

RESEARCH ARTICLE

Constitutions and their foundational discontents: Studying the process of constitution-making in Jammu and Kashmir

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Abstract

This article studies the process of constitution-making in Jammu and Kashmir as a hegemonic process dominated by, and an ideological reflection of, the dominant political party of Jammu and Kashmir, the National Conference led by the popular leader Sheikh Abdullah. The Constitution of Jammu and Kashmir emerged as an outcome of their ideas. Though the process itself was punctuated by the exclusionary violence against diverse communities present in the state at that time, very little attention has been paid to the idea of a constitution as an exclusivist text that embeds ‘foundational violence’ within it, and that eliminates dissenting groups and prevents the inclusion of plural conceptions of politics by actualizing a monopolistic discourse in favour of the dominant party. This article locates the violence that went into constitution-making and further employs hermeneutical interpretation of the Constituent Assembly Debates of Jammu and Kashmir to locate the differing viewpoints that existed in the State Constituent Assembly. It also takes the surrounding political and ideological context into account. In doing so, it constructs an alternative and ‘unofficial’ version of the constitution-making process, which helps challenge the dominant historical narrative that the constitution-making in Jammu and Kashmir was a successful experiment in Indian federal democracy.

Keywords: Conflict; constitutionalism; exclusion; Jammu and Kashmir; violence

1. Introduction

In 1947, Jammu and Kashmir was the only princely state that, while conditionally acceding to the Indian Union, opted to formulate its separate constitution within the broader sovereign confines of the Indian constitution. This option was agreed upon corresponding to the Instrument of Accession, signed between the last Dogra king of Jammu and Kashmir, Hari Singh, and the Indian state, which restricted the latter’s power to legislate only on matters of defence, foreign affairs and communication.¹ Residuary

¹Jammu and Kashmir’s accession to India is a highly contested event. For its contentious nature, see V Schofield, *Kashmir in Conflict: India, Pakistan and the Unending War* (New York: I.B. Tauris, 2021) 49–73.

powers were to be vested within the state government. The Jammu and Kashmir leadership of the time, led by the National Conference, supposedly chose this arrangement considering the historical distinctness of Jammu and Kashmir from other territories in terms of religion, ethnicity, language and geography, and simultaneously hoped to benefit from a federal association with the secular-democratic state that India had set out to become.

Constitutions are not only about who frames them or how they are framed, but also about the existence of people in whose name they are created in the first place. This is foundational to the idea of constitution-making. They are devices through which individual rights of citizens are established and thereafter protected against arbitrary state power. Despite this virtuous function, constitutions and constitution-making processes in plural societies face an arduous challenge in accommodating the rights and interests of multiple groups and communities in a single document. Consequently, constitutions emerge as processes of inclusion and exclusion in societies that are deeply diverse, and hold divergent conceptions of the principles of political organization. The inclusion of one is contingent on the exclusion of other. Indeed, this exclusionary violence bestows an undemocratic origin to constitutional democracies.²

Considering the discontents of constitution-making, this article argues that the process of constitution-making in Jammu and Kashmir was dominated by one political party: the National Conference. It excluded plural conceptions of political organization by actualizing a monopolistic discourse in favour of the National Conference and its popular patron, Sheikh Abdullah. The resultant constitution therefore emerged as an embodiment of exclusionary violence against communities and narratives that did not correspond to the dominant party ideology. Such groups were priorly eliminated, or thereafter marginalized. This article explains how such exclusion was effectuated through violence during the constitution-making process. Since little attention has been paid to the empirical aspect of constitutions as exclusionary texts that embed 'foundational violence' within them, this article fills the gap in the context of Jammu and Kashmir and adds to the critical literature that unveils the discontents of what is considered to be triumphant constitution-making in South Asia.

The first section surveys the constitution-making processes in order to establish a theoretical case for the exclusionary characteristic of constitutions. Next, through a critical appraisal of India's state-making and constitution-making, the politics of Jammu and Kashmir on the eve of subcontinental partition is situated in its immediate regional context. It outlines the incidences of violence that accompanied, and in a sense enabled, state-formation in Jammu and Kashmir and formed the surrounding context in which the constitution-making process began in 1951. Equally integral is the role of National Conference in maintaining complicit silence in, and sometimes directly fomenting, violence against dissenting groups. Finally, this article interprets the Constituent Assembly Debates of Jammu and Kashmir to locate the nature of debate and demonstrate how dissenting viewpoints were muffled and dissenters removed from the Constituent Assembly.

II. Constitutions, exclusion and violence: The theoretical case

The basis of Carl Schmitt's famous critique of liberal democracy centres around the prior existence of a homogeneous political community as a precondition for constitutional

²C Offe, 'Homogeneity and Constitutional Democracy: Coping with Identity Conflicts Through Group Rights' (1998) 6(2) *The Journal of Political Philosophy* 113.

formation and application.³ For him, in order for a constitution to exist, a homogeneous people should exist *a priori*; this then has the power to give itself a democratic constitution that protects and preserves its political life. In doing so, Schmitt's concept of the political considers pluralism as antagonistic to democracy, even though it has become a defining feature of contemporary liberalism. Liberal democracies, however, do not accommodate diversity in the absolute sense; rather, as evident from theorists of deliberative democracy, communitarianism, multiculturalism or cosmopolitanism, they seek to build a consensual community based on individual rights that are common to all, and specific rights for the minority groups only. The basis remains the same: to manufacture a homogeneous community whose commonalities are foregrounded to define the political domain, and whose differences are erased or restricted to the non-political domain so as to reduce conflict. Despite the differences in conceptions of homogeneity in Schmitt on the one hand, and liberalism on the other, the moot point is that constitutionalism and democracy function on a certain notion of homogeneity, in which differences are sought to be relegated from the public domain.

This deficit becomes increasingly manifest in the founding moments when constitutions are unable to substantively accommodate diversity, and end up doing violence to the marginalized groups. They either exclude difference priorly or assimilate difference in the constitution-making act as well as the constitutional text. Antoni Abat i Ninet shows how the founding moments of United States and French constitutionalism were undemocratic in the sense that the famous phrase 'We the people' practically did not involve all communities, thus bestowing it with an unrepresentative character.⁴ These constitutions constantly sought to homogenize the population and erase the diversity. The democratic legitimacy of such constitutional systems is seriously undermined as a result, in the absence of which the only element that ensures public fidelity towards the constitution is simply force – as he calls it, 'constitutional violence'.

This discourse on constitutionalism as a mode of organizing the politics that forgets its foundational deficits, and an enactment of several layers of violence, has been gaining currency, particularly in postcolonial contexts. A modern constitutional text thrives on the annihilation of diverse contexts, argues Upendra Baxi:⁵

The foundational violence of an inaugural constitutional text lives, if at all, in the dominant narrative tradition as a ruin of memory, not, as with the subaltern, as a lived and generationally embodied histories of collective hurt.⁶

The constitutional story embeds silences and absences of that which is not necessary, and is to be forgotten, for such silences have the potential to cause an existential threat to the state and perforate the dominant narrative, and hence run antithetical to the sustenance of the state and the constitution, making this obliteration somewhat compulsory.

