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Minorities and the Making of Postcolonial States in International Law

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In December 2019, the Republic of Gambia filed a [case](#) against Myanmar before the International Court of Justice under the [Genocide Convention](#) (1948). The case involved [genocidal persecution of the Rohingya minority](#) by the Myanmar army in collaboration with local Rakhine groups. The [United Nations Human Rights Council](#) and the UN [Independent Fact-Finding Mission on Myanmar](#) have already described the Rohingya persecution as an example of ethnic cleansing and as a potential case of genocide. While the Rohingya genocide is one of the worst incidents against minorities in recent times, minority oppression in various forms and at various intensities are defining features of postcolonial states in general. A global [study](#) on peoples under threat in 2019 reveals that of the 115 countries that the study ranked by level of threat, 72 faced conflicts involving claims to self-determination. All but a handful of the countries in the list are postcolonial states.

While most states, including Western liberal democracies, are not completely immune from ethno-nationalism and the minority ‘problem’, nationalist elites in postcolonial states address the problem of ethno-nationalism in general and minorities in particular by identifying the ‘postcolonial state’ itself as an ‘ideology’. Thomson’s notion of ‘ideology’ is a set of ways in which ideas and meanings help create and sustain relations of domination through a series of general modes of operation and strategies of symbolic construction.¹ Relying on Thomson’s notion, I argue that international law, as a core element of the ideology of the postcolonial state, contributes to the marginalisation of minorities. I introduce three visions of the postcolonial state as pertaining to minorities and then illustrate the role of international law across these three ideologies.

¹ See, John B. Thompson, *Ideology and Modern Culture: Critical Social Theory in the Era of Mass Communication* (Cambridge: Polity Press, 1990).

The Three Ideologies of the Postcolonial State

The ideological function of the postcolonial state vis-à-vis minorities takes three different yet interconnected forms: the postcolonial 'national' state, the postcolonial 'liberal' state, and the postcolonial 'developmental' state. As ideologies, the three visions of the postcolonial state inflict various forms of marginalisation on minorities but simultaneously justify the oppression in the name of national unity, liberal principles of equality and non-discrimination, and economic development, respectively.

The Postcolonial 'National' State

The ideology of the postcolonial national state is premised upon a homogenous national identity that absorbs all ethno-cultural differences. With a long-term goal of assimilation and homogenisation, such an ideology expects that the minority problem will eventually wither away. However, the process of diminishing all meaningful ethno-cultural diversity, and reducing such diversity to a token showcase, results in imposing the majoritarian identity on the entire nation. In other words, the majoritarian culture, belief system, and cultural codes usually become synonymous with the 'national' identity in the name of nation-building and homogenisation. The ideology of the postcolonial national state, presented as a solution to the minority problem, thus in fact acts as a tool to perpetuate the dominance of the majority group over the minority in all political and cultural domains of the new state, leaving the minority at the mercy of the majority on vital political and economic issues.

The Postcolonial 'Liberal' State

Even as the vision of the 'national' state – a homogeneous nation within a defined territory – served as an ideology in dealing with minorities, such a national state affirmed the ideological vision of its internal political organisation. The predominance of the liberal worldview of the post-WWII international order provided the necessary ideological foundation for many postcolonial states and their constitutional architecture. Within the individualist legal framework of rights, minorities are often denied any group protection in the constitutions of postcolonial states, and are instead reduced to individual units of citizenry. In this way, the ideology of the postcolonial liberal state worked through fragmentation as the ideological mode of operation.

Within the liberal ideological framework, the constitutional prohibition on discrimination against any citizen on grounds of religion, caste, ethnicity, and so on, is generally seen as an adequate protection for minorities. The liberal regime of citizenship and individualist principles of equality and non-discrimination are designed to deal with minority groups without directly engaging with the groups per se. In fact, the idea of protecting minority *groups* is in direct conflict with the liberal ideology itself. As I have argued [elsewhere](#), the liberal idea of non-discrimination assumes that differential treatment, on religious grounds for example, is fundamentally irrational, and thus providing group protection on the basis of ethno-religious features and

solidarity undercuts such reason. Instead, for the liberal, minorities are better protected through the liberal-individualist principle of non-discrimination.

