty.[49] Therefore, he finds sovereign authority vested in the political executive of the Weimar republic, as the president possesses the authority to suspend the legal norms.[50] This, to a large extent aligns also with the Lockean notion of the federative power that is not completely bounded in law.[51] Along with the exception, the right to make the friend and enemy distinction i.e., who forms part of the political body and who stands outside of the body is also a sovereign function for Schmitt and remains deeply linked to his conception of the political.[52] This in essence contains the question of citizenship of the polity.[53]

All these manifestations or forms of sovereignty start converging in the constituent power conception of sovereignty under constitutional theory. It is in this form that popular sovereignty gets manifested and as a body is competent to enact the new constitutional order.[54] While many have called the idea of constituent power as merely conceptual and having no practical value[55] while others have called for abandoning the idea,[56] my use of the concept here is to show how

---

[49] See Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (George D. Schwab tr., University of Chicago Press 2004). Also see, Ernst-Wolfgang Böckenförde, *Constitutional and Political Theory: Selected Writings* (Oxford University Press 2017) 74.

[50] Böckenförde ibid.

[51] Thomas Poole, 'The Idea of the Federative' in Jacco Bomhoff, David Dyzenhaus and Thomas Poole (eds.), *The Double-Facing Constitution* (Cambridge University Press 2020) 70-71.

[52] Mika Ojakangas, 'Carl Schmitt's Real Enemy: The Citizen of the Non-exclusive Democratic Community?' (2003) 8(4) The European Legacy 411.

[53] ibid.

[54] See Böckenförde (n 49) 171-172.

[55] Sergio Verdugo, 'Is it time to abandon the theory of constituent power?' (2023) 21(1) International Journal of Constitutional Law 18.

[56] ibid 22.

constitution-making and constitutions become a site for articulating and contesting state sovereignty.

In this section, I define what I mean by sovereignty and constituent power for the purpose of this thesis. I will provide a brief overview of the existing discourse on the sovereignty and constituent power in contexts where legal and constitutional authority has come to be shared between two entities. I will then demonstrate how the case of Kashmir adds to and complicates this discourse by showing us how constitutional pluralism operates in a potential confederation at its formative stages when the constituent assembly is still in operation. As pointed out before, my focus on sovereignty in this thesis is on the constitutional theory conception of the term, and not the international law conception.

Sovereignty and constitutional pluralism in the European union

It has been claimed that the constitution of Europe has emerged without a constitutional theory in place to act as its bulwark.[57] Notwithstanding this claim, it is safe to say that the theory of constitutional pluralism has emerged in a set of circumstances where the national legal order came into a direct confrontation with the European legal order and therefore the theory aimed to resolve potential conflicts between the claims of the European union as against the national constitution's.[58] The seminal work done by MacCormick and Walker has contributed immensely to the development of this theory, articulating constitutional pluralism 'as a theory of European

[57] Miguel Poiares Maduro, 'Europe and the Constitution: What If This Is As Good As It Gets?' in J Weiler and Marlene Wind (eds.), *European Constitutionalism Beyond the State* (Cambridge University Press 2003) 74, 76.

[58] Julio Baquero Cruz, 'The Legacy of the Maastricht-Urteil and the Pluralist Movement' (2008) 14(4) European Law Journal 389-422.

constitutionalism and not simply as a theory of constitutional conflicts.'[59] While in this account, constitutional pluralism is focussed on giving legitimacy to European constitutionalism, the theory's post facto development and use must not be overlooked.

The claims of constitutional pluralism challenge the Kelsenian notion of the legal order which is imagined to be synonymous with the nation-state.[60] In this imagination, EU's constitutional claims pose the most pressing challenge to monist account of constitutional law.[61] As Barber argues, the European Union makes three interconnected claims of supremacy: one, the ECJ is competent to answer all question pertaining to EU law; two, the ECJ is competent to determine what qualifies as a question of European law; and three, European law supersedes any non-compliant national legislation.[62] More often than not, these claims are questioned by national constitutional courts, most notably the German constitutional court which makes the counter-claim that the German constitution is the supreme source of law in Germany and it is through this source that the European law gets legitimacy and effect in the German legal order.[63]

Since the sources of laws are different, no court can reasonably claim that there is a single legal system in Europe.[64] Therefore, the question of sovereignty and consequently the question of supremacy remains contingent on 'which system the lawyer chooses to reason within'.[65] Therefore, while the legal order remains distinct and separated, there is an overlap where the two orders interact and interlock with each other, and it is this overlap that becomes an embodiment of

---

[59] Miguel Poiares Maduro, 'Three Claims of Constitutional Pluralism' in Matej Avbelj and Jan Komárek (eds.), *Constitutional Pluralism in the European Union and Beyond* (n 44) 70.

[60] Hans Kelsen, *General Theory of Law and State* (Anders Wedberg tr., Russell & Russell 1961) 192-4.

[61] Walker (n 5) 337.

[62] Nick Barber, *The Constitutional State* (Oxford University Press 2012) 164.

[63] ibid 164-165.

[64] ibid 168.

[65] ibid 167. Also see, Tierney (n 2) 113.

constitutional pluralism where constitutional actors face inconsistent rules of recognition.[66] As defined by Walker, constitutional pluralism 'recognises that the European order inaugurated by the Treaty of Rome has developed beyond the traditional confines of inter-national law and now makes its own independent constitutional claims, and that these claims exist alongside the continuing claims of states. The relationship between the orders, that is to say, is now horizontal rather than vertical – heterarchical rather than hierarchical.'[67] What this essentially implies is a severance of constitutional law from the state, since constitutionalism acts 'not only as a property of polities and political processes but as a medium through which they interconnect – as a structural characteristic of the relationship between certain types of political authority or claims to authority situated at different sites or in different processes'[68]

Over the years, many other variations of constitutional pluralism developed,[69] but none gained wide acceptance like the original theory. Some scholars also tried to export the theory out of Europe and draw parallels with for instance, the American model of divided sovereignty claiming that constitutional pluralism speaks the 'federal prose'.[70] This is telling of the currency that the theory has gained, but not without its fair share of criticism to which I turn now.

Loughlin dismisses constitutional pluralism as another form of legal pluralism premised on MacCormick's equating of constitution as the legal order.[71] He makes a distinction between

[66] See Barber ibid 169, 171. Also see, MacCormick (n 5) 9.

[67] See MacCormick ibid 10. Also see, Walker (n 5) 337.

[68] Walker ibid 340.

[69] See Matej Avbelj and Jan Komárek, 'Introduction' in Matej Avbelj and Jan Komárek (eds), *Constitutional Pluralism in the European Union and Beyond* (n 44) 12.

[70] See Schütze (n 44) 211. This is contrary to how Walker and MacCormick imagine constitutional pluralism. In Schütze's account, the doctrine gets reduced to essentially a constitutional conflict management mechanism.

[71] Martin Loughlin, 'Constitutional Pluralism: An Oxymoron?' (2014) 3 Global Constitutionalism 9, 16, 17.

constitutional law of the state and 'the constitution as institutional normative order'[72] and argues that EU as an 'alliance of states' cannot be replaced by the term 'multi-level constitutionalism'.[73] This, for him implies that EU as a derived order gets replaced by 'an association of constitutions (within which the EU constitution acquires the status of a separate order within an interdependent arrangement).'[74] Based on this, Loughlin concludes that the claim of an autonomous EU legal order 'does nothing less than signal the death of the juristic concept of sovereignty'.[75]

It is important to note here that while the promoters of constitutional pluralism rely on disassociation of state and constitutional law in order to justify the kind of claims that the EU makes over national legal orders, the detractors like Loughlin use this premise to turn this logic on its head by claiming that there is a qualitative difference between the constitutional regime of the state and the constitutional nature of the claims that a supra-national body like the EU makes. Both narratives call for a separation of the state form the constitution but in the latter account there is no constituent power at the level of the European order as the nature of constitutional claims that EU makes are not similar to the constitutional law of the member-state.[76] One of the main reasons for this disagreement is because of the non-constitutional nature of the European treaty and for its formal non-incorporation in the national constitutional text.[77] This is where the Kashmir case departs from the EU. But before I explain its full implications, the divergence in the discourse on constitutional pluralism based on the state-constitutional law relationship requires

[72] ibid 22.

[73] ibid 23.

[74] ibid.

[75] ibid.

[76] See generally Markus Patberg, *Constituent Power in the European Union* (Oxford University Press 2021).

[77] See, Signe Rehling Larsen, *The Constitutional Theory of the Federation and the European Union* (Oxford University Press 2021) 38.

more attention. Here I turn to Tierney's recent work where he calls for a similar disassociation between state and constitutional law in a slightly different context.

Sovereignty and federalism

While federalism as a tool for power-sharing has received significant attention in political science scholarship, it has largely been neglected in constitutional theory.[78] Because of this, there prevails a conceptual confusion in constitutional studies of federalism over its meaning and implications for constitutional theory. For Tierney, the principal reason for this conceptual confusion over the nature and meaning of federalism has been that it has been 'described, explained, justified (or refuted), and ultimately defined exclusively by reference to practice; in particular, to the practice of American constitutionalism'.[79]

Tierney begins his account of the federal contract by stating: 'A key feature of the process of state-building has been the unification of disparate territories within a singular constitutional system and the husbanding of all political power under the authority of one, all-encompassing, sovereign order of rule. Accordingly, modern constitutionalism has come to be conceived as a single, universalisable model of democratic government, premised upon a monistic construction of both the people and the constitution as a unified legal-normative project.'[80] Tierney includes European states in this paradigm,[81] which calls into question the pluralist claim of constitutionalism in the EU since within the states, monism seems to be the basic organising theory of the state.

---

[78] Tierney (n 2) 2, 6.

[79] ibid 7. Also see Ronald Watts, *Comparing Federal Systems* (3rd edn, McGill-Queen's University Press 2008) 42.

[80] Tierney ibid 1.

[81] ibid 6.

Be that as it may, Tierney's reimagination of federalism in constitutional theory follows two arcs: by reimagining constituent power theory and sovereignty from their unitary construction to a federal construction that is founded upon 'territorially situated demotic pluralism rather than demotic homogeneity'.[82] In his account, sovereignty is neither divided in federalism nor does it disappear.[83] In what follows, I describe Tierney's account of constituent power and sovereignty and then draw links to constitutional pluralism and sovereignty as described in the previous section.

Tierney begins by pointing out that most scholarship on federalism conflate state with its constitution owing to the particular nature of the American federal model and its enduring influence on the approaches that scholars of federalism have taken.[84] This tradition, he points out, singularises and unifies conceptions of people, nation, and state.[85] Tierney makes a departure from this strain of scholarship by arguing that the agents of constitution-making are not an 'undifferentiated body of individuals',[86] but the constitution's constituent territories.[87] Constituent power, therefore, gets reimagined from its unitary underpinnings to a federal constituent power where authority comes to be derived from the 'nascent polity's' constituent territories.[88] This also fulfils for him what he calls as 'constitutionalism's trinity of legitimising factors' which include, agency, foundational act, and validation,[89] for 'the normative constitutional bond created by the federal idea is conceptualised as one between territories rather than individuals.'[90]

---

[82] ibid 21, 22

[83] ibid 21-22.

[84] ibid 30.

[85] ibid 63

[86] ibid 64

[87] ibid 64.

[88] ibid 64, 76. Also see, James Madison, 'Federalist No. 39' in Alexander Hamilton, James Madison, and John Jay (eds.), *The Federalist Papers* (C. Rossiter ed., New American Library 1961) 240–246.

[89] Tierney ibid 64

[90] ibid 78

Responding to Loughlin's relational theory of sovereignty[91] and Lindahl's reflexivity thesis[92] where both try to fill the gap between authority vis-à-vis constituent power and constitutional form, Tierney argues that constituent territories must exist as political entities at the time of constitution-making for the federal contract to make conceptual sense.[93] As these territories exist as 'coherent political entities' before the constitutional contract comes into existence, the 'conceptual gap between foundational constituent power and constitutional constituent authority is far less pronounced than it is with the individualised conception of constituent power'.[94] Therefore, the gap between 'the real and fictive constituent power' does not arise in a federal context, since the constituent territories which form the constitution continue to remain in existence as the new constitution's subjects.[95] In a sociological sense, the transformation that the people undergo with the enactment of the new constitutional order need not be the case for the constituent territories.[96]

With the reimagination of constituent power from its unitary and monist construct to one that is federal and plural in nature, Tierney proceeds to elaborate on its implications for state sovereignty. He begins by critiquing the elision of state and sovereignty, which has led to co-opting and reification of the 'constitution as a proxy for the nation-state'.[97] This has been achieved by the monist conception of the state which in turn has imposed on 'constitutional thought a monistic

[91] ibid 73; Martin Loughlin, 'The Concept of Constituent Power' (2013) European Journal of Political Theory 218–237

[92] Lindahl, Hans, 'Constituent Power and the Constitution' in David Dyzenhaus, and Malcolm Thorburn (eds.), *Philosophical Foundations of Constitutional Law* (Oxford University Press 2016) 141.

[93] Tierney (n 2) 78.

[94] ibid 79.

[95] ibid 79. This is contrary to the individualised constituent power since the people change over time and therefore representation becomes the core of this version of constituent power.

[96] ibid 80-81.

[97] ibid 84.

idea of government and of the relations of sovereignty within the state.'[98] But where does this leave the question of demos or the people in whose name the constitutional order comes into being? For scholars like Grimm, popular sovereignty remains latent so long as the constitution is in force.[99] That is, sovereignty is expressed solely in the constituent power and in the act of constitution-making, and once the constitution is created the new state possesses powers and not sovereignty.[100] For Tierney, on the other hand, sovereignty instead of being latent comes to be alienated to the constitution.[101]

As for the people, under a monist conception, it gets transformed into the nation and becomes 'wedded ineluctably to the state'.[102] This leads to, as he points out, the nation becoming 'the demotic representation of state sovereignty as well as that of constitutional sovereignty'[103] and this nexus between the nation, state, and the constitution allows for 'the external state and internal nation mapping neatly onto one another as demotically monistic synonyms',[104] for the state in its external dimension has always been conceived of as a monolith.[105] This account of sovereignty and the legal order comes to be challenged under the pluralised territorial conception of constituent power.

First, Tierney identifies two approaches that scholars of federalism have taken until now towards sovereignty. One, that sovereignty must be conceptually divisible and hence comes to be shared

[98] ibid 86.

[99] Dieter Grimm, *Sovereignty: The Origin and Future of a Political and Legal Concept* (Belinda Cooper tr., Columbia University Press 2015) 71.

[100] ibid.

[101] Tierney (n 2) 91.

[102] ibid 92.

[103] ibid 92.

[104] ibid 93.

[105] ibid 97.

between the union and the provinces. Or two, since indivisibility is the characterising feature of sovereignty, therefore, either the federal state must be regarded as a separate category from the unitary state, or the concept of sovereignty must serve no useful purpose in federations.[106] He rejects both of these approaches. For him, the first approach is conceptually misconceived for its concerned solely with seeing sovereignty in its authority distributive dimension overlooking 'authority generational aspect which gives sovereign authority its political legitimacy',[107] and second is a result of either confusing the state with the constitution[108] or a narrow positivist understanding of constitutional sovereignty.[109]

Tierney answers this dilemma by delineating internal sovereignty from its external dimension, and explaining the former using a relational approach that is focussed on legitimacy-authority nexus.[110] This involves shifting the focus to the constitutional authority's relationship with the constitution's subjects (constituent territories) as sovereignty 'is not about relations of authority within the constitution; it is about relations of authority to the constitution'.[111] This follows a cyclic logic – since the constituent power is premised on constituent territories of the polity, the constitution is able to provide a salient role for the territorial governments in constitutional politics, thereby embodying and institutionalising 'the inherent significance of its territorial constituents as its authority generators.'[112] Therefore, the territories of the constitution continue to be the subjects of the constitution just like they were the bearers of constituent power.

[106] ibid 103

[107] ibid 105.

[108] ibid 109

[109] ibid 106.

[110] ibid 113.

[111] ibid 114.

[112] ibid 118.

Based on this, he concludes that 'a state with a federal constitution needs to be conceived as a polity of polities: its foundational territorial pluralism conditions how we understand constitutional authority within it.'[113] As the essence of Tierney's approach is the treatment of the issue of subjecthood, federalism as a concept 'challenges the very ideological premise of nation-building, positing as its premise a politics of inter-societal diversity rather than of uni-societal homogeneity.'.[114] This also leads him to conclude that confederal constitutions can also be accommodated within the contract model of federalism.[115] And it is this claim I use to segue into the next section where I connect the two traditions of sharing of constitutional authority.

Sharing of constitutional authority and sovereignty

Before I proceed it is important to recapitulate the claims and premises of these two approaches to sharing of constitutional authority. It's worth noting that both deal with sharing of constitutional authority and not just legal authority in a way that de-centres the state from constitutional law. While the critics of constitutional pluralism question the basis of the constitutional claims made by the European union as qualitatively different from the constitutional claims made by nation-states, in Tierney's reimagination of federalism as a constitutional principle, the external dimension of sovereignty is a monolith whereas the constitutional dimension is territorially pluralised. Both traditions seem to reject monism, internally as an organising principle of the state, and externally in relation to the European union.

In this reimagination, the constituent territories become the bearers of constituent power and as well as subjects of constitutional authority. As per this account, the confederal constitution also

[113] ibid 129.

[114] ibid 129.