Ninet classifies constitutional violence into two types: foundational and maintaining.⁷ While the former is imposed as a founding act that creates a new identity and a new

³C Schmitt, *The Concept of the Political*, George Schwab trans (Chicago: University of Chicago Press, 2007) 46–48.

⁴A Abat i Ninet, *Constitutional Violence: Legitimacy, Democracy and Human Rights* (Edinburgh: Edinburgh University Press, 2013) 80–81.

⁵U Baxi, 'Constitutionalism as a Site of State Formative Practices' (2000) 21(4) *Cardozo Law Review* 1183.

⁶Ibid 1192.

⁷Ninet (n 4) 115–56.

political order, despite the underlying diverse social and ethnic realities, the latter is evident in the manner in which the constitution is used to expand and impose its hegemonic conceptions of rationality, civilization, national unity and national culture. The Turkish and Chilean experiences are examples of foundational violence as they brought into existence a new state and a new political structure, which was superimposed on the base of a different social and political reality. US constitution, on the other hand, is an example of maintaining violence as it sought to ‘civilize’ the ‘illiterate savages’ who were the real natives of that land.

The French constitution is yet another example, as it intended to forcibly produce centralization and homogenization through constitutional legitimacy. The concomitant law empowered the state apparatus to interpret and enforce the national identity on the everyday lives of its citizens. In doing so, the French constitution replaced ‘popular sovereignty’ with ‘national sovereignty’ as it provided a template for future ethnonationalist movements and constitutionalisms.⁸ By enunciating the violent foundations of law, Ninet argues that violence is legalized (and hence considered to be legitimate) by constitutions, and that constitutionalism uses codification, interpretation and enforcement of law to preserve this violence.⁹ Thus, in a nutshell, the current constitutional legitimacy is utterly undemocratic and ultimately based on violence.

III. India’s constitutional founding: The regional context

In the heterogeneous mass of what was British India existed 600-odd semi-sovereign princely states, ‘a disparate group of state-like entities, all with distinct traditions of governance’,¹⁰ which were administered by the British paramountcy law and were significantly autonomous as far as internal affairs were concerned. The terms of independence held that the paramountcy was rendered inoperative and the princely states were provided with the options of choosing either India or Pakistan or remaining independent. Immediately after partition, both India and Pakistan began imploring the possibility of gaining the accession of these princely states. In India, Sardar Patel and VP Menon spearheaded this effort, which saw all but a handful of states land under India’s control.¹¹

The integration process consisted of three stages. First, the princely states were made to sign an Instrument of Accession with the Indian Union, handing over their sovereignty except in matters of defence, foreign affairs and communication. Second, for the sake of national unity and security against an impending war with Pakistan, a complete merger was compelled. Third, the commitment of the Congress to democratic centralism required the princely states to establish popular governments, frame constitutions and ensure socio-economic development in which they failed and thus were brought into the ambit of a national governance model.¹² Negotiation was not the only method used to persuade the princes. It was complemented by the use of force whenever necessary and

⁸Ibid 136.

⁹Ibid 102–9.

¹⁰L Tillin, ‘United in Diversity? Asymmetry in Indian Federalism’ (2006) 37(1) *Publius: The Journal of Federalism* 60.

¹¹VP Menon, *The Story of the Integration of the Indian States* (London: Macmillan, 1956).

¹²1 Copland, ‘The Integration of the Princely States: A “Bloodless Revolution”?’ (1995) 18 *South Asia: Journal of South Asian Studies* 133.

wherever the former policy failed to yield the preferred results.¹³ Ian Copland corroborates that the integration was not a 'bloodless' or a 'watershed' revolution, as remarked by Sardar Patel and other leaders, but pervaded by princely resistance to integration politics, local resistance to princely fiefdoms and widespread communal violence, which consumed a large albeit unspecified number of lives.¹⁴ In his precise words, it was 'a remarkable coup'.¹⁵

Equally in this process, the significant role of Hindu Mahasabha, the Rashtriya Swayamsevak Sangh and the newspapers published by these right-wing organizations cannot be missed.¹⁶ Copland claims that the princely states were conducive to the actualization of the Hindutva agenda as the princes were mostly Hindus who ruled according to prevalent Hindu customs, and had included yet conveniently subordinated religious minorities.¹⁷ This alliance between the Hindu right-wing forces and princely power provided 'valuable material and structural support in the shape of money, property, and access to the government', whereas the 'princes obtained a significant short-term dividend in the form of Mahasabhite propaganda favorable to the princely cause'.¹⁸ Simultaneously, in the princely states the right-wing organizations and their mouthpieces raked up narratives of a glorious Hindu past that had to be institutionalized in the state in independent India.

What India's founding moment tells us is that 'India that came into being was both an entirely novel construct and rested on manifest legacies, was postcolonial and liberated, was territorially partitioned, and built a federation out of a wide range of disparate political entities'.¹⁹ The eventualities of Indian independence run concurrently with the assemblage of distinct units to create the modern form of the Indian state. Corresponding to the violent nature of integration process, Ted Svensson remarks that Indian federalism was 'violently imposed', exemplified by the suppression of indigenous resistance in princely states as well as the military intervention to secure the accession of Junagadh, Hyderabad, and Jammu and Kashmir.²⁰ It was not a process achieved through people's participation and deliberations. As with other vital matters, the Constituent Assembly Debates also involved disagreements over the course that Indian federalism would take.²¹ However, the need to maintain the national unity of a nascent nation-state managed to achieve unanimity among the members and thus triumphed over other concerns.

The Indian constitution undoubtedly occupies a special status in the founding of the Indian state. On one hand, it is considered to be the hard-earned labour of leaders of the anti-colonial struggle that broke away from the colonial past, transformed people from subjects into rights-bearing citizens and reposed sovereignty in Indian hands. On the other hand, this celebratory version is refuted and colonial influences in the making of the

¹³T Svensson, 'A Federation of Equals? Bringing the Princely States into Unified India' (2016) *STANCE Working Paper Series 2*.

¹⁴Copland (n 12) 138–45.

¹⁵I Copland, 'The Princely States, the Muslim League, and the Partition of India in 1947' (1991) 13(1) *The International History Review* 31.

¹⁶M Bhagavan, 'Princely States and the Hindu Imaginary: Exploring the Cartography of Hindu Nationalism in Colonial India' (2008) 67(3) *The Journal of Asian Studies* 881.

¹⁷I Copland, 'Crucibles of Hindutva? VD Savarkar, the Hindu Mahasabha, and the Indian Princely States' (2002) 25(3) *South Asia: Journal of South Asian Studies* 218–20.

