

*Modern statehood is an act of erasure and a product of colonial boundary making. Here, law and artificial frontiers come together to create a disembodied sense of belonging through ideas of territorial sovereignty and citizenship. International law is inseparable from this territorial statehood and subsequently locates its own borders in abstract ideas of security, development and containment of territory – systematically erasing memories, polity and communities of pre-colonial forms and colonized spaces. In this strange inheritance of territorial borders, post-colonial states as mirrors of colonial ‘othering’ also assert themselves in ways where land is continually acquired and controlled at the expense of its most significant stakeholder – the people. While a conversation on statehood and borders is not new in international law, contrary to its conventional framing, I urge that these continuities suggest a different discussion from the ones we lock ourselves in. There are concerns with territoriality itself, as opposed to territorial concerns in the international law sense.*

*To do this, I engage with Kashmir as a site of legal unpacking and a challenge to modern (territorial) statehood where Kashmir becomes relevant for three reasons. First, its stale topicality renders it necessary to resist the normalization of this state of exception and violence. Second, it is one of the most complex manifestations of competing*

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<sup>#</sup> This reflection is born out of several conversations with an extended community of scholars, comrades and thinkers, both within and beyond academia. I am particularly grateful to Suraj Gogoi for sharing my imagination and enriching them with his profound scholarly observations. Without him, the notional potential of this paper would have been very different. I am thankful to my colleagues and friends – Aaliya Anjum and Mohammad Shahabuddin for their close readings, sharp insights, nuanced expertise, kindness and time. Their interventions have widened my thinking in the most capacious ways. I am very grateful to Vanessa Chishti, friend, comrade and colleague for her brilliant account of Kashmir’s history and, for continued solidarity in the academe. I am thankful to my friends in Oxford - Gautam Bhatia and Sameer Rashid Bhat for providing me with feedback, discernment, comity and resources from the heart of the empire! And finally, I am thankful to the NALSAR journal editorial team for their support, grace and immense patience.

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*identarian and relational claims, enmeshed and disguised in a limited notion of territoriality and terrain. And third, located in Kashmir is the expression of citizenship as an extension of the statehood idiom where the vision of citizens as economic agents is disrupted by the systematic refusal of Kashmiris to unquestioningly accept this mandate. A form of double 'othering' occurs where the 'unproductive', un-citizen is also a Muslim un-citizen. In this context, I find myself asking the following questions - what does/should an endorsement of the right of self-determination mean in international law for a nation which is 'stateless'”? And where can we go from here in a way where the lay of the land is not forced into the myth of violent territoriality once again? This paper is an attempt to problematize territoriality and allow ourselves to critically imagine a relocation of Kashmiri land to where it truly belongs – in the people.*

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## INTRODUCTION

A Kashmiri acquaintance and I were walking down the streets of Delhi several months ago and as we walked, he kept looking over his shoulder every couple of minutes. “*I think I am being followed*”, he stated, and added a few moments later, “*I am not welcome in your country*”. As I looked around incredulously, I realized that he and I were navigating very different streets and realities. I, an entitled Indian citizen, was walking with a man who came from the heart of a place<sup>1</sup> that understands all too well what it means to fight for freedom, identity, dignity and borders against an institution no less powerful than the state. A cursory glance at a map of the region will reveal that Jammu and Kashmir has borne the brunt of occupation by both India and Pakistan for over seven decades. As of 2021, following the formal revocation of Article 370 of the Constitution of India,<sup>2</sup> the former Indian state is now a union territory,<sup>3</sup> and

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<sup>1</sup> Space here refers to an internal as well as an external site of contestation.

<sup>2</sup> The revocation is discussed in detail subsequently.

<sup>3</sup> *Jammu and Kashmir Reorganization Act (2019)* reconstituted the former state of Jammu and Kashmir into two union territories of Ladakh and Jammu and Kashmir.

has been under armed siege<sup>4</sup> coupled with intermittent internet blackouts and blockades. In this context, we begin apprehending the concepts of citizen, state and territory discursively.

At this juncture, it is important to offer some important heuristics and caveats before I proceed with the reflection itself. Critical legal scholarship serves a unique function of oscillating between the extra-ordinary and the mundane. If the latter allows us to observe doctrines and nuances in close proximity, the former encourages us to transcend immediate reality and imagine beyond our (theoretical) homes. In this article, I use critique as a site of imagination<sup>5</sup> to bring into line of sight three elements/strands of thinking: *First*, the limits of territoriality in sovereign statehood and the moving minority subject (sometimes citizen). *Second*, a politics of inflexibility and homogeneity through (and expected of) border and identities, and *third*, the production of knowledge about the ‘other’ and identity formation through colonial stationery<sup>6</sup> and cartography.

What I offer is an attempt at *problematizing* statehood beyond conventional legal readings and terms of the debate; a vantage point to contest the view that political authority, under any form or name, will inevitably turn to a form of power that has no choice but to border and control the space it inhabits and then, treat the space under its control in a territorial (literal and otherwise) way. Therefore, what this paper is not trying to do is equally important. This work is not a detailed archival account of border-making and identity formation in Kashmir, nor does it engage in great detail with liberal constitutional doctrines which formulate the idea of the citizen. Both of these postulations have been provided to indicate the beginning of an engagement with these ideas.<sup>7</sup> Finally, it does not claim to know what the alternatives to borders can look like, but I do invite my readers to imagine the possibilities and configurations with me as part of this process.

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<sup>4</sup> It must be mentioned that the armed siege of the region is decades old, however, following the revocation of Article 370, there has been a significant increase in the militarization of the region.

<sup>5</sup> I am mindful of the theoretical limits and remits of critique, but I impose no such bounds on imagination - academic or otherwise.

<sup>6</sup> For a similar discussion on Thailand, see P. SINGH, OF INTERNATIONAL LAW, SEMI-COLONIAL THAILAND AND IMPERIAL GHOSTS 46-74 (Asian Journal of International Law 2019).

<sup>7</sup> A task I hope is carried into the future as well.

First, let us take a moment to *see* Kashmir as it is before contemplating its political geography. Kashmir lies in the northern-most part of the Indian sub-continent and is the manifest marker of territorial conflict between India and Pakistan, as well as India and China.<sup>8</sup> Today, the term Kashmir denotes a large area: the Indian-administered territories of Jammu and Kashmir, and Ladakh, in the south and south east respectively; the Pakistani-administered territories of Azad Kashmir,<sup>9</sup> and Gilgit-Baltistan, in the north and northwest respectively; the Chinese-administered territories of Aksai Chin and the Trans-Karakoram in the east. It is the seat of a long-standing territorial conflict, undefined cartography and porous citizenry where a battle for identity has merged with a battle against the notion of the State. This reflection uses the broad term Kashmir but focuses on the Indian state's actions in Jammu and Kashmir where state-making and citizenship is foregrounded and unpacked against the backdrop of a heavily contested terrain.

Kashmir has been endlessly scrutinized by international legal scholars<sup>10</sup> through the lens of human rights, self-determination,<sup>11</sup> occupation<sup>12</sup> and sovereign dominion<sup>13</sup> of the three neighbouring states. Alternatively, I look at Kashmir, the abrogation of Article 370 and India's recent citizenship law, as a battleground for one of TWAIL's<sup>14</sup> oldest debates with mainstream international law: the incapacity to resolve any identarian conflict as long as we cling to our inheritance of the Westphalian sovereign state. I have divided this paper into five parts, this prelude being the first. In Part II, I set the context through a brief and limited history of the formation of the state of Kashmir and ground it in contemporary legal and temporal alignments. In Part III, I revisit the making of the post-colonial state up until its most recent neoliberal iteration, particularly in post-colonial locations. This is followed by an unpacking of colonial boundary making as what I call international law's original sin and the role of territorial

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<sup>8</sup> Territorial conflict as understood within the current paradigm of international law refers to a dispute between two sovereign states about historical claims to a territory.

<sup>9</sup> India claims this region to be a part of Jammu and Kashmir, and under Indian administration.

<sup>10</sup> See generally PARVATHI MENON, *KASHMIR CRISIS AND THE SCHIZOPHRENIA OF INTERNATIONAL LAW* (Harvard Law School 2012).

<sup>11</sup> Kalana Senaratne, *Internal Self-Determination in International Law: A Critical Third-World Perspective* 3 (2) *ASIAN JOURNAL OF INTERNATIONAL LAW* 305-339 (2013).

<sup>12</sup> FOUZIA NAZIR LONE, *HISTORICAL TITLE, SELF-DETERMINATION AND THE KASHMIR QUESTION* (Brill Nijhoff 2018).

<sup>13</sup> SYATAUW, *SOME NEWLY ESTABLISHED ASIAN STATES AND THE DEVELOPMENT OF INTERNATIONAL LAW* 45-100 (Springer).

<sup>14</sup> *Third World Approaches to International Law*; <https://criticallegalthinking.com/2019/04/02/twail-coordinates/>.

encasement as the true site of power of the Westphalian (and post-colonial) state. Part IV looks at Kashmir as the wild zone of sovereignty, where the maladies and fallacies of statehood best manifest and I conclude with an urge to reimagine territorial polity as an effort to resolve indentarian crisis in the region (and at large).

## I. WHO<sup>15</sup> IS KASHMIR?

### A. *The Colonial Inheritance*

An attempt to trace the historical configurations of Kashmir in limited space is nothing short of impossible. However, for the purposes of deploying a TWAILian, feminist and de-colonial gaze at territory and territoriality, it is helpful to understand where history locates Kashmir and its struggles. I will meander across two historical forms of Kashmir - colonial and post-colonial, using three interpretative instruments - land, cartography and territory. While the former (colonial) intends to denote a moment in time,<sup>16</sup> the latter (post-colonial) will act as an archive of social functions and relations that are made and unmade through these instruments. Before I move to either passage of inquiry, it is useful to note that colonial Trigonometric Surveys record pre-colonial Kashmir as an ancient, mostly inaccessible terrain which “*appears to have been a kingdom for a period that transcends the limit of legitimate history.*”<sup>17</sup> This classification alludes to a particular colonial gaze where the territory of the colonized other is immeasurable, inaccessible and to a certain extent, incomprehensible, yet, produced decisively through this colonial knowledge. This description is also significant because of the nature of the territorial diffusion it indicates and, till about A.D 1586, the region mostly remains this way. The Mughals are the first to survey and re-engineer the land, largely to facilitate the dynasty’s continued enjoyment of the place.<sup>18</sup> In 1753, it is seized by the Afghans and from them, the Sikhs wrest control in 1819, bringing it under Maharaja Ranjt Singh’s reign. Following a famine, an epidemic,

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<sup>15</sup> The personification here is intentional for two reasons: a) to relocate the idea of sovereignty in people-centric narratives and b) to unpack the relationship of the subject-citizen to the territorial state.

