Decolonising Minority Rights Discourse

Shahabuddin, Shahab

DOI:
10.1163/15718115-bja10137

Document Version
Publisher's PDF, also known as Version of record

Citation for published version (Harvard):
Shahabuddin, S 2023, 'Decolonising Minority Rights Discourse', *International Journal on Minority and Group Rights*, vol. 30, no. 5, pp. 931-979. https://doi.org/10.1163/15718115-bja10137

BRILL
NIJHOFF

INTERNATIONAL JOURNAL ON MINORITY AND GROUP RIGHTS 30 (2023) 931–979

INTERNATIONAL JOURNAL ON MINORITY AND GROUP RIGHTS

brill.com/ijgr

Decolonising Minority Rights Discourse

Mohammad Shahabuddin
Professor, Birmingham Law School, University of Birmingham, Birmingham, UK
m.shahabuddin@bham.ac.uk

Published online: 20 December 2023

Abstract

Mainstream discourse on minority rights embodies a series of normative biases and assumptions, which ignore the colonial underpinning of some of the core concepts such as the definition of minority and the notion of minority protection. In this paper, I argue that contemporary minority rights discourse needs to engage closely with relations of power and subaltern agency to 'decolonise' conventional thinking within the discipline. I unpack this decolonising agenda and map out what such an agenda would entail by critically analysing five key areas of relevance: reconceptualising the minority to expose 'otherness' embedded in the concept; scrutinising the reification of the state as a prerequisite for decolonising minority rights discourse; mainstreaming subaltern resistance; reevaluating a priori assumptions about the need for legal interventions; and finally, taking seriously the political economy of neo-colonial violence. Thus, the paper offers a framework for systematically thinking about decolonial promises of minority rights discourse.

Keywords

minority rights – power relations – subaltern agency – resistance – colonialism and decolonisation – postcolonialism – economic development – law and social movement

> With the march of civilisation certain backward groups would in the course of time become assimilated, and it would be undesirable to insert a [minority protection] provision in the draft covenant which would oblige States to delay that inevitable historical process.[1]

1 Introduction

Colonial legacies are omnipresent in the quotidian life of the postcolonial world. As UN Secretary General Antonio Guterres noted in his Nelson Mandela Annual Lecture in 2020:

> After the Second World War, the creation of the United Nations was based on a new global consensus around equality and human dignity. And a wave of decolonization swept the world. But let's not fool ourselves. The legacy of colonialism still reverberates. We see this in economic and social injustice, the rise of hate crimes and xenophobia; the persistence of institutionalised racism and white supremacy.[2]

These comments are interesting by virtue of their rarity, not because of their novelty. While the link between colonialism and current global inequality is scarcely acknowledged by international institutions beyond as a mere historical fact, the issue remains alive as an important element of academic discourse in a number of disciplines, including postcolonial studies and subaltern studies. The most important aspect of this scholarship is to identify the way colonial discourse on 'civilisation' took new forms but maintained old premises. Terms such as 'civilisation' and 'Christianising', the anthropologist James Scott writes,

---

1 Comments made by the British delegate in 1953 during discussions on the proposal to include a minority protection clause in the draft international human rights covenant. *See* UN Commission on Human Rights, *Summary Record of the 369th Meeting* (30 April 1953), UN Doc E/CN.4/SR369, p. 5.

Core themes in this paper were first presented as a keynote speech in the 'Workshop on Decolonisation and Minority Rights' at the Tom Lantos Institute on 9 July 2023. I am thankful to workshop participants for their challenging questions and insightful comments. I am also grateful to Dr Anna-Maria Biro and Dr Shaimaa Abdelkarim for their useful feedback on the draft paper. In writing some parts of the paper, I have also expanded, reframed, or reevaluated through decolonial lenses my previous research, published as two monographs: *Ethnicity and International Law: Histories, Politics and Practices* (Cambridge University Press, Cambridge, 2016) and *Minorities and the Making of Postcolonial States in International Law* (Cambridge University Press, Cambridge, 2021).

2 Full text of the speech is available at <www.nelsonmandela.org/news/entry/annual-lecture-2020-secretary-general-guterress-full-speech>, visited on 19 August 2023.

"strike the modern ear as outdated and provincial, or as euphemisms for all manner of brutalities. And yet if one substitutes the nouns *development, progress,* and *modernisation,* it is apparent that the project, under a new flag, is very much alive and well".[3] So far as international law is concerned, in the last many decades Third World Approaches to International Law (TWAIL) scholars have demonstrated how colonial connotations such as the standard of civilisation or the presumed incapacity of the colonised to govern their own affairs, continued in more subtle forms to inform, shape, and govern current international law and institutions to the disadvantage of already marginalised communities.[4]

Beyond these critiques and intellectual elucidations, however, calls have been made more recently to proactively look into ways in which colonial legacies can be undone and how colonial links can be de-linked, if possible at all. In other words, the agenda now is to put critiques into action. One of the key focuses of this important 'decolonising' project is on the domain of knowledge production. Started in South Africa and symbolised by the 'Rhodes Must Fall' campaign,[5] the decolonising the curriculum movement swept across academic institutions in the West, including traditionally elite ones, which directly benefitted from colonialism and the slave trade. The decolonising the curriculum campaign underscored the need for diversity of perspectives, reading materials, teachers, and pedagogies representing alternative non-White worldviews, so that the curriculum "reflects and addresses a range of experiences and *promotes cultural democracy*, as well as developing *all* students into critical and analytical thinkers and leaders within their education".[6] Similarly, the decolonising museums movement not only

3 J. C. Scott, *The Art of Not Being Governed: An Anarchist History of Upland Southeast Asia* (Yale University Press, New Heaven, 2009) p. 98 (emphasis in the original).

4 For a snapshot of TWAIL scholarship covering a wide range of international law areas, *see* A. Anghie, 'Rethinking International Law: A TWAIL Retrospective', 34:1 *European Journal of International Law* (2023) pp. 7–112. Anghie made the point specifically in response to Guterres comments (p. 97).

5 M. Mamdani, 'Between the Public Intellectual and the Scholar: Decolonisation and Some Post-independence Initiatives in African Higher Education', 17:1 *Inter-Asia Cultural Studies* (2016) pp. 68–83.

6 W. Ahmed, *et al.*, 'Decolonising the Curriculum Project: Through the Kaleidoscope' (2019), available at <www.decoloniseukc.files.wordpress.com/2019/03/decolonising-the-curriculum-manifesto.Pdf>, visited on 19 August 2023 (emphasis in the original). As part of this movement, Birmingham Law School at the University of Birmingham introduced a new compulsory module on 'Decolonising Legal Concepts' for undergraduate law students. For a more nuanced take on the movement, *see also* F. Adebisi, *Decolonisation and Legal Knowledge: Reflections on Power and Possibility* (University of Bristol Press, Bristol, 2023); M. al-Attar and S. Abdelkarim, 'Decolonising the Curriculum in International Law: Entrapments in Praxis and Critical Thought', 34 *Law and Critique* (2023) pp. 41–62.

demanded the return of historical artefacts to their rightful owners in former colonies but also sought to recognise the integral role of empire in the creation and maintenance of museums.[7] Scholars in a number of academic disciplines, including ones in core sciences, also took up the project of decolonising their respective disciplinary practices.[8] In this continuum, minority rights scholars are also gradually engaging with the decolonisation question with renewed rigour, and exploring what a decolonising project in the field of minority rights would look like.[9] Against this backdrop, in this paper I attempt to unpack the decolonising agenda in minority rights discourse and map out what such an agenda would entail.