In reality, the individualist notions of equality and non-discrimination are not merely inadequate for minority protection, but are indeed the *modus operandi* of assimilation and the extinction of group identity. Lacking any specific guarantee for minority rights, in the long run the liberal protection against non-discrimination is prone to encourage the minority group's assimilation into the dominant culture. Thus, the vision of the postcolonial 'liberal' state serves the ideological function of assimilating minorities into the 'national' (read, majoritarian) culture, thereby suppressing minority identity. In addition to fragmentation, legitimation and dissimulation are ideological modes by which the 'liberal' state justifies the denial of any special protection for minorities and, in the name of egalitarianism, glosses over the asymmetric power relations in which minorities find themselves vis-à-vis the dominant group in a given polity.

The Postcolonial 'Developmental' State

The legitimacy of postcolonial states draws on the ideology of 'development'.² The developmental ideology also has important implications for the internal organisation of ethnic relations in postcolonial states. If the ideology of the 'liberal' state is put forward as a 'political' solution to the protracted crisis of ethno-nationalism and the ensuing minority problem, the 'economic' solution to these problems comes in the form of the ideology of the 'developmental' state. Here, the ideology of the postcolonial developmental state with its mandate of economic development operates through the general mode of dissimulation. Developmentalism attempts to use dissimulation to gloss over the existing asymmetric power relations that continue to produce socio-economic vulnerability for minority groups.

The perception that economic development advanced by the modern postcolonial state will eradicate communal tensions arises from two legitimate yet inconclusive concerns about the artificiality of ethno-nationalism: instrumentalism and elite-constructivism. Instrumentalists typically assume that human beings are rational individuals, who act primarily to optimise their economic pay-off. They, thus, conceive ethnic groups as a collection of profit-maximising individuals and, consequently, ethno-nationalism primarily as a form of competition for scarce economic resources between or among coalitions identified along ethnic lines.³ On the other hand, the assertion that ethno-nationalism is merely an elite construct assumes that various political, religious, or military elites mobilise individuals by accentuating and inventing individuals' ethnic attachments as well as their claims to economic resources.⁴ Given the centrality of considerations of economic competition and resource allocation in both instrumentalist and elite-constructivist approaches to ethno-nationalism, the ideology of a postcolonial 'developmental' state that has the task of ensuring

² Partha Chatterjee, *The Nation and Its Fragments* (Princeton, NJ: Princeton University Press, 1993), 205.

³ Mohammad Shahabuddin, *Ethnicity and International Law: Histories, Politics, and Practices* (Cambridge: Cambridge University Press, 2016), 181.

⁴ Ibid.

'economic progress for all' appears to be quite a natural solution to the problem of ethno-nationalism and minorities.

International Law and the Ideology of the Postcolonial State

International law is central to the making of postcolonial states, and it plays a key role in the ideological function of such states across the three forms discussed here. So far as the postcolonial 'national' state is concerned, international law offers the necessary legal basis for the demarcation of territorial and political boundaries of the national state. With its ambition of achieving a homogenous and unified sovereign entity, the postcolonial state essentially relies on international law principles governing postcolonial boundaries (*uti possidetis*), territorial integrity, sovereign equality, and non-interference in internal affairs. It is within this legal framework that the colonial administrative units, unified for the first time by colonial administrations, transform into postcolonial states. Territorial boundaries, often arbitrarily drawn by colonial administrations without any regard to ethnic composition, come to define the state. In this set-up, where the 'national' often equates to the majoritarian, despite the lofty slogan of nation-building, minority groups remain vulnerable to political and cultural suppression. The [minority problem is therefore embedded in the very process of creation of the postcolonial 'national' state through the operation of international law.](#)

