Sovereignty and Minorities: Towards Reshaping Postcolonial National Identities?

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(Reviewing Mohammad Shahabuddin, *Minorities and the Making of Postcolonial States in International Law*, Cambridge University Press, 2021, pp. 345 ISBN 978-1-108-48367-4, forthcoming, *Nordic Journal of International Law*, 2021/22)

In a remarkably insightful essay on nationalism, Isaiah Berlin concluded by noting the 'astonishingly Europocentric' outlook of nineteenth and twentieth century thought. He incidentally observed on the political thinking of the time: '…the peoples of Africa and Asia are discussed either as wards or victims of Europeans, but seldom, if ever, in their own right, as peoples with histories and cultures of their own'.[1] The process of decolonisation, well under way at the time of this writing, corrected or mitigated such an asymmetrical view of non-European territories, and several studies over the years, across a vast range of disciplines, have engaged with the legacy of colonialism and European empires. Yet, with some rare exceptions, peoples' identities and cultures of the sort alluded to by Berlin hardly featured in discussions about colonialism, since they generally focused more broadly on the illegitimacy (then illegality) of foreign rule, and the consequent need for new territorial configurations arising from the right of colonies to independence.[2]

The book written by Mohammad Shahabuddin, a law professor at Birmingham University, on *Minorities and the Making of Postcolonial States in International Law* (with a foreword by Prof Chimni), is effectively the first study to address the specific impact of international law on the position of minority groups and identities in the context of, not pre-independence 'native' cultures, but the actual workings of the state following decolonisation.

As an exercise in critical theory, it investigates the role of international law in supporting a vision of the postcolonial state that is presented to be at the intersection of notions of nationalism, liberalism, and development. As a study steeped in postcolonial scholarship (following in the footstep of Antony Anghie's seminal work)[3], the analysis breaks with an exclusively human rights perspective to look at the interplay of group identity, colonialism, and its attendant capitalist structures as the necessary backdrop to the three 'ideologies' said to be behind the emergence of the postcolonial state – the 'national' state, the 'liberal' state, and the 'developmental' state (Part I). As a critique only partly drawing upon Marxist insights, it retains the importance of group and national identifications while still placing them in the broader context of concrete historical conditions under which they developed in the postcolonial world.

The conceptual structures of Part I set the stage for an analysis in Part II of the impact of international law on cementing an instrumentalist space of postcolonial sovereignty via the

[1] Isaiah Berlin, 'Nationalism: Past Neglect and Present Power', in Henry Hardy (ed.), *Against the Current: Essays in the History of Ideas* (The Hogarth Press, London, 1979) p. 354.
[2] Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press, Cambridge, 1995).
[3] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, Cambridge, 2005).

uti possidetis principle, moulding an internal national identity based on majoritarian concerns, and embracing large scale economic development and planning strategies as the fundamental way of taking the country beyond tradition, communalism, and inter-communal tensions.

The book is rich in scholarly and historical detail, but the general argument is relatively straightforward: international law has contributed to, or facilitated, the marginalisation and oppression of minority groups (including indigenous peoples) living within the boundaries of the states resulting from decolonisation.

The book reassesses familiar themes of the postcolonial critique of international law by applying them to minority and group accommodation, and to that extent, it undoubtedly provides an expanded and richer version of that critique. Particularly telling in this analysis, though not exclusive to postcolonial research, are the ambiguities of the notions of 'nation' and 'rights', human rights in particular. These notions – it is suggested – largely worked in favour of homogenous communities (according to the classic Western nation-state paradigm) that were either indifferent to the recognition of specific minority group concerns in the constitutional setting or were, at best, bound to constantly drift between 'the Scylla of radical modernism …[and] …the Charybdis of proud and gloomy traditionalism'.[4]

The author follows the above-mentioned ideologies through the relevant international legal debates. He questions the legal foundations of the *uti possidetis* principle and argues that its rigid application effectively denied minority groups the right to self-determination in the process of decolonisation. This reality chimes with the lack of a (post-independence) right to secession under international law, and the weak legal standing of so-called 'remedial' secession on exceptional, human rights, grounds. If anything, international law is intent on either stifling any external nation-building project of a minority group (the *Reference* case before the Supreme Court of Canada being, for the author, an example of judicial 'ambivalence' towards the notion of self-determination – p. 153) or drifting towards an individualist view of self-determination that is intrinsically hostile to any meaningful form of group rights protection beyond standard egalitarian, individual entitlements in a liberal democracy.