Borrowing from Foluke Adebisi, I use 'decolonisation' as a collection of "strategies and trajectories whose boundaries are delineated, not only by the manifestations of the specific colonial manifestation contested, but also the structural and epistemic tools contextually available".[10] Thus, the decolonisation project entails a series of interconnected activities and purposes seeking to "fundamentally unseat colonially produced structures or coercive power and technologies of permanent dispossession and dehumanisation".[11] Translating this conception of decolonisation into minority rights discourse then reveals at least two major avenues to explore the nexus between decolonisation and minority rights: formal 'decolonisation processes' affecting minorities and 'decolonising minority rights discourse'.

---

7 *See* the statement of Museums Association, available at <www.museumsassociation.org/campaigns/decolonising-museums>, visited on 19 August 2023.

8 For example, s*ee* A. O'Brien, 'Decolonising Mathematics, a Case for Their Aestheticising' (2022), available at <www.kcl.ac.uk/decolonising-mathematics-a-case-for-their-aestheticising>, visited on 19 August 2023; M. Burgis-Kasthala and C. Schwobel-Patel, 'Against Coloniality in the International Law Curriculum: Examining Decoloniality', 56:4 *The Law Teacher* (2022) pp. 485–506. Similarly, Berlin-based Hertie School organised an important workshop on 'Decolonising Global Migration Law' in June 2022. The workshop agenda is available at <www.hertie-school.org/en/events/event-detail/event/workshop-decolonising-global-migration-law>, visited on 19 August 2023.

9 For example, the leading minority rights think-tank Tom Lantos Institute organised an interdisciplinary workshop on 'Decolonisation and Minority Rights' and also focused on this subject as the theme of its Annual Global Minority Rights Summer School in 2023. Event details available at <www.tomlantosinstitute.hu/events>, visited on 19 August 2023. Similarly, the Minority Rights Solidarity Network recently proposed a 'Decoloniality and Minority Rights' reading group. *See* <www.sussex.ac.uk/schrr/research/minority_rights_solidarity_network>, visited on 19 August 2023.

10 Adebisi, *supra* note 6, p. 21–22. For a useful summary of decolonisation discourses reflecting temporal-spatial breadth, *see* pp. 21–33.

11 *Ibid.*, p. 33.

First, the fundamental aspects of minority rights are intrinsically connected to colonialism and decolonisation processes in the vast majority of states. The construction of the minority as a socio-political category in need of protection is informed by the way colonial rule shaped legal, political, and economic architecture of communities over centuries. In the aftermath of formal decolonisation processes – as part of the right to self-determination but within a Eurocentric legal framework – many of these minorities found themselves in hostile new states, which asserted new forms of colonial relations vis-à-vis minorities. Operating as an ideology, the postcolonial state often marginalised minority groups but simultaneously justified such marginalisation in the name of national unity, liberal egalitarianism, and economic development. And all these happened within a global structure that sustains imperialism in many forms and shapes. Thus, decolonisation processes reveal a multi-layered system of asymmetric power-relations between minorities, on the one hand, and a wide range of national and transnational actors including majoritarian states, international financial institutions, and corporations, on the other hand.

Second, at the conceptual level, mainstream discourse on minority rights embodies a series of normative biases and assumptions, which ignore the centrality of power-relations, subaltern agency, political economy, hegemonic global governance structures, and masculinity, among others, to the conceptualisation of the minority and its protection. As a result, some of the core concepts such as the definition of minority, statehood, discrimination, violence, and protection, are often archaic, mono-dimensional, and marked by colonial understandings. Hence, there is an urgent need for decolonising foundational tenets in contemporary minority rights discourse. In doing so, it is imperative to critically examine relations of power and subaltern agency in the working of minority rights and, in this connection, to expose the kind of discourse they produce.

While both aspects of the nexus between decolonisation and minority rights are equally important and somewhat interrelated, this paper primarily focuses on the second aspect, i.e., 'decolonising minority rights discourse'.[12] I argue that contemporary minority rights discourse needs to engage closely with relations of power and subaltern agency to decolonise conventional thinking within the discipline. To substantiate this argument, in what follows, I analyse five key areas of relevance to this decolonising project. Given their centrality, concepts of power-relations and subaltern agency will unavoidably appear as recurring themes throughout the paper. First of all, the very conception of

12 For an in-depth analysis of the first aspect, *see* M. Shahabuddin, *Minorities and the Making of Postcolonial States in International Law* (Cambridge University Press, Cambridge, 2021).

the minority needs to be critically reevaluated through decolonial lenses to expose a sense of 'otherness' and 'backwardness' embedded in the concept. A decolonial understanding of the minority brings to the fore the question of power-relations and helps us problematise the notion of 'minority protection' within the liberal legal architecture of minority rights. As part of this inquiry, I also analyse elements of subjectivity in the conceptualisation of the minority and minority protection.

Second, the continuation of colonial boundaries in postcolonial states created and aggravated the minority issue in many postcolonial states. Unsurprisingly, a standard criticism against the decolonising project comes in the form of an assertion that undoing colonial boundaries would cause more trouble than ameliorating minority situations. While there is at least some merit in this proposition, the decolonial project cannot be sensibly reduced to the issue of colonial boundaries as a stand-alone item. Instead, the decolonising agenda requires a critical examination of the reification of the state itself. Thus, in this paper, I engage with a much broader notion of decolonising the state as a prerequisite for decolonising minority rights discourse.

Third, any decolonial project must pay attention to and engage with subaltern voices and perspectives. More specifically, the agenda of decolonising minority rights needs to mainstream the often-ignored aspect of resistance by minorities. Going beyond an elitist discourse on minority rights and minority protection within institutional sites, the decolonial project demands a sharp focus on learning from grassroots practices. It is in everyday struggles of minorities to protect their lives and livelihood that actual decolonisation is taking place. Their subaltern agency should, therefore, constitute the core of minority rights discourse.

Fourth, like any decolonial project, the agenda of decolonising minority rights needs to critically engage with the perception and role of law in minority rights protection. The project needs to reflect on how legal concepts and categories are themselves tools of oppression. This will then help underscore the strategic use of law as a site of contestation and also explore other possible languages of resistance, such as social movements, outside the domain of law. These strategic aspects of law and their role in social movements should form an important part of decolonising contemporary minority rights discourse.

And finally, as postcolonial studies and TWAIL have powerfully articulated, despite formal decolonisation, neo-colonialism and imperialism continue to subjugate postcolonial states and peoples in many ways. Developmental ideology historically offered an avenue to make such subjugation happen from the moment of formal decolonisation. In decolonising minority rights discourse, it is vitally important to take seriously the political economy

of violence and expose how minorities suffer economic marginalisation at multiple levels by powerful states, international financial institutions, postcolonial states, and national and transnational corporations. Compared to civil and political rights, this is rather an ignored area in contemporary minority rights discourse demanding adequate attention.