¹⁸Ibid 226.

¹⁹Svensson (n 13) 4.

²⁰Ibid.

²¹Ibid 13–14.

constitutional document are pointed out, treating it as nothing more than a colonial continuity. The Constitution of India was, in Rohit De's words, 'a document with alien antecedents that was a product of elite consensus'.²² The promise of change offered by the Constitution was therefore an aggregation of elitist interests, communicated by the elites and thrust upon the non-elites without seeking their deliberative consensus – 'a slavish imitation of Western constitutions'.²³ Despite such a damning assessment, De's work largely replicates a triumphalist version of Indian constitution-making.

Of specific concern here is the absence or exclusion of different groups and communities from the constitution-making body. The Constituent Assembly members were not elected directly, but rather drawn indirectly from the provincial legislatures that were elected way back in 1935, raising doubts about its claims of being a popular and representative body. Peasants, workers and small traders did not feature in the electoral roll, which was delimited using tax payments, property holdings and educational qualifications. Socialists and communists were also absent from the Assembly.²⁴ The Assembly was a 'one-party body in a one-party country', represented by the Congress, which was also the acting government.²⁵ Further, the four Congress leaders – Jawaharlal Nehru, Sardar Patel, Rajendra Prasad and Maulana Azad – constituted an oligarchy within the Assembly.²⁶

The subsequent Constitution and the state had institutions, laws, and property distributions that reflected bourgeois aspirations.²⁷ The rulers of erstwhile princely states drew rewards in the form of upper purse legislation. The Constitution effectively safeguarded the interests of the upper classes; it did not express 'the will of the many rather than the needs of the few' as claimed by Granville Austin,²⁸ but rather was drafted 'by the few, for the few'.²⁹ The constitutional choice made by India also simultaneously rejected the possibilities of political organization on the basis of Swaraj – which was a non-Western, Gandhian idea – or the human right to self-determination for territories wishing to embrace this, as it subsumed within it subnational and regional identity politics.³⁰ The constitutional-federal arrangement reached with princely states was accompanied by civil war, insurgencies and draconian legislations to contain dissent – for example, in Hyderabad, states in the North East, Punjab, or Jammu and Kashmir.

Baxi argues that the Indian constitution as a text and as a founding moment masks foundational violence in the form of Partition, which formed the state and peppered the constitution-making process.³¹ He differentiates this 'foundational violence', which accompanies the founding moment, from 'reiterative violence', which periodically reinforces constitutional existence. Reiterative violence is witnessed in the form of communal riots that have become a regular occurrence in modern India. Both these forms of violence

²²R De, *A People's Constitution: The Everyday Life of Law in the Indian Republic* (Princeton, NJ: Princeton University Press, 2018) 4.

²³Ibid 9.

²⁴H Chand, 'Class Character of the Indian Constitution' (1975) 3(8) *Social Scientist* 55.

²⁵G Austin, *The Indian Constitution: Cornerstone of a Nation* (Oxford: Oxford University Press, 1966) 8–9.

²⁶Ibid 21.

²⁷S Kaviraj, 'A Critique of the Passive Revolution' (1988) 23 *Economic and Political* 2429.

²⁸Austin (n 25) 9.

²⁹Chand (n 24) 56.

³⁰U Baxi, 'Outline of a Theory of Practice of Indian Constitutionalism' in Rajeev Bhargava (ed), *Politics and Ethics of the Indian Constitution* (Oxford: Oxford University Press, 2008) 106–7.

³¹Baxi (n 5) 1183.

are enabled and embedded in the law, and the law that manufactures exclusion and assimilation in the first place justifies this violence.

The debates of the Indian Constituent Assembly, which founded the Indian sovereign polity, experienced deliberations between political actors of different backgrounds in terms of ethnicity, class, caste or tribe. Such a diverse composition had the possibility of producing many alternative conceptions of constitution, rights and democracy. However, most of the alternative conceptions were conveniently silenced because they did not adhere to the standards set by the referential models borrowed by the Congress.³² The Indian constitution therefore subsumes myriad wars – class, caste, religious, ethnic – and, seen from the margins, does not corroborate with the success story it is always portrayed as being.

The treatment of religious minorities – especially the Muslims – in Indian constitution-making has been the object of the most critique. Following partition and migration of Muslims to Pakistan, the remnant Muslims became the largest minority in independent India, and they were politically disenfranchised in the constitution-making debates. The Constituent Assembly members frequently resorted to religiously motivated perspectives in debating the question of religious minorities,³³ and finally decided on providing them only with cultural safeguards while denying them political rights.³⁴ They were, for example, granted rights to preserve their culture and establish educational institutions to do so but not reservation in the parliament to represent their communities. The latter was thought to be the sentiment that culminated in Partition and would only fuel further separatism in the Indian state. Consequently, Muslim members faced ‘heckling repeatedly in the course of the proceedings of the Constituent Assembly’ as ‘any articulation of community-based discrimination was deemed illegitimate’ and ‘backed by not-so-subtle threats’ in the Assembly.³⁵

The final constitutional document had Hindu bias written all over it. Pritam Singh argues that the Constitution’s ‘Hindu bias must be read as symptomatic of the depth of institutionalized Hindu communalism in India and the shallowness of the secular foundations of the Indian republic’.³⁶ A few examples that substantiate the claims made by Singh are: Article 1, which names India as Bharat (which is a Hindu name); Article 25, which allows the state to make laws for the social welfare and reform of Hindus; Article 48, which prohibits the slaughter of cows and calves; and Articles 343 and 351, which make Hindi the official language, drawing vocabulary primarily from the Sanskrit language.

So, while India began as a plural democratic state, it simultaneously embarked on a homogenizing project, which attempted to reduce non-Hindus to second-class citizens and erase them from the singular version of national identity. It actually followed the Schmittian logic of homogenization subtly at first, but did so more aggressively later. The recent intensified right-wing turn in the Indian polity should therefore not be seen in

³²R Samaddar, ‘Colonial Constitutionalism’ (2002) 3(1) *Identity, Culture and Politics* 20.

³³I Majid, ‘Confronting the Indian State: Islamism, Secularism, and the Kashmiri Muslim Question’ (2022) 19(1) *International Journal of Asian Studies* 67–80.

³⁴ZA Bader, ‘Difference and Reservation: A Reading of the Constituent Assembly Debates’ (2016) 10(1) *History and Sociology of South Asia* 74.

³⁵A Nigam, ‘A Text Without an Author: Locating the Constituent Assembly as Event’ (2004) 39 *Economic and Political Weekly* 2110–12.

³⁶P Singh, ‘Hindu Bias in India’s “Secular” Constitution: Probing Flaws in Instruments of Governance’ (2005) 26(6) *Third World Quarterly* 909.

alienation or in violation of the constitutional founding. It is only a reflection of the Hindu bias that interspersed the constitution-making process and hence derives its legitimacy from the same Constitution. In both ways, the exclusion of religious minorities and marginalized groups is enabled by the constitutional structure itself.