In a similar vein, the legal overview of minority protection instruments and practice suggests for the author an equally disappointing picture, one that is largely dominated by minimalist views of individual rights (as exemplified by the limited scope of Article 27 ICCPR) and the principle of equality and non-discrimination as their ultimate basis. The enduring (and historically entrenched) assimilationist desires of many modern states, and certainly of many postcolonial states, can only partly be mitigated by legal advances in indigenous rights, as initiated by the 2007 UN Declaration on the Rights of Indigenous Peoples, as well as the burgeoning jurisprudence in the field within the Inter-American and African human rights

[4] This is how Isaiah Berlin described the dilemma facing India as it emerged as an independent country: Isaiah Berlin, 'Rabindranath Tagore and the Consciousness of Nationality', id., *The Sense of Reality – Studies in Ideas and Their History* (edited by Henry Hardy, Princeton University Press, Princeton, 2019, 2nd edition) p. 330; for similar tensions, see also Michael Walzer, *The Paradox of Liberation: Secular Revolutions and Religious Counterrevolutions* (New Haven and London: Yale University Press, 2015).

systems, especially in relation to land and natural resources. On this score too, though, the author argues that the human rights approach remains inherently limited and, on a practical level, inapplicable to non-indigenous minorities in the postcolonial world.

There is a sense that the author's argument plays to the claims' most uncompromising and extreme articulations. For example, minority secessionist claims and overly individualist views of internal democracy along the lines of Thomas Franck's famous cosmopolitan thesis can be conceptually mutually reinforcing from the point of view of the author, but they do not exhaust the range of claims that can be addressed by the evolving language of self-determination (or indeed, possibly, democracy itself).[5] The complexities and nuances of the *Reference* case seem to play no role in the analysis. The nominal legal distinction between 'minorities' and 'indigenous peoples' in human rights discourse is clearly a limiting factor in articulating claims, but *can* (and should) be challenged or contextualised, in law and policy-making, in vast areas of the postcolonial world (if not, anywhere else).[6] The wholesale association of human rights with 'liberalism' can prove problematic when seeking to explain the international community's reluctance to endorse group rights standards (was colonial self-determination, framed as a distinct human rights issue at the UN, an endorsement or a rejection of liberalism? Is the Banjul Charter or the UN Declaration on indigenous peoples the reflection of a single political and moral tradition? Does postcolonial states' idiosyncrasy with group rights make them identity-blind liberal zealots, aggressive ethno-nationalists, human rights critics, or abusers *tout court*? Is there any space for a dynamic cross-cultural understanding of human rights? And so on).

I have no doubt that the author did not mean to ignore or gloss over these tensions. Rather, the point of the argument lies elsewhere: international law as it stands will not be enough to disrupt the sort of deeper structures of domination that that law, it is said, helps promote and entrench. Seen in the context of this grand narrative and the truly impressive amount of historiographical research brought to bear on the analysis, matters of legal detail tend, overall, to compare unfavourably. In many ways, this is somehow entailed by the very observer's 'external' critical standpoint and normative stance.

The predictable sense of scepticism (and reductionism) about legal arrangements that transpires from the assessment need not, however, distract the reader from two uncomfortable truths that the author validly brings to the fore: the devasting impact of exclusivist notions of national identity and spurious conceptions of rights and development on the substance and effectiveness of group accommodation; and the direct or indirect role of international law in managing the fact and consequences of state-making. These truths are more radical in tone compared to typical human rights assessments, but they are not new. They have been stated before.[7] What is new (or more uncommon), and surely welcome, is a

[5] G. Pentassuglia, 'Assessing the Consistency of Kurdish Democratic Autonomy with International Human Rights Law', 89 *Nordic Journal of International Law* (2020), p. 168.