It is to be noted here that the list of five key areas of relevance, which I have identified and discussed in this paper, is by no means exhaustive. I hope my takes on these themes will provoke further discussion and enrich the field of research with more innovative thoughts and ideas. It also needs to be acknowledged at the outset that the project on decolonising minority rights is not a singular act; quite the opposite, it involves a complex web of activities and a wide range of actors. This paper focuses on various aspects of minority rights *discourse* while leaving aside other significant aspects of this project, such as decolonial *strategies* for minority rights. An important part of the decolonising project in general is active listening and attentiveness to subaltern voices. As a prominent Rohingya community leader powerfully made the point before the Human Rights Council in March 2019:

> Today, when this meeting is over, everybody will go back home. I have no home to go back to. When I leave Geneva, I return to the refugee camp in Cox's Bazar. I go to my shelter made of tarpaulin and bamboo. I invite you to come and visit me in my shelter. Come and visit the one million Rohingya refugees like me. Come and explain to us about the discussions *you* are having about us. Or, *include* us and *listen* to us.[13]

2 Reconceptualising the 'Minority' in Relations of Power

Any attempt to decolonise contemporary minority rights discourse should ideally begin with the concept of 'minority' itself, for the concept as conventionally understood is informed by a sense of 'otherness' and premised upon asymmetric power-relations, resonating with the colonial discourse on the standard of civilisation. This is largely due to the historical treatment of 'ethnicity' as 'primitive' and 'backward' in liberal political philosophy and the

13 UN Human Rights Council, Oral Statement for the Interactive Dialogue with the Special Rapporteur on the Situation of Human Rights in Myanmar, 11 March 2019. Statement made by Muhib Ullah, representing Arakan Rohingya Society for Peace and Human Rights, available at <www.fidh.org/en/region/asia/myanmar/oral-statement-for-the-interactive-dialogue-with-the-special> (emphasis added). Ullah was shot dead inside the refugee camp in September 2021.

dominance of the liberal ideology in the aftermath of the Second World War.[14] The assimilationist urge of liberal nationalism in the late nineteenth century had recourse to an influential concept of the period: social Darwinism.[15] Both monogenic and polygenic streams of social Darwinism, having the binding force of 'science', offered the logic of assimilation of different social groups within one political unit or their strict segregation on the basis of race. While the polygenists argued for the exclusion of the derogated 'other' to preserve racial purity, the liberal monogenic framework went beyond being a mere parallel of natural evolutionary processes to rationalise assimilation as part of social evolution.[16]

While describing social evolution, Peter Dickens notes, the social Darwinist scholarship indicated "progress occurring through evolution, direction to social change and teleology, an end which is built into social change itself".[17] Given that this monogenic understanding of evolution was informed by the Enlightenment philosophies, unsurprisingly all these concepts of progress,

14 For an elaboration of this argument, *see generally* M. Shahabuddin, *Ethnicity and International Law: Histories, Politics, and Practices* (Cambridge University Press, Cambridge, 2016).

15 For a detailed account of social Darwinism, *see* M. Hawkins, *Social Darwinism in European and American Thought, 1860–1945* (Cambridge University Press, Cambridge, 1997); P. Dickens, *Social Darwinism* (Open University Press, Buckingham, 2000); J. C. Greene, *Science, Ideology and World View* (University of California Press, Berkeley, 1981); J. Peel (ed.), *Herbert Spencer on Social Evolution – Selected Writings* (University of Chicago Press, Chicago, 1972).

16 For a monogenic-assimilationist account of social Darwinism, *see* C. L. Brace, 'Letter to The Washington Independent (September 12, 1861)' in E. B. Donaldson (ed.), *The Life of Charles Loring Brace Chiefly Told in His Own Letters* (Sampson, Low, Marston and Co., London, 1894) p. 390; F. Ludwig Buchner, *Man in the Past, Present and Future*, trans. W. S. Dallas (Asher and Co., London, 1872) pp. 151, 156, 157; H. Spencer, *The Study of Sociology*, 7th ed. (Kegan Paul, London, 1878) p. 51; C. Royer, *Origine de l'homme et des sociétés* (Guillaumin, Paris, 1870) pp. 169, 215–217, 270–272, cited in Hawkins, *supra* note 15, p. 126; L. L. Clark, *Social Darwinism in France* (The University of Alabama Press, Tuscaloosa, 1984) p. 14. For a polygenic-exclusionist account of social Darwinism, *see* G. Le Bon, *L'Homme et les sociétés: leurs origins et leur histoire*, 2 vols. (Rothschild, Paris, 1881) pp. 199–200, cited in Hawkins, *supra* note 15, p. 187; G. Le Bon, *Les Lois psychologiques de l'evolution des peuples*, 6th ed. (Felix Alcan, Paris, 1906) p. 26, cited in R. F. Betts, *Assimilation and Association in French Colonial Theory 1890–1914* (Columbia University Press, New York, 1961) p. 67; L. Gumplowicz, *Outlines of Sociology*, trans. F. W. More (Paine-Whitman, New York, 1963) p. 161, 177, 217; G. V. de Lapouge, *Les selections sociales* (Fontemoing, Paris, 1896) pp. 1, 5, 8, and 11, cited in Hawkins, *supra* note 15, pp. 192, 193; E. Haeckel, *The History of Creation, or the Development of the Earth and Its Inhabitants by the Action of Natural Causes*, rev. trans. E. Ray Lankester (King, London, 1876) pp. 303–310; A. de Gobineau, 'Essay' in M. Biddiss (ed.), *Gobineau: Selected Political Writings* (Jonathan Cape, London, 1970) p. 175.

17 Dickens, *supra* note 15, pp. 31–44.

direction, and teleology in fact related to the realisation of a civilised society in the Western European sense.[18] Thus, 'progress' is exemplified by modernisation: a modern society is a fully developed one that relies on modern political, educational, and legal systems as well as includes a value system supportive of economic growth in contrast to the 'traditional' societies that largely depend on clan-based or autocratic systems of government as well as pre-Newtonian science and technology.[19] The same is true for the concepts of 'direction' and 'end'.[20]

It is, therefore, the vision of a 'culture' through which 'progress' would be maintained and, thereby, the 'end' would be realised. Given that the 'high culture' that would lead to the liberal 'progress' is the selected (European) cultural traits in the social evolutionary process, everything else is arguably destined to submit to this high culture. This explains the logic of assimilation of the low cultural groups, such as ethnic minorities, into the liberal, universal high culture. The nineteenth-century concept of world civilisation was translated into the theory of modernisation in the early twentieth century and then into the notion of globalisation in the era that followed.[21] Nevertheless, in both cases, culture – in ethnic, hence backward, term – remained labelled as a barrier to progression; culture was invoked to explain apparently irrational behaviour and self-destructive strategies directed towards the attributes of advanced societies such as development and democracy.[22] So, the liberal anxiety is how to deal with the 'primitive' ethnic phenomenon as it remains relevant to the pragmatic need of dealing with problems emanating from ethnicity-defined phenomena such as ethnic minorities and ethnic conflicts. This anxiety is reflected in definitional debates on the minority. Here I use the term 'ethnicity' in a broad sense as the core of the conventional understanding of the minority in order to capture a general sense of 'backwardness' and 'otherness' embedded in the concept.[23]

18 *Ibid.*

19 *Ibid.*, p. 32.

20 For example, *see* F. Fukuyama, 'The End of History?' 16 *The National Interest* (1989) pp. 3–18.

21 A. Kuper, *Culture: The Anthropologists' Account* (Harvard University Press, Cambridge, 1999) p. 10.

22 *Ibid.*

23 As a broad theme, here 'ethnicity' includes attributes such as colour, descent, origin, religion, language, nationality, shared common ancestry, and history, among others. This understanding of ethnicity is deliberately wide, and while it is true that not all the religious or linguistic categories can be logically or practically brought under the rubric of ethnicity, sharp demarcation of each category is not necessary for the purpose of my thematic discussion in this paper.