<sup>16</sup> History is a processual account of events rather than a linear narrative. Here, I deploy the three terms as continuous and simultaneous with distinct erasures and structural continuities than disjunctive periods that follows one after other. I borrow this from Trouillot’s conceptualization of history. See generally, TROUILLOT MICHEL-ROLPH. *SILENCING THE PAST* (Beacon Press 1995).

<sup>17</sup> This is recorded as part of ‘On the Trigonometrical Survey and Physical Configuration of the Valley of Kashmir,’ by William H. Purdon, C.E., F.R.G.S., &c., Executive Engineer, PuNjab. Read, December 12, 1859. He alludes to a report prepared by a Professor Wilson.

<sup>18</sup> *Id*; *Supra* Note 14 at 8.

an earthquake and, finally, Ranjit Singh's death in 1839, the British acquired dominion over the region.<sup>19</sup> This colonial signposting of Kashmir is important for two reasons. It marks the introduction of colonial cartography and its ramifications, and it is the beginning of the process of fractured identity formation in the region.

In the early nineteenth century, the British, having occupied most of its erstwhile colonies, turned their attention to Kashmir given its immense geopolitical significance. A gateway to central Asia, Kashmir was critical to the colonial expansion project. The British acquired Kashmir through the Treaty of Lahore<sup>20</sup> in 1846, following the annexation of Punjab as a result of their victory in the first Anglo-Sikh War (1845-46). Soon after, they handed over its immediate administration through a treaty<sup>21</sup> to Gulab Singh, the founder of the Hindu Dogra<sup>22</sup> dynasty and first ruler of the princely state of Jammu and Kashmir.<sup>23</sup> Gulab Singh was an ally and through him, the British retained significant influence over frontier politics in the region. Such was their informal authority that by 1870, they had completed a detailed Trigonometrical Survey and mapping of the region through the Survey of India<sup>24</sup> - a process that clearly required uninterrupted mobility and access. The significance of this instrument on land engineering and subsequent identity formation in the region was to be immense.<sup>25</sup> Colonial cartography is a well-documented imperial tool<sup>26</sup> with little cognizance of local realities, social functions and social relationships with the land. Not only was the Survey of India an imperialist institution,<sup>27</sup> but the very nature of British cartography

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<sup>19</sup> *Id*; See also MRIDU RAI, HINDU RULERS, MUSLIM SUBJECTS (Princeton University Press, 2004); PREM NATH BAZAZ, THE HISTORY OF STRUGGLE FRO FREEDOM IN KASHMIR (Kashmir Publishing Company, 1954).

<sup>20</sup> Signed on March 9, 1846, the treaty forced the Sikhs to cede Jammu and Kashmir to the British.

<sup>21</sup> Treaty of Amritsar of March 16, 1846, < <https://www.kashmirnetwork.com/justju/stuff/treaty.pdf>>.

<sup>22</sup> MRIDU RAI, HINDU RULERS, MUSLIM SUBJECTS (Princeton University Press, 2004).

<sup>23</sup> It is said that the British 'sold' Kashmir to Gulab Singh for 75 lakh nanak shahi rupees as an early allusion to one of defining British policies of converting land to (private) property - a move that is resented by Kashmiris to this day. MUHAMMAD IQBAL, THE JAMMU FOX 221 (Heritage Publishers, 1988).

<sup>24</sup> Supra Note 14; Memoranda on the Progress of the Trigonometrical Survey in Kashmir by Captain S.G Mongomerie, Engineers, F.R.G.S., & c., in charge of the series.

<sup>25</sup> For similar discussions on cartography, borders and identity formation in Myanmar and Punjab, see M. Shahabuddin, *Post-colonial Boundaries, International Law, and the Making of the Rohingya Crisis in Myanmar*, 9 (2) ASIAN JOURNAL OF INTERNATIONAL LAW 334-358 (2019), and V. Jain, *Broken Boundaries: Border and Identity Formation in Post-Colonial Punjab*, 10(2) ASIAN JOURNAL OF INTERNATIONAL LAW 261-292 (2020).

<sup>26</sup> Graham Huggan, *De-colonizing the Map: Post-Colonialism, Post-Structuralism and the "Cartographic Connection"*, 20 A Review of International English Literature 115 (1989).

<sup>27</sup> JOHN B. HARLEY, THE NEW NATURE OF MAPS: ESSAYS IN THE HISTORY OF CARTOGRAPHY (Johns Hopkins University Press, 2001).

was premised on colonial mandates of resource extraction, revenue collection and military expansion.<sup>28</sup> None of these mandates took into account how knowledge was produced in communities and physical spaces, and more importantly, how the people of the region understood these cohesive processes.

The Dogra rule was extremely unpopular and cause for much discontent in the region<sup>29</sup> - a fact that was not unknown to the British empire.<sup>30</sup> The Dogras established a particular brand of Dogra imperialism in the state, predicated on the idea that Jammu was their home and Kashmir, a conquered country where all non-Dogra communities and classes were given the 'humble place of inferiors.'<sup>31</sup> This latitude given to the local Hindu rulers invariably disadvantaged the Muslim population, creating an explicitly religious idiom of statehood<sup>32</sup> in Kashmir. This produced two liberation struggles in the region in the early 1900s: the Indian freedom struggle against British colonization, and one waged by Kashmiri Muslims<sup>33</sup> against their Hindu rulers kept in place through the patronage of the British. The ensuing feuding led to the formation of political bodies who championed the cause of either landed Hindus or landless disenfranchised Muslims.<sup>34</sup> By the mid-1940s, Kashmir consisted of two complex camps which proved to be decisive to the fate of the region in the run up to Indian independence.

When partition of the Indian subcontinent by the British seemed inevitable, the two emergent states of India and Pakistan both staked claims to Kashmir. The Maharaja (then ruler of Kashmir) and Abdullah (a popular local political leader) stressed affinity with the formally secular<sup>35</sup> India, while the Muslim Conference in Kashmir advocated for a merger with Pakistan, a homeland for Muslims. With considerable support from

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<sup>28</sup> ABRAHAM, ITTY, *HOW INDIA BECAME TERRITORIAL: FOREIGN POLICY, DIASPORA, GEOPOLITICS* (Stanford University Press 1<sup>st</sup> ed. 2014); P. L. MADAN, *INDIAN CARTOGRAPHY: A HISTORICAL PERSPECTIVE* 51-57 (Manohar Publishers and Distributors, 1997).

<sup>29</sup> Rai, *Supra* Note 21, Chapter 5.

<sup>30</sup> Lord Hardinge, the governor-general of India at the time of the first Anglo-Sikh War, in a letter to his wife, describes Gulab Singh as "the greatest rascal of Asia" and "a cruel tyrant", stating that he was an instrumental geographical ally to gain foothold in the region. <http://hdl.handle.net/10603/33270>

<sup>31</sup> *Supra* Note 32; *Supra* Note 21, 559-564.

<sup>32</sup> *Id*; U.K. ZUTSHI, *EMERGENCE OF POLITICAL AWAKENING IN KASHMIR* 165.

<sup>33</sup> This struggle was fundamentally administrative and identarian where religion was not the dominant line of fracture. Much like Punjab, the social cohesion and fabric of the region was not communal and, these identities were broken and reformed as part of the colonial project.

<sup>34</sup> *Supra* Note 21; This fracture is equally important to understand the struggle over land acquisition and land-grabbing in post-colonial India.

<sup>35</sup> Nehruvian Indian regimes, and compromised local politicians used secularism and national security to crush Kashmiri separatism. *Id*.



the Indian National Congress party, and against the backdrop of military skirmish between these two newly formed states, Kashmir was ultimately integrated into India in 1947. While most contemporary legal discourse identifies *this* as the moment of departure to determine what should be applicable and relevant, the terms of discussing the political geography of Kashmir, at the very least, is much more complex than that.

Modern-day Kashmir is a consequential legacy of the colonial powers' imperial geopolitical strategies in the Indian subcontinent,<sup>36</sup> and yet, our conversations about its fate seem to affix itself narrowly to a very specific lexicon of international law – the legality of *uti possidetis*.<sup>37</sup> The principle states that newly formed sovereign states should retain the borders that were drawn prior to/at the time of their independence. And like all other territorial conflicts, it is undeniably relevant in any engagement with state-making processes. This is because the borders established in that moment of territorial de-colonization have become the literal line of battle between the two states. Since then, instead of effectuating a long-promised plebiscite<sup>38</sup> to allow Kashmiris to determine their preferences, India has thrown its economic, political, and military weight behind figures who assure the finality of Kashmir's integration into the mainland. Simultaneously, India has tolerated, if not actively encouraged, the suppression of organized political opposition<sup>39</sup> or popular mobilization against this ultimate goal.<sup>40</sup> Although a simplification of Kashmir's complicated history, what is relevant for the purposes of this reflection is that Kashmir rests on the ramifications of not only bitter religious antagonism left by Partition but also the poisoned seeds of the colonial project around a particular iteration of territorial polity it zealously protects.

### ***B. Lay of the Land (and Laws) and the Rise of Hindu Nationalism with(in) the Post-Colonial State***

At the heart of this formulation are the ways in which land continues to be apprehended and acquired from those who literally live of it, through continued apparitions of the colonial project. Thus, in addition to *uti possidetis*, the centrality of

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<sup>36</sup> Abraham, *Supra* Note 31 at 17-20.

<sup>37</sup> For detailed discussion on the origin and framing of *uti possidetis*, see Jain, *supra* note 28, 262-270.

<sup>38</sup> <http://unscr.com/en/resolutions/doc/47>.

<sup>39</sup> <https://catalyst-journal.com/vol3/no4/kashmir-the-long-descent>.

<sup>40</sup> The panoply of the law of sedition being applied to Jammu Kashmir from 1947 onwards and in different time periods, clearly shows a long and consistent repressive approach; Kashmir Constitutional History and Documents: Documents, Mohan Krishen Teng, Ram Krishnen Kaul Bhatt, Santosh Kaul, 1999 at 550-569.

territory to the discourse of statehood is prevalent in the design of land-grabbing, dispossession and displacement practices in the post-colonial state. Here, expansion is effectuated not just through settler colonialism by the Indian state, but also located in the increased privatization and conversion of land through developmental projects.<sup>41</sup> An unveiling of the process of ordering through borders where laws become instrumental to make/un-make such territoriality, revealing to us how the significance of Kashmir lies in the contestation between enforced strategic proximity<sup>42</sup> and lived proximity to land itself.<sup>43</sup>

On 5 August 2019, India revoked Article 370 of the Constitution taking away the autonomy accorded to Jammu and Kashmir during the formation of the Indian state.<sup>44</sup> Article 370<sup>45</sup> articulated Kashmir's special status in recognition of the power tussle, uniqueness and violence surrounding its annexation by India in 1947.<sup>46</sup> As per this provision, the region was partially immune to the powers, legislative and otherwise, of the Indian government and enjoyed a degree of autonomy over its politics and resources. The struggle for Kashmir has been long and complicated and, by 1960, the Indian government had all but reduced Article 370 to a dead letter, an exercise which Kashmiris have continued to resist fiercely at every step.<sup>47</sup> Kashmir has become a battleground to assert Indian statehood in its most instrumentalist form – the security, border and polity project.