[6] B. Kingsbury, "Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International and Comparative Law," 34 *New York University Journal of International Law and Politics* (2001) p. 189, at pp. 233, 244.

[7] For aspects of this debate, see, among others, Patrick Macklem, *The Sovereignty of Human Rights* (Oxford: Oxford University Press, 2015).

book-length robust engagement with the implications of those uncomfortable truths for the postcolonial world, and what this tells us about the position of minority groups in the international legal system.

The debate is indeed followed through two important case studies, involving the Rohingya minority in Myanmar and the Chittagong Hill Tracts (CHT) People of Bangladesh. All the key dimensions to these cases, discussed in detail in chapters 3, 4 and 5 of Part II, play effectively to the general concepts and principles espoused in the book. They include the question of Arakan (currently Rakhine State) prior to the independence of Myanmar and the harsh citizenship laws that followed an increasingly rampant Buddhist nationalism hostile to the Muslim Rohingyas and minority rights more broadly; the negative impact of Bengalese nationalism in Bangladesh on the status of the CHT People in the name of strict national unity, with its attendant neglect of group rights/autonomy issues or even later challenges to the 1997 CHT Peace Accord on grounds of equality and non-discrimination; and broad brush large-scale development projects seriously affecting the groups concerned. All of these dimensions reflect back on certain notions of nation, rights, or economic progress and the varying degrees to which, for the author, international law has been directly or indirectly involved in their respective processes.

It is, however, postcolonial India's struggle to cope with communal identifications that comes across as, not only the historical backdrop to those two case studies, but also the most genuine battleground – conceptually, and legally – for the accommodation of minority groups within the newly established (postcolonial) state. In this (and other cases) both the Marxist and postcolonial critiques are well-known: the first dismissing ethno-religious (or national) identities as a case of parochial 'false consciousness' unconducive to class and global solidarities; the second treating the monolithic unit of the postcolonial state as the direct product of Western colonialism against the backdrop of pre-colonial legacies.[8] Unsurprisingly, there are significant echoes of both such critiques (especially the postcolonial one) in the way the author discusses the case.

Unlike more standard critical accounts, the analysis appears, though, nuanced, and rich(er) in detail. The author usefully recounts the difference between the moderate (pluralist/autonomist) and radical (monist/intolerant) wings *within* the Hindu and Muslim movements, the progressively cross-class alliances across ethno-religious lines, and more crucially, the difference between the initial determination of Jawaharlal Nehru to provide robust minority rights protections in the constitution and the subsequent (or parallel) emergence of radical nationalists or Hindutva ideologues looking back to the time of Hindu raj (echoes of which are offered at the end of the book, in relation to India's current strong nationalist outlook). He rightly critiques 'the ambivalence of the liberal secular rhetoric' under Nehru (p. 75), the actual mixing of popular appeals that looked partial and thus inconsistent. Yet his argument seems overall to retain the value of national and religious identifications and to present the constitutional debates of the time essentially as a missed opportunity for strong minority protection, and perhaps a more widely shared playing field

[8] See, for example, Michael Walzer, *supra* note 4, chapters 3, 4.

within a robust framework of constitutional rights. In short, the case, despite the complex underpinnings of the book's general argument, reads more like unfinished business than a systemic failure of the (postcolonial) state as such.

While international law's support for the ideology of the postcolonial (national, liberal, developmental) state is explained and examined in no uncertain terms, the concluding chapter is left with the task of identifying what, if anything, to do with that law – a more constructivist dimension deconstructionists are not necessarily comfortable with. A set of reflections is offered in the form of 'potential approaches', themselves to be treated as 'far from exhaustive' (p. 279).