2.1 *'Othering' Through Definition*

Difficulties in defining a minority within the liberal framework is obvious, in that the effort to define the minority represents an endeavour to define "the indefinable", rationalise the irrational.[24] Formulating a general definition of a group that is identified by the centrality of ethnic affiliation essentially contradicts the liberal proposition that ethnicity has no real value and is relevant, if at all, only for instrumental purposes.[25] Yet, as the liberal instrumentalist intuition dictates, the minority is a source of conflict; hence, some form of definition of a minority is necessary to ascertain with whom to deal. As a result, a series of context-specific definitions of minority emerged, each highlighting the definitional debate as well as the need for some sort of working definition.[26]

---

24 G. Guliyeva, 'Defining the Indefinable: A Definition of 'Minority' in EU Law', 9 *European Yearbook of Minority Issues* (2010) pp. 189–222.

25 I need to concede here that liberalism itself is not a homogeneous idea, and there is influential scholarship within liberalism acknowledging that there are compelling interests related to culture and identity, which are consistent with the liberal principles of individual freedom and equality and justify granting special rights to minorities. For example, *see* W. Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford University Press, Oxford, 1995); W. Kymlicka, *Politics in the Vernacular: Nationalism, Multiculturalism, and Citizenship* (Oxford University Press, Oxford, 2001) pp. 51–66; Y. Tamir, *Liberal Nationalism* (Princeton University Press, Princeton, 1995); J. Raz, 'Multiculturalism: A Liberal Perspective', *Dissent* (Winter 1994) pp. 67–79; J. Raz, 'Multiculturalism', 11:3 *Ratio Juris* (1998) pp. 193–205. However, such accommodation is conditional upon compliance with certain liberal values. This raises the issue of 'governmentality' and re-assertion of power-relations, which I have elaborated later. Also, there is dominant liberal voice labelling such efforts as 'illiberal' and counterproductive to liberalism itself. For example, *see* B. Barry, *Culture and Equality* (Polity Press, Cambridge, 2001).

26 For a comprehensive account of various UN-level attempts at defining the concept of minority, *see* UN General Assembly, *Report of Special Rapporteur on Minority Issues* (2019), UN Doc A/74/160. *See also* UN Commission on Human Rights, *Compilation of Proposals Concerning the Definition of the Term 'Minority'* (1986), UN Doc E/CN.4/1987/WG.5/WP.1. For scholarly interventions over decades, *see* K. Henrard*, Devising an Adequate System of Minority Protection* (Martinus Nijhoff Publishers, The Hague, 2000); P. Thornberry, *International Law and the Rights of Minorities* (Clarendon Press, Oxford, 1991); J. Packer, 'Problems in Defining minorities' in D. Fottrell and B. Bowring (eds.), *Minority and Group Rights in the New Millennium* (Brill Academic Publishers, Leiden, 1999) pp. 223–274; J. Packer, 'On the Definition of Minorities' in J. Packer and K. Myntti (eds.), *The Protection of Ethnic and Linguistic Minorities in Europe* (Abo Akademi University Press, Abo/Turku, 1993) pp. 23–65; G. Pentassuglia, *Defining 'Minority' in International Law: A Critical Approach* (Lapland University Press, Rovaniemi, 2000); G. Pentassuglia, *Minorities in International Law* (Council of Europe Publications, Strasbourg, 2002) pp. 55–75; N. Lerner, *Group Rights*

However, the need for defining a minority goes beyond the mere substantive and procedural specificity that effective protection of the group in question arguably requires. Rather, this need is related to a process in which some groups are attributed certain distinct characteristics and, thereby, identified as the conservative 'other' vis-à-vis liberal progressiveness. This ethnic notion of the minority then reflects back on the distinctiveness of the majority, or vice versa. For example, in 1954 the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities defined minorities as "those non-dominant groups in a population which possess and wish to preserve ethnic, religious or linguistic traditions or characteristics markedly different from those of the rest of the population".[27] Special rapporteurs Francesco Capotorti and Jules Deschenes specifically highlighted the element of a 'sense of solidarity' in their respective definitions of the minority in the 1970s and 1980s.[28]

The concept of 'otherness' in the sub-commission's understanding of the minority is translated into the subordinate position of the minority in a given society compared to the majority. At the same time, by wishing to preserve its distinctive characteristics as the insignia of its identity, the minority appears as a symbol of the nineteenth century's conservative tradition of defining the 'self' in ethnic terms, which makes it different from the liberal understanding of the 'self' as a non-ethnic or post-ethnic notion. In other words, this process of defining a minority can be seen as an ambiguous pronouncement: in one direction it speaks of the 'otherness' of the minority understood in terms of its ethnic differentiation from the majority; the converse of its 'otherness' is the affirmation of the homogeneity of the majority. In another direction it may speak to the liberal tradition by emphasising the contrast between those who are committed to speaking the language of ethnicity in their self-identification and the majority who have dispensed with such a 'primitive' condition.

---

and Discrimination in International Law, 2nd ed. (Martinus Nijhoff Publishers, The Hague, 2003); B. Vizi, 'Protection without Definition – Notes on the Concept of "Minority Rights" in Europe', 15 *Minority Studies* (2013) pp. 7–24; J. Pejic, 'Minority Rights in International Law', 19:3 *Human Rights Quarterly* (1997) pp. 666–685; V. Grammatikas, 'The Definition of Minorities in International Law: A Problem Still Looking for a Solution', 52:2 *Hellenic Review of International Law* (1999) pp. 321–364; J. R. Valentine, 'Toward a Definition of National Minority', 32:3 *Denver Journal of International Law and Policy* (2004) pp. 445–474; B. de Gaay Fortman, 'Minority Rights: A Major Misconception?' 33:2 *Human Rights Quarterly* (2011) pp. 265–303.

27 UN Doc E/CN4/358.

28 F. Capotorti, *Monograph 23 Prepared towards the Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, UN Doc E/CN4/Sub 2/384/Add5, para. 24; Jules Deschenes, *Proposals Concerning a Definition of the Term 'Minority'* (1985), UN Doc E/CN4/Sub2/1985/31, para. 181.

In this sense, the minority is not only the 'other' of the majority within a given polity because of its distinctive ethnic features but also, due to its tendency to portray the self-image in ethnic terms, it is the 'other' of liberal universalism itself. Therefore, instead of being understood as an isolated object with certain distinctive features, the minority as a concept needs to be perceived in relational terms – it is in this asymmetric relationship with the majority (in the realm of power-relations and in terms of demographic composition) and liberalism (at the ideological level) that the minority is consistently defined and understood as distinct as well as 'primitive'. This, then, necessitates a critical scrutiny of the notion of 'minority protection' within a liberal framework.

2.2 *Unpacking 'Minority Protection'*

Given that ethnicity turns the minority into the victim of oppression by the majority and also undermines the individual human rights of the minority group members, the liberal way of minority protection would thus logically mean the suppression of ethnicity through the individualist principles of equality and non-discrimination. In other words, the liberal version of minority protection appears as an emancipatory project: the liberal not only constructs the minority as a symbol of conservative passion but also protects them from the 'curse' of ethnicity – the very constitutive element of minorities. Given that the liberal idea of non-discrimination assumes that a treatment on ethnic or religious grounds is fundamentally irrational, this proposition completely undercuts the idea that groups should be protected on the basis of their ethno-religious features and solidarity.