[115] ibid 120.

gets collapsed into the federal constitution as the distinction between the two becomes a thin one. Based on Tierney's theory, one could even make the claim that the EU has a federal constitution (whether it is a state or not matters only for the external dimension of the EU), as the territories which are the member-states remain the bearers of constituent power and the demos is territorially pluralised and not conceived from a monist perspective. This would endorse Schutze's claim that the European constitution speaks the 'federal prose'.[116] On the other hand, the American example starts looking far from a federal state, as sovereign relations are conceived as a singular form between the constitution and its one people even though the people are organised in various territorial units and governments.[117]

While it is not my intention to collapse federalism into constitutional pluralism,[118] the Kashmir case speaks to both these traditions while raising critical question for both. If one treats Tierney's account as a normative work, then it's unlikely that India's would qualify as a federal constitution (barring in its relations with Kashmir) and if one sees his work as an empirical claim then the Indian case fundamentally problematises his theory. In what follows, I show how the case of Kashmir from 1949 to 1953 complicates these two schools of thought. For this, I provide a thick description of the constitutional negotiations between India and Kashmir in the aftermath of the British withdrawal from the Indian subcontinent. These negotiations show us how constitutions become the site for enforcing, contesting, and reinforcing sovereignty, and how these three processes imagine sovereignty's relationship with statehood. While the two accounts I have considered above draw a strict boundary between state and the constitutional order or between

[116] See Schütze (n 44) 211; Also see, Larry Backer, 'The Extra-National State: American Confederation Federalism and the European Union' (2001) 7 Columbia Journal of European Law 173–240.

[117] ibid 138

[118] See for example, 'What is the Indigenous voice to parliament, how would it work, and what happens next?' (*The Guardian*, 7 August 2023) < https://www.theguardian.com/australia-news/2023/aug/07/what-is-the-indigenous-voice-to-parliament-australia-what-does-it-mean-explained-referendum-campaign> accessed 5 August 2023.

internal and external sovereignty, the Kashmir case shows us that these boundaries are often blurred and not as rigid. This will also show, as I mentioned in the beginning, that while there prevails a certain sense of exhaustion from a statist account of constitutionalism in the global north, in the global south, constitutions have been precisely used for constituting the state, laying down its normative goals, and determining its relations externally and internally.[119]

The language of sovereignty and the British colonial state in the Indian subcontinent

Before I consider the question of sovereignty in the Kashmir-India constitutional relationship, in this section, I look at how sovereignty as a doctrine was deployed by the colonial state to control Indian territories leading up to the events of 1947.

The colonial state's exercise of sovereignty over the Indian subcontinent took two forms. In its first form, it came to exercise direct control and absolute sovereignty over territories called as Indian provinces.[120] The colonial state's officials governed these provinces with the help of limited representative institutions. In its second form, the colonial state controlled indirectly, and shared sovereignty with rulers of territories called as princely states.[121] A central feature of indirect rule vis-à-vis princely states was the exercise of paramountcy by the colonial state.[122] Paramountcy was the most visible manifestation of shared sovereignty and the hierarchy that existed between the two, as it allowed the colonial state to intervene in the internal affairs of the princely states, if it deemed it necessary.[123] The princely states along with the Indian provinces together formed the

[119] See Khosla (n 9) chapter 2. See also Sarbani Sen, *The Constitution of India: Popular Sovereignty and Democratic Transformations* (Oxford University Press 2011) chapter 4.

[120] VP Menon, Integration of the Indian States (Orient BlackSwan 1956) 16-38.

[121] Hartcourt Butler, Report of the Indian States Committee (1929).

[122] ibid 25.

[123] ibid.

British empire in the Indian subcontinent. Because of the variations in the meaning and deployment of the term sovereignty, scholars have argued that indirect rule came to acquire a distinct meaning within the Indian subcontinent compared to direct rule.[124]

As Kashmir was one of the princely states, I consider the discourse on sovereignty in colonial India briefly here. By sharing sovereignty, the colonial state came to exercise control over defence and foreign affairs whereas the princely states reserved complete control over their internal affairs.[125] But this sharing of sovereignty was not governed under international law.[126] As the Butler committee report would note, the princely were sui generis and there existed 'no parallel to their position in history', therefore, they had come to be governed by 'rules which form a very special part of the constitutional law of the Empire.'[127] Imperial law as per Benton became a hybrid of international law and municipal law that was able to encompass a divisible idea of sovereignty.[128] Moving away from an Austinian conception of sovereignty which informed colonial relations elsewhere and in the metropole, Maine's writings on international law became central to the modified version of sovereignty in South Asia.[129] He argued that sovereignty in essence was a bundle of rights that could be divided between two entities.[130] On the Indian context, he argued that while both the British and the princely states exercised sovereignty in various degrees, the

---

[124] This was different from direct and indirect rule in places like Africa where there was little difference between the two mechanisms of control. See Saksena (n 8) 9. Also see, Mahmood Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Princeton University Press 1996).

[125] Menon (n 120) 34.

[126] Butler (n 121) 25.

[127] ibid 25.

[128] Lauren Benton, *A Search for Sovereignty: Law and Geography in European Empires, 1400–1900* (Cambridge University Press 2009) 294.

[129] Karuna Mantena, *Alibis of Empire: Henry Maine and the Ends of Liberal Imperialism* (Princeton University Press 2010) 116.

[130] See Michael Lobban, 'English Approaches to International Law in the Nineteenth Century' in Matthew Craven, Malgosia Fitzmaurice, and and Maria Vogiatzi (eds.), *Time, History and International Law* (Martinus Nijhoff Publishers 2007) 65–90.

princely states lacked an international and independent status, since external sovereignty vested with the British.[131]

A consequence and a striking feature of sharing sovereignty was that it became a 'tool and the terrain of legal and political struggle' between the colonial state and the princely states.[132] The language employed by the princely states for contestations over the precise limits of control exercised by the British was a combination of international law and imperial constitutional law.[133] Another feature of state sovereignty in the colonial period, was as Saksena has shown, its evolution over the years for different actors.[134] In the initial period of colonial rule, while the princely states articulated a territorial and absolute conception of sovereignty to make the claim that they were the sole bearers of sovereign authority, the colonial states argued sovereignty was divisible in nature.[135] A divisible conception of sovereignty ensured that the princely states had some semblance of internal sovereignty and hence continued to be allied to the British, while at the same time allowing the British to justify interference in the internal affairs of the princely states.[136] At the turn of the 20th century, Saksena argues that the princely states had shed their claim of territorial sovereignty and adopted the divisible conception of sovereignty.[137] Apart from resisting incursions made by the colonial state or the anti-colonial Indian nationalists,[138] the divisible conception of

---

[131] See Ian Copland, *The British Raj and the Indian Princes: Paramountcy in Western India, 1857–1930* (Orient Longman 1982) 98–112.

[132] Saksena (n 8) 7.

[133] ibid 9. As per Pillai, in the aftermath of 1857 though, the relationship was largely articulated in terms of imperial constitutional law and sovereignty, see Sarath Pillai, 'Fragmenting the Nation: Divisible Sovereignty and Travancore's Quest for Federal Independence' (2016) 34 Law and History Review 748.

[134] See generally Saksena (n 8).

[135] ibid 77, 78.

[136] ibid 8. One major domain of intervention in internal affairs was deciding the question of succession of the ruler, see K M Panikkar, *Relations Of Indian States with The Government of India* (Martin Hopkinson & Co. Ltd. 1927) 53-54.

[137] Saksena (n 8) 102.

[138] ibid 3.

sovereignty as deployed by the princely states allowed them to seek a semi-international status.[139] This, it was stated, was due to their relationship being contracted with the crown as equals, and not the colonial state in the subcontinent.[140] The divisibility of sovereignty also allowed for a proposed federation of provinces and the princely states through a constitutional enactment.[141] Even though these plans did not materialise, the proposed federation would have allowed the princely states to arrest the exercise of paramountcy by the colonial state. These contestations prove the claim that sovereignty is able to be used in multiple and contradictory ways in the same context.[142]

The contestations between the princely states and the colonial states revolved around its territorial/absolute and divisible conceptions, whereas on the other hand, anti-colonial nationalists articulated sovereignty as 'territorial to create a unified state space over which centralized authority could be exercised after independence while also tackling the challenges posed by subnational movements to their developmentalist project.'[143] Therefore, sovereignty as a concept remained deeply contested, with different actors interpreting it differently. The Muslim question and the demands for two constituent assemblies, for India and Pakistan further complicated the discourse on sovereignty. At the cusp of partition, therefore, all these meanings of sovereignty suffer their demise, and sovereignty comes to acquire a new meaning and a new basis. I explore this in the next section.

Of founding moments, constituent assemblies, and a three-way partition

[139] ibid 15.

[140] ibid.

[141] ibid 133, 139, 143.

[142] Hent Kalmo and Quentin Skinner, 'Introduction: A Concept in Fragments' in (n 1) 8.

[143] Saksena (n 8) 3.

Drawing on the two traditions where constitutional authority comes to be shared, in this section I consider the case of Kashmir and India. For this, I frame the relationship between 1949-53 between the two as confederal, where the Hobbesian question of 'who decides' loomed large. As the description will make clear, while there are parallels between constitutional pluralism and federal constitutionalism, there are striking departures as well which raise critical questions for the constitutional law scholarship on Kashmir. First, I consider how state sovereignty comes to constructed through the text of constitution and how in turn the constitution is used to create a unified territory and demos. In the next part, I consider how Kashmir contested this sovereignty by relying on three phases of contestations between India and Kashmir over the meaning and nature of sovereignty in the aftermath of empire. The conclusion shows how the Kashmir case complicates the theories of constitutional pluralism and federal constitutionalism discussed in the previous section.

Indian constituent power and popular sovereignty

Before the partition plan was accepted, the British government in 1946 despatched a Cabinet Mission to the subcontinent to evolve a mechanism for a united India with one constituent assembly.[144] The mission proposed a federated model where the union would have authority over defence, foreign affairs, and communications (the three subjects), while the provinces would be formed into groups in a three-tier system.[145] It was envisaged that the princely states would execute an Instrument of Accession (accession agreement) that would vest the dominion with the aforementioned three competences as these subjects were deemed to require coordination between all the units.[146] The mission clarified that once the colonial state comes to an end, the

[144] See the Cabinet Mission's Plan, May 16, 1946, in B Shiva Rao *The Framing of India's Constitution: Select Documents* (Universal Law Publishing 1967) vol 1, 208-243.

[145] ibid.

[146] See the Cabinet Mission's Memorandum on States' Treaties and Paramountcy, May 12/22, 1946, in ibid 246-248.

paramountcy that it exercises over princely states could not be transferred to the proposed federation nor could it continue to vest in the British government. Therefore, it pointed out that paramountcy would lapse resulting in all the rights and powers transferred by the princely states to the British over the years reverting to the rulers, thereby making them independent of the British empire and the new federation.[147]

As there were fundamental differences between the Congress Party and the Muslim League (a party advocating the creation of Pakistan), the Cabinet Mission plan fell through.[148] The British government enacted the Indian Independence Act that would lead to the independence of the subcontinent and create the two dominions of India and Pakistan.[149] Two constituent assemblies were set up within the territory of the subcontinent, one for India, and another for Pakistan. Joining each of these assemblies, as mentioned before, was considered as joining the new dominion territory as well.[150] Therefore, the constituent assembly gets imagined as the embodiment of not just territorial and demotic unity but also sovereignty.[151] The new dominion territories were imagined encompassing two distinct peoples – Indians and Pakistanis.

While the plans of a federation were aborted, the Cabinet Mission's proposal about the princely states were incorporated in the Indian Independence Act and therefore continued to remain valid.[152] Before the partition plan was approved, the Congress party's imagination of federalism included giving full internal sovereignty to the princely states that would join the united Indian

[147] ibid.

[148] See the Congress and League Reactions to the Cabinet Mission's Plan, May 20-24, 1946, in ibid 249-257.

[149] See the Indian Independence Act (n 33).

[150] ibid s. 2(2)(c). Also see, Letter issued to all the Princely States in the various Groups of States by the Constituent Assembly of India, June 7, 1947, in Shiva Rao (n 144) 633-35.

[151] Kapila (n 10) pg. 235, 237.

[152] See the Cabinet Mission's Memorandum on States' Treaties and Paramountcy (n 144).

dominion.[153] That is, barring the three subjects, the princely states would maintain their autonomy. However, as soon as the partition plan got announced, Congress claimed that the limitations imposed by the Cabinet Mission could no longer hold,[154] and the imagination of federalism took a diametrical shift from that of a weak centre to a strong centre with residuary powers vesting with the union instead of the units.[155] In these new circumstances, it was envisaged that all acceding princely states will eventually be brought on par with the former provinces, with Nehru even claiming that paramountcy instead of lapsing and leading to independence of princely states will now be shared between the union and the states, if not being fully inherited by the Indian dominion.[156]

It's worth noting that the accession agreements only vested the union with competence to legislate on the three subjects, whereas the rest of the competences continued to remain with the princely states.[157] As the Congress Party regarded this model of sharing sovereignty a relic of the past,[158] it evolved a scheme whereby each acceding princely state would execute a merger agreement through which the state's autonomous existence would come to an end bringing them on par with the former provinces.[159] While some states like Saurashtra, Hyderabad, Travancore, and Mysore were supposed to have their own constitutions drafted by their constituent assemblies, such plans were

---

[153] The Nehru Report, 1928 guaranteed the same rights to the princely states as were vesting in them until then, see Nehru Report, 1928 in Shiva Rao (n 144) 74.

[154] See Minutes of the Joint Meetings of the Union Constitution and Provincial Constitution Committees, June-July 1947 in B Shiva Rao, *The Framing of India's Constitution: Select Documents* (Universal Law Publishing 1967) vol 2, 607.

[155] See Minutes of the Meetings of the Union Constitution Committee, May- August 1947 in ibid 553.

[156] See Proceedings of the Joint Meetings of the States Committee of the Constituent Assembly and the States Negotiating Committee of the Chamber of Princes, February-March 1947 in Shiva Rao (n 144) 676. Also see, Harshan Kumarasingham, 'The Tropical Dominions: The Appeal of Dominion Status in the Decolonisation of India, Pakistan and Ceylon' (2013) 23 Transactions of the Royal Historical Society 223.

[157] See the Instrument of Accession (n 14).

[158] See the White Paper on Indian States (n 36).

[159] For draft merger agreements, how they differed from accession agreements and their impact on the sovereignty of the princely states see ibid 38-58, 190-235. Also see generally Menon (n 120).

quickly aborted and the union constitution was extended to these states in its entirety, leading to extinguishment of their legal orders.[160] What is worth noting here is that the act of application of the entire Indian constitution to these states was regarded as subsuming them territorially and demotically within the union.[161]

This represents a unified conception of sovereignty vested in the aftermath of partition.[162] India is quick to move away from the divisible sovereignty that informed the relations of the colonial state with the princely states and articulates a unified and absolute conception of sovereignty.[163] This articulation of sovereignty is connected intimately to Nehruvian vision of the developmental state where a centralised republic was seen as a cure for all the ills that ailed the Indian subcontinent.[164] As Saksena argues, the developmental state was sought to be achieved through 'the articulation of a version of sovereignty that privileged exclusive and absolute control over defined territory'.[165] This was further enabled by the Indian state's claim of being the sole inheritor of sovereign rights which the British exercised until recently.[166] This went against the claims of many princely states who were articulating their own versions of divided sovereignty.[167] By accepting a dominion status for India, scholars argue, allowed the Indian state to continue colonial legal linkages to princely

[160] De and Shani (n 36). Also see, Taylor C Sherman, 'The Integration of the Princely State of Hyderabad and the Making of the Post-Colonial State in India, 1948–56' (2007) 44(4) Indian Economic and Social History Review 505.

[161] See Proclamations issued by Unions and States accepting the New Constitution of India, White Paper on Indian States (n 36) 365-373.

[162] See Tierney (n 2).

[163] See Saksena (n 8). Also see Pillai (n 133).

[164] Khosla (n 9) 99-100. Mehta argues Indian constitutionalism emerges in opposition to history, see, Uday Mehta, 'Indian Constitutionalism' in Dipesh Chakrabarty, Rochona Majumdar, and Andrew Sartori (eds.), *From the Colonial to the Postcolonial: India and Pakistan in Transition* (Oxford University Press 2007) 24.

[165] Priyasha Saksena, 'Building the Nation: Sovereignty and International Law in the Decolonisation of South Asia' (2020) 23(1) Journal of the History of International Law 62.

[166] ibid 65. Also see, See Proceedings of the Joint Meetings of the States Committee of the Constituent Assembly and the States Negotiating Committee of the Chamber of Princes, February-March 1947 (n 156).

[167] See for instance the case of Travancore in Pillai (n 133).

states, thereby precluding them from making any viable articulation of a different vision of sovereignty.[168] Nehru, had in fact warned that the princely states that had not joined either Pakistan or India would at best, still come under the Indian sphere of control as it had inherited the rights of the colonial government and at worst, be considered as hostile states.[169]

The Indian constitution, therefore, comes to be imagined as the bearer of this sovereignty through its repealing of the old colonial order and by bringing to an end the separate existence of princely states and incorporating them in the union's fold.[170] This included doing away with constituent assemblies in many princely states and by incorporating their people as Indian citizens.[171] Even within the body of the constitution, common citizenship becomes the embodiment of internal sovereignty where any form of dual citizenship is seen as a threat to the Indian conception of the people.[172] For most of the princely states, the Indian imagination of state sovereignty is constructed through the accession agreements and merger agreements. While accession agreements vest India with external sovereignty, merger agreements lead to extinguishment of internal sovereignty of these states. Under the process adopted, therefore, internal sovereignty is taken to be a natural concomitant to external sovereignty.[173]

Therefore, while external sovereignty is sought to be encapsulated with the help of accession agreements, internal sovereignty is constructed by articulating unified imagination of the Indian people. This entails one common citizenship for the whole of the union, for dual citizenship

---

[168] See Kumarasingham (n 156) 236.

[169] Pandit Nehru's Address, 18 April 1947', Indian Annual Register, i (1947), 212 as quoted in Saksena (n 8) 182.

[170] De and Shani (n 36).

[171] See Mehta (n 164). Also see, White Paper on Indian States (n 36).

[172] Constitution of India, art. 5. See, Amendments to Article 370 proposed by the Ministry of States of the Government of India in Noorani (n 20) 53-54. The ministry argued that citizenship was a natural concomitant to external sovereignty which had already been transferred to India through the accession agreement.