Second, the post-WWII liberal vision of international law feeds into the ideology of the postcolonial 'liberal' state in the form of 'individualism', which dominates the discourse on the constitutional architecture of rights. One direct implication of such liberal individualism is the often very weak – or sometimes the total lack of – protection afforded to cultural *groups*. Instead, the whole liberal human rights regime is designed to diffuse groups into liberal individuals, thereby facilitating their assimilation into a homogenous national (read majoritarian) identity. In a way, this complements the vision of the 'national' state. In general, the 'minority' is seldom a holder of rights in postcolonial constitutional orders. Another consequence of the liberal underpinning of international law and the ensuing ambivalence towards group rights is the denial to national minorities of the right to self-determination. While the right to self-determination in international law enjoys the status of a peremptory norm (*jus cogens*) in the context of decolonisation, such a right is granted to the colonial peoples – the nascent postcolonial 'national' state – as a whole; minorities in those national states fall outside its operation. In recent years, liberal interpretations of the right to self-determination in the form of democratic entitlements even moved far enough to depict the individual as the holder of this right and, thereby, to establish the primacy of the individual over sovereign states.⁵ Liberal international law, however, refrains from extending this right to minorities, except as a remedial measure in cases of extreme violations of human rights. Indeed, international law prefers that minorities

⁵ See, for example, Thomas Franck, 'The Emerging Right to Democratic Governance,' *American Journal of International Law* 86 (1992), 46-91. In making this argument, Franck relied on the writings of Kant. See, Immanuel Kant, 'Perpetual Peace: A Philosophical Sketch (1795),' in *Kant: Political Writings*, ed. H. S. Reiss, trans. H. B. Nisbet (New York: Cambridge University Press, 1970), 93-130; See also, I. Kant, 'The Metaphysics of Morals (1797),' in *Kant: Political Writings*, 164-173.

slowly disappear through assimilation – a preference that the postcolonial 'liberal' state materialises.

And finally, the ideology of the postcolonial 'developmental' state offers the language of economic progress and development to undermine the minority question as such. The idea that economic development is the answer to all social problems is embedded in the very logic of international law's engagement with postcolonial statehood. As influential international law scholarship in this field persuasively demonstrates, since the creation of the League of Nations, the colonial underpinning of international law has been transformed into a more subtle form of economic imperialism.⁶ The free market economy, deregulation, free movement of capital, and so on have become international law and institutions' *raison d'être*. On the other hand, the third world resistance, in the form of Permanent Sovereignty over Natural Resources or of the New International Economic Order, almost exclusively operates within the framework of the postcolonial 'national' state and also hardly pays any attention to minorities. The more recent proposition of the right to development too suffers from the same limitation of being contextualised within the individualist framework of human rights. As a result, minorities become the foremost victims of development activities by the state as well as by international development agencies. In the globalised market economy, while the presumably weakening 'national' state was arguably expected to relax its grip on long-oppressed minorities, increasingly powerful national and multinational corporations are disenfranchising already vulnerable communities on an unprecedented scale and pace in the name of economic development.

Thus, given the peculiarities of postcolonial states and the centrality of international law therein, conventional doctrinal approaches premised primarily upon European worldviews are bound to fall short of an adequate framework of analysis. We therefore need a radically renewed international law approach to the question of statehood – one that takes into account the unique nature and background of postcolonial nation-states and, at the same time, pays attention to minority perspectives going beyond both state-centrism and liberal individualism. It is only through this approach that international law can finally make sense of humanitarian catastrophes in postcolonial states and its involvement therein.

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⁶ See, for example, Antony Anghie, 'Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations,' *New York University Journal of International Law and Politics* 34 (2001–2002), 513-633; Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2005); Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements, and Third World Resistance* (Cambridge: Cambridge University Press, 2003); Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth, and the Politics of Universality* (Cambridge: Cambridge University Press, 2011); Luis Eslava, *Local Space, Global Life: The Everyday Operation of International Law and Development* (Cambridge: Cambridge University Press, 2015).

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