Within a liberal contractualist framework, for example, a minority is defined as "a group of people who freely associate for an established purpose where their shared desire differs from that expressed by the majority rule".[29] With such an approach to the minority as an association, it is the "free desires of individuals" that determine the nature of such an association – classified as a positive association, which is formed by the voluntary choices of the constituent members, or a negative association, constructed by the majority or other external forces such as the state. Although this approach locates an individual in the context of his or her social life and surroundings as opposed to an "American extreme of the isolated individual", it nevertheless understands a minority group as "individuals in community".[30] And therefore, any claims of "'collective rights' in the sense of rights to be enjoyed by entities themselves" or "the rights of minority cultures", as opposed to the "cultural rights of minorities"

29 Packer (1993), *supra* note 26, p. 45.

30 Packer (1999), *supra* note 26, p. 244.

are perceived by this liberal approach as illiberal in nature, as they appear to justify actions which could violate human rights.[31] In this way, the reduction of a minority group to individuals is justified, the argument goes, as it allows no question of protecting any particular culture.

The problem with this position, of course, is that it fails to engage with what many liberals explicitly understand to be the problem – the link between ethnicity and violence – and assumes a position that tends to hide ethnicity by excluding it from the discourse, by not talking about it. The problem with the alternative position that they are alert to is that if there is this link between ethnicity and violence, then reinforcing it in regimes for minority protection may just end up affirming its value and importance. That is the liberal dilemma in dealing with the minority as an ethnic phenomenon.

Seen through Foucauldian lenses, the liberal requirement that groups need to act in a particular manner to enjoy rights in a liberal regime essentially symbolises a kind of power-relations produced through a combined process of "subjectivity" and "governmentality". A critical examination of the process of subjectivity sheds light on how the subject was constructed at different moments and in different institutional contexts; how the knowledge of the self is organised according to certain socio-political schemes; and how these schemes are defined, valorised, recommended, or imposed.[32] The most important aspect of this inquiry is what Foucault calls the "techniques of the self", which people in positions of power (the producers) prescribe to individuals with a view to determining their identity, maintaining it, or transforming it in terms of a certain number of ends through self-knowledge.[33]

The element of governmentality in power-relations becomes relevant thus. Here, governmentality means a collective process involving institutions, procedures, analyses, reflections, calculations, and tactics "that allow the exercise of the very specific albeit complex form of power, which has as its target population, as its principal form of knowledge political economy, and as its essential technical means apparatus of security".[34] Seen through the optics of governmentality, the government then has as its purpose the welfare of the population, on which the government will "act either directly, through large-scale campaigns, or indirectly, through techniques that will make possible,

31 *Ibid.*, pp. 242–243.

32 M. Foucault, 'Subjectivity and Truth', in P. Rainbow (ed.), *Essential Works of Foucault 1954-1984*, vol. I (Penguin Books, London, 2000) pp. 87–92.

33 *Ibid.*, p. 87.

34 M. Foucault, 'Governmentality' in J. D. Faubion (ed.), *Essential Works of Foucault 1954–1984*, vol. III (Penguin Books, London, 2002) p. 220.

without the full awareness of the people, achieving certain goals".[35] In the case of minorities, for example, assimilationist policies would be frequently implemented as a series of measures advocated as necessary to achieve goals of equality and non-discrimination, on the one hand, and national unity and territorial integrity, on the other.

In short, relations of power put in place a system of differentiations that permits one to act upon the actions of others to pursue certain objectives.[36] Elaborated, transformed, and organised, power-relations are rooted in the whole network of social relations involving instrumental modes (such as the threat of arms, speech, economic disparities) and various forms of institutionalisation, including traditional conditions, legal structures, and matters of habit.[37] Conventional attempts to define the minority and to frame minority protection squarely fit into this mould of power-relations, as we have seen. It is, therefore, essential to foreground the relations of power in decolonising the concepts of minority and minority protect.

2.3 *Subjectivity and Minority Agency*

While it is generally accepted that the objectively recognisable fact of having ethnic, religious, and linguistic characteristics differing from those of the rest of the population should be the starting point of every effort to formulate a definition of the minority, the latest attempt at developing a working definition below took rather an extreme approach and undermined the subjective element (the desire), which we noted as a core element in previous definitions:

> An ethnic, religious or linguistic minority is any group of persons which constitutes less than half of the population in the entire territory of a State whose members share common characteristics of culture, religion or language, or a combination of any of these. A person can freely belong to an ethnic, religious or linguistic minority without any requirement of citizenship, residence, official recognition or any other status.[38]

Although the definition has a clear emphasis on free association, it focuses heavily on the objective criteria and somewhat downplays the subjective element of the desire of the minority to preserve their objective elements.

35 *Ibid.*, p. 217.

36 M. Foucault, 'The Subject and Power' in J. D. Faubion (ed.), *Essential Works of Foucault 1954-1984*, vol. III (Penguin Books, London, 2000) p. 344; *see generally* pp. 326–348.

37 *Ibid.*

38 F. de Varennes, *Report of Special Rapporteur on Minority Issues* (2019), UN General Assembly, UN Doc A/74/160, para. 53.

Understandably, the intention behind this minimalist approach to requirements in defining a minority is to extend legal protection to the maximum number of groups. Nevertheless, this approach is problematic for a number of reasons, especially if seen through decolonial lenses.

First, with its almost exclusive focus on objective elements, the definition inadvertently adopts an essentialist approach to identity markers as self-contained categories. In the process it ignores how, far from being fixed primordial categories,[39] identities evolve and are constructed through ethno-genesis.[40] As Scott asserts, "[*a*]*ll* identities, without exception, have been socially constructed" and whether invented or imposed, such identities select certain traits, such as religion, language, skin colour, diet, means of subsistence, as the desideratum.[41] "To the degree that the identity is stigmatized by the larger state or society, it is likely to become for many a resistant and defiant identity."[42] The issue is far more crucial in this globalising world with better technologies readily available to make possible interactions, transmutation, and encounters between cultures more than any time before in human history.[43] In this sense, it is through the forceful collective desire to preserve relevant ethno-cultural traits in the face of adversaries that minority identities are constructed or at least sharpened. Not paying attention to these nuanced processes of identity formation runs the risk of normatively locking minorities into fixed identity categories. One might make the counter argument that the element of 'free association' offers necessary protection but the point to be made here is that minority identities need not be conceived of in such a binary way.

Second, in addition to the transmutation of cultural identities, how one forms a knowledge about the self is also relevant to a critique of the definition in question. I have noted earlier Foucault's critical take on the process in which the knowledge of the self is constructed through a series of "techniques of the self". It would be pertinent to highlight the point further by briefly mentioning

39 For a debate on the role of primordial ties in identity formation, *see* E. Shils, 'Primordial, Personal, Sacred, and Civil Ties', 8 *British Journal of Sociology* (1957) pp. 130–145; E. Shils, 'Colour, the Universal Intellectual Community, and the Afro-Asian Intellectual', 96:2 *Daedalus* (Colour and Race) (1967) pp. 279–295; J. Franklin (ed.), *Colour and Race* (Houghton Mifflin Co., Boston, 1968); P. L. van den Berghe, *The Ethnic Phenomenon* (Elsevier, New York, 1981); C. Geertz, *Old Societies and New States* (Free Press, New York, 1963) pp. 108–113; C. Geertz, *The Interpretation of Cultures* (Basic Books, New York, 1973).

40 J. Bengoa, *Existence and Recognition of Minorities* (2000), UN Working Group on Minorities, UN Doc E/CN.4/Sub.2/AC.5/2000/WP.2.

41 Scott, *supra* note 3, p. xii.

42 *Ibid.*, p. xiii.