[173] Noorani ibid. Also see, White Paper on Indian States (n 36).

implies a fractured Indian demoi.[174] By the time the constitution is enacted, the external and the internal aspects of sovereignty get articulated through the written constitution making it a site for contesting Indian sovereignty. Since the Congress Party never accepted the lapsing of sovereignty and the break in the relations between princely states and the Indian government, it never envisaged the subjects of the princely state of Kashmir as constitutive of a separate demoi.[175] Consequently, Nehru did not recognise or accept the argument of Sheikh Abdullah, prime minister of Kashmir, that sovereignty had reverted to the people on the lapse of paramountcy and therefore the Kashmir constituent assembly was a sovereign body. In fact, Nehru argues that in law, the constituent assembly is not a sovereign body, just as the promise to the people of Kashmir to decide their own fate is not a legal claim.[176]

Popular sovereignty and Kashmiri constituent assembly

In his first address to the Kashmir constituent assembly, Sheikh Abdullah, Kashmir's prime minister declares that:

> You [Kashmir constituent assembly] are the sovereign authority in this State of Jammu and Kashmir; what you decide has the irrevocable force of law. The basic democratic principle of sovereignty of the nation embodied ably in the American and French Constitutions, is once again given shape in our midst.[177]

[174] Noorani ibid. As I discuss in the next section, when the Kashmir governments makes a claim for separate citizenship, it comes to fiercely contested by the Indian government. For an account of how legal citizenship undergoes a slow transformation towards a *jus sanguinis* conception in India, see, Niraja Gopal Jayal, *Citizenship and its discontents: An Indian History* (Harvard University Press 2013) 51-82.

[175] Proceedings of the Joint Meetings of the States Committee of the Constituent Assembly and the States Negotiating Committee of the Chamber of Princes, February-March 1947 (n 144).

[176] Jawaharlal Nehru Lok Sabha/House of the People vol II (7 August 1952).

[177] See Sheikh Abdullah (n 38).

There is a fundamental divergence between the two sides on the question of Kashmir's sovereignty. Kashmir complicated fundamentally one, the Indian articulation of state sovereignty and two, the claim that colonial sovereignty subsisted over princely states during Indian dominion-hood. While the Kashmir state articulated a divisible sovereignty vis-à-vis India based on its own developmental model of the state which was claimed did not align with India's or was considered as more radical,[178] it was also based on Kashmir's new popular government's own nationalistic aspirations.[179] Therefore, the negotiations that it has with India on the future federation reflects the two contradictory impulses – to remain allied with India and yet remain a separate entity, internally vis-à-vis India as well as externally vis-à-vis the rest of the world. As the Kashmir government had only executed the accession agreement and never the merger agreement like the rest of the princely states, its relationship with India soon came to be seen as that of an outlier.[180]

As state sovereignty came to be encapsulated in the constitutional text, application of the entire Indian constitution to Kashmir was seen as a threat to its sovereignty.[181] To prevent Kashmir from undergoing the integration that was achieved in the case of the rest of the princely states, the Kashmir constituent assembly allowed for application of only those provisions of the Indian constitution that followed its vision of state sovereignty.[182] The provisions that were non-complaint were suitably modified to make them compliant, making 'way for a re-authoring of the

[178] Jawaharlal Nehru Lok Sabha/House of the People vol I (7 July 1952). Also see, Nehru's Note Recording Discussions with Kashmir's Delegation on 20 July 1952 in S Gopal (ed), *Selected Works of Jawaharlal Nehru* (Oxford University Press 1998) vol 19 211.

[179] See Hussain (n 19) 24-76.

[180] See Nehru (n 176)

[181] See the Letter Dated 17 May 1949 by N. Gopalaswami Ayyangar to Vallabhbhai Patel enclosing Jawaharlal Nehru's draft letter to Sheikh Abdullah for his approval in Noorani (n 20) 50-52.

[182] See the Interim Report of the Basic Principles Committee, Jammu and Kashmir Constituent Assembly Debates, vol I (10 June 1952). The report further acknowledges that the Kashmir constituent assembly was convened with sovereign powers. Also see, See Constitution of India, art. 370.

Constitution of India' in its application to Kashmir.[183] These modifications took the form of insertions, exceptions, omissions, substitutions, differing constructions, and additions.[184] For instance, Part V of the Indian constitution prescribes the method of direct elections for the Indian parliament. However, this part was applied to Kashmir with a modification that its representatives in the Indian parliament would be appointed by the Indian president on consultation with the Kashmir government.[185] Therefore, just like a treaty is acceded to by a state with reservations and such reservations operate vis-à-vis those states alone, in the case of Kashmir, the Indian constitution acts as a treaty and the modifications made in the constitution's application take the form of reservations.[186]

From the very beginning Kashmir's government articulates a vision of sovereignty and statehood which would keep it separate from India and Pakistan. In 1944, through a proposed draft constitution for Kashmir, Sheikh Abdullah's party, the National Conference, declares its intention to constitute an independent and a socialist republic in Kashmir.[187] This draft constitution also lays down an elaborate plan for a Bolshevist-inspired, thorough reorganisation of state and society in Kashmir. The plan includes elaborate socio-economic goals that the new state would be constitutionally mandated to pursue.[188] There were provisions for reorganising agriculture, distribution, industries, apart from having a peasants and a women's charter. When the Cabinet Mission announces that with the lapse of paramountcy, sovereignty would revert to the rulers,

---

[183] See Aman, "'Tuhindi Article" ("The Articles Were Yours")' (*VerfBlog*, 29 December 2022) <https://verfassungsblog.de/tuhindi-article-the-articles-were-yours/> accessed 15 July 2023.

[184] See the Constitution (Application to Jammu & Kashmir) Order, 1950 as quoted in the White Paper of Indian States (n 36) 378-383.

[185] ibid.

[186] See Marko Milanovic and Linos-Alexander Sicilianos, 'Reservations to Treaties: An Introduction' (2013) 24(4) European Journal of International Law 1055.

[187] See New Kashmir Manifesto, 1944, Kashmir Bureau of Information <https://www.kashmirconnected.com/resources/new-kashmir-the-english-text-in-full> accessed 28 July 2023.

[188] ibid.

Sheikh Abdullah, in pursuance of this plan makes an intervention arguing that sovereignty should revert to the people of Kashmir.[189] The logic for this claim is that the lapsing of paramountcy terminates the treaties that were concluded between the British and the Kashmiri ruler, bringing to an end the monarchical rule in Kashmir.[190] Although, the Indian Independence Act formalised the cabinet mission's statement on paramountcy vis-à-vis princely states, Sheikh Abdullah's position on popular sovereignty continued to inform his and National conference's stance on the Kashmir question.

Therefore, Abdullah's imagination of sovereignty hinges on regarding the sovereign character of the Kashmiri demos as a separate category from the Indian demos. This he achieves by constructing a common citizenship for the five disparate provinces of Kashmir and by giving autonomy to these regions.[191] As a result, the constituent power in Kashmir is regarded as the source of sovereignty and authority, as against sharing constituent power with the Indian constituent assembly.[192] Therefore, constitution-making and conferring constitutional citizenship to the Kashmiri subject was central to constituting the Kashmiri state vis-à-vis India and externally as well, as I will demonstrate in the next section.

From Abdullah's claim of sovereignty reverting to the people of Kashmir flowed many conclusions. For one, decision-making with respect to the external or the internal aspects of the Kashmir question, resided with the people of the Kashmir region through its constituent

[189] See Abdullah's letter as quoted in Adarsh Anand, *The Constitution of Jammu & Kashmir: Its Developments and Comments* (LexisNexis2016) 48.

[190] The British had executed a treaty with the Dogra rulers in the middle of the 19th century vesting in them the authority to ruler over Kashmir, see, See Treaty of Amritsar (16 March 1846) in Puranlal Lakhanpal, *Essential Documents and Notes on Kashmir Dispute* (2nd edn., International Books 1965) 31-32.

[191] Article 1, New Kashmir Manifesto (n 187).

[192] See Sheikh Abdullah's inaugural speech to the constituent assembly (n 38).

assembly.[193] Seeing the National conference as an expression of the popular will of the people who had now formed the constituent assembly, Abdullah resisted any resolution of the Kashmir problem through the UNSC and instead favoured a constitutional settlement that would grant an international legal personality for Kashmir while sharing constitutional authority with India.[194] It was for this reason that the three subjects under the accession agreement were given a strict literal interpretation that would allow the state to pursue the goals that were laid down in the Naya Kashmir manifesto.

Even though external sovereignty comes to be vested in India owing to the accession agreement forced due to the war, the imagination of external and internal sovereignty is very distinct from that of the Indian government. While for the Indian state, external sovereignty became a route for seeking internal sovereignty, for the Kashmir government, the converse was true i.e., it sought external sovereignty by relying on its claim of internal sovereignty.[195] However, sovereignty in the sense of the power to decide and demarcate authority was stated to be vested in the Kashmir constituent assembly.[196] That is, once the constituent assembly in Kashmir had been convened, it became clear that the disagreement between the two sides was about the question of source of authority i.e., who makes the final decision or whose claims were supreme, and not with the quantum of autonomy. While Nehru saw the Indian constitution as the ultimate source of authority, for Abdullah, it could only be the state's own constitution drafted by its constituent assembly.[197] It is for this reason that both sides attempt to wrest authority from the other using the constitution as I show in the next section. Apart from the traditional markers of sovereignty, many

[193] ibid.

[194] The UNSC had passed a resolution on Kashmir calling for settlement of the dispute based on a plebiscite in Kashmir, see, UNSC Res 47 (21 April 1948) UN Doc S/Res/726.

[195] See the Kashmir-India negotiations in Noorani (n 37).

[196] Sheikh Abdullah's inaugural speech to the constituent assembly (n 38).

[197] Nehru (n 176).

new markers were regarded as sites on which Kashmir contested Indian articulation of sovereignty. These included but were not limited to citizenship, fundamental rights, constitutional directives, and organs of government. Therefore, sovereignty takes many new lives in the Kashmir-India negotiations over the nature and form of future federation.

It's worth noting here that this form of relationship would make Kashmir an exception to what constitutional scholars later called India's asymmetrical federalism since the source of sovereignty was imagined differently.[198] For Nehru and others, sovereignty had been inherited by the constituent assembly and had the sanction of Indian people. For Abdullah, colonial paramountcy had lapsed and consequently had made void the monarchical rule in Kashmir. Therefore, sovereignty had been reverted to the Kashmiri people which was not shared with either of the new dominions. Not just the constituent assembly, but Abdullah's political party, and the new government, were considered as an expression of this sovereignty. For Abdullah, the taking over the reins of the government by his party was a 'revolutionary transfer of power', manifesting the break in the old colonial relations.[199]

In the next section, I consider the positions taken by Nehru and Abdullah as the Indian and the Kashmiri positions respectively.[200] I consider the imagination of Kashmiri sovereignty in three phases. One, when Article 370 comes to be negotiated during the time when Indian constituent assembly was functioning. Two, the negotiations over the 1950 presidential order where the Indian constitution becomes the site for enforcing and contesting sovereignty. Finally, the agreement of

[198] See Tillin (n 21) and Khosla (n 21).

[199] Sheikh Abdullah's inaugural speech to the constituent assembly (n 38).

[200] As I make this representation, I am conscious there were other voices that dissented from their approaches. For example, the Hindu right in India was demanding Kashmir's total integration in India. Similarly, the Muslim Conference in Kashmir advocated for Kashmir's accession to Pakistan.

1952 by which time the constituent assembly in Kashmir had been convened and was envisaging making momentous changes in the constitutional setup.

The three phases of contestations

The point of making this distinction between the three phases is not to make the claim that state sovereignty evolves from the first phase to the third. Rather, to showcase how the two states contest each other's claims to sovereignty and how each imagines its relationship with the colonial legal order. These contestations also reveal how different parts of the Indian constitution become sites for enforcing and contesting sovereignty. While the primary logic for resisting Indian sovereignty for Abdullah is treating the Kashmir subject as a distinct category from the Indian subject, in these three phases his reliance on the legal instruments of the colonial order, shows that the linkages to the colonial law had not been lost for Kashmir. For Nehru, on the other hand, the colonial order and its various legal instruments were relics of the past which had no place in the new legal order that the Indian constituent assembly was about to enact. For Abdullah, the link to colonial order was still perpetuating since the ruler had not been yet formally replaced. That is, the moving away from the colonial order was indirectly approached through the question of monarchy and this brought him into a direct confrontation with Nehru.

Therefore, the postcolonial separateness of the two constitutional orders is justified on the basis of the separateness of the colonial Indian and the monarchical Kashmiri orders.

Negotiating Article 370 – Phase I

The accession agreement provided for shared law-making powers between Kashmir and India, it made no provision for application of the Indian constitution in Kashmir.[201] Therefore, when the Indian constitution was about to be enacted, the Indian government started negotiations with the Kashmir government for a provision that would incorporate the terms of the accession agreement in the Indian constitution.[202] Article 370 provided a two-way process of extending Indian constitutional provisions to Kashmir by promulgating a presidential order – on consultation with the Kashmir government, provisions of the constitution and legislative entries corresponding to the three subjects in the accession agreement could be extended.[203] Whereas, only on concurrence of the Kashmir government, could the provisions and legislative entries not corresponding to the three subjects be extended.[204] The concurrence given on these matters required further ratification by the Kashmir constituent assembly.[205] The provision defined Kashmir government as the ruler of Kashmir, recognised as such by the Indian president and acting on the aid and advice of the council of ministers that was headed by Sheikh Abdullah.

Therefore, the contestations between the two governments were in essence about their interpretation of the accession agreement's three subjects and to what extent each corresponded to the provisions of the Indian constitution. That is, to what extent could the meaning of the three subjects be extrapolated so as to ensure maximum application of the provisions and legislative entries of the Indian constitution to Kashmir on *consultation* of its government. By following this

[201] See clause 8 of the accession agreement stated: Nothing in this Instrument affects the continuance of my sovereignty in and over this State, or, save as provided by or under this Instrument, the exercise of any powers, authority and rights now enjoyed by me as Ruler of this state or the validity of any law at present in force in this State, see, Instrument of Accession (n 14).

[202] See the Kashmir-India negotiations in Noorani (n 37).

[203] Constitution of India, art. 370(1)(b)(i) and 1(c).

[204] ibid clause 1(b)(ii) and 1(d).

[205] ibid clause 2.

course, the Indian government was side-stepping the authority of the Kashmir constituent assembly and thereby limiting its role.

Recall that the three subjects in the accession agreement corresponded to external sovereignty. When Article 370 comes to be negotiated, the Indian government claims internal sovereignty in Kashmir on account of external sovereignty. It argues that the Kashmiri subject is an Indian citizen since external sovereignty has been transferred to the Indian dominion. Under the draft prepared by the Kashmir government, only such provisions and entries could be extended to Kashmir that 'directly related' to the accession agreement.[206] No provision for going beyond the terms of the accession on concurrence or otherwise was made. When this draft comes to be debated between the Indian constituent assembly and the Indian government, it is stated that the provisions relating to fundamental rights, Supreme Court, and citizenship needed to be applied as well along with the entirety of legislative entries.[207] This would achieve what the merger agreement had achieved in case of the other princely states.

This claim is resisted by Abdullah on the basis of the accession agreement and the monarchical constitution existing in the state then. He argues that provisions pertaining to citizenship, fundamental rights, Supreme Court among others that the Indian government wanted to extend to Kashmir, did not correspond to the terms of the accession agreement and therefore must be applied only on the consent of the constituent assembly.[208] For Abdullah popular sovereignty had found expression in the 'revolutionary transfer of power' to his government, but popular sovereignty as the power to make a constitution had not yet been realized and therefore the

[206] Draft Article 306A as Proposed by the Government of Jammu & Kashmir as quoted in K M Munshi, *Indian Constitutional Document* (Bharatiya Vidya Bhavan 1967) vol II 519–20.

[207] See Amendments to Article 370 proposed by the Ministry of States of the Government of India in Noorani (n 20) 53-54.

[208] Sheikh Abdullah's Letter to N Gopalaswami Ayyangar on 17 October 1949 as quoted in Noorani (n 20) 72-75.

question of application of various provisions of the Indian constitution to the state ought to be reserved for the constituent assembly's decision-making.[209]

Therefore, Indian sovereignty articulated through its constituent assembly is countered by Kashmir's linkages to colonial law and the future constituent assembly in Kashmir.

From this brief exchange, two things become clear. The Indian state saw accession agreement as a limitation on its authority and yet a stepping-stone to integration. This would involve making Kashmir a unit of India territorially, and thereby determine the sphere of its autonomy. On the other hand, for Abdullah the accession would keep Kashmir tied to India, but the authority to determine the sphere of union jurisdiction resided in its constituent assembly and could not be wrested from it by applying provisions of the constitution that went beyond the terms of accession.

The 1950 presidential order – Phase II

In this phase, the 1950 presidential order comes to be negotiated between the two governments. The 1950 order was passed in consultation with the Kashmir government under Article 370(1).[210] It applied those provisions and legislative entries of the Indian constitution to Kashmir which seemingly corresponded to the accession agreement.

This phase makes clear that the two sides differed on their interpretation of the three subjects under the accession agreement. For Nehru and other Indian officials as shown in the previous phase, all the consequential constitutional provisions and legislative entries were covered by the three subjects of the accession agreement. It is worth noting that when all the major provisions of

[209] Sheikh Abdullah's inaugural speech to the constituent assembly (n 38).