The formal revocation of Article 370 was lethal in that it used the language of law to further a particular endgame – the full 'integration' of Kashmir into the Indian state, a long-standing goal of the Hindu far right<sup>48</sup> that was also enabled by centrist

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<sup>41</sup> PEER GHULAM NABI, *PIECES OF EARTH: THE POLITICS OF LAND-GRABBING IN KASHMIR*; The developmental projects are private as well as state led whereby ensuring control of land by state remains dispersed and accountable through purportedly public welfare projects.

<sup>42</sup> Those who claim ownership and affiliation through of colonial cartography, legal doctrines and territorial finitude.

<sup>43</sup> *Supra* Note 44 - in his work, Suhail Peer Ghulam Nabi has conducted multiple interviews with peasants, landed elites and political scientists, and, this particular observation is grounded in a culmination of their accounts.

<sup>44</sup><https://www.aljazeera.com/news/2019/08/05/india-revokes-disputed-kashmir-special-status-with-rush-decree/>.

<sup>45</sup>[https://www.satp.org/satporgtp/countries/india/states/jandk/documents/actsandordinances/article\\_370\\_constitution\\_india.htm](https://www.satp.org/satporgtp/countries/india/states/jandk/documents/actsandordinances/article_370_constitution_india.htm).

<sup>46</sup> Christopher Snedden, *The Untold Story of the People of Azad Kashmir*

<sup>47</sup> Vanessa Chishti, *Kashmir: The Long Descent*, <https://catalyst-journal.com/vol3/no4/kashmir-the-long-descent>

<http://dspace.jgu.edu.in:8080/jspui/bitstream/10739/3810/1/Kashmir%20the%20long%20descent.pdf>.

<sup>48</sup> <https://caravanmagazine.in/conflict/modi-war-dispatches-from-seething-kashmir>.

political parties since 1945. De facto reneging on Kashmir's constitutional rights had now become de jure, and it was a way for the state to become the ultimate authority on matters of autonomy and borders, leaving no room for debate or dissent. The region has been subjected to a near total communication blackout (rolled back partially as of 5 March 2020),<sup>49</sup> increasing military deployment, punitive restrictions on mobility, mass arrests and frequent night raids. More than 700,000 members of the Indian armed forces sit in total siege of the region. Yet, this legal tool merely formalizes what has been Kashmir's reality for decades – held by force and maintained in a permanent state of emergency<sup>50</sup> against the continuous effort of local peoples to seek a form of autonomy that makes the most sense to them.

These measures, along with others, coincide with the mercurial rise of Hindutva,<sup>51</sup> the most prominent form of Hindu nationalism in India, which looks to hegemonically assert the Hindu way of life. In a secular country, this poses considerable challenges. While India's political landscape has seen authoritarian moments before, the unprecedented expansion of right-wing politics has eclipsed every form of opposition and dissent. The Bharatiya Janata Party (BJP), led by Prime Minister Narendra Modi, is a harbinger of ethno-chauvinistic nationalism. BJP has close links to the Rashtriya Swayamsevak Sangh (RSS),<sup>52</sup> a longstanding Hindu nationalist paramilitary organization. In Modi's India, Muslims, particularly Kashmiri Muslims, are denied a dignified existence. Alongside the interminable lockdown in Kashmir, the Modi government's political vision, mired in brute Hindutva, is increasingly instrumentalizing law and applying this exclusionary politics to the rest of India as well.

In recent times, the Indian state has witnessed incessant communally charged violence,<sup>53</sup> primarily across north India, against a legislation that allows discrimination between citizens on the basis of religion.<sup>54</sup> The recently passed Citizenship (Amendment Act) 2019 (CAA), the proposed All India National Register of Citizens

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<sup>49</sup> <https://caravanmagazine.in/conflict/echoes-of-fascism-in-kashmir-valley>.

<sup>50</sup> <https://twailr.com/crisis-constitutionalism-permanent-emergency-and-the-amnesias-of-international-law-in-jammu-and-kashmir/>.

<sup>51</sup> <https://twailr.com/rewriting-india-the-construction-of-the-hindutva-citizen-in-the-indian-state/>.

<sup>52</sup> <https://www.npr.org/2019/05/03/706808616/the-powerful-group-shaping-the-rise-of-hindu-nationalism-in-india?t=1595165488756&t=1603154173455>.

<sup>53</sup> [https://www.washingtonpost.com/gdprconsent/?next\\_url=https%3a%2f%2fwww.washingtonpost.com%2fworld%2fasia\\_pacific%2fwhat-days-of-communal-violence-mean-for-modi-and-for-india%2f2020%2f03%2f01%2f3d649c18-5a68-11ea-8efd-0f904bdd8057\\_story.html](https://www.washingtonpost.com/gdprconsent/?next_url=https%3a%2f%2fwww.washingtonpost.com%2fworld%2fasia_pacific%2fwhat-days-of-communal-violence-mean-for-modi-and-for-india%2f2020%2f03%2f01%2f3d649c18-5a68-11ea-8efd-0f904bdd8057_story.html).

<sup>54</sup> <https://www.flipsnack.com/yesho/15-burning-questions-on-the-cao-nrc-final.html>.

(NRC), and the National Population Register (NPR) have catalysed what appears to be India's most potent constitutional moment since independence.<sup>55</sup> The government's position has been unrelenting,<sup>56</sup> unwilling to display any semblance of deliberative democracy and undermining every institution<sup>57</sup> that stands between the executive and absolute authoritarianism. The Supreme Court has deferred to the executive and taken a position<sup>58</sup> that appears to empower the state.<sup>59</sup> Countless corpses, displaced lives, and the destruction of predominantly Muslim property suggests that the state's extra-judicial and judicial limbs may be in tandem<sup>60</sup> during this extermination project.<sup>61</sup>

The removal of its special status has simultaneously led to the erasure of inherited protections on land and jobs in Kashmir. Despite widespread resistance, the Modi government continues to enact a series of new laws as part of its hard-lined Hindu nationalist policies, stonewalling even the possible fall-back of continued Kashmiri integration in the region.<sup>62</sup> On 19 May 2020, the Jammu and Kashmir Re-organisation (Adaptation of State Laws) Second Order, 2020, modified the applicability of domicile orders to 'all level of jobs' in the union territory. Under this, anyone residing in Jammu and Kashmir for 15 years would be able to claim a place of domicile in the occupied territory. According to the Jammu and Kashmir Civil Services (De-centralisation and Recruitment) Act, a domiciled person is any individual who has resided for a period of 15 years in the territory or has studied for a period of seven years and appeared in class 10 or 12 examinations in an educational institution located in the territory.

Prior to this, the definition of a citizen was only to be determined by Article 35A of the Constitution of Jammu and Kashmir. However, post the new legislation, a wide array of individuals can be deemed to be domiciles.<sup>63</sup> Aside from granting near

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<sup>55</sup> <https://thewire.in/politics/an-insurgent-constitutionalism-is-driving-popular-politics-in-india-today>.

<sup>56</sup> <https://timesofindia.indiatimes.com/india/bjp-unfazed-says-will-implement-cao-nrc/articleshow/72893970.cms>.

<sup>57</sup> <https://www.nytimes.com/2020/04/02/world/asia/modi-india-press-media.html>.

<sup>58</sup> <https://thewire.in/rights/supreme-court-refuses-to-intervene-on-jamia-violence-asks-petitioners-to-go-to-hc>.

<sup>59</sup> [https://main.sci.gov.in/supremecourt/2019/29796/29796\\_2019\\_2\\_1501\\_21240\\_Judgement\\_02-Mar-2020.pdf](https://main.sci.gov.in/supremecourt/2019/29796/29796_2019_2_1501_21240_Judgement_02-Mar-2020.pdf).

<sup>60</sup> <https://www.thehindu.com/opinion/op-ed/favouring-public-order-over-justice/article30551737.ece>

<sup>61</sup> <https://www.outlookindia.com/website/story/opinion-india-muslims-cao-shaheen-bagh-what-supreme-court-chooses-to-hear-what-it-doesnt/347028>.

<sup>62</sup> It is pertinent to remember that integration into India is not a desired outcome for pro-independence Kashmiris and multiple other constituents.

<sup>63</sup> These include a person registered as migrant by the relief and rehabilitation commissioner in the union territory; children of central government officials, all India services officers, officials of PSUs, an

unfettered access to land, the legislation now compels the locals to apply for the new ‘domicile certificates’ in order to qualify for permanent resident rights. In order to obtain this, they are required to produce their Permanent Resident Certificates (PRC). Not unlike the mechanism of CAA, the acquisition of the new ‘domicile certificate’ renders all other proof of being and residence, including the PRC which has been valid since 1927, worthless. Unsurprisingly, this move was met with a wave of dissent and protest.

This was followed by yet another legislative intervention on 27 October 2020, which further alters the land-owning pattern of Kashmir.<sup>64</sup> Until 2019, Indians were forbidden from buying property in the region, with the exception of ‘permanent residents’.<sup>65</sup> However, following the new laws, any Indian national is permitted to buy land and the military is allowed to directly acquire land in the region. This new legislation abolished the land reform laws of the 1950s that redistributed large patches of land to landless farmers. With this, most laws that govern local land rights have come to a decisive end, with serious consequences for the people in the region.

The move has been heavily criticized by the pro-independence or independist<sup>66</sup> parties as well as the pro-India politicians in Kashmir, who accuse the state of settler colonialism<sup>67</sup> which aims to alter the Muslim-majority demographic of the space. These laws appear to have little to no democratic bearing, much to the resentment of Kashmiri’s who are already consumed in a battle of will and demand for independence from the Indian state. The new laws also authorize the Indian army to declare any area as ‘strategic’ for operational, residential and training purposes against Kashmiri rebels

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autonomous body of the central government, officials of public sector banks, officials of statutory bodies, officials of central universities and recognised research institutes of the central government “who have served in Jammu and Kashmir for a total period of ten years or children of parents who fulfil any of the conditions in these sections”.

<sup>64</sup><https://abcnews.go.com/International/wireStory/shutdown-kashmir-protests-indias-land-laws-73939136>.

<sup>65</sup> This harks back at the state-subject law formulated by the Dogra King in 1927. After Kashmiri Pandits felt threatened by growing number of Punjabis in the Dogra administration, they demanded a state-subject law to distinguish between Mulkis and Ghair Mulkis. See, MUHAMMAD YUSUF SARAF, *KASHMIRIS FIGHT FOR FREEDOM 1977-1999* (Ferozesons,).

<sup>66</sup> Sumantra Bose uses this term to include both supporters of an independent Kashmir and those who support Kashmir’s merger with Pakistan. ; Sumantra Bose, *Kashmir: Roots of Conflict, Paths to Peace*, HARVARD UNIVERSITY PRESS (2003).