43 Bengoa, *supra* note 40. *See also* H. K. Bhabha, *The Location of Culture*, 2nd ed. (Routledge, London, 1994).

four major types of such techniques: "technologies of production" to produce, transform, or manipulate things; "technologies of sign systems" to use symbols, meanings, or significations; "technologies of power" to determine not only the conduct of individuals and submit them to certain ends or domination but also to objectivise the subject in the process; and finally, "technologies of the self", which permit individuals to "effect a certain number of operations on their own bodies and souls, thoughts, conduct, and way of being, so as to transform themselves in order to attain a certain state of happiness, purity, wisdom, perfection, or immortality".[44] Each of these technologies implies certain modes of domination as well as modification of individuals, thereby engendering new forms of power-relations. In this sense, the knowledge of the 'self' held by the subject of themselves is far from static and is indeed a product of evolving power-relations. The above definition of the minority largely misses the point by assuming a fixed, a priori existence of ethnic, religious or linguistic minorities, which 'a person can freely belong to'.

And finally, a more compelling issue here is the question of minority agency. The sole focus on the objective criteria reduces the minority to a subject of an automatic process of external identification based on those objective criteria. This takes agency away from minority groups as to their own collective imaginations of their identity at a given time or in a given political context – factors which are in turn contingent upon a wide range of other factors. In a sense, the emphasis on the objective element can be seen as a response to another extreme view that "objective criteria do not constitute elements of a definition", as put forward by the Advisory Committee on the Framework Convention on National Minorities in 2016.[45] However, seen through decolonial lenses, while the purely objective approach to the minority appears quite colonial as a normative phenomenon, it is indeed the case that historically identity-labelling has been a common feature of colonial administration in many parts of the world.

The evolutionary science of the nineteenth century offered not only a blueprint for a hierarchical mapping of the international society but also an agenda of action for dealing with 'primitive-uncivilised' nations.[46] This racially motivated hierarchical mapping worked at the micro level too; social Darwinism

44 M. Foucault, 'Technologies of the Self' in P. Rainbow (ed.), *Essential Works of Foucault 1954-1984*, vol. I (Penguin Books, London, 2000) p. 225; *see generally* pp. 223–252.

45 Council of Europe, *Thematic Commentary No. 4: The Framework Convention: A Key Tool to Managing Diversity through Minority Rights* (Council of Europe Publications, Strasbourg, 2016). I have discussed in the previous sub-section the problem with a purely contractualist approach to the definition of minority.

46 *See* Shahabuddin, *supra* note 14, pp. 62–97.

proved to be an extremely handy tool for ordering according to evolutionary progress various groups that European colonial powers 'discovered' in the rest of the world. In India, as Meena Radhakrishna notes, the evolutionary theory was applied to "sort out the loyal from the disloyal, the respectable from the criminal, the malleable from the obstinate".[47] In the case of Africa, Kwadwo Appiagyei-Atua highlights, although minority groups had already existed before the arrival of European colonisers, the advent of colonialism created several "new minority groups" and "exposed pre-colonial minority groups to new and intractable challenges through efforts to foster and facilitate the development of the colonial economic enterprise".[48] It is well-documented how European missionaries and scholars sharpened Hutu-Tutsi identities in Rwanda.[49] Awareness of distinct identities existed in pre-colonial times in most colonial cases but re-defining those identities by Europeans and then translating those into policy interventions in line with colonial administrative convenience is at the root of many ethno-religious conflicts in postcolonial states. As these examples illustrate, defining a minority based on 'objective' criteria alone is prone to external determination and, therefore, problematic at many levels. Not taking seriously minority agency and the relations of power, within which the minority is conceptualised as we have seen in the preceding sections, only adds to the limitations of current approaches to the definitional debate.

2.4 *An Alternative Vision for the Minority?*

As the preceding discussion on various attempts to define the minority reveals, what remains at the heart of such exercises is an iteration of asymmetric power-relations of different forms: beginning from the hegemony of liberal worldviews which identify the ethnic connotation of minorities as primitive – to a version of liberalism that reduces the question of minority identity to individual choice as part of the larger agenda of undermining precisely what forms the minority identity but the liberal considers primitive and therefore irrelevant – to a formulation which takes minority agency away by subjecting their construction to external identification based on objective criteria. The

47 M. Radhakrishna, 'Of Apes and Ancestors: Evolutionary Science and Colonial Ethnography', in B. Pati (ed.), *Adivasis in Colonial India: Survivals, Resistance and Negotiation* (Orient Blackswan, New Delhi, 2011) p. 39.

48 K. Appiagyei-Atua, 'Minority Rights, Democracy and Development: The African Experience', 12 *African Human Rights Law Journal* (2012) pp. 73–74.

49 E. Katongole, *A Future for Africa: Critical Essays in Christian Social Imagination* (Scranton University Press, Scranton, 2005) pp. 98–99; E. R. Sanders, 'The Hamitic Hypothesis: Its Origin and Functions in Time Perspective', 10:4 *Journal of African History* (1969) pp. 521–532; P. Uvin, 'Ethnicity and Power in Burundi and Rwanda: Different Paths to Mass Violence', 31:3 *Comparative Politics* (1999) pp. 253–271.

ensuing concept of minority 'protection' then evolves within this asymmetric power structure.

Attempts to decolonise contemporary minority rights discourse need to reconceptualise the minority beyond the dominant 'vulnerability framework' in existing scholarship, which conceives of the minority merely as helpless social groups in constant need of external protection. Within this vulnerability framework, minorities are generally understood as mere subjects of oppression; this in turn makes them the individual objects of international human rights discourse along with members of other oppressed social groups – based on gender, sex, or age – that too routinely face discrimination but generally do not question the legitimacy of the state. While the traditional framework will continue to have its relevance, it is far from adequate to fully grasp the peculiarities of minority groups as political entities or to understand their particular needs within the state they find themselves in.

The decolonising project calls for a new vision of the minority as an organising element of the state. In this regard, rehistoricising the state itself essentially from minority perspectives would demystify many of the suspicions around the special status of minorities within a state and make political and economic concessions to them more palatable to the broader society. A key part of this subaltern historiographic project should be to clearly demonstrate how the process of state-making and border drawing left minorities behind and denied them their legitimate right to self-determination. Since the birth of modern statehood in Westphalia, whenever states have been reorganised, the minority question resurfaced in relation to the very political organisation of the state: how to deal with the leftover population (minorities), who have been denied their own state? The question reappeared in the aftermath of the Great War in Paris Peace negotiations and in the Mandate System, and then again at the time of decolonisation, and more recently, in the aftermath of the collapse of the Soviet Union. This underscores the sui generis nature of minorities, compared to other vulnerable social groups. This project of retelling the history of the state from minority perspectives is especially relevant to postcolonial states wherein state-making has been a hasty and messy affair. However, as Edward Said reminds us, such a subaltern historiography of the state is going to be methodologically challenging, precisely because of the fact that as subalterns their history as well as their historical documents are necessarily in the hands of elites who write the dominant history of the state.[50]

50 E. W. Said, 'Foreword', in R. Guha and G. C. Spivak (eds.), *Selected Subaltern Studies* (Oxford University Press, Oxford, 1988) p. vii.