[210] The Constitution (Application to Jammu & Kashmir) Order, 1950 (n 184).

the Indian constitution would be applied to Kashmir as Nehru was envisaging, consequently, there would remain a very limited role for Kashmir's constituent assembly. Therefore, the aim of application of the Indian constitution was twofold – one, reinforce Indian sovereignty over Kashmir (internal and external) i.e., using powers of consultation, apply all the major provisions of the constitution and legislative entries to Kashmir and thereby bring the state at par with the rest of the princely states using the constitutional text, and two, limit the role, scope, and authority of the Kashmir constituent assembly by leaving only such matters for its decision-making as pertained to the organs of government. This would go against what Abdullah was claiming until now that the constituent assembly in Kashmir was a sovereign body with no formal limits on its authority.[211]

But that is not the only reason why this phase is important. The negotiations over the presidential order bring into sharp relief the two sides' imagination of sovereignty. For Nehru, it is important to seek internal sovereignty on the basis of external sovereignty and therefore, the three acceded subjects that pertained to the latter are given an expansive meaning in order to cover the former. This interpretation is based on the reading of the new constitution as a whole.[212] On the other hand, Abdullah, does not engage with the Indian constitution at all. Instead, he relies on the colonial constitutional legislation i.e., the Government of India Act, 1935 to accord a very strict and textual interpretation of external sovereignty.[213] This ensures that internal sovereignty remains untouched, and Kashmir also gains external sovereignty in certain domains.[214] Through external sovereignty, Abdullah also seeks statehood for Kashmir, internally with India, and externally with the rest of the world. It was for this reason that Abdullah argued that while the Indian constitution

[211] Sheikh Abdullah's inaugural speech to the constituent assembly (n 38).

[212] Jawaharlal Nehru's note dated 15 November 1950, File No. 1(2)-K/60, National Archives of India.

[213] Letter from Sheikh Abdullah to Ministry of States, Government of India dated 24 January 1950, ibid.

[214] ibid.

could repeal the colonial Government of India Act, 1935 for the Indian state, it could not do so with respect to the act's applicability to Kashmir as this would be the prerogative of the Kashmir constituent assembly.[215] The Kashmir government argued that the Government of India Act, 1935 would govern the interpretation of the accession agreement, whereas the Indian government relied on the Indian constitution to interpret the accession agreement.[216] In what follows, I consider the how the Kashmir government interpreted defence and foreign affairs as mentioned under the accession agreement vis-à-vis the Indian constitution as both had bearings on the external dimension of sovereignty and statehood.

While the union was attempting to apply all legislative entries from the Indian constitution that pertained to defence, foreign affairs, and communications, the state government taking a strictly textual view of the accession argued for a limited application of these entries. It either rejected or asked for suitable modifications in entries pertaining to defence that did not directly correspond with the accession agreement's entry on defence.[217]

Entry 1 of the union list stated as: 'Defence of India and every part there of including preparation for defence and all such acts as may be conducive in times of war to its prosecution and after its termination to effective demobilisation'.[218] The Kashmir government asked that the following part be dropped for it infringed in the internal affairs of the state: 'and all such acts as may be conducive in times of war to its prosecution and after its termination to effective demobilisation'.[219] Similarly,

[215] ibid.

[216] ibid.

[217] ibid.

[218] Constitution of India, seventh schedule, union list.

[219] Letter from Sheikh Abdullah (n 213).

entry 7 was stated to go beyond the terms of accession.[220] Under foreign affairs, the state argued for a limited application on the basis of a strict literal interpretation. This implied that Indian citizenship (entry 17) would not apply.[221] Entries that could lend an international legal status for Kashmir were sought to be similarly modified. In entry 10, relations with foreign countries were sought to be restricted to only political relations and simultaneously,[222] whereas entry 41 pertaining to trade and commerce with foreign countries was stated to vest with the Kashmir government.[223] With respect to entries 12 and 13 which deal with the UNO and participation in international conferences respectively, it was stated that Kashmir's prime minister had already taken part in negotiations at the UNO and that all the parties to the dispute had recognised that a plebiscite administrator could only be legally appointed by the state government, implying that Kashmir enjoyed some sort of personality under international law.[224] Reliance was placed on the republics of Soviet Union which despite being units of the union, enjoyed a distinct status under international law and took part in international conferences as such.

On constitutional provisions, objections were raised to the application of constitution's preamble, citizenship provisions, fundamental rights, and directive principles, provisions pertaining to the Supreme Court.[225] As per the state government, these went beyond the terms of accession and hence ought to be placed reserved for the constituent assembly. Particularly, Indian fundamental rights are rejected for they go against the normative goals that the Kashmir state is supposed to

[220] Entry 7: 'Industries declared by Parliament by law to be necessary for the purpose of defence or for the prosecution of war.'

[221] Entry 17: 'Citizenship, naturalisation and aliens.'

[222] Entry 10: 'Foreign affairs; all matters which bring the Union into relation with any foreign country.'

[223] Letter from Sheikh Abdullah (n 213).

[224] ibid.

[225] ibid.

pursue.[226] In this case, the right to property under the fundamental rights was stated to go against the land reforms project that the Kashmir state was about to initiate.

As these negotiations show, the Indian constitution became a site for enforcing and contesting Indian sovereignty in Kashmir. The Kashmir government, by drawing its linkages to the colonial constitutional legislation and the future constituent power resisted the application of the Indian constitution in the state. In the third phase, the constituent assembly takes centre stage and brings the two sides into yet another confrontation.

Discord and the 1952 agreement – Phase III

In the previous two phases reliance is placed on the colonial law and the future constituent assembly to resist Nehru's attempts at integrating Kashmir. But the overarching reasoning is based on the imagination of the separateness of Kashmir's constitutional order and popular sovereignty being vested in the Kashmiri subjects as a separate category from the Indian demos. This logic takes centre stage in this phase in which the constituent assembly in Kashmir comes to be convened. As a consequence, when Abdullah starts the process of making major constitutional changes, Nehru interferes in the process. While Abdullah considers the process of constitution-making an internal exercise to be achieved by its constituent assembly without any fetters or restrictions on its authority, Nehru makes the claim that any change having an implication for relations with India, must be first discussed with the union government.[227] In this part, I consider the question of monarchy in Kashmir and the initiative of the Kashmir constituent assembly to replace the same with a republican form of government.

---

[226] ibid.

[227] Nehru's Letter to Abdullah dated 5 June 1952 as quoted in S Gopal (ed), *Selected Works of Jawaharlal Nehru* (Oxford University Press 1998) vol 18 397-401.

Recall that Article 370 defined the term Kashmir government as the ruler of Kashmir, recognised as such by the Indian president and acting on the aid and advice of the council of ministers that was headed by Sheikh Abdullah. As the ruler was known to act in a constitutionally suspect manner and was known to collaborate with the Indian intelligence agencies,[228] the first step that the Kashmir constituent assembly took towards drafting the constitution was the replacement of monarchical rule with a republican form of government.[229] Such was the urgency that this was sought to implemented with, that the assembly did not wait for the entire constitution to be drafted and instead chose to amend the existing constitution to replace the ruler with an indirectly elected head of state.[230] This would make it constitutionally mandatory for the head of state to act on the aid and advice of Kashmir's cabinet.

Therefore, when the question of monarchy was raised before the constituent assembly, Nehru made an intervention stating that the assembly could not on its own abolish the monarchy as the ruler had been previously given recognition by the Indian president as Kashmir's head of state.[231] He points out[232]:

> You [Sheikh Abdullah] say that he [Kashmir's ruler] should be deposed by the Constituent Assembly. I am doubtful about the result of such a resolution in the Assembly, because he owes his position there according to our Constitution by virtue of recognition by the President. A resolution of deposition might well be considered a discourtesy to the President.

---

[228] Noorani (n 20) 9-12.

[229] See Interim Report of the Basic Principles Committee, Jammu and Kashmir Constituent Assembly Debates (n 182).

[230] Constitution Act of 1939, s. 5.

[231] Nehru's letter to Abdullah dated 6 August 1952 as quoted in S Gopal (ed), *Selected Works of Jawaharlal Nehru* (Oxford University Press 1998) vol 19 282.

[232] ibid 284.

Instead, Nehru suggested that the Indian president would first withdraw his recognition and then invite the constituent assembly to make recommendation for a new head of state.[233] Only once this had been done, could the constituent assembly abolish monarchy and replace it with a republican form of government. Abdullah, on the other hand, sought to do the reverse. That is, first abolish the monarchy through the constituent assembly, elect the new head of state, and based in it recommend to the Indian president the change in the headship of the state.[234]

While this disagreement might appear to be trivial, logistical, or a matter of procedure, at its heart lies a two fundamentally different imaginations of sovereignty and constitutional ordering. For Nehru, India stood as a territoriality and legally, a unified order. Sovereignty gets inherited from the colonial state and remains absolutely vested in the union. For Abdullah, on the other hand, the princely state of Kashmir as a sovereign entity, had a separate constitutional order from India's. Although the two constitutional orders interacted and interlocked, none could claim supremacy over the other. While for India, its constituent assembly is the source of authority for the new republic, for Abdullah, the Kashmir constituent assembly retains the final decision-making powers barring the limited competences to legislate that vested with the Indian union. Therefore, as pointed out before, the contestations between the two sides show that the disagreements do not just extend to power sharing but even (in fact more so) to question of the final decision-making body. For Nehru, it's the Indian constituent assembly, for Abdullah, it's the Kashmir constituent assembly.

[233] ibid.

[234] ibid.

Eventually, both Nehru and Abdullah enter into an agreement where both agree that monarchical rule in the state would be replaced with a republican form of government amongst other things.[235] Even though this follows the course that Abdullah had suggested, the other provisions of the agreement would lead to further integration of Kashmir in India.[236] As these provisions are not implemented by the Kashmir constituent assembly while it goes ahead with the abolition of monarchical rule, the relationship between the two turns sour.[237] An organised campaign across India by the Hindu right calling for a total integration of Kashmir and withdrawal of its case from the UNSC, acts as the last nail in the coffin.[238]

As Abdullah starts demanding implementation of the UNSC resolutions, his actions put him on a collision course with the Indian government which in 1953 is quick to order his dismissal from office through the new head of state.[239] While in the period between 1947-53, Abdullah was attempting at equalising an inherited unequal relationship, from 1953 onwards, Kashmir's sovereignty comes to be systematically subordinated, and it gets further integrated in the union. This is once again achieved by the application of the Indian constitution and its laws to Kashmir through a series of presidential orders.[240] As a consequence, the Indian legal authority over Kashmir gets aggrandised while at the same time reducing and limiting the scope and authority of the Kashmir state. This process reached its natural conclusion in 2019 when the BJP led Indian government abrogated Article 370, the Kashmir constitution, and partitioned the Kashmir state into two federally administered territories.

---

[235] For the Delhi Agreement, see Noorani (n 20) 123-173. Under the agreement, it was decided to extend provisions relating to fundamental rights, citizenship, Supreme Court, emergency powers, and financial integration.

[236] Though it did specify that the agreement would be subject to the decision-making of the constituent assembly.

[237] A. G. Noorani, 'How and Why Nehru and Abdullah Fell Out' (1999) 34(5) Economic and Political Weekly 268-272.

[238] ibid.

[239] See Noorani (n 20) 226-242.

[240] See ibid 303-387.

This section showed how sovereignty comes to be imagined by the two states in the aftermath of empire and what their articulation of sovereignty entails for the Kashmir-India constitutional relationship. It showed that while India was eager to construct a unified constitutional order by its articulation of state sovereignty, Kashmir's articulation of sovereignty implied not only constitutional pluralism but also a federated state. The state is sought to be constituted by the constitutional order.

Conclusion

Compared to the courts which I discuss in the next chapter, the two governments nor their constituent assemblies are in agreement over the nature of the Kashmir-India relationship and its consequences for state sovereignty. While both the accounts of constitutional pluralism and federalism showed that they require some agreement at least between the two parties, that does not seem to be case here. Therefore, the question of the role of the courts gains more significance.

While I consider the role of courts in the next chapter, here I ask the question as to how the case of sovereignty in Kashmir speaks to the two traditions that I began the chapter with. While both these traditions can only be fully engaged with over a book or multiples books, I want to focus here on factors that connect the two cases, and in turn connect with the case of Kashmir. For that I recapitulate the central claims of the two theories I discussed at the beginning of this chapter.

Tierney's central thesis argues for a reimagination of constituent power in federal states from an 'undifferentiated body of individuals'[241] to the constituent territories of the polity.[242] From this,

[241] Tierney (n 2) 64.

[242] ibid.

flows many conclusions like the constituent territories being the bearers of constituent power and constituent authority. [243] If one treats this as an empirical claim, then the case of India as a state that claims to have a federal constitution complicates this claim for the treatment that is meted out to the princely states. Most constitutional commentaries or accounts of federalism in India ignore the history of princely states and what their coming-together model of integration could offer for the imagination of federalism.[244] Even in Tierney's account of Indian federalism, the consequences of the princely states' integration for the federation are not fully explored.

While the provinces can be regarded as falling under the holding-together model, the princely states arguably fall under the coming together model.[245] Yet by extinguishing their distinct territorial and demotic existence, the Indian constitution is able to create a unified order where territorial or demotic pluralism is not tolerated. Even though these princely states existed as polities before they executed instruments to join the Indian state, the new postcolonial constitution nullifies their distinct existence as polities and relegates them to the status of provinces.[246] It's worth noting that even though these provinces are distinct units with rights, the federal imagination is engineered towards extinguishing their constituent power at the time of their integration in India. For a limited period, the constitution does recognise the distinct status of some of the princely states from the provinces by classifying them under Part A, B, and C of its first schedule.[247] While Part A comprises of all the provinces, Part B comprises some of the formerly princely states and Part C includes the chief commissioners provinces.[248] By a

[243] ibid 79.

[244] See Tillin (n 21) and Khosla (n 21).

[245] Dr B. R. Ambedkar, Indian Constituent Assembly Debates, vol VII (4 November 1948).

[246] For an account of how the merger is carried out see the White Paper on the Indian States (n 36).

[247] Constitution of India, first schedule.

[248] See White Paper on the Indian States (n 36).

constitutional amendment in 1956, these distinctions are nullified, and most of these princely states get merged into provinces when India undertakes a thorough redrawing of internal borders.[249]

Kashmir is the only case in India therefore, where the claim of territorial and demotic pluralism comes alive for it has its own constituent power that seeks to join the Indian union. But since Tierney argues that there is little conceptual distinction between a confederation and a federation,[250] it is difficult to see how the competing claims made by the Kashmir constituent assembly would be answered by his account.[251] It's worth recalling that the Kashmir constituent assembly does not only seek constitutional pluralism but also a federated state i.e., splitting of state function between India and Kashmir. This also brings us to the claims of constitutional pluralism in the EU.

Tierney makes a strict distinction between the state and constitutional order and makes the claim that the mapping of the external dimension of statehood and sovereignty onto the internal functions of the state has produced a monist conception of constitutional sovereignty.[252] Therefore, he also calls for a strict distinction between external and internal sovereignty. On similar lines, the discourse on constitutional pluralism makes a distinction between state and the constitutional order, to make the claim that a non-state entity like the EU can make constitutional claims.[253] The critics of the theory of constitutional pluralism make a similar distinction between the two to argue that the state's constitutional claims are qualitatively different from the constitutional claims made by the EU.[254] In the case of Kashmir, these boundaries are not as rigid.

[249] Report of the States Reorganisation Commission, 1955, Government of India.

[250] Tierney (n 2) 30, 121.

[251] ibid.

[252] ibid 93, 110.

[253] Walker (n 5) 337. Also see, MacCormick (n 5) 10.

[254] See Loughlin (n 71) 22.

In the case of Kashmir, both entities that make constitutional claims vis-à-vis each other are states or aspirant states. India seeks statehood vis-à-vis Kashmir through its constitutional order. That is, the logic of statehood is said to flow from the constitutional order as the constituent assembly has come to be imagined as the embodiment of the unity and sovereignty of the territory and nation-state building.[255] Externally, it seeks statehood on the basis of the accession agreement that vested the union with external sovereignty.[256] On the other hand, Kashmir seeks to establish its statehood, internally as well as externally, using its constitutional order. Internally, it seeks statehood vis-à-vis India through a variety of measures. One, by arguing that the Kashmir demos was distinct from the Indian demos and had gained sovereignty after the lapsing of paramountcy sui generis.[257] This is sought to be encoded in the constitutional order by rejecting the application of Indian constitutional provisions relating to citizenship, making Indians aliens in the Kashmir territory and vice versa.[258] Two, similarly, these boundaries are sought to be implemented through the mechanism of a permit system under which Indians would be required to apply to the Kashmir government for permission to travel to Kashmir.[259] Three, while this is the internal conception of statehood that is sought to be achieved through the constitutional order, the external statehood is conceived on the basis of external sovereignty being encapsulated in the constitutional order. The Kashmir government argues that Indian state functions externally only extend to managing political relations with the rest of the world, whereas trade relations are to be managed by the Kashmir state.[260] Similarly, for representation before the UNO and participation in international conferences, the Kashmir state enjoys a separate status. Reliance is placed on the ruling of the

[255] Singh (n 32). Also see, Kapila (n 10).

[256] See Noorani (n 37).

[257] See Abdullah's letter as quoted in Anand (n 189).

[258] See the discussion on the 1950 presidential order in the previous section.

[259] Noorani (n 20) 2-27.

[260] ibid.

UNSC that the only the Kashmir state has the legitimate constitutional authority to appoint the plebiscite administrator whenever a plebiscite is agreed to be held.

Therefore, the distinctions that constitutional pluralism and Tierney's account of federalism makes between state and the constitutional order, and between external and internal sovereignty are not as rigid in the case of Kashmir. Here, the state and the constitutional order are co-constitutive. The constitutional conception of sovereignty is used not just to seek statehood internally with India but externally as well i.e., external sovereignty and statehood become a natural concomitant to constitutional sovereignty. Therefore, the internal division of sovereignty and statehood gets mapped onto the external dimensions as well.