The above discussion about the integration of princely states and the constitutional treatment of Muslims in India forms the context within which Jammu and Kashmir's association with the Indian Union needs to be read. This discussion becomes important for many reasons: (1) India and Jammu and Kashmir entered into a legal though contested association through a provincial relationship which was agreed upon in 1947 and constitutionalized as Article 370 in the Indian constitution; (2) this association was a result of the Jammu and Kashmir leadership of the time getting swayed by, and hence putting its blind faith in, the secular-democratic route that Indian state had adopted; and (3) this relationship consequently provided the sub-text to the constitution-making process in Jammu and Kashmir and heavily influenced it. What follows is the political historic account of Jammu and Kashmir specifically up to the time when the constitution-making process began.

IV. Jammu and Kashmir's Political Scene: The Local Context

The political destiny of Jammu and Kashmir was tied to the princely states that were provided with the option of choosing between the two dominions of India and Pakistan, or remaining independent. The violence accompanying the formation of the modern state of Jammu and Kashmir and its subsequent accession to the Indian state has to be located in this context of violent integration of princely states. Because of the terms of independence, the subcontinental partition occurred on the considerations of religious and geographical contiguity. As a Muslim majority region, geographically and culturally congruent with Pakistan, Jammu and Kashmir had the option to accede to Pakistan. India's secular democratic intentions had swayed the National Conference leadership on the other hand. Ultimately, for various reasons – primarily the use of violence – it ended up acceding to India under 'contentious circumstances'.³⁷

The majority Muslim community had been impoverished and disenfranchised by the Hindu Dogra rulers ever since they bought the Kashmir Valley from the British in 1846 via the infamous Treaty of Amritsar. Muslim Conference – the region's first Muslim political organization, formed in 1934 – was converted into the National Conference under Sheikh Abdullah to include non-Muslim subjects in the struggle for rights against the Dogra regime. Sheikh had already developed personal ties with Nehru and thereby grown ideologically close to the Indian National Congress, anticipating that the secular-democratic Indian state would allow Jammu and Kashmir to implement land reforms without any restrictions. Objecting to this, Choudhary Ghulam Abbas and other Jammu-based leaders revived the Muslim Conference in 1939. While the Muslim Conference towed the line of Mohammad Ali Jinnah's Muslim League and favoured accession to Pakistan, the National Conference held on to the Congress's promise of carving out a secular and democratic India.³⁸

In 1944, the Working Committee of the National Conference put forward the Naya Kashmir Manifesto.³⁹ Andrew Whitehead notes that the Punjabi Communist leader,

³⁷Schofield (n 1) 49–73.

³⁸Ibid 40–41.

³⁹New Kashmir Manifesto (New Delhi: Kashmir Bureau of Information 1944).

BPL Bedi, was the influential figure behind the formulation of this document.⁴⁰ On the advice of Sheikh Abdullah, he produced a ‘substantial forty-four-page document, containing a proposed constitution for Jammu & Kashmir and a detailed economic plan’, with the introduction written by Sheikh himself. It was almost a ‘carbon copy’ of the Stalin constitution, with minor differences.⁴¹ Sheikh wrote in its introduction that ‘when political and economic systems are in the melting pot and ideas of a New World Order are being debated, it [the National Conference] too must formulate more concretely its own conception of the New Kashmir that it strives to build’.⁴²

By 1947, the overwhelming Muslim majority of the state was posing a potent danger to Hari Singh’s ambition to remain independent. Partition had already communalized politics in British India and the subsequent communal violence spilled over to the Jammu region as well. It provided the sub-text to Hari Singh’s anti-Muslim purge along with the Poonch revolt. The Sudhans of Poonch, who formed the bulk of the Dogra forces to fight for Britain in World War II, had returned home to find their land had been taxed heavily and even confiscated. A no-tax campaign soon turned into a full-fledged indigenous revolt as Sardar Ibrahim Khan, a barrister, and Sardar Abdul Qayoom Khan, a landowner, galvanised an army of 50,000 men and led the revolt. Hari Singh began suppressing the revolt by force. He invited and patronized Hindu and Sikh mobs, which killed thousands of Muslims and forced their mass migration from Jammu province.⁴³

The demographic alteration arising from this violence reduced the Muslim population in Jammu province from 61 per cent in 1941 to 30 per cent in 1961.⁴⁴ Hari Singh, together with Sheikh, who took over as the Head of Emergency Administration on October 30, 1948, was complicit in this violence against Muslims.⁴⁵ Sheikh himself attested to Hari Singh’s role: ‘The Maharaja had organised killings of Muslims in Jammu “for weeks under his very nose”’.⁴⁶ This mass migration and demographic change immediately turned into the first Indo-Pakistan War of 1948, which culminated in a ceasefire. The ceasefire line drawn (today known as the Line of Control) divided the state into Indian- and Pakistan-administered Kashmir. It became a de facto border separating families and communities in an erstwhile undivided region.

The Indian National Congress desired Kashmir more than anything else and, in contradiction to the Muslim League’s policy of non-interference in the accession of princely states, its leadership made repeated trips to the Valley to persuade Hari Singh to accede to India.⁴⁷ The statesman in Nehru, aware of the simmering discontent against the Dogra regime, had located Sheikh and his National Conference as the dominant political force in Jammu and Kashmir, especially in the Valley. So he and the Congress leadership, including MK Gandhi, made strenuous efforts to gain Sheikh’s confidence.

⁴⁰ A Whitehead, ‘The Making of the New Kashmir Manifesto’ in R Maxey and P McGarr (eds), *India at 70: Multidisciplinary Approaches* (London: Routledge, 2020) 15–32.

⁴¹ Ibid.

⁴² New Kashmir Manifesto (n 39) 7.

⁴³ I Rashid, ‘Theatrics of a “Violent State” or “State of Violence”: Mapping Histories and Memories of Partition in Jammu and Kashmir’ (2020) 43 *South Asia: Journal of South Asian Studies* 215.

⁴⁴ C Snedden, ‘What Happened to Muslims in Jammu? Local Identity, “the Massacre” of 1947 and the Roots of the Kashmir Problem’ (2001) 24(2) *South Asia: Journal of South Asian Studies* 111.

⁴⁵ B Puri, ‘Ham Handed in Kashmir’ (1971) 6(42/43) *Economic & Political Weekly* 2195.

⁴⁶ AG Noorani, ‘Kashmir: Blunders of the Past’ *Frontline* (Chennai, 29 December 2006), available from <<https://frontline.thehindu.com/other/article30211954.ece>>.

⁴⁷ Schofield (n 1) 32.