Another important and interconnected way of looking beyond the vulnerability framework would be to think about the minority as part of the global governance structure. Feminist legal approaches to statehood can be a useful tool in this aspect of decolonising minority rights.[51] To begin with, feminist scholars have called for dismantling the idea of state as a homogeneous entity with a single centre of power and, instead, appreciating the state as a complex network of interrelated but distinct institutions, relations, hierarchies, discourses, interests, and players. Such an understanding enables us to closely study the particular mechanisms of power within the state.[52] In this connection, Hilary Charlesworth and Christine Chinkin hope that "[t]he methodology of challenging gendered dichotomies classifying the world according to male perspectives and priorities could be used to scrutinise established dichotomies", for example, of state/non-state actors.[53]

In this regard, Karen Knop in particular has emphasised the need for questioning the assumed centrality of statehood and sovereignty in the international legal order and for exploring possibilities of its reconstruction by understanding the relationship between the state and civil society.[54] She focused primarily on how the existence of a robust civil society at the international level and more active participation of women therein can challenge the asymmetric power-relations in both the state system and the civil society, thereby making the global decision-making more responsive to women's interest. The same argument can be made about more visibility of minority groups in international decision-making as part of the global governance structure.

On the other hand, Ruth Houghton and Aoife O'Donoghue bring feminist insights into the discourse on global constitutionalism and its utopian vision of

51 H. Charlesworth and C. Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester University Press, Manchester, 2000) p. 168; R. Kapur, *Gender, Alterity and Human Rights: Freedom in a Fishbowl* (Edward Elgar Publishing Ltd., Gloucestershire, 2018) p. 101.

52 *See* W. Brown, *States of Injury* (Princeton University Press, Princeton, 1995) p. 179; J. Allen, 'Does Feminism Need a Theory of "The State"?' in S. Watson (ed.), *Playing the State: Australian Feminist Intervention* (Allen & Unwin, Sydney, 1990) pp. 21–38; R. Pringle and S. Watson, 'Fathers, Brothers, Mates: The Fraternal State in Australia', in *Playing the State: Australian Feminist Intervention*, pp. 229–243.

53 Charlesworth and Chinkin, *supra* note 51, p. 167.

54 K. Knop, 'Re/statements: Feminism and State Sovereignty in International Law', 3 *Transnational Law and Contemporary Problems* (1993) pp. 293–344; K. Knop, 'Why Rethinking the Sovereign State is Important for Women's Human Rights Law', in R. Cook (ed.), *Human Rights of Women: National and International Perspectives* (University of Pennsylvania Press, Philadelphia, 1994) pp. 153–164.

international law.[55] Critically engaging with feminist utopias in science fiction, they demonstrate how such utopias help understand ways of dismantling hierarchical structures and of devising non-patriarchal approaches to governance. Such insights, in turn, facilitate the reimagining of global constitutionalism by problematising the relationship between constituent power holders and the constituent moment, thereby "offering new points of departure for global constitutionalist debates".[56] Their feminist approach to global constitutionalism also dismantles the homogeneous concept of 'global community' by highlighting alternative ways of constructing communities. Such a feminist revision allows for an "alternative basis for understanding global community and its relationship with constituent and constituted power".[57] The decolonising project on reconceptualising the minority as an organising element of the global order has a lot to benefit from feminist approaches to global constitutionalism and global governance.

Thus, having contextualised the minority in relations of power and underscored the importance of subaltern agency as part of the decolonising project, I emphasise the need for the reconceptualisation of the minority by moving beyond the normative framework of vulnerability and victimhood, and instead by embracing a new vision for the minority as a constitutive element of the state as well as global governance. This is an emancipatory move, in that it has the potential of redefining existing power-relations vis-à-vis the majoritarian state and international institutions, thereby opening new avenues for asserting minority agency. However, let me reiterate that this call by no means undermines the relevance and significance of existing international human rights mechanisms for minority protection – however meagre those are – at least in the short run. Instead, my argument for an alternative approach to conceptualise the minority is more about offering a better premise for the protection of minorities beyond the 'protectionist' rhetoric.

3 Decolonising the State as a Prerequisite

Writing in 1895, the positivist international lawyer Thomas J. Lawrence defined international law as "the rules which determine the conduct of the general body of civilised states in their dealings with one another", and accordingly

55 R. Houghton and A. O'Donoghue, '"Ourworld": A Feminist Approach to Global Constitutionalism', 9:1 *Global Constitutionalism* (2020) pp. 38–75. They define global constitutionalism as "theories of constitutionalism for global governance".

56 *Ibid.*, p. 48.

57 *Ibid.*, p. 61.

argued that "[t]he area within which the law of nations operates is supposed to coincide with the area of civilization".[58] For the contemporary Cambridge international law professor John Westlake, "the general rules of international law apply in their fullness only to sovereign States like France or the United Kingdom", and sovereignty is an attribute of European civilisation alone.[59] This was indeed the dominant view among the nineteenth-century international lawyers in general. These ideas are now, of course, rejected. International lawyers of our generation and the generation before have challenged or at least expressed discomfort with Eurocentrism, and focused more on heterogeneity in the development of international law. With the solemn declaration of sovereign equality among nations in the UN Charter and the formal decolonisation process of the 1960s and the 1970s, international egalitarianism temporarily offered a renewed hope. Nevertheless, as noted earlier, the colonial architecture of international law largely remained in place. Colonial boundaries continued to shape the political imagination of postcolonial states. Liberal ideologies soon became universal norms, ready to be exported globally, if necessary by coercive means. In the economic domain, the colonial underpinning of international law has been transformed into a subtler form of economic imperialism through free market economy, deregulation, free movement of capital, and developmentalism. In other words, concerns about inclusiveness and exclusiveness in international law are still relevant.

Thus, although statehood has always been a central element of international legal studies, in the orthodox narrative of international law the peculiarities of postcolonial nation-states hardly drew any attention. Instead, the concept of statehood is heavily influenced by Eurocentric worldviews. The questions of self-determination and decolonisation appear only *en passant* in the context of creating new states with the assumption that as soon as these states are created, they join a 'horizontal' system of states governed by the standard international legal regime. Therefore, with doctrinal approaches to the question of statehood, mainstream international law often fails to fully appreciate the complexities and peculiarities of postcolonial statehood and the centrality of international law therein. In other words, like almost all other branches of international law, the discourse on statehood is also dominated by Eurocentrism, wherein the European experience of the historical development of states is flatly assumed as universal. This has significant implications for minority rights discourse.

58 T. J. Lawrence, *The Principles of International Law* (Macmillan and Co., New York, 1895) p. 1, 59.

59 J. Westlake, *Chapters on the Principles of International Law* (The University Press, Cambridge, 1894) p. 86.

The creation and continuation of the 'minority problem' is closely connected to the formation of the modern sovereign state itself – both in Europe and beyond. This is due to the denial of statehood to aspiring nations, who are then treated as the leftover of the nation-state making process. It is, therefore, not an uncommon phenomenon that minorities are seen as a threat to the political and territorial integrity of the states they live in. The nationalist elites in postcolonial states had even more serious reasons for concern. This is because, compared to European political boundaries, which to some extent coincided with linguistic groups, colonial boundaries were drawn with little attention paid to the demographic composition.[60] Since the postcolonial states were set to continue with the colonial boundaries, these elites were well-aware of the immediate challenge of unifying the entire nation within the given territorial boundary, however arbitrary. Therefore, the solution to this potential problem was sought in what later came to be popularly known as 'nation-building'.

The ideology of the postcolonial national state is premised upon a homogenous national identity that absorbs all ethno-cultural differences. Given the long-term goal of assimilation and homogenisation, it is expected that the minority problem would wither away. At the same time, the process of diminishing all meaningful ethno-cultural diversity and reducing such diversity to a token showcase element imposes the majoritarian identity on the entire nation. In other words, the majoritarian culture, belief system, and cultural codes come to synonymise 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, acts as a tool to perpetuate the dominance of the majority group over the minority in political and cultural domains of the new state, leaving the minority at the mercy of the majority on vital political and economic issues.