The author returns to the issues of space, rights, and development, and does so by usefully adding sections on feminist approaches to group-related matters and the very role of minority protection in the postcolonial world. Given the wealth and depth of issues that are examined through the needle's eye of minority rights – from territorial claims to neoliberalism and feminist readings of the law – one can hardly escape the impression of a discursive crescendo that goes beyond the seemingly narrower confines of the book. The discussion is very interesting and intellectually engaging, yet many of the – often overlapping – intimations offered in the chapter largely translate into overviews of previous scholarship on the subject and are probably not as conceptually sharp as those of previous chapters. Remedial secession rooted in pre-colonial legacies (whether it is for the Rohingyas or some other sub-unit) remains tested by overwhelmingly contrary evidence, and (as recognised by the author) the danger of reproducing the exclusivist logic that the book is (rightly) intended to challenge. A call for the 'decolonisation of minority rights, and of international law in general, from liberal ideological hegemony' (p. 289) does arguably little to advance matters if disconnected (at least at the level of the metanarrative) from a revamped, consciously pluralist, yet consciously grounded, human rights project. It is unclear where group accommodation would sit without it, especially at a time where indigenous rights, a category which is highly relevant to most former European colonies across the globe, continue to thrive on new and more inclusive international legal meanings and processes.[9]

However, the conclusions do offer some important, specific insights. Whilst the book challenges certain ideologies of the state, it equally recognises that 'as of now, states do indeed remain the core of the international system and there is no sign of their demise anytime soon' (p. 298). Group issues necessarily require governments, scholars, and institutional policymakers to grapple with matters of sovereignty at least on three levels: territorial claims; internal decentralisation; and the reconceptualization of minority/group protection itself.

Moving beyond *uti possidetis* for the purpose of (postcolonial) state-making and boundary-redrawing appears unviable (and, to many, unwise), but the author importantly reminds us that territorial integrity should not make us blind to what attaches particular groups to

[9] See, for example, the recent Symposium on 'The Impact of Indigenous Peoples on International Law', 115 *American Journal of International Law* (2021) at https://www.cambridge.org/core/journals/american-journal-of-international-law/ajil-unbound-by-symposium/the-impact-of-indigenous-peoples-on-international-law.

particular territories – an understanding that need not have legally disruptive implications. Given that peaceful consent-based border changes are already allowed under international law, the point is primarily an invitation, based on existing scholarship, to reassess the role of territory theoretically.[10] Decentralising sovereignty through autonomy arrangements and power-sharing models is said to be needed as part of a wider process of constitutional recognition – one that remains incomplete in the case of the CHT People despite the 1997 Peace Accord (or rolled back, as in the recent case of Kashmir). On a deeper level, the book calls for a new vision of minority protection that more clearly connects the field to the historical process and consequences of state-making and thus treats minority groups, unlike other social groups brought together under the anti-discrimination rubric of 'vulnerability', 'as an organising element of the state' (p. 300), as the state itself seeks to rebuild and reframe its own sense of legitimacy.

These insights may not look entirely new to the expert eye, or indeed be a necessary function of the critical normative framework from which the investigation begins (even more so if one were to link the account up with an imagined end-state of history in terms of sovereignty or post-sovereignty). However, there is much in their articulation that speaks critically to more generic ideas of integration and non-discrimination that increasingly inform certain contemporary institutional strategies, just as they informed the tentative, partial, and abstract (non-negotiated), approach of secular national liberators like Nehru to group identities within the state. The critique points to unfinished business in the field across international and national legal-institutional domains.[11]

The book is ultimately about the inescapable social, political, and legal fact of group belonging, how it becomes affected by concrete historical and economic conditions in the postcolonial setting, and how, in the author's view, international law shapes this process and is shaped up by it. Eminently readable regardless of methodological preferences or approaches, it is unfused with commendable humanism but also a sense of urgency – a pragmatic awareness that lack of group recognition contributes to disruptive conflict more than group rights can destabilise states in the real world.

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[10] For one of the few systematic attempts to do so, see Margaret Moore, *A Political Theory of Territory*, (Oxford: Oxford University Press, 2015).

[11] The book, however, does not engage with the issue of how to reconcile group rights or the recognition of distinct national identities with the rights of individuals, or the extent to which this can be done. Here too, a more nuanced debate would have been helpful, considering that many of the ethnic conflicts in former colonial territories echo legal and policy challenges arising from constitutional settlements or peace settlements in other contexts (for example, the Western Balkans).