<sup>67</sup> Patrick Wolfe, *Settler colonialism and the elimination of the native*, JOURNAL OF GENOCIDE RESEARCH 387-409 (2006); Impact of the new legislations are likened to those in the West Bank or Tibet, with settlers living in guarded compounds among disenfranchised locals.

– harking back to colonial curbing of dissent and resistance.<sup>68</sup> The Indian government justifies this incursion as a move towards peace and development of the contentious region.

While many parts of India remain light years away from the carnage that Kashmir has witnessed since its annexation, the meeting point of Kashmir and the new citizenship and residency legislations forces us to revisit a primary concern of TWAIL – sovereignty in its different forms in the global north and south. At this juncture, it is also important to consider that most of north-east India has had long-standing confrontations with the rest of the mainland over territory, governance and the spectre of ‘allegiance’. In addition to Kashmir, there are a cluster of states that are not only seeking autonomy<sup>69</sup> from a rigid sovereign, but are also looking to reorganize as entities that depart from a singular vision of borders and governmentality. Departure from this normative form may not always be an act of conscious resistance. However, it is indicative of a need to delve into epistemologies that allow the imagining of such communities that are not quite legacies of the Westphalian state. What may appear as symptomatic to the rise of ethno-chauvinism across the globe is perhaps a much deeper structural problem – the malady of the concept of statehood.<sup>70</sup>

## II. TWAIL, INTERNATIONAL LAW AND THE ‘FAILED’ 71 STATE

Before I embark on a TWAILian and de-colonial critique of territory, I must lay out three important caveats. The first is to emphasize that international law discourses on statehood seem to presume territorial sovereignty as a given, even when they engage with pre-colonial making of the state. It is near impossible to imagine the modern political world without prior conditions of territorial possession and control in which

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<sup>68</sup> Both the Armed Forces Special Powers Act (AFSPA) and the Indian Penal Code (IPC) contain provisions that allow arbitrary and unaccountable detention and arrest for activities that are ‘anti-national’ or ‘against the state’; AFSPA, S. 4 (1990) and I.P.C. S. 124A (1860).

<sup>69</sup> See generally, Prasenjt Biswas and Chandan Suklabaidya, *Ethnic Life-Worlds in North-East India: An Analysis*, SAGE PUBLICATIONS (2008).

<sup>70</sup> Mainstream international law grants it institutional significance and therefore, I treat it as such in my text. This can be discerned from the process of international legal reproduction and how much emphasis is placed on it by states. See generally, Parfitt, *The Process of International Legal Reproduction: Inequality, Historiography, Resistance*, CAMBRIDGE UNIVERSITY PRESS (2019).

<sup>71</sup> Eurocentric international uses the term ‘failed state’ to indicate a sovereign state whose sovereignty is now contingent, for failure to discharge its duties as a state. See generally Thürer, D. (1999). The ‘failed State’ and international law. *Revue Internationale De La Croix-Rouge/International Review of the Red Cross*, 81(836), 731-761. I use the term ‘failed’ here to indicate the failure of the territorially bounded state form itself as a sustainable concept.

the exclusionary control of sovereignty is the only politically viable model. Yet, territorial sovereignty became a universal condition when former colonies like India attained independence - compelled to define themselves in territorial terms alone.<sup>72</sup> It is only through the post-colonial states' acceptance of colonial administrative borders that territorial sovereignty gained acknowledgment, legal consequence and political significance.<sup>73</sup>

Second, is to contextualise my use of TWAIL in relation to its position on minorities and their location in the making of post-colonial states. Although TWAIL exposes the limitations of orthodox international law, it also supports the statist system wholeheartedly.<sup>74</sup> TWAIL has repeatedly demonstrated a blind spot for minorities and various other groups such as the people of Kashmir, due to its obsession with the post-colonial state. The role of minorities is central to unpacking state-making. Diverging forces operated within the political boundaries that were arbitrarily drawn by colonial powers and subsequently inherited by post-colonial states. In these nation-building projects post de-colonization, ethnic groups who were outside the state-sponsored national culture were subsumed and repressed. Subsequently, an individualist notion of human rights has become the dominant vocabulary through which the concept of 'minority' is expressed in the post-colonial state.<sup>75</sup> In salvaging the statehood project, TWAIL sets itself up for a paradox where the state-form is dismantled only to be built up again.

Following the use of existing TWAIL literature to unpack the oppressive inheritances of statehood, I move on to question the relevance of confined territory as the only form through which sovereignty can be expressed. As a TWAIL scholar, I find myself at a disciplinary turning point at this juncture. Does deviation from existing TWAIL literature make my position an 'un-TWAIL argument' or should we be open

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<sup>72</sup> It is not within the scope of this paper to discuss at length how and why post-colonial states accepted colonial boundaries and the processes leading to their eventual adaptation. For a detailed conversation on this, see generally Antony ANGHIE, "Bandung and the Origins of Third World Sovereignty" in Luis ESLAVA, Michael FAKHRI, and Vasuki NESIAH, eds., *Bandung, Global History, and International Law: Critical Pasts and Pending Futures* CAMBRIDGE UNIVERSITY PRESS 544 (2017).

<sup>73</sup> *Ibid*, page 20-22.

<sup>74</sup> It is important to acknowledge that TWAIL operates as a spectrum and those on the other end of the reformist understanding of international law do not subscribe to this vision. However, TWAIL has not decisively proposed a departure of statism as yet, despite critiquing it consistently.

<sup>75</sup> For an in-depth analysis of why the liberal individualist approach to minority protection was counter-productive by design, see Mohammad Shahbuddin, *Ethnicity and International Law: Histories, Politics, and Practices*, CAMBRIDGE UNIVERSITY PRESS 136-64 (2016).

to the idea that TWAIL is a moving approach and can also account for minorities as an integral canvas for understanding manifestation of state power? I will leave it to the reader to decide for themselves.

Third, I intend to go beyond the framing of territorial disputes as a contestation between colonial *uti possidetis* and post-colonial self-determination principles. TWAIL has ably exposed that contrary to the colonial (in its contemporary forms) emphasis on the capacity of *uti possidetis* for settling boundary disputes among post-colonial states, it violently exacerbates such claims.<sup>76</sup> This principle undermines the legitimate right to self-determination of numerous ethnic minorities in post-colonial states and its embrace has often lead to violent ethnic conflicts instead of actually curbing violence.<sup>77</sup> In this prevalent framing, both *uti possidetis* and self-determination are understood as competing legal rules followed by an exhaustive analysis of which rule should have prevailed during the de-colonization process. I understand this framing to be limiting, in that it does not engage with the scope of negating the sovereign form of bounded statehood itself.

While *uti possidetis* is indeed a relevant colonial legal signpost, the manner in which we approach the conversation may set us free from pre-existing legal epistemological constraints as well. Thus, the questions of - a) if self-determination prevailed over *uti possidetis* would post-colonial borders have been drawn differently? and, b) if self-determination was secured in both form and substance would defined borders give way to other forms of sovereignty and porosity of territorial configurations? – are both important. However, my preoccupation is not so much with the first as it is with the second because it is the latter that helps us understand if it is possible to be anything other than a territorially bounded state. It is this theme that I try to explore through the reimagination of land, cartography, law and space. This framing is very well within the purview of a reading of law since a) it is rather odd to read law

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<sup>76</sup>See especially Jorg Fisch, *The Right to Self-Determination* (New York: Cambridge University Press, 2015), 69–81, 206–7. See, on colonial borders, Makau Mutua, “Why Redraw the Map of Africa: A Moral and Legal Inquiry,” *Michigan Journal of International Law* (1995): 1113–76. See, on the question of ethnicity and international law, Mohammad Shahabuddin, *Ethnicity and International Law: Histories, Politics and Practices* (Cambridge: Cambridge University Press, 2016). See generally, Itty Abraham, *supra* note 31.

<sup>77</sup> Shahabuddin, *supra* note 28 at 344 to 347; Jain, *supra* note 28.



as simple contestations of rules and doctrines when outside of courtrooms and legal office spaces<sup>78</sup> and, b) law can and must be read in more than one way.

### *A. TWAIL and the Making of the (Post) Colonial State*

TWAIL scholarship has been systemically battling through its critique, the consequences of the Westphalian state, its transfigurations and the imperial relations and domination implemented primarily<sup>79</sup> (but not only) through the model of the state. Despite a diversity of views, TWAIL scholars are unanimous on the conclusion that sovereign statehood in the third world is a positivist and inflexible European colonial imposition through international law. Sovereignty today is a product of the colonial encounter<sup>80</sup> and is at the centre of international law's claim to universality. To participate in international law, a community must attain this form of sovereign statehood and commit to the linear trajectory of development predetermined by Western states as an inherent attribute of sovereignty. The modern state is also a Weberian state<sup>81</sup> that monopolises all legitimate use of force within its territory, eliminating any counterfactual of freedom from this singular vision of governance.

Eurocentric international law grounds the idea of sovereignty in physical territory and all that it contains and shapes. 'Being' a state is demonstrated foremost through the possession of a defined territory<sup>82</sup> while the remaining characteristics follow from the establishment of borders and the act of containment – of people, culture and movement.<sup>83</sup> Malcolm Shaw, the author of the most heavily cited textbook of mainstream international law, speaks of territory not only as “*a geographical conception relating to physical areas of the globe*”, but also that “*its centrality in law and international law in particular derives from the fact that it constitutes the tangible framework for the manifestation of power by the accepted authorities of the state in*

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<sup>78</sup> Tzouvala, *Capitalism As Civilisation: A History of International Law*, CAMBRIDGE UNIVERSITY PRESS 37-42 (2020).

<sup>79</sup> B.S. Chimni, *Third World Approaches to international Law: Manifesto*, 8 INTERNATIONAL COMMUNITY LAW REVIEW 3–27 (2006).

<sup>80</sup> Van der Molen and C. H. Alexandrowicz, *An introduction to the History of the Law of Nations in the East Indies (16th, 17th and 18th centuries)*, CLARENDON PRESS, OXFORD (1967). *Nederlands Tijdschrift Voor Internationaal Recht*, 18(2), 245-246 (1971).

<sup>81</sup> MAX WEBER, *ON LAW IN ECONOMY AND SOCIETY*, (Harvard University Press, 1954).

<sup>82</sup> Even if borders of this territory are contested, it has no bearing on its capacity to remain a sovereign state. In fact, borders conflicts appear immanent to the idea of statehood as the possession of territory itself.