There is another way in which the distinctions between the state and the constitutional order get blurred in the Kashmir-India case, as well as the Indian case when considered separately. Both states seek to use the constitutional order to lay down the normative goals that the state is constitutionally mandated to pursue.[261] These goals are the socio-economic goals of the state in the form of constitutional directives.[262] Therefore, the constitutional order apart from establishing and constituting statehood, is also used to lay down the aims and objectives of the state that it constitutes. This reflects in the contestations between the Kashmir government and the Indian government in 1952 when the latter tries to extend Indian constitutional provisions pertaining to fundamental rights and constitutional directives to Kashmir. The Kashmir government resists this on the ground that its state goals are different from the socio-economic goals that the Indian constitution lays down for the Indian state. Since Indian fundamental rights 'as an expression of sovereignty'[263] contradict the state goals of Kashmir, these rights also come to be rejected.

[261] Constitution of India, part IV; Constitution of Jammu & Kashmir, part IV.

[262] ibid.

[263] Loughlin (n 12).

Therefore, the Kashmir government makes the case that it will draft its own fundamental rights in a way that does not go against its constitutional directives to the state.

This shows that the claim of a definitive distinction between statehood and the constitutional order, might not always imply a constitutional conception of sovereignty.[264] Similarly, the distinction between external and internal sovereignty, as many scholars have also shown, is not always no neat.[265] In the case of Kashmir, a divisible internal sovereignty provided by the constitution is used to make a claim of divisible external sovereignty and a federated statehood. Based on this I show that the postcolonial state and constitutional order are co-constitutive.

As I show in this chapter, India is quick to move away from the colonial logic of divisibility of state sovereignty. On the other hand, Abdullah retains the linkages to the colonial legal order until Kashmir's own constituent assembly does not abolish the monarchy. Further, while sharing of constitutional authority is acceptable to Nehru only on the terms of the Indian constitution leading to a limited autonomy for Kashmir, for Abdullah, constitutional authority is shared only to the extent of the three acceded subject and anything falling outside comes under the authority of the Kashmir state. In conclusion, I show how the Kashmir case complicates the two traditions of constitutional authority sharing that I considered at the beginning of this chapter.

[264] Tierney (n 2) 93, 110.

[265] Besson (n 46).

Constitutional courts and the Kashmiri constituent power

Introduction

In the previous chapter, I showed that the fundamental difference between the Indian and Kashmir government was over constitutional ordering of the two states. For the Indian government, the constitution had created a unified order where all the powers derived from the constitution and therefore Kashmir could only be possessed with a very limited autonomy on the basis of the terms set by the Indian constitution.[266] On the other hand, for the Kashmir government, the lapsing of paramountcy had led to the people of Kashmir becoming sovereign as a separate category from the Indian subject.[267] This became the basis for its claim that the Kashmir constitutional order was separated from the Indian order. The separated constitutional order also became the basis for the Kashmir government to seek external sovereignty and statehood. This as I show in the previous chapter complicates the claim of a strict separation of state and the constitutional order in contexts where constitutional authority comes to be shared between multiple entities.

In this chapter I consider how the contestations over sovereignty that we saw in Chapter 2 play out in constitutional courts. I will look at how the founding moment and sovereignty get imagined by the Indian Supreme Court (SCI) and the Kashmir High Court (HC) and their treatment of the constituent power in Kashmir in their constitutional jurisprudence.[268] I will first consider the interactions of constitutional courts with sub-state national minority groups and the European Court of Justice's (ECJ) interactions with the national constitutional courts to make the claim that

[266] Constitution of India, article 370.

[267] See Anand (n 189).

[268] For judicial dialogue in the European context, see, Takis Tridimas, 'The ECJ and National Courts: Dialogue, Cooperation and Instability' in Damian Chalmers and Anthony Arnull (eds.), *The Oxford Handbook of European Union Law* (Oxford University Press 2015) 412.

the approach that courts take in contexts such as these are defined by a whole host of factors such as the state's history and institutional design of the state, among other factors depending on the context. In the next section, I show how the SCI dealt with federal questions in the early years of the Indian constitution. I focus only the period of the early years of the constitution in this section, as the Kashmir cases that I consider in the next section belong to this period. I will argue that the two sets of Kashmir cases largely take Abdullah's line of reasoning to hold that there are two separated constitutional orders in India and Kashmir as against the Nehruvian logic of unified sovereignty and one-constitutional-order. However, both sets of cases maintain silence on the question of statehood for Kashmir. Finally, I explore some of the reasons for this approach of the courts in the early years.

While there are a quite a few cases that deal with the question of Kashmir later and enable Kashmir's integration in India,[269] in this chapter I deal with only those cases which were decided during or in the aftermath of the constitution-making process i.e., are contemporary to the events of the previous chapter. Given how the doctrine of sovereignty is deployed and counter-deployed by the political actors, it's important to see how the courts have used sovereignty and federalism to mediate Kashmir-India relations.

Courts and competing claims of constitutionalism

While federalism, in acting as a tool for accommodation, is increasingly becoming 'one of the most important structural and constitutional mechanisms'[270] for dealing with deeply divided societies, it can at the same time be used as a tool for integration and assimilation.[271] As one of the organs of

[269] Noorani (n 20) 386-402.

[270] Richard H Pildes, 'Ethnic Identity and Democratic Institutions: A Dynamic Perspective' in Sujit Choudhry (ed), *Constitutional Design for Divided Societies: Integration or Accommodation?* (Oxford University Press 2008) 198.

[271] Sujit Choudhry, 'Does the world need more Canada? The politics of the Canadian model in constitutional politics and political theory' 5(4) (2007) International Journal of Constitutional Law 606, 614.

the state, national constitutional courts face an awkward situation when national minorities make claims assertive of a distinct identity or autonomy before it.[272] Some scholars remain deeply sceptical of the role national constitutional courts can play in 'acting as nationalizing agencies for specific cultural particularisms'.[273] On the other hand, scholars such as Tierney based on a study of Canada-Quebec, Spain-Catalonia, UK-Scotland, argue that 'relations between a sub-state national society and the courts of the host-state generally do not reach a debilitatingly low ebb' and that the former groups can take a 'positive view' of the courts believing them to be 'honest-brokers within the constitution'.[274] In this section I consider first the discourse on constitutional courts and the claims of sovereignty made by subnational groups, and then the contestations between the ECJ and national constitutional courts.

Sub-state national minorities and constitutional courts

Popelier in her study shows that no constitutional court really takes a decentralist position all the time.[275] Based on her study of multiple constitutional courts, she concludes that: 1) the courts are more inclined to take a non-centralist position if the representation of provinces in federal law-making is weak; 2) the courts are inclined to take a centralist stance if the role of provinces in the process of selection of federal judges is low; 3) the courts' centralist or non-centralist position reflects on the nature and the course that federalism has taken in the state; 4) finally, there is evidence that the courts take non-centralist stance in contexts where there are sub-state national

[272] Will Kymlicka, *Multicultural Citizenship* (Oxford University Press 1995) 11.

[273] Ferran Requejo, 'Democratic Legitimacy and National Pluralism' in Ferran Requejo (ed), *Democracy and National Pluralism* (Routledge 2001) 167-169. See also Patricia Popelier, 'Federalism Disputes and the behaviour of Courts: Explaining variation in Federal Court's Support for Centralization' 47(1) (2017) Publius: The Journal of Federalism 27, 44.

[274] Stephen Tierney, *Constitutional Law and National Pluralism* (Oxford University Press 2004) 248.

[275] Popelier (n 273) 6

groups.[276] These conclusions clarify that the constitutional courts act under a certain set of constraints imposed by history and institutional design of the state and therefore this path dependence needs to be kept in mind when considering contestations between courts and various groups making claims about their sovereign characters.

Be that as it may, it's also worth making a distinction between claims made before a constitutional court by a province or a unit of a federation over ordinary federal questions like the competence to enact a certain legislation or its implementation, as against claims made by a sub-state national group. The former claims are qualitatively different from the claims that are made by or on behalf of sub-state national groups against the nation-state. It can be the case that a constitutional court maybe non-centralist in the sense that it tilts more towards the units over questions of competence but the same constitutional court maybe centralist vis-à-vis a sub-state national group. The core difference between the two kinds of claims that can arguably produce two kinds of results is that while the former seeks an interpretation of the constitution that reinforces the nation-state, the latter's claims more often than not seek a radical reimagination of federal relations between the state and the union and are therefore seen as antithetical to the nation-state.

Having made this distinction between *who* makes the claims before the constitutional court and the impact of it on the decision of the court, I consider a few examples of constitutional courts interacting with sub-state national groups. While some scholarship considers the federalism jurisprudence of constitutional court of Canada as that of centralism,[277] some others argue that the

[276] ibid 18. The last point is endorsed by Tierney when he argues that the Canadian experience of federalism has been different from American centralised experience due to the presence of a sub-national entity like Quebec see Tierney (n 274) 124.

[277] Bzdera André, 'Analysis of federal high courts: A political theory of judicial review' (1993) 26(1) Canadian Journal of Political Science 3-29.

court has overall had a balanced approach towards provinces and the union.[278] The court's secession reference has been hailed globally for it was the first time a Canadian court (and perhaps the first time a constitutional court in our age) ruled that a province could secede without causing a rupture in the constitutional order even though no provision existed in the constitution that provided for a province's constitutional secession.[279] Choudhry calls this as post-sovereign constitution-making of 'compromise, of consensus, of stages, of constraint, of legalized procedure, of pluralism.'[280] The court ruled that a duty was imposed on all parties to take into account the wishes of the people and negotiate in good faith to arrive at a settlement for secession if a desire to that effect is expressed. This was an unprecedented ruling from a constitutional court. Scholars praising this ruling have noted that the most important outcomes of the verdict were that it 'preserved the legitimacy of the Supreme Court. There was nothing in it that could be used to provoke a sense of humiliation or rejection in Quebec that could be directed against the court's authority.'[281] Apart from restoring the court's legitimacy, the decision also implicitly recognised the plurinational nature of Canadian federalism where Quebec occupied a distinct status.[282]

Similarly, the nature of Spanish constitutional tribunal's federalism jurisprudence remains deeply contested. While some scholars have shown that the court's approach has been balanced between the provinces and the union, scholars working on Catalonia and Basque country differ and make

[278] Popelier (n 273) 6. Also see, Baier Gerald, *Courts and federalism: Judicial Doctrine in the United States, Australia, and Canada* (UBC Press 2006).

[279] Tierney (n 274) 259.

[280] Sujit Choudhry, 'Secession and post-sovereign constitution-making after 1989: Catalonia, Kosovo, and Quebec' (2019) International Journal of Constitutional Law 17(2) 469.

[281] Robert Young, *The Struggle for Quebec* (McGill-Queen's University Press 1999) 147.

[282] Tierney (n 274) 283.

the claim that the court takes a very centralist stance.[283] López Bofill argues that by striking down the Catalan statute of autonomy 2006:

> 'the Spanish Constitutional Court, possessed by an excess of hubris, likely put itself consciously above the will of the Catalan people (and above the intricate political negotiations between the Catalan and the Spanish governments), strengthening its role as a supreme interpreter of the Constitution while emphatically blocking any further Catalan self-government development taking into account "the indissoluble unity of the Spanish Nation."'[284]

In his account, therefore, the Spanish constitutional court maybe different from the rest of the central institutions of Spain owing to the nature of the task it performs, but on the question of Catalonia, the court acts like any other central institution making the 'obstinate defence of the "the indissoluble unity of the Spanish nation"'.[285]

But, on the question of competences, when the union government tried to take back many devolved powers under the guise of harmonisation during 1980s, the tribunal did find that the harmonisation power of the union was limited and therefore it struck down many of the provisions of the union's legislation.[286] Based on this decision, Tierney concludes that the tribunal 'was able to refute the allegations of critics who would attack it for a purported centrist bias.'[287] The question of competences brings the discussion to Scotland. Scotland, until the early 2000s had a fairly stable relationship with the UK and the same was reflected in the judgments of the Scottish sessions court.[288] However, recently when attempts were made by the Scottish parliament to enact the Scottish referendum bill in order to hold a second referendum on the question of Scotland's

---

[283] Nicholas Aroney and John Kincaid, 'Introduction' in Nicholas Aroney and John Kincaid (eds.), *Courts in federal countries: Federalists or unitarists?* (University of Toronto Press 2017). Also see, Popelier (n 273) 6.

[284] Hèctor López Bofill, 'Hubris, constitutionalism, and "the indissoluble unity of the Spanish nation": The repression of Catalan secessionist referenda in Spanish constitutional law' (2019) 17(3) International Journal of Constitutional Law 957.

[285] ibid 968.

[286] Tierney (n 274) 273.

[287] ibid 273.

[288] ibid 279.

independence from the UK in the aftermath of Brexit, the UK Supreme Court ruled that the competence to enact the law would fall under reserved matters and therefore under the prerogative of the UK parliament.[289] Like the Quebec secession reference, this is an extreme case and therefore the factors surrounding the case must also be considered, which I turn to now.

From this discussion on the interaction of sub-state national minorities and national constitutional courts, it becomes clear that the answer that courts act as 'nationalising agencies'[290] is a rather simplistic take on the question. A lot depends on the kind of claims that are being made, history and the institutional design of the state, as this path dependence decides more often than not the approach that the courts take towards sub-state national minorities. The Catalan and Scottish example also showed that the course that these cases take also depends on the political relations between the national government and the sub-state national governments.[291] While the cases that I discussed above pertained to both extreme cases and ordinary cases involving sub-state national minorities and the constitutional courts, the question of constitutional pluralism and the approach of constitutional courts there is what I turn to now. After this, I consider the question of the SCI and its approach towards federalism in its early years after the inauguration of the constitution to situate the case of Kashmir's claims of sovereignty contextually in the SCI's jurisprudence on federalism.

Constitutional pluralism and the courts

While these cases discussed above involved contestations between a sub-state national minority and the constitutional court, another space of contestations takes place between the member states of the European union and the ECJ within a different paradigm of law. The previous section

[289] Reference by the Lord Advocate of devolution issues under paragraph 34 of Schedule 6 to the Scotland Act 1998, [2022] UKSC 31.

[290] Requejo (n 273).

[291] As the courts are not totally independent of their political environment, see, Nicholas Aroney and John Kincaid, 'Introduction' (n 283) 12.

showed that there are many factors that contribute to the constitutional courts taking the approach they take but are there any such factors that determine the course that the ECJ or the national constitutional court takes is the question I am interested in this section. While constitutional courts have internally dealt with extreme cases where it was required to decide questions like secession or referendum references, the ECJ has for a better part of its history not dealt with cases of the like nature and therefore I am only considering its approach to the question of competences.[292]

As shown in the previous chapter, the EU was established as a community of states but the EU institutions like the ECJ have played a pivotal role in transforming the European legal system through its interpretation of the TEU. As Alter notes, this was achieved by enabling a system where violations of European law could be challenged before national constitutional courts and making European law hierarchically supreme to the national law.[293] This, the court achieved even when the sole purpose for which it was established was to check the supranational institutions of the EU.[294]

The second outcome resulted from the first. Even though the EU was formed between member states, the ECJ ruled that the establishment of the EU created a new legal order which conferred rights on individuals of the member-states to invoke before their national courts.[295] Therefore, the nature of the EU changed from an entity comprising of member-states to an entity that encompassed the demos of the member-states as well. That is, the European legal order interacted directly with the citizens of the member-states and not through national legal orders.[296] From this

[292] Carlos Closa, 'Secession from a Member State and EU Membership: The View from the Union' (2016) 12(2) European Constitutional Law Review 240-264.

[293] Karen Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (Oxford University Press 2010) 2.

[294] ibid 6.

[295] Van Gend en Loos v. Nederlandse Administratie Belastingen, ECJ Case 26/62, [1963] ECR 1.

[296] Alter (n 293) 19.

flowed the doctrine of supremacy. In another case where an Italian law was challenged before the ECJ, the Italian court premeditatedly declared that the EU law could not prevail upon an Italian law even though the TEU did restrict the sovereign rights of the member-states.[297] The ECJ, according to Alter took the approach of the US Supreme Court in Marbury[298] by declaring that the community law was supreme and that the national law was subordinated in nature to the former. But at the same time, it ruled that the Italian law did not contravene the EU law therefore 'by simply doing nothing the Italian government seemingly accepted the decision.'[299]

While there are similarities between the approach that the two courts take, the differences between the institutional trajectory of the two courts needs to be pointed out. One, the division of competences between the member-state and the union is not a zero-sum affair and the mutation of the competences in the 1970s and 80s was enabled by the member-states.[300] Two, the decision-making of the ECJ vis-à-vis the member-states is to a large extent been contingent on the cooperative relationship with its national constitutional courts.[301]

Both these doctrines mentioned above were finally cemented in the EU legal system in another case where the ECJ ruled that:

> 'It follows from the foregoing that every national court must, in a case within its jurisdiction, apply Community law in its entirety and protect rights of individuals and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule'.[302]

---

[297] Costa v. Ente Nazionale per L'Energia Elettrica (ENBL), ECJ Case 6/64 [1964] ECR 585.

[298] Marbury v. Madison 5 U.S. 137 (1803).

[299] Alter (n 293) 19.

[300] Joseph Weiler, 'The Transformation of Europe' (1991) 100 Yale Law Journal 2429.

[301] Steve Boom, 'The European Union After the Maastricht Decision: Will Germany Be the "Virginia of Europe?"' (1995) 43(2) The American Journal of Comparative Law 204.

[302] Amministrazione delle Finanze dello Stato v. Simmenthal SpA (1978) Case 106/77, [1978] ECR 629.