The latter, propelled by ideas of socialism and secularism, found more in common with the Congress than the Muslim League, and thus a growing friendship developed between Sheikh and Nehru, which was to have serious implications for the state's future.⁴⁸ This friendship benefited both individuals and satiated their ideological underpinnings. While Sheikh used Nehru as a bait to end the Dogra autocratic rule – which went against Nehru's democratic ethos – thus securing political power, Nehru used Sheikh's ideological motivations to bring Jammu and Kashmir closer to India and away from Pakistan. It was a win-win situation for both, as the National Conference began to function as an extension of the Congress.

Sheikh got to nominate himself and three of his colleagues as members of the Constituent Assembly of India as the latter began discussions on constitutionalizing Jammu and Kashmir's conditional accession in 1949. Article 370 was the result. The negotiations over Article 370 provide added proof that the Indian state resorted to religiously motivated statecraft and constitution-making. Claiming to found a secular state, the Indian leadership paradoxically used 'religiosity' of Jammu and Kashmir for this secularisation. The Muslim-majority demography of Jammu and Kashmir was instrumentalized to 'secularize' an otherwise Hindu-majority polity: Nehru proclaimed in 1953 that, 'Kashmir is symbolic as it illustrates that we are a secular State, that Kashmir, with a large majority of Muslims, has nevertheless, of its own free will, wished to be associated with India.'⁴⁹ Any future possible breakaway of Jammu and Kashmir would automatically falsify the claim of India to be a secular state, or so it seemed.⁵⁰ The other part of the conditional accession was the state's choice to form its own constitution, to which we now turn.

V. Constitution-making in Jammu and Kashmir: The embodied violence

By now, it can be summarized that violence in the constitutional founding assumes some common forms. One is the mandatory exercise of force in the prior exclusion of distinct and dissenting groups to physically eliminate them from the resultant political formation. The other is the suppression of those distinct voices that may not fall in line with the dominant ideological conceptions of the leading political dispensation. Yet another is the assimilation of such groups in the production of a homogeneous national culture. Taken together or individually, these forms of violence inundate the process of constitution-making and raise serious questions about the legitimacy of the process as well as the end product.

Eliminating the 'enemy'

'The Jammu massacre is the starting point of the Kashmir dispute, but it features nowhere in conflict discourses on Kashmir.'⁵¹ Michel-Rolph Trouillot's work describes in detail the role of power in the production of history.⁵² He considers historical absences as 'acts of

⁴⁸Ibid 22.

⁴⁹M Rai, 'The Indian Constituent Assembly and the Making of Hindus and Muslims in Jammu and Kashmir' (2018) 49(2) *Asian Affairs* 205.

⁵⁰P Brass, *The Politics of India Since Independence* (Cambridge: Cambridge University Press, 1994) 192.

⁵¹C Snedden, *The Untold Story of the People of Azad Kashmir* (London: Hurst & Co, 2012).

⁵²MR Trouillot, *Silencing the Past* (Boston: Beacon Press, 1995).

silencing⁷, which deliberately obscure the past and produce only the dominant narrative. Silences enter the history-production process at four moments: the making of sources, the making of archives, the making of narratives and the making of history.⁵³ At every moment in the historical discourses of Jammu and Kashmir, the eventualities of the Jammu massacre are silenced. First, the facts are recreated and twisted to make this violence look like a retaliation for the infamous ‘tribal invasion’. Second, there are no factual sources preserved in the archives –⁵⁴ in other words, factual sources were deemed to be unworthy of being preserved. Third, the twisted and manipulated facts are used to form and propagate the dominant/official narrative – for example, blaming Pakistan for being the aggressor state. And fourth, the whole process culminates in a hierarchically produced version of history – the Indian nationalist narrative denies any such violence in Jammu while scholarship on communal violence in British India in 1947 has silenced/excluded Jammu and Kashmir from its domain.

The silence of archives on this important event is also symptomatic of what Achille Mbembe calls an act of ‘chronophagy’ – that is, consuming the past by destroying the archive to hide the constitutive violence of state.⁵⁵ This allows the state to free itself from accountability for the past. Mbembe argues that archives are products of a process that decides the worth of certain documents to preserve them for public consumption.⁵⁶ Playing politics with the archive, whereby they are either silenced or destroyed, allows the possibility of manufacturing history anew. This is just one way of employing violence in state formation, which is overall fundamentally a violent process.⁵⁷ This constitutive violence and its character of creating new histories while getting rid of the past enables the formation of a new state.

The Jammu massacre, which occurred at a crucial time in Jammu and Kashmir’s history as the future of the princely state was being decided, is in this sense an act that enabled the state formation. It simultaneously allowed for promulgating a new version of history that allowed the Indian state to exonerate itself of any accountability about this violence and facilitated the sustenance of state after 1947 by priorly excluding the region and population, which were considered to be a stronghold of Muslim Conference politics. This displacement also eliminated the possibility of severe ideological confrontations in the state, while excluding a significant population from the constitution-making process.

What does this constitutive violence achieve? Schmitt thought homogeneity among the people had to be founded on an ‘us–them’, ‘friend–enemy’, ‘insider–outsider’ distinction, which he explicated to be a necessary condition for the founding of a constitutional community.⁵⁸ Only through this distinction, wherein people distinguish themselves from the outsiders/enemies, can a homogeneous political community be created that prioritizes its interest, and can go to war to preserve its unity if necessary. This enemy or outsider is the category that is liable to elimination for the sake of maintaining homogeneity. In this case, the Muslims of Jammu region were the enemy who had to be eliminated to preserve the state.

⁵³Ibid 26.

⁵⁴Rashid (n 43) 230.

⁵⁵A Mbembe, ‘The Power of the Archive and Its Limits’ in C Hamilton, V Harris, M Pickover, G Reid, R Saleh and J Taylor (eds), *Refiguring the Archive* (Dordrecht: Kluwer, 2002).

⁵⁶Ibid 20.

⁵⁷C Tilly, ‘War Making and State Making as Organized Crime’ in T Skocpol, PB Evans and D Rueschmeyer (eds), *Bringing the State Back In* (Cambridge: Cambridge University Press, 1985).

⁵⁸Schmitt (n 3) 46–48.

The attempt to create a homogeneous polity *a la* Schmitt was the hallmark of the postcolonial Indian state-building project. On the face of it, the Indian project achieved popularity for its promises to create a new nation-state on the ideals of secularism, constitutionalism and democracy, spearheaded by the Congress. But on the substantial level, identification and exclusion of the 'other' by military force or assimilation or suppression very much precluded and pervaded the entire project. Jammu and Kashmir was one distinct region that the Indian state desired to integrate in order to fulfil its secular ideal. It was therefore necessary to sway the Kashmiri leadership towards Congress; simultaneously, the political diversity within Jammu and Kashmir had to be erased, which meant those against the idea of accession with India and demanding a plebiscite or simply a merger with Pakistan had to be done away with. The Muslim Conference, its leadership and its support base became the enemy, which had to be eliminated in order to gradually establish the homogeneous Indian nation, a secular state on the surface but at its core seeking to homogenize all its components.