<sup>83</sup> Montevideo Convention, Article 1 provides the four criteria for statehood, two of which are intimately connected to the idea of recognition by other states.

question. The principle whereby such a state is deemed to exercise exclusive power over its territory can be seen as a fundamental axiom of classical international law”.<sup>84</sup>

This co-production of territory and sovereignty is also suggested by Henri Lefèbvre when he notes, how “each state claims to produce a space wherein something is accomplished—a space, even where something is brought to perfection: namely, a unified and hence homogenous society.”<sup>85</sup> Bringing ‘something’ to perfection is rooted in a mapping of the political onto a very particular form of spatial - nation-state onto territory - ‘a physical basis’ which seems to render it eternal and most importantly, inevitable.<sup>86</sup>

This construct of Westphalian, territorial statehood also has a distinctly Eurocentric and deleterious heritage. The modern-day state emerges from *ius publicum Europaeum* which provided the framework for the emergence of states and the proper code of conduct for the new nations.<sup>87</sup> As Pahuja and Eslava observe, *ius publicum Europaeum*, which morphed into the nation-state, was a product of the Enlightenment and European colonial expansion, reflecting the “prevailing social transformations and Eurocentric cultural understandings.”<sup>88</sup> For Europe, bounded territory and statehood was the highest form of political organization of community. The state, notes Bluntschli, is “a great body which is capable of taking up into itself the feelings and thoughts of the nation, of uttering them in laws, and realising them in acts.”<sup>89</sup> It is this ethos that marked the consolidation of the nation-state as the only accepted form of governmentality within the international legal system. Thus, with the centralization of European positivist praxis as international law, 1945 became the moment of ‘capture’ where all post-colonial states were trapped in the false binary<sup>90</sup> of continued territorial

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<sup>84</sup> MALCOLM SHAW, NETHERLANDS YEARBOOK OF INTERNATIONAL LAW (1983).

<sup>85</sup> HENRI LEFÈBVRE, THE PRODUCTION OF SPACE 281 (Wiley-Blackwell, 1991).

<sup>86</sup> Paul Allies quoted in Stuart Elden, “Land, Terrain, Territory,” *Progress in Human Geography* 34, no. 6 801 (2010).

<sup>87</sup> Brett Bowden, *The Colonial Origins of International Law: European Expansion and the Classical Standard of Civilization*, 7 *JOURNAL OF THE HISTORY OF INTERNATIONAL LAW*, 13-20 (2005).

<sup>88</sup> Schmitt, Carl, and G. L. Ulmen. 2003. *The nomos of the earth in the international law of the Jus Publicum Europaeum*. New York: Telos Press; Eslava, Luis and Pahuja, Sundhya, *The State and International Law: A Reading from the Global South* (April 12, 2018). *Humanity: An International Journal of Human Rights, Humanitarianism and Development*, Forthcoming.

<sup>89</sup> JOHAN KASPAR BLUNTSCHLI, THE THEORY OF THE STATE (Kitchener, Ontario: Batoche, 2000).

<sup>90</sup> There is a prevailing tension in international law regarding the self-determining desires of the post-colonial state and what it could choose to be, if at all there was a choice. This paper does not intend to unpack that tension. See generally, *Supra* Note 28.

colonialism or opting for a process of ‘international legal reproduction’<sup>91</sup> in the form of the nation-state.

De-colonization, thus, was an act of ‘self-determination’ instead of ‘self-definition’<sup>92</sup> whereby colonies could conditionally obtain the right to govern themselves. This right, however, could only be practiced in the form of a ‘nation-state’ within pre-established colonial boundaries, over ‘highly disparate ethnic groups and incongruous geographical spaces.’<sup>93</sup> This and only this allowed the emergence and participation of the global south states in the international legal system. However, this imposition of borders and erasure of other forms of governance/existence/polity or even being , came at great cost to the inhabitants, texture and history of the lands, as I illustrate in the following segment.

Subsequently, the nation-state morphed into the modern-day developmental state – an entity on the misplaced linear trajectory of development, signposted by the global north. In order to achieve this, the post-colonial state became a commanding territorial vision, with highly centralized, nationalist and reformist institutions. Recognising their growing inequality and disadvantage, the global south pushed back against international law’s imperial legacy by proposing the New International Economic Order (NIEO) in 1972. For a brief moment, an equitable international legal restructuring seemed almost possible. The NIEO, however, was relegated to a rhetoric and soon after, in the throes of cold war and in an increasingly unequal international economic order, the idea of the Eurocentric sovereign-state was finally embraced as ‘the agent of development’, even among the post-colonial states.<sup>94</sup> This turn was significant in that it paved way for expansion that went beyond security and securitization and shifted focus to contemporary forms of extraction through the free market and the eventual neo-liberal state.

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<sup>91</sup> Rose Parfitt describes ‘International Legal Reproduction’ as international law’s role in establishing and perpetuating inequalities of wealth, power and pleasure. Parfitt, *The Process of International Legal Reproduction: Inequality, Historiography, Resistance*, CAMBRIDGE UNIVERSITY PRESS (2019).

<sup>92</sup> Eslava and Pahuja, *supra* note 93 at 43.

<sup>93</sup> On the loss of the right to self-definition, see GILBERT RIST, *THE HISTORY OF DEVELOPMENT: FROM WESTERN ORIGINS TO GLOBAL FAITH* 79 (Zed Books, 2014).

<sup>94</sup> See generally, Anghie, A. (2005). *Imperialism, Sovereignty and the Making of International Law* (Cambridge Studies in International and Comparative Law). Cambridge: Cambridge University Press..

It is in the second half of the twentieth century that the maladies of the post-colonial state came to the fore. Much like its colonial predecessor, it designed itself around ideas of homogeneity where indigeneity and local forms of governance were invisibilised in the name of a different form of nationalism.<sup>95</sup> National governments became obsessed with the extension of ‘national’ logics and interests over the existing spatial and human landscape of their nations. Following the colonial streak, territory was forcibly reduced to economic relations (land as private property) or strategic relations (terrain as power).<sup>96</sup> A wave of dictatorship could be seen emerging across the former colonies,<sup>97</sup> characterised by a need to control ‘their’ territories and populations in order to realise the nationalistic vision of this new developmental, post-colonial state. In India, this period was marked by a declaration of national emergency and extreme curtailing of rights through neo-colonial<sup>98</sup> policies of forced sterilization<sup>99</sup> et al. In contemporary India, the series of citizenship and residency laws enacted under Narendra Modi’s government seems to be eerily reminiscent of this authoritarian form of territorial vanguardism, aiming to curtail and control the territory, population and the territory *through* population of the ‘within and beyond’<sup>100</sup> of the Indian state. Between then and now, what remains common is the ever- morphing idea of state.

In the late 1980s, in yet another turn of events, this international commitment to assist the development of third world states was marked by a rupture and the flow of aid from the global north was replaced by interventionist criticism.<sup>101</sup> The post-colonial states were asked to account for their uneven development across geographies, gender, and ethnicities, and accused of failing their human rights obligations. Following this

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<sup>95</sup> *Supra* Note 93 at 43; *Supra* Note 28 at 14.

<sup>96</sup> Neither formulation is an accurate representation of the concept of territory. This depiction of territory is not natural nor obvious, but rather the spatial outcome of a specific set of territorializing practices through colonial cartography - ownership, distribution, mapping, bordering and control. See generally John A. Agnew and Stuart Corbridge, *Mastering Space: Hegemony, Territory and International Political Economy* (London and New York: Routledge, 1995), Chapter 4.

<sup>97</sup> See generally ODD Arne Westad, *The Global Cold War: Third World Interventions and the Making of Our Times* (Cambridge University Press, 2005).

<sup>98</sup> I cite Nkrumah here to speak of the overarching spectre and use of the term Neo-Colonialism, 239–354.

<sup>99</sup> These measures map on to two distinct patterns of the sovereign state a) biopolitics and biopower as modern modes of subjectification and governance and, b) necro-politics as sovereign decisionism on death. See M Foucault, *The Birth of Biopolitics: Lectures at the Collège De France 1978-79* (trans. G Burchell, 2008) 21-22 for a and A Mbembe ‘Necropolitics’ in Campbell and Sitze 161 for b.

<sup>100</sup> Given the laws inevitable double bind on the Kashmiri Muslim ‘outsider’ (as discussed in part IV), this distinction of within and beyond becomes relevant.

<sup>101</sup> Samir Amin, *Accumulation on a World Scale: Critique of the Theory of Underdevelopment*, N. Y. MONTHLY REVIEW PRESS (1974).

transition, the global south's lack of 'development' was completely divorced from its colonial history and it became an ahistorical, self-contained project. The impact of enforced European culturalization through statehood was transposed on to the south's 'state of nature'.<sup>102</sup> Centralized development programmes and public institutions were deemed inadequate to address these concerns. Soon, private actors and market-based approaches led to the shrinkage of the state's role in this endeavour. The Bretton Woods institutions were replaced by the Washington Consensus and from this, emerged the new developmental or the neo-liberal state.

With the arrival of the neo-liberal state, the economic reach of multinational corporations expanded significantly, creating new lines of fracture as against the north-south developmental divide. In this form of statehood and the post-colonial state, a more flexible relationship was envisioned between the public and the private sectors, with increased decentralization of state-led development. More recently still, this transmutation has found expression in and through the citizenry of the new developmental state where the individual consumer is an agent responsible for their own development. "Today", write Pahuja and Eslava, "*governments address citizens as if individuals were sovereign over their own destinies.*"<sup>103</sup> Globalization has expanded the relational forms between territory and institutional encasement beyond the conventional idea of sovereign rule and national territory.<sup>104</sup> With the emergence of transnational corporations and transnational elites, supra and sub-state actors, both public and private have significantly decentered the role of the nation state.<sup>105</sup> In each of these reconfigurations, international law remains the language of conveyance while the state remains the vessel.

Thus, in spite of such decentralization and reorientations, the Westphalian nexus between territory and sovereignty has remained. International law continues to build around the notion of territory which undergirds countless international legal doctrines.<sup>106</sup> The constitutive force of territory has been reiterated through colonial era

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<sup>102</sup> See generally, THOMAS HOBBS, THE LEVIATHAN (Project Gutenberg, 2002).

<sup>103</sup> Pahuja and Eslava, *Supra* Note 93 at 43.

<sup>104</sup> Sassen S, *Bordering Capabilities versus Borders: Implications for National Borders*, 30 MICH, JOURNAL OF INTL. LAW 567–597 at 574 (2009).

<sup>105</sup> *Id.*

<sup>106</sup> Kritsiotis D., 2009. Public International Law and Its Territorial Imperative Michigan Journal of International Law. 30(3), 547-5662009, at 547. For an account of the ongoing resilience of sovereignty as an organizing category in international law and international relations in spite of contemporary

conceptions of *terra nullius*, de-colonisation, principles of *uti possidetis* and post-colonial crystallization of self-determination. Foundational institutions and texts such as the League of Nations and the UN Charter also mirror these myths through Mandates, Trusteeship Councils and General Assembly resolutions on de-colonisation and self-determination. Territorial integrity, and through it, sovereign identity (and equality) remains foundational to the contemporary international legal order, despite increasing fragmentation.<sup>107</sup> It is within this concept of bounded territory that maladies of the Westphalian state truly rest. The new state also continues to reproduce the colonial praxis and concerns as against land and citizens. For Eurocentric international law, the state formed through de-colonization (and government) is taken to represent the entire social body. “*Class divisions, ethnic or racial discrimination, gendered oppression are all ‘absorbed’ by the state-form, which operates as the embodiment of the postcolonial*” notes Tzouvala.<sup>108</sup> Consequently, all forms of social struggle are invisibilised or mediated through the state-versus-private actors binary, reinstating the centrality of the ‘territorial’ sovereign.