Even though the EU was established as a community of states, by these doctrines, the ECJ completely changed the nature and face of the European legal order over time through its interpretation of the treaty. But this hasn't been without contestations by the national constitutional courts. While the German constitutional court has at times enabled European legal integration through its interpretation of the TEU, there have been phases where it has proved to be the most defiant of the national constitutional courts.[303] In its Maastricht decision for instance, the German constitutional court's decision implied that the EU legal order was subject to the national legal order.[304] Alter notes that this case seemingly overruled the court's earlier jurisprudence on the EU where it had ruled that the court would not review whether the EU law violated any German basic rights 'so long as the ECJ was sufficiently protecting these rights.'[305] This was from a not so distant past when the same court 'had gone further than any other national high court in affirming the European Court's Van Gend en Loos jurisprudence.'[306]

But the tendency of the German constitutional court nowadays to take a more German-centric view of the EU legal order does not necessarily imply that the rest of the member-states have followed suit. The French courts have been 'less strident' in their claim that the European law should be subject to the French constitution.[307] This variance is also explained by the institutional design of the state and its history which in turn determines how its courts interact with the EU legal order.[308] In the French case, it has been argued that the lack of legal and constitutional tools like Germany, and its monism-inspired legal system are some of the factors that have contributed

---

303 Alter (n 293) 72-117

304 Brunner and others v. The European Union Treaty, 'Maastricht decision', BVerfG decision, 2 BvR 2134/92 and 2 BvR 2159/92 of 11 Jan. 1994. Also see, Nigel Foster, 'The German Constitution and EC Membership' (1994) Public Law 404.

305 Alter (n 293) 106.

306 ibid 79.

307 ibid 179.

308 ibid.

to its less influential role in the EU-French contestations compared to the role that German constitutional court plays.[309] Similarly, the ECJ is tasked with ensuring that the common market law remains unaffected by national laws/policies or any barriers that the national governments might create towards free-trade across borders.[310] Therefore, this factor plays a big role in the ECJ's imagination of the EU.

Having discussed how constitutional courts internally deal with the sub-state national groups and externally interact with the European legal order, in the next part I consider the SCI and how it deals with questions pertaining to federalism. This part showed us that the approach that constitutional courts dealing with sub-state national minority groups or interacting with the European legal order, or the ECJ in its approach to the member-states' legal order is driven by many factors which the court might not have control over. It is true that courts take a political position when their rulings favour integration or promote de-centralism, but at the same time, the constraints within which these courts operate determine the course of action that they tend to or are bound to take in such cases. I also showed that it's important to make a distinction between constitutional courts deciding questions of ordinary federal relations that relate to competency, and claims that are made by a sub-state national group that seek to alter the basis of the relationship or reimagine the dominant understanding of federalism. As the Kashmir case will show, no such claim has been made on behalf of the Kashmir government and that all these cases have been brought by private citizens.

[309] ibid 178-180

[310] ibid.

Federalism and the Indian Supreme Court

The Indian judiciary has been vested with the powers to review legislation and constitutional amendments.[311] Even though each state has its own constitutional court in the integrated judicial structure, the SCI acts as the final decision-making body as a constitutional court as well as the appellate court.[312] The Kashmir HC used to fall outside of this structure as the powers for it flowed from the Kashmir constitution and until 1953 it had its own highest constitutional court and a court of final appeal.[313]

Compared to Scotland or Quebec, the SCI hasn't had to deal with any extreme case where a unit sought secession from the union. However, there are cases where the units have challenged the authority of the union to enact law which the state claims belonged to the state competences. The law-making powers have a three-way division under the Indian constitution – a union list of competences for the union, a state list for the state and the concurrent list over which both the union and the state can legislate.[314] In this section, I consider the role of the SCI towards federal questions in the aftermath of the coming into force of the constitution so that I am able to contextually situate the Kashmir cases I deal with in the next part. I restrict the Kashmir cases to this period as they are contemporary to the phase I deal in the previous chapter. While I acknowledge that the Kashmir cases before the SCI are qualitatively different from the other federal questions that come before it from the Indian provinces for reasons mentioned in the previous chapter, it is nevertheless essential to locate the SCI's Kashmir jurisprudence contextually within the SC's federalism jurisprudence.

[311] Constitution of India, arts. 13 and 32. For review of amendments, see, Kesavananda Bharati Sripadagalvaru & ors. v. State of Kerala & anr. (1973) 4 SCC 225.

[312] Constitution of India, arts. 132, 133, and 134.

[313] Constitution of Jammu & Kashmir, s. 93.

[314] Constitution of India, seventh schedule.

Prasad has argued that apart from a few 'over-publicized and spectacular cases'[315] in the SC's history in which it promoted over-centralization, it has largely protected and legitimated provincial competences.[316] This has been confirmed by other scholars who have shown that the approach of court on questions of legislative competence has been balanced, in the Nehruvian years and some years after as well. While the court has ruled in favour of the union in some cases, in an equal number of cases, the court has ruled in favour of the states.[317] Bhatia also makes the claim that in the early years of the constitution, both centralising and federalising readings of the constitution were considered 'viable interpretations of the constitutional text, and of constitutional silences.'[318] However, the *West Bengal* case[319] from 1963, in Bhatia's account, constituted an inflection point from where the centralised reading of the constitution started becoming entrenched and continues till date.[320]

Before the *West Bengal* case, not many cases came before the SCI where questions pertaining to the nature of federalism and state soveirgenty were raised. The cases that were decided by the court in this period between 1950 until early 1960s all raised questions of legislative competence where the court relied on doctrines of pith and substance, colourable legislation among others to decide the cases. The two major cases in this period both dealt with the legislative competence of the state as

---

315 Anirudh Prasad, *Centre-State Relations in India: Constitutional Provisions, Judicial Review, Recent Trends* (Deep and Deep Publications 1985) 654-8.

316 Sudhir Krishnaswamy, 'Constitutional Federalism in the Indian Supreme Court' in Mark Tushnet and Madhav Khosla (eds), *Unstable Constitutionalism: Law and Politics in South Asia* (Cambridge University Press) 357.

317 Wilfried Swenden & Rekha Saxena, 'Policing the federation: the Supreme Court and judicial federalism in India' (2021) Territory, Politics, Governance 8. The three cases that are relevant for us in this period are: Ch. Tika Ramji & Others v. The State of Uttar Pradesh & Others 1956 AIR 676; The State of Bombay and Another v. F. N. Balsara 1951 AIR 318; Babulal Parate v. State of Maharashtra And Others 1961 AIR 884.

318 Gautam Bhatia, 'A Federal Framework and a Centralising Drift: Re-Assessing Federalism under the Indian Constitution' (15 June 2022). Available at <http://dx.doi.org/10.2139/ssrn.4137112> accessed 30 July 2023.

319 State of West Bengal v. Union of India 1963 AIR 1241.

320 Bhatia (n 318).

against the union and in both the cases the court ruled in favour of the states.[321] In both the cases the court did not have occasion to delve into the question of the nature of federalism in India, that opportunity only arose in the *West Bengal* case.

In the *West Bengal* case,[322] the power of the union to acquire property under its concurrent jurisdiction was challenged on the ground that this power did not extend to state property. To support this claim, petitioners argued that each state was sovereign in its domain as was the union in its domain, and therefore none could constitutionally infringe on the rights and powers of the other. Therefore, while the union could acquire property for union's purposes, it could not acquire property, the ownership of which belonged to the state. The court repelled this argument on the ground that the states powers were limited compared to the powers of the union and:

> 'That being the extent of the power of the Parliament it would be difficult to hold that the Parliament which is competent to destroy a State is on account of some assumption as to absolute sovereignty of the State incompetent effectively to acquire by legislation designed for that purpose the property owned by the State for governmental purpose. The parliamentary power of legislation to acquire property is, subject to the express provisions of the Constitution, unrestricted. To imply limitations on that power on the assumption of that degree of political sovereignty which makes the States coordinate with and independent of the Union, is to envisage a Constitutional scheme which does not exist in law or in practice. On a review of the diverse provisions of the Constitution the inference is inevitable that the distribution of powers - both legislative and executive - does not support the theory of full sovereignty in the States so as to render it immune from the exercise of legislative power of the Union Parliament - particularly in relation to acquisition of property of the States.'[323]

Therefore, far from a federalist position, the court concludes that the powers of the union are of a superior nature to those of the states. Bhatia argues that the court 'synthesised the structure of the Constitution, and a particular historical story about its origins, into a legal conclusion.'[324] The structural reading of the constitution for the court showed that the legislative and executive

[321] Tikka Ramji (n 317) and F N Balsara (n n317).

[322] West Bengal (n 319).

[323] ibid.

[324] Bhatia (n 318).

supremacy of the union over the states was evident in the many provisions of the constitution whereas the historical reading implied that India was a quasi-federal state following a holding-together model of federalism and not a coming-together model.[325]

It's worth noting that before this case was decided, the same court in the *Babulal Parate* case[326] had concluded that there was no need to consult twice the state legislature on altering its territorial boundaries, even if on the first instance of consultation the proposal had been substantially modified. Interestingly, *Babulal Parate* was based on a textual reading of Article 3 of the constitution,[327] as textualism was the dominant tool that the SCI in early years would follow for constitutional interpretation.[328] In both the cases, the court considers the Indian demos as a unified construct that became sovereign as soon as the British withdrew and this sovereignty was vested in the constituent assembly which embodied holding-together instead of a coming-together model of federal relations. The difference between *Babulal Parate, F N Balsara* and the *Tikka Ramji* cases, on the one hand were decided on the basis of a textual reading of the constitution, whereas the *West Bengal* case was decided on the basis of a structural reading of the constitution.[329] Scholars have shown that this textualist approach in the early years of the SCI was not only restricted to federal questions but also rights question and particularly questions related to preventive detention.[330]

---

325 Bhatia ibid.

326 Babulal Parate (n 317).

327 Bhatia (n 318). Article 3 prescribes the method to be followed for redrawing of boundaries of states.

328 Chintan Chandrachud, 'Constitutional Interpretation' in Sujit Choudhry, Madhav Khosla, and Pratap Bhanu Mehta (eds.), *The Oxford Handbook of the Indian Constitution* (n 21) 73-93.

329 Bhatia (n 318).

330 Chandrachud (n 328) 83.

Overall, the early court avoided a consistent centralist or federalist position, and there is no clear or consistent line of interpretation over questions of competency or the nature of federalism.[331] As Bhatia points out, it is only after the *West Bengal* case that the court assumes a more centrist position, and which is then followed on for a long time.[332]

This discussion on the Indian supreme court's approach towards federalism also confirms what we saw in the previous section – that the contextual factors and history play a big role in the approach that the court takes in cases such as these. The factors that determine the approach of the SCI in its early years are arguably the colonial history of India and the court's reading of that history, and the textualist approach towards constitutional interpretation. The discussion also showed that in the early years there is no one consistent line that the court took towards federal questions and that the decisions of the court were contingent. It is only after the *West Bengal* case that we see a trend towards a consistent centralising position being taken by the SCI.

In light of this discourse, in the next part I study the SCI vis-à-vis its decisions on Kashmir HC's claims of a 'distinctive identity or sovereignty'[333] and autonomy-assertive claims in the immediate aftermath of partition. These claims, more often than not, involve a question of interpretation of the accession agreement and Article 370 of the Indian constitution which until 2019 vested Kashmir with its autonomous character (at least as a matter of principle, if not in practice). While some scholarship has focussed on centre-state relations vis-à-vis distribution of competences and

---

331 Manish Tewari and Rekha Saxena, 'The Supreme Court of India: The Rise of Judicial Power and the Protection of Federalism' in Nicholas Aroney and John Kincaid (eds.), *Courts in federal countries: Federalists or unitarists?* (n 283) 246.

332 See Bhatia (n 318). ibid. Some of the cases which according to Bhatia are influenced by the West Bengal case' logic are: Kuldip Nayyar v. Union of India, AIR 2006 SC 3127; Mullaperiyar Environmental Protection Forum v. Union of India, (2006) 3 SCC 643; Naga People's Movement of Human Rights v. Union of India, among many others.

333 Antoni Ninet and James Gardner, 'Distinctive identity claims in federal systems: Judicial policing of subnational variance' 14(2) (2016) International Journal of Constitutional Law 378, 380.

the role of the Indian judiciary, questions arising from Kashmir's sovereign character go to the heart of Indian federalism, constitution, and nationhood.[334] Further, it must be noted that the protection of provincial competences has not always been extended to Kashmir once the process of subordination begins in 1954.[335] Therefore, how the courts imagined Kashmir's status in the 1950s, and how it compares with the Abdullah-Nehru debates, and the global discourse on constitutional courts and sovereignty claims made before them gains more significance.

The Supreme Court and the Kashmir High Court on Kashmir's sovereignty

Having dealt with the global discourse on courts responding to claims of competing nationalism and sovereignty in the EU and other federal contexts, in this part I consider the question of how the SCI and Kashmir HC approaches Kashmir's sovereignty in the early years after the constitution comes into force. In this period, as I show, both the courts recognise the distinct constitutional order of Kashmir. This reasoning is based on a textual reading of the Kashmir constitution (1939) and the accession agreement. Lastly, I also attempt to situate these cases in their socio-political contexts.

The first contestation and the absoluteness of sovereignty

In the first case, *Rehman Shagoo*,[336] the petitioners challenged the constitutional validity of the Enemy Agents Ordinance promulgated by the ruler of Kashmir in 1949. The ordinance was a war time measure and it provided for a parallel mechanism to try and punish those who were alleged

[334] See chapter 2.

[335] Noorani (n 20) 386-402.

[336] Rehman Shagoo And Ors. v. The State Of Jammu And Kashmir 1958 CriLJ 885.

to have aided or continued to aid Pakistan's cause in Kashmir.[337] The power to promulgate the ordinance flowed from the then constitution in Kashmir (constitution of 1939) that vested the ruler with absolute powers of law-making.[338]

The first argument against the ordinance was that once the ruler had acceded to India through the instrument of accession, he had surrendered law-making powers over the subjects of defence, foreign affairs, and communications.[339] As the ordinance was relatable to the subject of defence, the ruler could not have legally promulgated the same as with the signing of the accession agreement, he had lost the right to enact law over the three subjects. In other words, it was argued that with the accession agreement coming into effect, there was a clear and rigid distribution of law-making powers between India and Kashmir. India had competence over the three subjects whereas only the residuary power remained with Kashmir's ruler.

The HC begins by stating that the power to promulgate the Ordinance flowed from the plenary powers of the ruler which were inherent in him by virtue of the constitution. Since the constitution had the monarch's sanction it was the supreme law of the state at that time.[340] Having determined the constitution as the primogenitor of all law, the court proceeds to consider the impact of the accession agreement on the state's constitution i.e., whether the accession agreement could take away powers of the ruler while the state constitution prescribed otherwise?

---

[337] Enemy Agents Ordinance, 2005 (1948) (Ordinance No. VIII of Samvat 2005) <https://www.indiacode.nic.in/bitstream/123456789/16416/1/enemy_agents_ordinance%2C_samvat_2005.pdf> accessed 4 August 2023. The ordinance continues to be valid law today.

[338] Constitution Act of 1939, s. 5.

[339] Para 7. For the Instrument of Accession, see (n 14).

[340] Para 8, 9.

It is worth pointing out that while the accession agreement did vest the Indian dominion with law-making powers over defence, communications, and foreign affairs, no amendment was made to the state constitution to give effect to the agreement nor did the agreement supersede the constitution. In light of this, the court answers the question by holding that the accession agreement only created legislative competence in the Indian dominion over the three subjects and this creation of law-making powers in the dominion did not result in a simultaneous loss of competence in the ruler.[341] Therefore, the ruler 'retained the full ambit of that power in himself'.[342] The court and holds that while competence is vested in India over certain subjects, this does not imply loss of sovereignty of the ruler as the authority for it was provided by the constitution which remained unamended.

Therefore, the HC considers the Kashmir constitutional order as distinct from the Indian order. While the Indian dominion comes to exercise law-making powers over Kashmir, this does not imply that the ruler's powers are extinguished. This implies that the accession agreement does not affect Kashmir's legal order in the way that it affects the Indian legal order. This claim of the court needs more unpacking.

Drawing on the colonial Government of India Act, 1935 from which the dominion government derived its powers of law-making in respect of acceding princely states, the court makes a constitutional pluralist claim that while the union's powers are derivable from a union constitutional statute which lies outside the Kashmir legal order, it continues to remain 'subject to the terms of the Instrument of Accession'.[343] That is, both legal orders remain independent of each other with the only connecting link between the two being that of the instrument of accession.

[341] Para 9.

[342] ibid.

[343] Para 9.

Therefore, 'the Dominion acquired authority by Instrument of Accession and subject to the terms of that instrument.'[344]

Based on this the court finds that on the three subjects both the union and the state have concurrent jurisdiction. While the union can legislate 'for the purposes only of the dominion', the state can legislate for other local matters and issues that pertain to the three subjects.[345] Only in case there arises a conflict between two legislations, the union law shall prevail for its general nature and the need for uniformity for the whole territory.[346] Therefore, there are two ways that limitations are imposed on law-making powers of the two sides: one, the dominion's law-making powers are subject to the accession agreement and are to be exercised 'for the purposes only of the dominion'; and two, the state's law-making powers on the same subjects are limited by the Government of India Act to the extent that if the union law comes into conflict with the state law, the former shall prevail.

The court holds[347]:

> There must be some purposes of the State as distinct from the purposes of the Union as a whole. The Dominion legislature made laws for the entire Dominion including the State but the purposes must be general and could not be local. After the instrument of accession some powers were certainly given to the Dominion but so far as the States were concerned the powers of the rulers with regard to federal items also remained.

That is, as per the court, the union gets to exercise law-making powers over the three subjects for the purposes of the dominion. This is to ensure that there is coordination and common policy over these subjects for all the territories of the union. But this exercise of law-making powers vis-

[344] ibid.

[345] Para 10.

[346] ibid.

[347] Para 10.

à-vis Kashmir is subject to the terms of the accession agreement. On the other hand, the ruler continues to be competent to legislate on the three subjects to the extent that his laws are in compliance with the dominion law. In case there is non-compliance, the dominion law would prevail. This limitation comes from the Government of India Act.