Following the violence in Jammu and the subsequent Indo-Pakistan War, about one-third of the area of Jammu and Kashmir state was separated. This loss marked a significant absence of the hereditary subjects of the state from having a say in their state's future. They could no longer be a part of the future constitution-making process. The Muslim Conference leadership was imprisoned and then deported to Pakistan. Sheikh drove dissenters, belonging mostly to the Muslim Conference, across to Pakistan using the Enemy Agents' Ordinance, which was heartily approved by Nehru.⁵⁹ The use of this Ordinance provided 'the J&K state with far-ranging powers to deliver punishments ranging from imprisonment of 10 years to death and to institute trial by a designated special court with no right of appeal for persons designated as enemy agents or as persons aiding the enemy'.⁶⁰ The extent of the use of this Ordinance to crush dissent remains understudied.

The violence did not stop there. In 1953, with the State Constituent Assembly being operative, Nehru grew impatient to secure the state's complete integration with India while Sheikh intended to preserve the state's autonomous position.⁶¹ Nehru's impatience led Sheikh to rake up the call for plebiscite on multiple international forums. An alarmed Nehru conspired and got Sheikh unconstitutionally and forcibly dismissed from office and subsequently arrested.⁶² The 'removal of certain well-known corrupt officers, suspension of others whose loyalty is doubted' and 'apprehending any persons taking a lead in creating any disturbance' were the conditions under which Sheikh was arrested – as recorded by Nehru's Private Secretary, MO Mathai, on 31 July 1953.⁶³ The replacement, Bakshi, played according to Nehru's book but when he no longer served his purpose, he too was replaced. BK Nehru records this state of affairs:

From 1953 to 1975, Chief Ministers of that State had been nominees of Delhi. Their appointment to that post was legitimized by the holding of farcical and totally rigged

⁵⁹Noorani (n 47).

⁶⁰H Duschinski and SN Ghosh, 'Constituting the Occupation: Preventive Detention and Permanent Emergency in Kashmir' (2017) 49(3) *The Journal of Legal Pluralism and Unofficial Law* 329.

⁶¹AG Noorani, *Article 370: A Constitutional History of Jammu and Kashmir* (Oxford: Oxford University Press, 2011) 9.

⁶²Ibid 9.

⁶³*Selected Works of Jawaharlal Nehru*, Vol 23, 303–5.

elections in which the Congress party led by Delhi's nominee was elected by huge majorities.⁶⁴

The project to completely assimilate Jammu and Kashmir went full throttle and did not spare even Sheikh, whose credit had been enabling India's successful control of the state. In the absence of the Muslim Conference, he and few of his loyalists became the new 'enemy' who had to be eliminated from the process to completely integrate the state with India. Consequently, Sheikh was held in prison until 1968 under various detention laws. This happened to the supposedly most popular leader of the time who had heralded a successful anti-Dogra movement, implemented radical land reforms, abolished the Dogra monarchy and laid the foundations of the constitutional process. Yet he was conveniently erased from the political scene and debarred from the constitution-making process.

Under Bakshi, the Constituent Assembly ratified accession on 6 February 1954.⁶⁵ With the Assembly's approval, the Indian President passed the Constitution (Application to J&K) Order 1954, which among other things gave the Supreme Court full jurisdiction in Jammu and Kashmir, and extended fundamental rights to Jammu and Kashmir on the condition that they could be suspended in the interests of security and without judicial review.⁶⁶ Duschinski and Ghosh raise three crucial points of departure here.⁶⁷ First, this Order specifies that restrictions on fundamental rights would be determined by the state legislature and not be subject to judicial review, meaning that any law validly passed by the state legislature that violates these rights would not be unconstitutional. Second, the Order stipulates that preventive detention laws can only be passed by the state legislature. And third, the Order added Article 35(c) into the Indian Constitution to protect preventive detention laws from judicial review for five years (later extended to ten, fifteen and twenty years).

Thus, preventive detention remained in vogue throughout. The Indian state allowed the institution of a state legislature to be used by incumbent regimes against incumbent enemies. This, in turn, enabled a permanent state of emergency wherein new enemies were regularly created and eliminated, and became the justification for repeated executive orders.⁶⁸ With the Indian courts backing these emergency regimes, Duschinski and Ghosh have termed this form of dominance and control produced and reproduced through legal mechanisms and processes across time that institute a state of emergency and permanent crisis 'occupational constitutionalism'.⁶⁹ The displacement of the Muslim Conference, and the arrest of the Sheikh in an environment of violence compromised the credibility of the 'constituent power' well before the actual process began.

The violent politics enabled the existence of only one political formation, and it was the National Conference. The leadership of the party was replaced as and when needed, as seen above, but the party largely remained a constant character in the state's constitutional politics. While the displacement of the Muslim Conference amid the Jammu massacre served as 'foundational violence', the arrest of the Sheikh and planting of compliant regimes in an environment of permanent emergency continued to act as

⁶⁴BK Nehru, *Nice Guys Finish Second* (Harmondsworth: Penguin, 1997) 614–15.

⁶⁵*Jammu and Kashmir Constituent Assembly Official Report: Part I* (1951–55) 936.

⁶⁶L Tillin, 'Asymmetric Federalism' in S Choudhary, M Khosla and PB Mehta (eds), *The Oxford Handbook of the Indian Constitution* (Oxford: Oxford University Press, 2016) 45–67.

⁶⁷Duschinski and Ghosh (n 60) 328–29.

⁶⁸Ibid.

⁶⁹Ibid 318.

‘maintaining or reiterative violence’ that sustained Indian control in Jammu and Kashmir. Furthermore, the erasure of this aspect from the dominant narratives facilitates the propagation of a triumphant story of state-making and subsequent constitution-making.

Suppressing the ‘internal-outsiders’

The events that followed the state formation continued to be interjected by violence. It did not come from external actors only but also internal actors among which the National Conference, which was the dominant party and the de facto government, was the main actor with full access to machinations of state violence. On assuming power as head of the interim government, the reign of the Sheikh had been ‘a potential dictatorship and one-party regime’.⁷⁰ ‘One leader, one party, one programme’ had been the party slogan as the Sheikh exploited unchecked power to implement his party programme in opposition to ideals of pluralism, accountability and tolerance of dissent.⁷¹ Balraj Puri seconds this assessment: ‘Any deviation or dissent from this strict test of nationalism amounted almost to treason.’⁷²

His reign saw killings,⁷³ massive use of arbitrary arrests of people who disagreed with the government policies or expressed a pro-Pakistan sentiment during ordinary conversations in public places, dissemination of party propaganda through the controlled media, suppression of dissenting voices in the media, incarceration and deportation of dissident leaders such as Choudhary Ghulam Abbas and Prem Nath Bazaz, and most infamously, the use of Peace Brigades, a state-sponsored militia group, as the party whip.⁷⁴ Ghulam Mohiudin Karra, who had led the Quit Kashmir movement when Sheikh and other leaders were jailed, was marginalized and formed the Political Conference in 1953, demanding accession to Pakistan.⁷⁵ The Muslim Conference, the Political Conference and Praja Parishad⁷⁶ were excluded, even as there were alternative visions within the National Conference itself that were suppressed, including Abdul Ghani Goni’s.