With this as the context, where does one locate Kashmir in this evolving paradigm of territorial containment? In Kashmir, this artificial containment manifests simultaneously in multiple forms through the tools of terrain, development and the citizen. Following colonial cartography and bordering post 1947, Kashmir has been consistently flattened to be a territorial dispute between two states, each trying to posit land as terrain. The strand of ethnic, religious and social relations that are inherently associated with land have been completely erased. With the emergence of the neo-liberal state, this has concurrently morphed into a newer, neo-liberal settler colonialism as opposed to the more conventional state-driven settler colonialism.<sup>109</sup> This form of settler colonialism appears to be a logical continuation and a 21<sup>st</sup> century adaptation of a program, that has been ailing Kashmir (and comparably, Palestine) for most parts of

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challenges, see Aalberts T (2012) *Constructing Sovereignty Between Politics and Law*. Routledge, London.

<sup>107</sup>Kendall S., *Cartographies of the Present: ‘Contingent Sovereignty’ and Territorial Integrity*. In: Kuijer M., Werner W. (eds) *Netherlands Yearbook of International Law* (Asser Press, 2017).

<sup>108</sup><https://www.afronomicslaw.org/2020/10/26/international-law-and-de-colonisation-in-africa-60-years-later>.

<sup>109</sup> Partially comparable to Benjamin Netanyahu’s economic peace slogan where the settler colonialism is based on the interest and development plans of companies and economics. See generally, Dana, Tariq (2015). “The symbiosis between Palestinian ‘Fayyadism’ and Israeli ‘economic peace’: the political economy of capitalist peace in the context of colonisation”, *Conflict, Security & Development*, Vol. 15, issue 5, pp. 455-477.

the 20<sup>th</sup> century as well. In Kashmir's past, present and near future, one comes to see every possible account of territorial control and acquisition that could be exerted, by the state.

There are two assumptions that undercut the developmental trope advanced by the government through the newly ordained land laws in the region. First, it is not Article 35A but the lack of public investment that has deterred private industry in Kashmir. Haseeb Drabu, an economist and the former finance minister of Jammu and Kashmir observes that private investments often follow the lead of public investments.<sup>110</sup> Unlike other Indian states, where the government has created the infrastructure for the private sector to enter, public investment in Kashmir has been stagnant from 1947 to 1991 (the pre-insurgency period included).<sup>111</sup> Second, one must contextualise the uniqueness of land acquisition and dispossession in Kashmir. These are not just instances of state and/or corporate land grabbing but, the possession of occupied land in a conflict zone<sup>112</sup> - and this has immense narrative potential and significance in terms of who it really benefits and who it truly disenfranchises.<sup>113</sup>

The state's use of the economical characterization of land for further expansion as well as a reconfigured form of traditional settler colonialism is achieved by promising development through integration and assimilation of the region; a scheme where not only can the local population be displaced by new land-owners from the Indian mainland, but the people of Kashmir<sup>114</sup> can be equally co-opted into this notion of development. This developmental narrative envisions multiple public and private owned energy and resource base projects<sup>115</sup> where the state controls the land and its use through various interfaces. So, even if the region of Kashmir can be forcibly co-opted into an account of empowering progress due to the positive externalities it *may* have

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<sup>110</sup> <https://caravanmagazine.in/economy/kashmir-public-investment-private-industry>.

<sup>111</sup> One may cite insurgency as the reason for post liberalisation inertia but there is little to no explanation for state apathy prior to that moment. Even after 1991, the state's response through heavy and consistent militarization indicates an intention that is contrary to any standard formulation of development.

<sup>112</sup> Palestine is the only other documented instance and each of these cases should be studied independently and within their context of conflict of occupation as opposed to decontextualised land grabs.

<sup>113</sup> For a detailed discussion on land dispossession and displacement in Kashmir, see *Pieces of Earth*.

<sup>114</sup> When I say people of Kashmir, I refer to the landed elite and the middle class. The lower class and peasantry have consistently been dispossessed and displaced through colonial and post-colonial state forms.

<sup>115</sup> *Pisces of the Earth*, Chapter 1.

for the Kashmiri upper and middle-class,<sup>116</sup> it will be primarily economically dependent on the Indian state.<sup>117</sup> If the Indian state succeeds in this enterprise, then in the future, paradoxically, the presence of the settler may no longer be required in the settlement. However most importantly, most, if not all of these measures will continue to work towards the massive disenfranchisement of the poor, the landless and those who subsist on land holdings that are considered to be most viable for these stated-led projects *i.e.*, those who truly live of the land.

### ***B. Territory, Borders and Frontiers – International Law’s Original Sin***

Despite its fragmentation, evolution and the many moorings, international law remains rooted in its persistent original myth of the Westphalian state. The state, in turn, grounds its ordering through bordering territories – past and present.<sup>118</sup> Colonial expansion, linear boundaries and fronterization, I suggest, are international law’s *original sins*. In bringing the conversation back to state-making and territory, can we truly understand what ails the post-colonial state process. In doing this, I undertake what Foucault terms a ‘history of the present’, in which the conflicts and contingencies that unsettle the givenness of the contemporary order are uncovered through genealogical inquiries of the past.<sup>119</sup> A diagnosis of territorial boundary making opens up an archive of state-making that goes beyond positive legalism towards a (re)imagination of porous governmentality, cartography and the relationship between the inhabitant, their law and the land. In all its Biblical fanfare, the chronicle of this original sin takes us to a site where the continuities with the past manifest as the conflict of the present.<sup>120</sup>

Through the conception of territory and statehood, three critical events occurred: a) statehood became an ahistorical, foundational institution of international law, b) the post-colonial state inherited the trappings and maladies of the colonial state, and c) the ahistorical idea of statehood led to a complete decontextualization of the global south’s problems. The significance of territorial borders in the state-making

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<sup>116</sup> For these middle and upper classes, it is definitely an opportunity for investment and economic development, but it is difficult to find how the lower classes can benefit from it; *Ibid*.

<sup>117</sup> A comparison can be drawn with the new smart city of Rawabi in West Bank where development is synonymous with urban surveillance and neo-liberal settler colonialism.

<sup>118</sup> Kendall, *Supra* Note 112 at 57.

<sup>119</sup> Garland D, *What is a ‘History of the Present’? On Foucault’s Genealogies and Their Critical Preconditions*, 16 PUNISHMENT & SOCIETY. Punishment & Society, 365–384 (2014).

<sup>120</sup> *Supra* Note 123.



process was diffused and the state was accepted as the central, inevitable vehicle of the international legal reproduction<sup>121</sup> process. This, in turn, diverted us from a closer inspection of the impact that forced territorial borders had on communities, the corrosion of such identities, the creation of a new communal consciousness through colonial instruments in the lead up to independence and, the re-entrenchment of new (and old) fractures in post-colonial spaces.<sup>122</sup> I depart here from traditional TWAIL and post-colonial scholarship once again. My fear is that instead of carefully deconstructing the *source code of state-making*, we have misplaced our attention and energy on *how* the post-colonial state continues to reproduce the colonial mantle.

The demarcation of borders and frontier zone was at the heart of the 19<sup>th</sup> century colonial project and this was not limited to the British empire.<sup>123</sup> Early European empires were gatekeepers<sup>124</sup> in a hegemonic exercise of identity creation. Legitimacy was granted through transmutation and homogenization of other sovereign forms. States lost their porous borders and in many places, indigenous communities' unaffected communion with land was threatened by settler colonialism,<sup>125</sup> while in other places, rigid, inorganic borders replaced practices of collective ownership of land and spaces. International law refused to comprehend those who work the earth and assimilate into the socio-cultural milieu through acts of engagement. It created an *inside* and *outside* of the law through violent, arbitrary borders, removing all signs of pre-colonial peoples, community and arrangements. While the state is the legally recognized form of governance today, even the International Court of Justice has borne witness to these structures and relationships that predated the modern state.<sup>126</sup>

Contemporary historical materials, archives of official correspondence and cartography have allowed us to reconstruct the territorial dynamics at work during colonial frontierization, particularly in South Asia.<sup>127</sup> For colonial officers, territory

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<sup>121</sup> *Supra* Note 75 at 45.

<sup>122</sup> For a detailed and similar discussion on Rohingyas and the partition of Punjab, see Shahabuddin, *supra* note 28 and Jain, *supra* note 28.

<sup>123</sup> [https://www.himalmag.com/memories-of-galwan-valley-2020/?utm\\_source=NewsletterSubscribers&utm\\_campaign=47b37bec61-Newsletter+May+10\\_Survey\\_COPY\\_01&utm\\_medium=email&utm\\_term=0\\_949b3d6c7a-47b37bec61-408500321](https://www.himalmag.com/memories-of-galwan-valley-2020/?utm_source=NewsletterSubscribers&utm_campaign=47b37bec61-Newsletter+May+10_Survey_COPY_01&utm_medium=email&utm_term=0_949b3d6c7a-47b37bec61-408500321).

<sup>124</sup> *Supra* Note 99 at 48.

<sup>125</sup> <https://salvage.zone/in-print/the-walls-of-the-tank-on-palestinian-resistance/>.

<sup>126</sup> <https://www.icj-cij.org/en/case/32>.

<sup>127</sup> For an interesting discussion on how post-colonial India engaged with colonial cartography, see Itty Abraham, *Supra* Note 31 at 30-33.

could only be linear, unchanging and continuous. As a result, they would record territories using terms such as ‘detached’, ‘intermixed’, and in need of ‘adjustment’. In comparison, officers from South Asia would note territorial possessions through ideas of jurisdiction determined by historical custom, conquest, claims to taxation, tribute, inheritance and so on. Land, in these regions frequently shifted hands and forms of governance, between smaller kingdoms which, in turn, were dependencies of powerful states.<sup>128</sup> Shifting hierarchies exemplified a form of territorial dynamism and there was little need to keep territories and their boundaries continuous and constant.<sup>129</sup>

Contrary to colonial imagination and discourse, the pre-colonial subject appears to have possessed a keen awareness of the political and geographical expression of their relationship to land.<sup>130</sup> The staggered polity and governmentality demanded a conception of land that was flexible and rooted in fluidity and change. The native subject was not in need of scientific maps or linear boundaries to depict the contours of the land they inhabited and worked on. They lived in a world that had its own set of rules for establishing these lines on the ground.<sup>131</sup> My invocation of the native subject here is to speak of a relational and lived proximity to land. Ordering of territory through bordering produces a “*political field that transforms the internal contours of territory, privileging some places over others and the elevation of some peoples over others*”.<sup>132</sup> In this churning, the one that has lost the most and continues to, is this relational native subject.