The court's federalist imagination is that of a true federation as it rules that 'in a federal constitution each State is distinct from the Union.'[348] It concludes by pointing out that the 'legislative power retained by the ruler was of the same magnitude as it was before the Instrument of Accession was executed.'[349]

Another question that the court must answer is whether the Ordinance survives after the constituent assembly of Kashmir displaces monarchical sovereignty, abolishes the monarchy, and amends the state constitution to provide for a republican form of government. The court finds that the ordinance remains unaffected due to the amendment of the constitution as the new sovereign chooses to let it remain on the statute book.[350] By holding this, the HC recognises the seamless transfer of sovereignty from the ruler to the constituent assembly. There are other grounds as well which are raised in the case, but I have focused on those which pertain to Kashmir's sovereignty. To recapitulate, the court holds that there are two orders interlocking in a way that puts limitations on the exercise of law-making powers of both. It must be noted that this ruling delivered in the year 1958 has little practical value as it interprets a brief phase in between 1947 and 1949.

[348] Para 10.

[349] Para 3.

[350] Para

In appeal before the SCI,[351] it was argued that the HC had erred in holding that the ruler retained the full magnitude of powers that he transferred to India.[352] The SCI rules that it is not necessary to decide whether there was a concurrent jurisdiction in the union and the state over the acceded subjects and therefore it must proceed on 'the assumption that the Central Legislature alone had the power to legislate on these matters.'[353] By assuming that the central legislature alone had the power to legislate on the three subjects and not the ruler, the court decides by not deciding. While it might appear odd for a constitutional court to 'assume' that authority over the three subjects vested in the centre alone when the HC ruled otherwise, it's worth noting that the SCI like the HC finds that the ordinance was not relatable to defence but to public order. Since public order was not part of the accession agreement and continued to vest in the ruler, the SC arrived at the conclusion that the ruler had the authority to promulgate the ordinance. Recall that the HC begins its judgment by first considering the question of the concurrent exercise of jurisdiction. By first answering the question whether the ordinance pertained to defence or public order, the SCI is able to side-step the question of concurrent exercise of jurisdiction on the three subjects. The next case I consider raises a similar question, but the court's approach remains very different.

In the first contestation between the Kashmir HC and the SCI, one of the most important questions is left undecided by the apex court by 'assuming' that exclusive jurisdiction was vested in the union and the state was barred from legislating on the three subjects. By not commenting on the jurisprudence of multiplicity of legal orders that the HC lays down, the SCI leaves the door open for a more federalist interpretation of Kashmiri sovereignty by a later court.

[351] Rehman Shagoo And Others v. State Of Jammu And Kashmir 1960 SCR (1) 680.

[352] Para 9.

[353] Para 10.

The fading away of contestations and the demands of sovereignty

In the second interaction between the HC and the SC, the question of the nature of Kashmir's legal order post-accession agreement takes centre stage. But this happens in a case that is not strictly speaking related federalism in the sense that it does not concern union's competences as I show.

The Congress Party had come to power in India on the promise that land would be redistributed from the landlords to the tillers.[354] When this was implemented through law, the same came under challenge from courts all over India, with the Indian supreme court stating that these legislations violated the fundamental rights of the landlords.[355] More challenges were mounted while the Indian parliament amended the constitution to undo the effects of the rulings of the courts.[356] This period saw a sharp tussle between the judiciary and the parliament over who had the final word on the constitution, with all these cases leading to *Kesavananda Bharti*, where the SCI held that the parliament's power to amend the constitution was limited in nature and scope.[357]

What is worth noting here is that the land reforms initiated by the states across India was done by their state legislatures in their ordinary law-making capacity. Therefore, these laws were susceptible to judicial review on the grounds of violation of the Indian constitution. The Kashmir case of land reforms marked an important departure from this and hence raised important questions for Kashmir's sovereignty.

---

354 R S Gae, 'Land Law in India: With Special Reference to the Constitution' (1973) 22 International & Comparative Law Quarterly 312.

355 ibid 319. Sir Kameshwar Singh v. Province of Bihar AIR 1951 Pat. 246, here the court held that the land reforms legislation violated the landlords' fundamental right to property.

356 The State of West Bengal v. Mrs. Bela Banerjee and Others 1954 SCR 558.

357 Kesavananda Bharati (n 311).

The Kashmir government through its regent-ruler enacted the land reforms law in 1950 as the legislature had not been convened yet.[358] The previous ruler had abdicated in favour of his son who on the sanction of the popular government enacted this law. On the question of whether any compensation should be provided to the landlords, the law declared that it would be left for the decision-making of the Kashmir constituent assembly.[359] This was unlike India's case where the land reforms legislations were enacted by state legislatures and the question of compensation was also determined by them.[360] The Kashmir constituent assembly chose to award no compensation to the landlords whose lands were redistributed amongst the tillers.[361] In the first instance, the law was challenged before the Kashmir HC on the grounds that the ruler had become a constitutional monarch once the Indian constitution had started applying in the state through Article 370.[362] Consequently, the ruler's powers were subject to the Indian constitution and therefore he could not do something that militated against its provisions. This argument imagined India as a unified legal order where the Indian constitution was the singular constitutional source of authority for all primary and secondary legislations which in turn were subject to the that constitution.

The HC ruled that the ruler derived his powers from the constitution of 1939, in force at the time of enacting the land reforms law. As the accession agreement's clause 8[363] made it clear that sovereignty continued to vest in the ruler, Article 370 or any other provision of the Indian constitution could not materially affect the state constitution. As the state constitution was

[358] The Jammu and Kashmir Big Landed Estates Abolition Act, 1950 (Act 17 of 1950) <https://prsindia.org/files/bills_acts/acts_states/jammu-and-kashmir/1950/1950J&K17.pdf> accessed 20 July 2023.

[359] ibid s. 26.

[360] Gae (n 354).

[361] Report of the Land Reforms Committee, Jammu & Kashmir Constituent Assembly Debates, vol I (27 March 1952).

[362] Maghar Singh and others v. Principal Secretary, Jammu and Kashmir Government A.I.R. 1953 J&K 25(3).

[363] See (n 201).

unaffected by the application of the Indian constitution, therefore, the ruler's powers were not subject to the Indian constitution and continued to remain subject to the Kashmir constitution. Consequently, the land reforms law could not be challenged on the ground that it violated provisions of the Indian constitution. Therefore, the court recognises that there are multiple rules of recognition in the Kashmir-India case.

The court concedes that the ruler's powers are subject to the constitution, and he is therefore a constitutional monarch, but it is not the Indian constitution that his powers are subject to, it is the Kashmir constitution. Therefore, while the source of Indian law in Kashmir is Indian constitution as applicable in Kashmir and the former is subject to the latter, the Kashmir law is derivable from the Kashmir constitution and hence remains subject to the latter and not the Indian constitution. This means that there are multiple constitutional authorities, and each enjoys supremacy in its respective domain without infringing on the other. In this imagination, the question of ultimate sovereignty is to be decided on a case-to-case basis, much like the European union does it with its constitutional claims. This contrasts with the later cases which hold that that the union law and the union constitution enjoy supremacy over Kashmir's constitution and its laws.[364]

When this case reached the SCI in *Prem Nath Kaul*, a more comprehensive challenge was mounted bringing together questions of legitimacy and legality of the land reforms legislation and the effect of determination of compensation by the constituent assembly instead of the state legislature.[365]

The SCI begins by narrating the history of partition and its consequences on states like Kashmir from a constitutional law lens. Taking the line that Abdullah had in his negotiations with Nehru, the court states that with the lapse of paramountcy, states like Kashmir gained independence and

[364] State Bank of India v. Santosh Gupta & Others (2017) 2 SCC 538.

[365] Prem Nath Kaul v State of Jammu & Kashmir (1959) Supp (2) SCR 270.

powers that had been earlier transferred to the British reverted to the states.[366] This acknowledgement of Kashmiri sovereignty at the very beginning of the case determines arguably the whole course of the judgement as it implicitly recognises the existence of two orders.

The first argument that the petitioners make against the validity of the law is that once the accession agreement was signed, the ruler of Kashmir became a constitutional monarch, and his powers were of a limited nature (limitations imposed by the Indian legal order through the accession agreement) and therefore he could have only transferred those limited powers to the regent-ruler once he abdicated in favour of his son.[367] Therefore, under these limited powers, the regent could not have validly enacted this law even though the sanction came from a popular government which had been in place since 1948. Similar to the argumentation before the HC, this line of reasoning collapses the Kashmir legal order into the Indian legal order and imagined a unified source of authority in the Indian constitution. The Supreme court, in response, holds that the execution of the accession agreement did not affect the sovereignty of the ruler and therefore the powers that he transferred to the regent-ruler were identical.[368] The court goes on to say:

> 'and with the lapse of the British paramountcy the Rulers of Indian States were released from the limitations imposed on their sovereignty by the said paramountcy of the British Crown and by the treaties in force between the British Government and the States…In the result, subject to the agreements saved by the proviso, Maharaja Hari Singh continued to be an absolute monarch of the State, and in the eyes of international law he might conceivably have claimed the status of a sovereign and independent State. But it is urged that the sovereignty of the Maharaja was considerably affected by the provisions of the Instrument of Accession which he signed on October 25, 1947. This argument is clearly untenable. It is true that by clause 1 of the Instrument of Accession His Highness conceded to the authorities mentioned in the said clause the right to exercise in relation to his State such functions as may be vested in them by or under the Government of India Act, 1935, as in force in the said Dominion on August 15, 1947, but this was subject to the other terms of the Instrument of Accession itself; and clause 6 of the Instrument clearly and expressly recognised the continuance of the sovereignty of His Highness in and over his

[366] Para 8.

[367] Para 23.

[368] Para 27.

> State. We must, therefore, reject the argument that the execution of the Instrument of Accession affected in any manner the legislative, executive, and judicial powers in regard to the government of the State which then vested in the Ruler of the State.'[369]

The court essentially holds that the powers of the ruler after the accession remained the same as they were before the accession and therefore the same powers were transferred to the regent-ruler making him constitutionally competent to enact the land reforms law without there being any fetters placed on him by the Indian constitution.[370]

The next argument that the petitioners make brings the two legal orders face to face. They contend that the application of the Indian constitution in Kashmir through its Article 370 and the 1950 presidential order imposed constitutional limitations on the powers of the ruler which did not exist earlier.[371] The court answers this by making a constitutional pluralist claim that the Indian constitution could not have infringed upon the Kashmir constitution or constitutional authorities. It rules that the final decision-making with respect to the constitutional relationship with India was the domain of the constituent assembly of Kashmir and therefore it could not have been envisaged that Article 370 or any other provision of the Indian constitution could affect the plenary powers of the ruler until the constituent assembly had made its decision.[372] This again takes the line of Abdullah in his negotiations with Nehru that the Kashmir constituent assembly was competent to decide the relationship with Indian in all its dimensions without there being any limits on its powers.[373]

Making a distinction between the legal orders of Kashmir and India, the court states:

---

[369] Para 26.

[370] ibid.

[371] Para 30, 31.

[372] Para 31-33.

[373] Para 39-40.

> 'It would not be permissible or legitimate to hold that, by implication, this Article [Article 370 of the Indian constitution sought to impose limitations on the plenary legislative powers of the Maharaja. These powers had been recognised and specifically provided by the Constitution Act of the State itself; and it was not, and could not have been, within the contemplation, or competence of the Constitution-makers [Indian] to impinge even indirectly on the said powers.'[374]

Here the court's logic on the multiplicity of legal orders and their independence from each other is more fleshed out. The court clarifies that the Indian constitution-makers could not have contemplated nor was it under the competence of the Indian constituent assembly to limit the powers prescribed under the Kashmir constitution. While the two orders interact through Article 370, it does not imply that the Kashmir constitution becomes subject to the Indian legal order. Both domains are separated and yet interlocked, with the final nature of this relationship to be determined by the Kashmir constituent assembly.[375]

On the distribution of law-making powers between the state and the union, the court clarifies that the application of certain provisions of the Indian constitution to Kashmir only lead to creation of law-making powers in the union without affecting the powers of the ruler as the ruler's law-making powers were provided for by the state constitution.[376] On the question of award of compensation, the court recognises that the decision to not grant compensation to landlords was taken under the sovereign powers of the constituent assembly and hence could not be effectively challenged before any court.[377]

To conclude, the court here recognises the separateness of the Kashmir legal order and therefore, the accession agreement or Article 370 could not have envisaged putting restrictions on the powers

[374] Para 40.

[375] ibid.

[376] Para 41.

[377] Para 45.

of the ruler. This is premised on the fact that the ruler was deriving his powers from the monarchical constitution of 1939 which could not be infringed upon externally by the Indian constitution. The argument that ruler's powers were limited after the application of the Indian constitution is further repelled by the court on the grounds that only the constituent assembly of Kashmir could finally determine the nature and scope of powers exercised by the Indian union's authorities and the authorities of Kashmir. Based on two arguments: 1) the separateness of the two legal orders and 2) sovereignty vesting in the constituent assembly, the court concludes that the ruler's powers were not limited after the Indian constitution was applied in the state.

Therefore, compared to the contestations between Abdullah and Nehru or the examples we saw in the previous parts, and the court's approach in *Rehman Shagoo*, here the court takes a far more pronounced pluralist stance. While in *Rehman Shagoo*, the court seems reluctant to adjudicate on the question of concurrent exercise of jurisdiction, in this case, the court states that neither the accession agreement nor the application of the Indian constitution through Article 370 affected the Kashmir constitution or the powers prescribed under it.

Implications for sovereignty and aftermath

Compared to the stance that Indian authorities and institutions take on Kashmir's sovereignty as discussed in the previous chapter, the SCI in Prem Nath Kaul takes a rather different view that departs from the view held by people like Nehru. But what are the factors that contribute to the court's taking this approach?

The *Prem Nath Kaul* judgment confirms the claim that in the early Nehruvian years the SCI did not have a consistent line on federal questions, and that its approach to constitutional interpretation was based on textualism. Even though the courts do rely on history in both sets of cases that I

discuss in this part, the overarching approach to interpreting colonial constitutions, the Indian constitution, and the Kashmir constitutions remained textual.[378] History also plays an important role in the court's reasoning as it relies on the colonial legal instruments to show the effects on constitutional law by the British withdrawal from the subcontinent. Further, even though the land reforms project comes to be seriously challenged by the courts all across India and by the SCI as well, the Kashmir government avoided this fate by reserving the matter for the constituent assembly. Since the constituent assembly in Indian political and legal thought has been regarded as the ultimate source of sovereignty and the primogenitor of all laws,[379] therefore, it was very difficult for the SCI to subject the constituent assembly's decision to judicial review. For the Kashmir constituent assembly, the court could conclude that the application of the Indian constitution had no consequences for the ruler's authority as the final shape of the relationship was the prerogative of the constituent assembly.[380] Another factor that arguably contributes to the court making this decision is the fact that most of the judges in the early years of the SCI had previously served in colonial courts where divisibility of sovereignty was an established feature of the colonial state.[381] Further, as the land reforms litigation in India shows, the judiciary did not share the Nehruvian vision of socio-economic reforms nor of state sovereignty as *Prem Nath Kaul* shows.

These might be some of the factors that might have contributed to the court taking the approach that it did in these cases, the variance between the two cases even when both were decided around the same time, remains unanswered. A plausible explanation is that once the SCI ruled that the ordinance was relatable to public order, there was no need for the court to respond to the HC's

[378] See Chandrachud (n 328).

[379] Singh (n 32).

[380] Para 109, Prem Nath Kaul (n 100).

[381] Saksena (n 8).

holding of concurrent jurisdiction. And yet, the same court in *Prem Nath Kaul* takes the same road as the HC in *Rehman Shagoo*. This is due to the nature of the challenge in the two cases. While the first set of cases involve questions of competences of the union and the state, the second set of cases does not raise a question of competences of the union against the states.

Apart from these factors that concern the state of the SCI in its early years, these cases must also be considered in their wider socio-political context to understand the ramifications of a decision against the Kashmir government. The ordinance in question in *Rehman Shagoo* was a war-time measure and was enacted in order to try civilians who sought to aid Pakistan in the war.[382] Similarly, the land reforms law was one of the major projects of the Kashmir government based on which accession to India was justified by the National conference in 1947.[383] A scenario where the law would be struck down would have brought to question the whole basis of Kashmir's relationship with India and that too at a time when the case was still pending before the UNSC and the constitution-making process by the Kashmir constituent assembly had just been concluded.[384]

This is not to take away from the court's federalist positron in its early years, but these cases must also be considered in their socio-political contexts since Kashmir was fiercely contested internally and internationally as well. As the Catalan and Scottish cases also demonstrated, the courts' approach in these cases, many a times depends on the relationship of the political actors.

Conclusion

[382] See Duschinski and Ghosh (n 20).

[383] Sheikh Abdullah, Jammu & Kashmir Constituent Assembly Debates (n 38).

[384] UNSC Res 91 (30 March 1951) UN Doc S/Res/2017/Rev 1.

In this chapter I considered the approaches of the constitutional courts in Kashmir and India in the early years of the constitution. The earlier sections discussed the global discourse on courts interacting with national or sub-state national groups and showed how many institutional and historical factors played a role in determining the approach of the courts. These sections also showed that the claims made by sub-state national groups are qualitatively different from the ordinary federal claims made by provincial governments. The discussion showed that the courts do not always take a centralist or integrationist stance and that there can be occasions where the competing groups consider the court as an 'honest brokers'[385] within the constitutional scheme. The inclusion of constitutional pluralism cases further showed claims of pluralism can be sustained even in cases where these claims are made by states operating at two levels.

From here onwards, I proceeded to show that the early years of the SCI were marked by a balanced approach towards federal questions. Locating the Kashmir cases within this paradigm, I argued that the courts' approach to Kashmir's sovereignty differs significantly and substantively from the approach that central institutions and actors had taken. While the latter sought to place limits on the powers of the constituent assembly by formal or informal means and did not accept Abdullah's argument on Kashmiri sovereignty in the aftermath of partition, the courts, particularly the SCI seems more receptive to these claims and recognises a constitutional pluralist paradigm for Kashmir-India relations. I also situated these cases in their socio-political contexts as these cases were decided at a time when the question of Kashmir was being debated and contested fiercely in India and internationally. It is only in the later phases when the Indian government's project of subordination of Kashmir's sovereignty is proceeding with full force that the SCI's approach starts changing.[386]

[385] Tierney (n 274) 124.