Writing at the time, Josef Korbel, who was also a member of the UN Commission for India and Pakistan, noticed what he called ‘the dictatorial character of the Srinagar Government’.⁷⁷ The only radio channel and media outlets functioned as mouthpieces of the National Conference. Political opposition existed only on paper. The Kisan Mazdoor Conference (in Kashmir), the Kashmir Socialist Party, the Democratic Socialist Party (in Jammu) and the Sikh Akali Party were dissuaded from performing public political activities. This left the National Conference as the sole political party conducting

⁷⁰A Lamb, *Kashmir: A Disputed Legacy* (Hertford: Roxford Books, 1991) 184.

⁷¹S Bose, *The Challenge in Kashmir: Self-Determination and a Just Peace* (London: Sage, 1997) 26–27.

⁷²B Puri, ‘Kashmir and Rest of India: First Emotional Rupture’ (2003) 28(39) *Economic and Political Weekly* 5143.

⁷³AA Wani, *What Happened to Governance in Kashmir* (Oxford: Oxford University Press, 2019) 130.

⁷⁴AH Para, *The Making of Modern Kashmir: Sheikh Abdullah and the Politics of the State* (London: Routledge, 2019) 210–12.

⁷⁵Noorani (n 61) 5143.

⁷⁶Praja Parishad was a Jammu-based political party founded in November 1947 by Balraj Madhok, an activist of the Indian right-wing organisation the Rashtriya Swayamsevak Sangh. It opposed autonomous status to J&K, and called for complete integration with India.

⁷⁷J Korbel, ‘The National Conference Administration of Kashmir 1949–1954’ (1954) 8(3) *Middle East Journal* 283.

politics in the state, and hence the State Constituent Assembly, convened in 1951, was composed solely of members of the National Conference.

All the suppressed groups and voices were the 'internal-outsiders' who were to be tamed and barred from engaging in the constitutional deliberations. For Schmitt, according membership to 'internal outsiders' – the distinct groups that are accommodated within the community – is an act that dilutes the possibility of the creation of a political community. A community composed of multiple sub-communities cannot exist as one and, more importantly, cannot fight or defend as one. In the absence of a distinction, the community appears to be a mixture of multiple communities with scanty common interests. The inclusion of diverse groups therefore compromises political unity and defeats the purpose of constitutionalism: Without a political community, there can be no constitution.⁷⁸ Groups and voices such as the Muslim Conference and the Political Conference therefore diluted the homogeneity of the prospective political community, thus diluting the hegemony of National Conference.

The nature of debate in the Assembly during the formulation of the state's separate constitution succinctly reveals the unflinching conviction of Sheikh's National Conference on the Nehruvian Congress's idea of India.⁷⁹ The members seem to have skipped a critical analysis of Indian political formation. In almost all their speeches, with the exceptions of Abdul Ghani Goni and Mirza Afzal Beg, they resorted to a credulous appreciation of the Indian secular-democratic model. They considered the political formations in Indian and Pakistani states to be a simple binary of democracy and feudalism respectively. We find ample examples of the employment of this binarism in Sheikh Abdullah's inaugural address to the Constituent Assembly on 5 November 1951.⁸⁰ He invoked secular and democratic principles of constitution-making, abolition of landlordism and superior industrial capability as the merits of joining India. According to him, there was 'no danger of a revival of feudalism and autocracy' in India.⁸¹ Further:

The Indian Constitution has set before the country the goal of secular democracy based upon justice, freedom and equality for all without distinction. This is bedrock of modern democracy. This should meet the argument that the Muslims of Kashmir cannot have security in India, where the large majority of the population of Hindus. Any unnatural cleavage between religious groups is the legacy of imperialism, and no modern State can afford to encourage artificial divisions if it is to achieve progress and prosperity. The Indian Constitution has amply and finally repudiated the concept of a religious state, which is a throwback to medievalism, by guaranteeing the equality of right of all citizens in respective of their religion color, caste and class.⁸²

Simultaneously, he termed the Muslim League as 'forces of religious bigotry', and Pakistan as a strictly feudal, economically weak, politically unstable and constitutionally undemocratic state. According to him, states ought to be formed on the basis of political

⁷⁸Schmitt (n 3) 67–79.

⁷⁹The deliberations between Sheikh and Nehru, and their colleagues, on the constitutionalization of Article 370 in the Indian constitution also sufficiently demonstrate the common ideological platform on which both the parties negotiated. That, however, is beyond the scope of this article.

⁸⁰*Jammu and Kashmir Constituent Assembly Official Report* (n 65) 82–110.

⁸¹*Ibid* 105.

⁸²*Ibid* 106.

and economic considerations and not religious congruence. He even attacked the Muslim basis of the making of Pakistan:

This claim of being a Muslim state is of course only a camouflage. It is a screen to dupe the common man, so that he may not see clearly that Pakistan is a feudal State in which a clique is trying by these methods to maintain itself in power ... right thinking man would point out that Pakistan is not an organic unity of all the Muslims in this subcontinent. It has on the contrary, caused dispersion of the Indian Muslims for whose benefit it was claimed to have been created. There are two Pakistan at least a thousand miles apart from each other. The total population of western Pakistan which is contiguous to our State is hardly 25 million, while the total number of Muslims resident in India is as many as 40 million. As one Muslim is as good as another, the Kashmiri Muslim if they are worried by such considerations should choose the 40 million living in India.⁸³

As he condemned Pakistan, Nehru passionately impelled the idea of secular India. No idea opposed to Sheikh, the National Conference and the Congress ever found currency within or outside the Assembly. One such proposal that the Sheikh had rejected earlier had come from the Punjab Muslim League members who, at the behest of Jinnah, had offered autonomy to Kashmir along with the right to secession if it acceded to Pakistan or, if this offer was not acceptable, the suggestion that it should try to remain independent of the two states.⁸⁴ These terms were no different from (and perhaps would have been better than) the terms of accession and autonomy that Sheikh accepted from the Indian state. In fact, the willingness to work on a solution is pretty evident from the Pakistani leadership. Still, Sheikh showed no interest.