This is not to suggest that that pre-colonial regimes outside of Europe did not possess the capacity to deploy modern cartography to map their territories. Many Asian states (in erstwhile Indo-China) pursued cartographic projects that gave an idealised view of their respective dominions. For instance, Siam (present day Thailand) relied on French cartography in course of delimiting its boundaries from Cambodia (then a French protectorate)<sup>133</sup> and in the early 18<sup>th</sup> century, the Qing dynasty in China employed Jesuit cartographers to map the expanse of its kingdom (an idea that China

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<sup>128</sup> *Supra* Note 85 at 37.

<sup>129</sup> Wolfe, *supra* note 72 at 32; Michael, BERNARDO A., STATE-MAKING AND TERRITORY IN SOUTH ASIA: LESSONS FROM THE ANGLO-GORKHA WAR 1814–1816 (Anthem Press, 2012).

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Supra* Note 31 at 28

<sup>133</sup> See generally Kendall, *Supra* Note 112.

has transposed into its modern-day territorial projects).<sup>134</sup> Rather, this is to observe that modern maps have no memory and see only structures, not people. Here, I part ways with contemporary conversations on identity making through colonial cartography and segue into a different imaginary of my own making - porous subjectivity, fluid territory and being with/of land in the most intimate ways.

Prior to the modern cartographic creation of simplified and linear geographical scaffolding that now forms the state, people in pre-colonial nomadic, agrarian and coastal societies inhabited fluid territories that were intermixed in their governmentality, lay of the land and organisational practices. For such communities, the distribution of land rested on rights and privileges of *actual* use and inhabitation as opposed to boundaries that have little to do with the ethos of the regions.<sup>135</sup> Land, and the law that allowed for its governance, were deeply connected to the people and praxis, rooted in a notion of *use, reuse and continuity of change*.<sup>136</sup> Now, it is power, that determines the ability of a state to render its territories in straight lines. Porous boundaries and non-linear lines indicates the presence of social forces and interests that the state has to account for and accommodate while making boundaries;<sup>137</sup> populations, spirits and political energies that resist linear, disconnected lines by the sheer force of their history and presence. Linear boundaries are only possible in sparsely populated or captured landscapes whose native populations have been subdued, decimated or relocated. Boundary lines, therefore, are sites of state-making that reflect the power and capacity of the colonial state to delineate and enforce them. This process was reproduced through expansion, international legal formulation and modern cartography till only the Westphalian state remained.

### III. KASHMIR AS THE BORDER OF INTERNATIONAL LAW

Statehood is an act of erasure, and a study of legitimacy of identity and belonging invariably becomes an inquiry into the state-making process in a region. Modern statehood, resting on linear colonial border making, produces three lines of

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<sup>134</sup> *Supra* Note 134 at 68.

<sup>135</sup> See generally, Wolfe, *Supra* Note 72; Irene Watson, *Buried Alive*, Law and Critique, 13 KLUWER LAW INTERNATIONAL, 253-269 (2002).

<sup>136</sup> 'Use' here is very distinct from the colonial sense of private property. It alludes to a form of socially and environmentally responsible tenancy where one is simply to look after, love and be in the land for a brief time frame.

<sup>137</sup> *Supra* Note 140.

fracture: *First*, it segregates the land and its inhabitants, wherein people who work it are dislocated, invisibilised and their relationship to the land is made contingent. *Second*, it ruptures the population by creating a dichotomy between the good/authentic and bad/errant citizen. A good citizen does not question the underlying history, conflict and erasure imposed by borders. They accept the encasement of the state as instrumental and permanent. *Third*, it erases all pre-colonial forms of governmentality and the possibility of revisiting them, rendering any form of resistance to statehood illegal and redundant. In this configuration, belonging to a state, being a state, or being under the protection of the state are the only alternatives available for any form of native/local resistance.

Kashmir is the wild zone of sovereignty, where borders, as a dysfunctional colonial inheritance, allow each of these ruptures to be prominently displayed. It becomes not just a challenge to colonial continuities of the post-colonial state, but, to the idea of modern statehood itself. Historically, Kashmir is not distinct from other colonial border disputes. There are three things that make it lethal. It is a complex multi-ethnic, multi-party conflict which has been subsumed into a singular narrative of territorial dispute between states. It is the first recorded instance in any post-colonial society where a community has been asked to repeatedly prove their allegiance and belonging after decades of independence. It is veritable proof that land, at the cost of people, has been at the centre of international law's governance. In Kashmir, we see both actual and contingent sovereignty<sup>138</sup> – where India asserts its territorial and political boundaries against the international community and yet, violates those of Kashmir, on grounds of incursion and disruption by Pakistani support to Kashmiri insurgents. Now, with the abrogation of its special status, it has moved to insidious forms of settler colonialism.

The current Indian government has attempted to justify its incursion into Kashmir as a necessary step to development as well as consolidating Indian statehood. It has repurposed its fascist machinations as a developmental narrative,<sup>139</sup> arguing that the subjugation of Kashmir will benefit economic development in Kashmir and India, even if it comes at the expense of the free choice, identities and lives of those who live

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<sup>138</sup> *Supra* Note 112 at 57.

<sup>139</sup><https://www.forbes.com/sites/williampesek/2020/01/10/india-has-worst-economy-in-42-years-is-prime-minister-modi-watching/#6a6b2cd52a1>.

there. Again, I draw a distinction between Kashmiri elites, middle-class, landowners and the peasantry. While the entire region is subjugated under the political will of the Indian state, the sole focus on political movements bely the real impact of borders and territoriality in the region. Most public debates on Kashmir are confined to pro-independence movements, continued militarization, developmental projects (such as HEPs) by the government and subsequent resource exploitation and damage to the region. While all of these are significant, they offer an incomplete insight into the pathologies of territorial statehood. Rarely, if ever, is there an account of the cumulative impact of all these sites of fracture on the peasantry, poor landowners and labour of/on the land - in whom the true idiom of land rests. This is in keeping with the critique of TWAIL where categories of minorities are subsumed in and barely subsist within bounded territory which is currently the post-colonial state. This is an inherently masculine<sup>140</sup> and oppressive form of territorial statehood. No matter who occupies it, the ability to subjugate remains,<sup>141</sup> with variations only in the degree of inequality and exploitation. This capacity to thus exert power is deeply rooted in making impossible the pre-colonial forms of comity and community that linear boundaries have erased.

Kashmir is not only about dignity, sovereignty, and the ability of Kashmiris to choose their own fate. It points to a systemic failure in the concept of sovereign statehood that international lawyers have unsuccessfully tried to address through human rights and self-determination, TWAIL's recurrent warnings notwithstanding.<sup>142</sup> Battles for secession, national liberation, and new state formation may seem to be about the promise/threat of identity-based boundaries, but this is often a diversion from the real issue: the limitations inherent to boundary making itself. I choose to examine this failure in Kashmir's context for three reasons.

The first is its stale topicality, rendering it necessary to resist the normalization of this state of exception<sup>143</sup> and continued violence. The second is that it is one of the most complex manifestations of competing identarian and relational claims enmeshed in a certain notion of territoriality and terrain. The duration of the conflict, the

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<sup>140</sup> Ratna Kapur, *Gender, Sovereignty and the Rise of a Sexual Security Regime in International Law and Postcolonial India*, 12 MELBOURNE JOURNAL OF INTERNATIONAL LAW 317 (2013).

<sup>141</sup><http://opiniojuris.org/2017/01/17/asia-international-law-and-international-institutions-a-comment/>.

<sup>142</sup> Ratna, *supra* note 145 at 78; Anghie, *supra* note 99 at 48; Chimni, *supra* note 84 at 36.

<sup>143</sup> I use this as understood by Agamben in G. AGAMBEN, *STATE OF EXCEPTION* (2003).

stakeholders,<sup>144</sup> and the impasse<sup>145</sup> seem to guide us to the inevitable – Kashmir’s ‘territorial’ concerns<sup>146</sup> are unsolvable within the paradigm of modern statehood. The international community’s inaction has allowed India to finally make Kashmir an ‘internal problem’.<sup>147</sup> By inaction, I allude to the international community’s refusal to critically scrutinize the terms of debate as well - what does/should an endorsement of the right of self-determination mean in international law for a nation which is ‘stateless’? In other words, where can we go from here in a way where the lay of the land is not forced into the myth of statehood’s inevitability, once again. The reins, if one may call them so, must rest in the people who work them. The third reason is, the manifestation of this expression of statehood and boundary in a new category – the citizen.

The citizen is the legal personhood of belonging to a state, and the right of exclusion is premised on non-nationality which in turn is premised on sovereignty. If sovereignty is constructed racially, imperially and such, then its most logical conclusion is that the notion of the citizen is also premised on similar extrapolations.<sup>148</sup> It is pertinent to note that the issue of citizenship, while closely related to the question of territoriality, simultaneously relies on the liberal ideology embedded in the internal organisation of post-colonial states. Liberalism is a powerful tool to diffuse the ‘other’ (in this case, the Kashmiris as a community and within them, the Kashmiri peasantry) into individual citizens. While a keen engagement with liberal constitutionalism is integral to this conversation, for the purposes of this paper, I limit myself to territory and terrain.

Located in Kashmir is the expression of citizenship as an extension of the statehood idiom. The legal imaginary of the citizen is a product of the legal normative of the state. The power to both determine and define citizenship is a form of control exercised by the state. Sovereignty has always been used for the creation of

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<sup>144</sup> RADHA KUMAR, *PARADISE AT WAR: A POLITICAL HISTORY OF KASHMIR* (Aleph 2018).

<sup>145</sup> CHRISTOPHER SNEDDEN, *UNDERSTANDING KASHMIR AND KASHMIRIS* (Hurst Publication, 2015).

<sup>146</sup> I argue that there are concerns *with territoriality* as opposed to territorial concerns in the modern international law sense.

<sup>147</sup> UNHCR Kashmir Report, [https://www.ohchr.org/Documents/Countries/PK/KashmirUpdateReport\\_8July2019.pdf](https://www.ohchr.org/Documents/Countries/PK/KashmirUpdateReport_8July2019.pdf).

<sup>148</sup> I supplement this position with Arjun Appadurai’s argument that all nation-states are based on an ethnocentric core or a majoritarian core. See – A. APPADURAI, *FEAR OF SMALL NUMBERS* (Duke University Press, 2009).

‘disciplined, responsible sovereign subjects within the international legal order’.<sup>149</sup> Territorial sovereignty is a form of political technology that produces the notion of control of terrain and within it, the citizen as a disciplined, sovereign subject. The state formulates policies to promote a vision of citizens as “*economic agents with commercial initiative, economic judgment, and a duty of self-preservation*”.<sup>150</sup> Kashmiris have consistently challenged this narrative, allowing the Indian state to designate them as ‘unproductive’, ‘brainwashed’ excesses who defy the construct of the ideal citizen. This is particularly juxtaposed against the mainstream ‘ideal citizen’ who is a productive member of the community and in compliance (and consonance) with the machinations of the post-colonial state.