[386] Noorani (n 20) 386-402.

Conclusion

While some scholars have argued that the Indian state inherited sovereignty over its territory from the colonial state, recent scholarship has shown that sovereignty was not so much inherited as it was constructed over the new territory.[387] The postcolonial Indian constitution played an instrumental role in creating a territorially and demotically unified legal order. Conceptions of divisible or shared sovereignty, which had become the mainstay of the colonial state, were at once discarded in order to create a 'quasi-federal' state.[388]

While the colonial articulation of sovereignty came to be challenged by the princely states every once in a while, Kashmir challenged fundamentally the postcolonial Indian state's conception of sovereignty. This thesis adds to the scholarship on construction of sovereignty in the subcontinent by showing how the Indian state constructs its sovereignty over Kashmir at the founding moment and how this gets eventually subverted.[389] It first argued that the Kashmir government contested Indian sovereignty based on the separateness of its constitutional order. This was premised on the colonial separateness of the legal orders and drawing those linkages during constitutional negotiations with India. Against this, the Indian government imagined India as a unified order where any autonomy or asymmetrical relation with a unit would be derived from the Indian constitution and hence contingent on the terms set by the constitution. Drawing on the scholarship on sharing of constitutional authority, I showed how the Kashmir case adds to this discourse by its attempts at co-constituting of the state and the constitutional order.

---

[387] Saksena (n 8). Pillai (n 133).

[388] Saksena ibid.

[389] For an account of Sheikh Abdullah' dismissal and arrest, see Noorani (n 20) 226-242.

Moving away from the two governments, I considered the question of courts in Chapter 3. I showed that the courts are more receptive to the claims of constitutional pluralism in the Kashmir-India relationship as compared to the other central institutions in the early years of the constitution. I situated the Kashmir cases in the Supreme Court's wider federal jurisprudence which it has been argued was largely balanced until the case of West Bengal.[390] This also allowed me to bring the Kashmir-India judicial discourse in conversation with scholarship on contexts such as the EU and states with sub-state national minority groups.

Exploiting and building on the fault lines that existed previously, as the BJP led government transforms the Indian state for the worse,[391] this thesis has shown an alternative vision of state sovereignty articulated by the Kashmir government at the Indian founding moment.

[390] Bhatia (n 318).

[391] Tarunabh Khaitan, 'Killing a Constitution with a Thousand Cuts: Executive Aggrandizement and Party-state Fusion in India' (2020) 14(1) Law & Ethics of Human Rights 49.

Bibliography

Books:

- A G Noorani, *Article 370: A Constitutional History of Jammu & Kashmir* (Oxford University Press 2008)
- Anirudh Prasad, *Centre-State Relations in India: Constitutional Provisions, Judicial Review, Recent Trends* (Deep and Deep Publications 1985)
- Baier Gerald, *Courts and federalism: Judicial Doctrine in the United States, Australia, and Canada* (UBC Press 2006).
- Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (George D. Schwab tr., University of Chicago Press 2004)
- Chitralekha Zutshi, *Kashmir's Contested Pasts: Narratives, Sacred Geographies, and the Historical Imagination* (Oxford University Press 2018)
- Dieter Grimm, *Sovereignty: The Origin and Future of a Political and Legal Concept* (Belinda Cooper tr., Columbia University Press 2015)
- Ernst-Wolfgang Böckenförde, *Constitutional and Political Theory: Selected Writings* (Oxford University Press 2017)
- Fozia Lone, *Historical Title, Self-determination, and the Kashmir question* (Brill Nijhoff 2018)
- Gautam Bhatia, *The Transformative Constitution: A Radical Biography in Nine Acts* (HarperCollins 2019)
- Haley Duschinski, Mona Bhan, Ather Zia, and Cynthia Mahmood (ed.), *Resisting Occupation in Kashmir* (University of Pennsylvania Press 2018)
- Hans Kelsen, *General Theory of Law and State* (Anders Wedberg tr., Russell & Russell 1961)
- Ian Copland, *The British Raj and the Indian Princes: Paramountcy in Western India, 1857–1930* (Orient Longman 1982)
- Javaid Hayat, *Azad Jammu & Kashmir: Polity, Politics, and Power-Sharing* (Oxford University Press 2020)
- Jean Bodin, O*n Sovereignty: Four Chapters on Sovereignty* (Julian Franklin ed., Cambridge University Press 1992)
- Jens Bartelson, *A Genealogy of Sovereignty* (Cambridge University Press 1995)
- K M Panikkar, *Relations Of Indian States with The Government of India* (Martin Hopkinson & Co. Ltd. 1927)
- Karen Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (Oxford University Press 2010)

- Karuna Mantena, *Alibis of Empire: Henry Maine and the Ends of Liberal Imperialism* (Princeton University Press 2010).
- Lauren Benton, *A Search for Sovereignty: Law and Geography in European Empires, 1400–1900* (Cambridge University Press 2009)
- Lindahl, Hans, 'Constituent Power and the Constitution' in David Dyzenhaus, and Malcolm Thorburn (eds.), *Philosophical Foundations of Constitutional Law* (Oxford University Press 2016)
- Louise Tillin, 'Asymmetric Federalism' in Sujit Choudhry, Madhav Khosla and Pratap B Mehta (eds.), *Oxford Handbook of the Indian Constitution* (Oxford University Press 2017)
- Madhav Khosla, *India's Founding Moment: The Constitution of a most surprising democracy* (Harvard University Press 2020)
- Madhav Khosla*, The Indian Constitution* (Oxford University Press 2012)
- Mahmood Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Princeton University Press 1996).
- Markus Patberg, *Constituent Power in the European Union* (Oxford University Press 2021).
- Martin Loughlin, *The Idea of Public Law* (Oxford University Press 2004)
- Michael A Wilkinson, *Authoritarian Liberalism and the Transformation of Modern Europe* (Oxford University Press 2021)
- Michael Keating, *Plurinational Democracy: Stateless Nations in a Post-Sovereignty Era* (Oxford University Press 2001)
- Mona Bhan, Haley Duschinski, Deepti Misri (ed.), *Routledge Handbook of Critical Kashmir Studies* (Routledge 2022)
- Mridu Rai, *Hindu Rulers, Muslim Subjects: Islam, Rights, and the History of Kashmir* (Princeton University Press 2004)
- Murray Forsyth, *Unions of States: The Theory and Practice of Confederation* (Leicester University Press 1981)
- Neil MacCormick, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (Oxford University Press 1999)
- Nick Barber, *The Constitutional State* (Oxford University Press 2012)
- Niraja Gopal Jayal, *Citiznehsip and its discontents: An Indian History* (Harvard University Press 2013)
- Priyasha Saksena, *Sovereignty, International Law, and the Princely States of Colonial South Asia* (Oxford University Press 2023)
- Robert Young, *The Struggle for Quebec* (McGill-Queen's University Press 1999)

- Ronald Watts, *Comparing Federal Systems* (3rd edn, McGill-Queen's University Press 2008)
- Sarbani Sen, *The Constitution of India: Popular Sovereignty and Democratic Transformations* (Oxford University Press 2011)
- Shahla Hussain, *Kashmir in the Aftermath of Partition* (Cambridge University Press 2021)
- Shruti Kapila, *Violent Fraternity: Indian Political Thought in the Global Age* (Princeton University Press 2021)
- Signe Rehling Larsen, *The Constitutional Theory of the Federation and the European Union* (Oxford University Press 2021)
- Stephen Tierney, *Constitutional Law and National Pluralism* (Oxford University Press 2004)
- Stephen Tierney, *The Federal Contract: A Constitutional Theory of Federalism* (Oxford University Press 2022)
- Victoria Schofield, *Kashmir in Conflict: India, Pakistan and the Unending War* (IB Tauris Publishing 2000)
- VP Menon, Integration of the Indian States (Orient BlackSwan 1956)
- Will Kymlicka, *Multicultural Citizenship* (Oxford University Press 1995)

Book Chapters:

- Chintan Chandrachud, 'Constitutional Interpretation' in Sujit Choudhry, Madhav Khosla, and Pratap Bhanu Mehta (eds.), *The Oxford Handbook of the Indian Constitution*
- Duncan Kelly, 'Popular Sovereignty as State Theory in the Nineteenth Century' in Richard Bourke and Quentin Skinner (eds.), *Popular Sovereignty in Historical Perspective* (Cambridge University Press 2016)
- Ferran Requejo, 'Democratic Legitimacy and National Pluralism' in Ferran Requejo (ed), *Democracy and National Pluralism* (Routledge 2001)
- Hent Kalmo and Quentin Skinner, 'Introduction: a Concept in Fragments' in Hent Kalmo and Quentin Skinner (eds.), *Sovereignty in Fragments: The Past, Present and Future of a Contested Concept* (Cambridge University Press 2010)
- James Madison, 'Federalist No. 39' in Alexander Hamilton, James Madison, and John Jay (eds.), *The Federalist Papers* (C. Rossiter ed., New American Library 1961)
- Karuna Mantena, 'Popular Sovereignty and Anti-Colonialism' in Richard Bourke and Quentin Skinner (eds), *Popular Sovereignty in Historical Perspective Popular Sovereignty in Historical Perspective* (Cambridge University Press 2016)

- Manish Tewari and Rekha Saxena, 'The Supreme Court of India: The Rise of Judicial Power and the Protection of Federalism' in Nicholas Aroney and John Kincaid (eds.), *Courts in federal countries: Federalists or unitarists* (University of Toronto Press 2017).
- Miguel Poiares Maduro, 'Europe and the Constitution: What If This Is As Good As It Gets?' in J Weiler and Marlene Wind (eds.), *European Constitutionalism Beyond the State* (Cambridge University Press 2003)
- Miguel Poiares Maduro, 'Three Claims of Constitutional Pluralism' in Matej Avbelj and Jan Komárek (eds.), *Constitutional Pluralism in the European Union and Beyond* (Hart Publishing 2012)
- Neil Walker, 'Late Sovereignty in the European Union' in Neil Walker (ed.), *Sovereignty in Transition* (Hart Publishing 2006)
- Nicholas Aroney and John Kincaid, 'Introduction' in Nicholas Aroney and John Kincaid (eds.), *Courts in federal countries: Federalists or unitarists?* (University of Toronto Press 2017)
- Richard H Pildes, 'Ethnic Identity and Democratic Institutions: A Dynamic Perspective' in Sujit Choudhry (ed), *Constitutional Design for Divided Societies: Integration or Accommodation?* (Oxford University Press 2008)
- Robert Schütze, 'Federalism as Constitutional Pluralism: "Letter from America"' in Matej Avbelj and Jan Komárek (eds.), *Constitutional Pluralism in the European Union and Beyond* (Hart Publishing 2012)
- See Michael Lobban, 'English Approaches to International Law in the Nineteenth Century' in Matthew Craven, Malgosia Fitzmaurice, and and Maria Vogiatzi (eds.), *Time, History and International Law* (Martinus Nijhoff Publishers 2007)
- Sudhir Krishnaswamy, 'Constitutional Federalism in the Indian Supreme Court' in Mark Tushnet and Madhav Khosla (eds), *Unstable Constitutionalism: Law and Politics in South Asia* (Cambridge University Press)
- Takis Tridimas, 'The ECJ and National Courts: Dialogue, Cooperation and Instability' in Damian Chalmers and Anthony Arnull (eds.), *The Oxford Handbook of European Union Law* (Oxford University Press 2015)
- Thomas Poole, 'The Idea of the Federative' in Jacco Bomhoff, David Dyzenhaus and Thomas Poole (eds.), *The Double-Facing Constitution* (Cambridge University Press 2020)
- Uday Mehta, 'Indian Constitutionalism' in Dipesh Chakrabarty, Rochona Majumdar, and Andrew Sartori (eds.), *From the Colonial to the Postcolonial: India and Pakistan in Transition* (Oxford University Press 2007)

Journal Articles:

- A. G. Noorani, 'How and Why Nehru and Abdullah Fell Out' (1999) 34(5) Economic and Political Weekly 268
- Antoni Ninet and James Gardner, 'Distinctive identity claims in federal systems: Judicial policing of subnational variance' 14(2) (2016) International Journal of Constitutional Law 378
- Bzdera André, 'Analysis of federal high courts: A political theory of judicial review' (1993) 26(1) Canadian Journal of Political Science 3
- Carlos Closa, Secession from a Member State and EU Membership: The View from the Union (2016) 12(2) European Constitutional Law Review 240
- Christopher Clapham, 'Sovereignty and the Third World State' (1999) 47(3) Political Studies 522
- Haley Duschinski & Shrimoyee Nandini Ghosh, 'Constituting the occupation: preventive detention and permanent emergency in Kashmir' (2017) 49(3) The Journal of Legal Pluralism and Unofficial Law 314
- Hèctor López Bofill, 'Hubris, constitutionalism, and "the indissoluble unity of the Spanish nation": The repression of Catalan secessionist referenda in Spanish constitutional law' (2019) 17(3) International Journal of Constitutional Law 957
- Idreas Khandy, 'No place for "Kashmiri" in Kashmiri nationalism' (2021) 27 Nations and Nationalism 260
- Joseph Weiler, 'The Transformation of Europe' (1991) 100 Yale Law Journal 2429.
- Julio Baquero Cruz, 'The Legacy of the Maastricht-Urteil and the Pluralist Movement' (2008) 14(4) European Law Journal 389
- Kumarasingham, 'The Tropical Dominions: The Appeal of Dominion Status in the Decolonisation of India, Pakistan and Ceylon' (2013) 23 Transactions of the Royal Historical Society 223
- Larry Backer, 'The Extra-National State: American Confederation Federalism and the European Union' (2001) 7 Columbia Journal of European Law 173
- Marko Milanovic and Linos-Alexander Sicilianos, 'Reservations to Treaties: An Introduction' (2013) 24(4) European Journal of International Law 1055
- Martin Loughlin, 'Constitutional Pluralism: An Oxymoron?' (2014) 3 Global Constitutionalism 9

- Martin Loughlin, 'The Concept of Constituent Power' (2013) European Journal of Political Theory 218
- Mika Ojakangas, 'Carl Schmitt's Real Enemy: The Citizen of the Non-exclusive Democratic Community?' (2003) 8(4) The European Legacy 411
- Neil MacCormick, 'Beyond the Sovereign State' (1993) 56 The Modern Law Review 18
- Neil Walker, 'The Idea of Constitutional Pluralism' (2002) 65 The Modern Law Review 317
- Nigel Foster, 'The German Constitution and EC Membership' (1994) Public Law 404
- Patricia Popelier, 'Federalism Disputes and the behaviour of Courts: Explaining variation in Federal Court's Support for Centralization' 47(1) (2017) Publius: The Journal of Federalism 27
- Priyasha Saksena, 'Building the Nation: Sovereignty and International Law in the Decolonisation of South Asia' (2020) 23(1) Journal of the History of International Law 62
- R S Gae, 'Land Law in India: With Special Reference to the Constitution' (1973) 22 International & Comparative Law Quarterly 312
- Rohit De and Ornit Shani, 'Assembling India's Constitution: Towards a New History' (2023) Past & Present 10
- Sarath Pillai, 'Fragmenting the Nation: Divisible Sovereignty and Travancore's Quest for Federal Independence' (2016) 34 Law and History Review 748.
- Gurmukh Nihal Singh, 'The idea of an Indian constituent assembly' (1941) 2(3) The Indian Journal of Political Science 255.
- Sergio Verdugo, 'Is it time to abandon the theory of constituent power?' (2023) 21(1) International Journal of Constitutional Law 18.
- Steve Boom, 'The European Union After the Maastricht Decision: Will Germany Be the "Virginia of Europe?"' (1995) 43(2) The American Journal of Comparative Law 204.
- Sujit Choudhry, 'Does the world need more Canada? The politics of the Canadian model in constitutional politics and political theory' 5(4) (2007) International Journal of Constitutional Law 606.
- Sujit Choudhry, 'Secession and post-sovereign constitution-making after 1989: Catalonia, Kosovo, and Quebec' (2019) International Journal of Constitutional Law 17(2) 469.
- Tarunabh Khaitan, 'Killing a Constitution with a Thousand Cuts: Executive Aggrandizement and Party-state Fusion in India' (2020) 14(1) Law & Ethics of Human Rights 49.

- Taylor C Sherman, 'The Integration of the Princely State of Hyderabad and the Making of the Post-Colonial State in India, 1948–56' (2007) 44(4) Indian Economic and Social History Review 505.
- Wilfried Swenden & Rekha Saxena, 'Policing the federation: the Supreme Court and judicial federalism in India' (2021) Territory, Politics, Governance 8.

Online sources:

- Gautam Bhatia, 'A Federal Framework and a Centralising Drift: Re-Assessing Federalism under the Indian Constitution' (15 June 2022). Available at <http://dx.doi.org/10.2139/ssrn.4137112> accessed 30 July 2023.
- Samantha Besson, 'Sovereignty' Max Planck Encyclopaedia of Public International Law <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1472> accessed 22 June 2023.
- See Aman, '"Tuhindi Article" ("The Articles Were Yours")' (*VerfBlog*, 29 December 2022) <https://verfassungsblog.de/tuhindi-article-the-articles-were-yours/> accessed 15 July 2023.
- Venkatesh Nayak, 'The Backstory of Article 370: A True Copy of J&K's Instrument of Accession' (*The Wire*, 5 August 2019) <https://thewire.in/history/public-first-time-jammu-kashmirs-instrument-accession-india> accessed 20 July 2023.
- 'What is the Indigenous voice to parliament, how would it work, and what happens next?' (*The Guardian*, 7 August 2023) < https://www.theguardian.com/australia-news/2023/aug/07/what-is-the-indigenous-voice-to-parliament-australia-what-does-it-mean-explained-referendum-campaign> accessed 5 August 2023.