Abdul Ghani Goni appears to be the only dissenting voice throughout the debates. He scathingly objected to the extension of Supreme Court jurisdiction to the state: 'The Reports presented in the House not only are against the principles of New Kashmir but they also smack of Indian Imperialist mentality. We are handing over everything to the Indian Union.'⁸⁵ He also recommended that the right to secession and right to recall be provided.⁸⁶ Explaining his perspective, Goni cited the following reasons: the geographical disconnect with India, the poor representation of Muslims in government services in India, the strong assertion of Hindu Right in India that heavily influenced the Praja Parishad agitation, and the unauthorized position of the Constituent Assembly as the final decision-maker on the question of accession.⁸⁷ He proclaimed:

The people did not shed their blood for establishing permanent accession to India or for a change in the Government; they did it only to get their right of self-determination recognized they did it because our beloved leader was thrown behind the bars. I demand the right of self-determination for the protection of our leader.⁸⁸

⁸³Ibid 108.

⁸⁴MM Ishaq, *Nidai Haq* (Srinagar, 2014) 121–22.

⁸⁵*Jammu and Kashmir Constituent Assembly Official Report* (n 65) 824.

⁸⁶Ibid 811.

⁸⁷Ibid 824–30.

⁸⁸Ibid 827.

In response, all the members unequivocally spoke of the Assembly as the authorized decision-maker, and that the question of accession had been already decided in Sheikh's inaugural speech in the Assembly. This went against Nehru's repeated assertions that the Assembly was not the authorized decision-maker on accession.⁸⁹ But by then Sheikh had been dismissed from power and another of Nehru's close aides, Bakshi, had replaced him, implying that Nehru considered it to be the appropriate time to have the Instrument of Accession ratified. Nevertheless, Goni's voice was repeatedly shut down with laughter and shouting, following which he walked out in protest amid cries of 'He is going to Pakistan'.⁹⁰

The discussions on the Draft Constitution began on 10 October 1956. Beg, who was released on 20 October 1956 along with few other detained members, moved an adjournment motion in support of Sheikh and other detainees, which was rejected.⁹¹ On 24 October, Beg delivered a furious speech accusing the government of creating an inconducive environment for constitution-making, which was marked by Section 50 in Srinagar, arrests under detention laws and a ban on public discussions.⁹² He further went on to argue that the Constituent Assembly was not authorized to provide a binding decision regarding accession as that was the subject matter of a plebiscite promised by the Indian leadership.⁹³ Walking out with six other members, he declared:

I have said that this House had lost its representative character and that it is not competent to frame constitution, nor can it take any decision in regard to accession of the State. Therefore, I hand over statement to Mr President and declare our boycott of this Assembly.⁹⁴

In parallel, the Naya Kashmir Manifesto, drafted way back in 1944 by the National Conference, was unequivocally accepted as the basis of governing structure of the state. It continued to remain the blueprint for drafting the state constitution even when Sheikh was replaced by Bakshi as the Prime Minister in 1953. As with Congress in the Indian context therefore, the constitutional process in Jammu and Kashmir was directed exclusively by the National Conference and the resultant constitution was a clear-cut reflection of its ideology. The diverse communities had already been suppressed beforehand; even differing viewpoints among National Conference members of the Assembly were met with firm disapproval. Constitutionalism could therefore not establish democracy and accommodate plurality as expected. The suffusion of state and constitution formation with exclusionary violence corroborates experiences from around the post-colonial world.

Given the discontents and incongruities in constitutional process in Jammu and Kashmir, AG Noorani has rightly questioned the moral authority of the constitution-making process, the constitution-making body and the constitution itself.⁹⁵ According to him, the process that occurred in an environment of violence, wherein the Prime Minister

⁸⁹AG Noorani, 'How and Why Nehru and Abdullah Fell Out' (1999) 34(5) *Economic and Political Weekly* 268.

⁹⁰Lamb (n 70) 934.

⁹¹*Jammu and Kashmir Constituent Assembly Official Report: Part II* (1956) 57.

⁹²Ibid 102.

⁹³Ibid 112.

⁹⁴Ibid 119.

⁹⁵Noorani (n 47).

was forced out of office in 1953 and replaced by one of Nehru's trusted men, had no moral authority or political relevance. This was because it had lost the representative character, given that the committees that were tasked to frame vital components of the constitution were unilaterally reconstituted after 1953. This article asks similar questions and locates them in the theoretical gamut of constitution-making processes.

VI. Conclusion

The constitutional violence discussed in this article seldom features in the triumphant narratives about constitutions and constitution-making. Ninet argues that modern constitutions such as the US and French constitutions had a fundamentally religious character, with religious discourse playing a vital role in their founding moments.⁹⁶ These characteristics, however, are conveniently silenced because they are antithetical to the 'US or France as secular' narrative that has been promulgated and goes nearly unchallenged today. The question of political violence, which includes constitutional violence, is not even spoken of simultaneously with state and constitution formation. Similarly, the constitutional story of Jammu and Kashmir is always presented as a success and does not include, in Baxi's words, 'political practices of cruelty, or histories of deprivation, denial, and disadvantage'.⁹⁷

The case of constitution-making in Jammu and Kashmir furthers the establishment of a relationship between state, constitutions and violence to understand how violence, which has historically been so integral to the formation of states, has also punctuated the formation of constitutions. This is done by constructing a homogeneous ideological community and excluding diverse communities and conflicting viewpoints from the process. The formulated documents appear as a reflection of a particular, singular ideology – usually the dominant ideological party gets to frame the constitution according to its own notions of what constitutions are and how they should look. Constitutions are therefore formulated on the logic of inclusion and exclusion, which in turn is already determined to an extent by the hierarchical structure of the prevalent socio-political order.

In Jammu and Kashmir, the whole process of constitution-making was monopolized by the National Conference, the ideology of which was transmitted into the final constitutional text. Simultaneously, allowing the National Conference to hegemonically represent Jammu and Kashmir allowed the Indian state to lay claims to the state's accession as an outcome of democratic constitutionalism whereby the latter had been given the autonomous right to self-determine. This article has problematized the notion that National Conference was the sole popular representative of the people and its decisions were democratically legitimate. It has shown the connivance of the Indian state with the National Conference in substituting the promise of plebiscite with a constitutional process that was soaked in violence. The State Constituent Assembly, the constitutional process as a whole and the constitutionalized autonomy exemplified by the Indian state as an expression of self-determination of the people of Jammu and Kashmir do not adhere to the principles of constitutionalism.

The capability of constitutions to accommodate plurality and plural conceptions of political organization without assimilating them has been one of the core concerns of

⁹⁶Ninet (n 4) 80–81.

⁹⁷Baxi (n 5) 1191.

constitution-making. The question of race in US constitution, religion in the French constitution and the political rights of religious minorities in the Indian constitution are classical cases that exemplify this constitutional incapacity. Instead, constitutions tend to flatten the differences and produce a homogeneous political community. Jammu and Kashmir's constitutional story, as delineated here, adds to the validity of this limitation.

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