The new citizenship laws in India, in tandem with the land laws in Kashmir, have further qualified the formulation of the citizen that is acceptable to the Indian state. The concept of the citizen “*carries the ethical connotation of participation in the sovereignty of the state*”.<sup>151</sup> The use of documents to ‘other’ populations is an established tool of governance used by the post-colonial sovereign as well as the colonial state, particularly in South Asia.<sup>152</sup> The citizenship rules in India are setting apart new kinds of populations who are administered through colonial methods of classification and exclusion through tools of law and governmentality. These are the ‘illegal migrant’, ‘the bad Muslim’ and ‘the foreigner’ who are unable to validate themselves as Hindutva subjects through the administrative apparatus of the state.<sup>153</sup> Akin to colonial rule, all ‘populations’ are *prima facie* subjects, not citizens.<sup>154</sup> The law allows some subjects to transcend to *de jure* citizenship status as long as they are able to map onto the ethos of the state.

In the past, citizenship laws in India have been framed and amended in response to the Partition and its ensuing religious conflicts and political challenges. However, until the CAA, eligibility of citizenship has never been determined on the criterion of

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<sup>149</sup> Albert and Werner, 2011 at 2185.

<sup>150</sup> See generally, Eslava and Pahuja, *Supra* Note 93.

<sup>151</sup> PARTHA CHATTERJEE, *THE POLITICS OF THE GOVERNED*, (Columbia University Press, 2004).

<sup>152</sup> *Id.*

<sup>153</sup> TWAILR – Vasanthi Venkatesh and Fahad Ahmed < <https://twailr.com/rewriting-india-the-construction-of-the-hindutva-citizen-in-the-indian-state/>>.

<sup>154</sup> *Supra* Note 156 at 86. Chatterjee demonstrates how the modern and colonial states create identifiable, classifiable, wholly empirical ‘populations’ out of citizens. Their ‘participation’ is considered essential to legitimate state sovereignty, but they are made to inhabit only the ‘domain of theory’.

religion.<sup>155</sup> For Kashmir, this represents a form of double ‘othering’ where the ‘unproductive’, un-citizen is also a Muslim un-citizen. In 1953, Shyama Prasad Mukherjee, a pioneer Hindu right wing figure, wrote “*if the Muslims of Kashmir do not want to remain with us, let them go away, but Kashmir must and will be ours. This is a vital matter for the security of India.*” Mukherjee’s pronouncements are a haunting reflection of the population rupture created by statehood and many see the abrogation of Article 370 as a culmination of this long-standing right-wing vision.<sup>156</sup> The CAA is a state sanctioned machine to which communal Hindu Indians have condensed their collective dependence. It achieves two things – making the state and unmaking the citizen. It strengthens the sovereign power of the Indian state by showing how it can ‘bind and unbind’.<sup>157</sup> Citizenship laws, such as the CAA, produce the ‘neurotic citizen’<sup>158</sup> who bears heavily on the agency of the ‘minority citizen’<sup>159</sup> and determines the tonality of the state. In determining the characteristics of citizenship, the state tells us who belongs and who deserves to stay. Since community and border making are inherently linked through international law’s violent history, problematizing the idea of the citizen is to question statehood as well. Every new law in India that strikes at Kashmir and Muslims, exposes the unserviceable fractures of the statehood project.

### CONCLUSION

The colonial project was a vision driven by a desire to control, occupy and capture resources while disciplining populations, eroding their culture and their movements. The state was idealised as a container with clearly defined lines, marking its edges. However, the aim to secure a coherent and ordered empire was never truly realised. The forcibly imposed boundaries and the state-form never erased the complexity and fluidity that marked the underlying social life in these regions. It simply

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<sup>155</sup> Desai (2020); The CAA followed similar changes to the Passport (Entry into India) Act and the Foreigners Act. Perhaps the only notable exception is the rejection of the Permanent Settlement Bill moved by National Conference in 1980s, which sought to restore property rights to the 1947 Muslim refugees who had fled to Pakistan following the partition of Jammu. The bill was shelved by the Supreme Court stating that the refugees were now Pakistani citizens and, it was a question of sovereignty and citizenship.

<sup>156</sup><https://www.thehindu.com/news/national/article-370-martyrdom-of-dr-mukherjee-for-complete-integration-of-jk-honoured-says-ram-madhav/article28820818.ece>. It is pertinent to note that there is a certain continuity in the approach taken by the BJP and its predecessor, the Congress in which there has been a constant erosion of the autonomy of Kashmir.

<sup>157</sup> BUTLER AND SPIVAK, WHO SINGS THE NATION STATE (2007).

<sup>158</sup> Engin F. Isin, *The Neurotic Citizen*, *Citizenship Studies*, 8:3, 217-235 (2004).

<sup>159</sup> <https://twailr.com/minorities-and-the-making-of-postcolonial-states-in-international-law/>.



hid them from view or transmuted them into modern-day boundary disputes in post-colonial states. At its moment of independence, colonial India was a smattering of territory which included a plethora of princely states whose boundaries remained intermixed and unevenly surveyed. It is here that Kashmir, as the site of projected geo-body<sup>160</sup> of the Indian nation-state, becomes an act of telling and divulgence.

Unpacking Kashmir, the impact of CAA<sup>161</sup> and the recent legislation that reorganizes land ownership on the region, urge us to a pre-colonial disposition with an anti-colonial<sup>162</sup> gaze where land was never meant to be conquered and distributed though brute force masquerading as law and legal systems. Indigenous critiques such as Irene Watson's *Buried Alive*<sup>163</sup> take us to an imagined state that decouples law and land from a position of ownership and propriety. Here, law is a device that sustains everyone's temporary allegiance to land as something much bigger than themselves. There is no territorial state-form, and making borders contingent reveals how belonging is deeply connected to state-making (and un-making). Many conflicting desires are located in the narrative of Kashmiri resistance. But at the heart of them all, there is a call for *azadi* (freedom, in the most expansive sense) through a politics devoted to long-term preservation of human life. Perhaps, this is resolved if we turn to other epistemologies of land, law and governance. In shifting focus away from disruptive, linear borders, we gently hand the process to where it has always belonged – the intimacy between lands and their people.

The battle for Kashmir is more than a battle for the line of control. In mountains uncaptured by unfinished cartography, wounds in the land become wounds in the people. The never-ending siege of Kashmir by the Indian state rests precariously on the idea of territorial statehood and therefore, is irresolvable. As long as the state demands borders and creates its 'ideal' citizens, *tehreek* (armed resistance) will continue to raise its head, nestled among the weary hopes of the people. The conversational shift to land, law and liberation becomes imminent. The problem is not so much that one cannot

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<sup>160</sup> THONGCHAI WINIKACHUL, *SIAM MAPPED: A HISTORY OF THE GEO-BODY OF A NATION*, (University of Hawaii Press, 1997).

<sup>161</sup> <https://theconversation.com/call-the-crime-in-kashmir-by-its-name-ongoing-genocide-120412>.

<sup>162</sup> Here, I refer to Jayan Nayar's conceptualization where anti-colonial forms the frontier against colonial (b)ordering. Post-colonial, in his understanding, is simply continuous and analogous to the colonial form of world making in which positionality is another circuit in the system.

<sup>163</sup> *Supra* Note 73.

apportion land to those who stake competing claims. The problem is the *way* we have conceptualized land as sovereign territory and who has rights over it. Escaping the legacies of colonialism requires much more than ‘rectifying’ the post-colonial state – it demands an escape from the Westphalian bounded state as a form of governance. In this context, perhaps *azadi*, the battle cry for a free Kashmir, is not just a cry for freedom from the Indian state but from the idea of statehood itself.

An attempt towards resolution of the conflict over Kashmir and its hydra-headed impact on India as a whole, may require deeper imagination than we currently permit ourselves. Colonial obsessions about boundaries and lines of control (also masculine anxieties about control of space), are reproduced in post-colonial, developmental, nation-states. A truly post-colonial (and de-colonial) moment might call for more ingenuity than “*seeking solace from imagined pasts and the anxieties of colonial and national elites*”.<sup>164</sup> In exiting and abandoning the state-form and rigid boundaries, we may finally be able to return land to its inhabitants in meaningful configurations, devoid of power and excesses.

The other side of statehood need not be a place of epistemic void. It carries possibilities and visions of porous configurations, of social organisation that are just beyond our line of sight, somewhat akin to those prior to the colonial moment. As stated at the outset, my task here was to problematize, as sincerely as possible, without attempting to offer solutions that are epistemologically unfathomable without a collective conscience. In fact, the labour of problematizing is predicated not just on an account of what constitutes problems (as distinct from symptoms), but also as a relocation of the terms - problem and solution - themselves. In performing this exercise, I am hoping that others join me and take up the task of critical imagination to contemplate different spatial configurations and ways of being that are for the moment, let us say - not states.

Thus, a detailed examination of such alternatives lies outside the scope of this paper.<sup>165</sup> While there have been many proposed suggestions from the re-drawing of artificial colonial boundaries<sup>166</sup> to the retention of *uti possidetis* with re-adjusted

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<sup>164</sup> *Supra* Note 134.

<sup>165</sup> For a discussion on possible legal alternatives to *uti possidetis*, see Jain, *Supra* Note 28 at 291-292.

<sup>166</sup> Makau Mutua, *Why Redraw the Map of Africa: A Moral and Legal Inquiry*, 16 MICHIGAN JOURNAL OF INTERNATIONAL LAW 1113 (1995).

administrative borders in order to better accommodate local interests, they are all located within the bordering and ordering frame. International law can (and has) also accommodated non-linear traditional frontiers to better actualize local practices.<sup>167</sup> While I am sympathetic to the reality, gravity and associated consequences of sovereign statehood, I am equally compelled to think beyond its epistemological limits, particularly in Palestine, Kashmir and other uniquely placed places where any process of boundary formation profoundly impacts the territories and the people it divides continuously, to this day.

Kashmir, much like Palestine,<sup>168</sup> presents an opportunity for designing and generating a new vision for the people to live together and govern themselves. This social contract that we need to be thinking about does not necessarily have to exist anywhere or in this moment — it can very well begin in a microcosm of something that can be replicated in the future elsewhere; in which local needs, narratives and social relations form the basis for economics and governance and where the broad reckoning with the colonial past and present allow integration and equity between social, racial and religious identities under a new framework of belonging. An ethical way of being and living with the land is not limited to the consciousness of the territorial nation state and possibly, not at all, if one is to go by the global paradigms of the day.

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<sup>167</sup> Tayyab Mahmud, *Colonial Cartographies, Postcolonial Borders, and Enduring Failures of International Law: The Unending Wars Along the Afghanistan-Pakistan Frontier* (36 BROOKLYN JOURNAL OF INTERNATIONAL LAW (2010)).

<sup>168</sup> <https://jewishcurrents.org/the-palestinian-cause-at-a-moment-of-transition/>.