International law unequivocally facilitates the ideological function of the postcolonial national state by offering the necessary legal basis for the demarcation of territorial and political boundaries of the national state.[61] With its ambition of achieving a homogenous and unified sovereign entity, the postcolonial state essentially relies on international law principles governing postcolonial boundaries, 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. In other words, colonial territorial boundaries define the postcolonial state. In this set-up, where the

60 *See* I. Griffiths, *The Atlas of African Affairs*, 2nd ed. (Routledge, London, 1995).

61 For an elaboration of this argument, *see* Shahabuddin, *supra* note 12, pp. 89–105.

'national' often equates to the majoritarian, despite the lofty slogan of nation-building, minority groups remain exposed to political and cultural suppression.

Despite its questionable universality, the international law principle of the continuity of colonial boundaries in postcolonial states – commonly referred to as the principle of *uti possidetis juris* – continued to dominate the international legal imagination regarding the making of postcolonial boundaries.[62] The proposition that the continuation of colonial boundaries would avoid territorial conflicts between and among postcolonial states invariably informed all postcolonial and even non-colonial boundary settlements for new states.[63] This consensus on the pragmatic need for the continuation of colonial boundaries, along with the normative pull of the doctrine in general, is problematic. This is because, far from being a corrective to potential chaos, the continuation of arbitrarily drawn colonial boundaries undermines the legitimate right to self-determination of numerous ethnic minorities in postcolonial states, and often results in violent ethnic conflicts.[64] Also, with the reification of the nation-state form at the core of the international legal imagination and as the building block of the international order, international law legitimises the marginalisation of minorities as the left-over of the state-making process. In this way, international law advances the ideology of the postcolonial national state. The 'minority problem' is, therefore, embedded in the very process of the creation and reification of the postcolonial national state through the operation of international law.

62 For a brief history of *uti possidetis*, *see* S. R. Ratner, 'Drawing a Better Line: *Uti Possidetis* and the Borders of New States', 90:4 *American Journal of International Law* (1996) pp. 592–601. The view that the *uti possidetis* principle should be applied to postcolonial territorial delimitation was asserted by the ICJ Chamber in the *Burkina Faso* v. *Mali* case, ICJ Reports (1986) p. 565. This position was later endorsed by the arbitral tribunal in the *Guinea Bissau* v. *Senegal* case, ICJ Reports (1991) p. 53 and by the ICJ in the *Kasikili/Sedudu Island* (*Botswana* v. *Namibia*) case, ICJ Reports (1999) p. 6; the *Land and Maritime Boundary* (*Cameroon* v. *Nigeria*) case, ICJ Reports (2002) p. 303; and the *Frontier Dispute* (*Benin* v. *Niger*) case, ICJ Reports (2005) p. 90. For a critical take on the principle, *see* S. Lalonde, *Determining Boundaries in a Conflicted World: The Role of* Uti Possidetis (McGill-Queen's University Press, Montreal, 2002); D. M. Ahmed, *Boundaries and Secession in Africa and International Law: Challenging* Uti Possidetis (Cambridge University Press, Cambridge, 2015).

63 For example, the principle was applied by the Badinter Commission, dealing with legal issues emanating from the dissolution of the Socialist Federal Republic of Yugoslavia in 1991. *See* Conference on Yugoslavia, 'Arbitration Commission Opinion No. 3' (1991), 3 *European Journal of International Law* (1992) p. 185.

64 *See* M. Shahabuddin, 'Post-colonial Boundaries, International Law, and the Making of the Rohingya Crisis', 9:2 *Asian Journal of International Law* (2019) pp. 334–358.

Thus, it is vitally important that the project on decolonising contemporary minority rights discourse engages with the broader question of decolonising the state itself as a prerequisite. It is often the case that any proposition of decolonising statehood, especially postcolonial statehood, is immediately reduced to the question of undoing modern-day territorial boundaries of states and then met with an accusation of absurdity. As I have noted before, the continuation of colonial boundaries as a default choice is indeed a major cause behind many minority crises and the issue needs some thinking. A number of African scholars including Makau Mutua, Ali Mazrui, and Obiora Okafor, have in the past questioned the legitimacy of colonial boundaries of postcolonial African states and argued for their revision, thereby bringing ethnic peace to the continent.[65] At a more general level, the international lawyer Steven Ratner and the political theorist David Miller argued for a principled, normative basis for boundary-making as opposed to an automatic application of the principle of *uti possidetis*.[66]

Revisiting territorial boundaries has also been highlighted as part of the discussion on remedial secession and the Responsibility to Protect (R2P) under international law.[67] It is worth remembering that arguments for remedial secession paved Bangladesh's way to statehood in 1971 and finally brought an end to the indiscriminate brutality of the Pakistan army against Bangalees in the then East Pakistan. The creation of South Sudan is a more recent example. However, at the normative level, the development of the R2P principle has

65 M. Mutua, 'Why Redraw the Map of Africa: A Moral and Legal Inquiry', 16:4 *Michigan Journal of International Law* (1995) pp. 1113–1176; A. Mazrui, 'The Bondage of Boundaries', *The Economist*, 11 September 1993, p. 28; O. C. Okafor, '"Righting", Restructuring, and Rejuvenating the Postcolonial African State: The Case for the Establishment of an AU Special Commission on National Minorities', 13:1 *African Yearbook of International Law* (2006) pp. 43–64.

66 Ratner, *supra* note 62; D. Miller, 'Boundaries, Democracy, and Territory', 61:1 *The American Journal of Jurisprudence* (2016) pp. 37–40.

67 *See* A. Buchanan, 'Democracy and Secession', in M. Moor (ed.), *National Self-determination and Secession* (Oxford University Press, Oxford, 1998) pp. 14–33; *See generally* UN General Assembly, Resolution 60/1, Provisional Agenda Items 46 and 120, Supp. No. 49 (24 October 2005), UN Doc A/RES/60/1, paras. 138–139. *See also* R. Cohen and F. M. Deng, *Masses in Flight: The Global Crisis of Internal Displacement* (Brookings Institution Press, Washington DC, 1998) pp. 275–276; G. Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All* (Brookings Institution Press, Washington DC, 2008); R. Cohen, 'Humanitarian Imperatives are Transforming Sovereignty', 9 *Northwestern Journal of International Affairs* (2008) pp. 2–13; International Commission on Intervention and State Responsibility, *The Responsibility to Protect* (International Development Research Centre, Ottawa, 2001); UN Secretary-General, *Implementing the Responsibility to Protect: Report of the Secretary-General*, Agenda Items 44 and 107 (12 January 2009), UN Doc A/63/677.

been marred by uncertainty and lack of clarity on objective criteria as well as by subjective considerations on who should get to decide where and when to intervene.[68] These ambiguities make the entire project tenuous, and it is hardly surprising that many postcolonial states look at the R2P project with suspicion.[69]

At the same time, it also needs to be acknowledged that creating a new state by breaking with the oppressive state does not always solve minority problems, in that the new state is unlikely to be ethnically homogeneous. Therefore, problems inherent to the very ideology of the postcolonial state will multiply and continue in new forms to marginalise minorities in the new state, especially in the absence of strong representative institutions.[70] Thus, decolonising the state, as a precondition for decolonising minority rights, perhaps demands a more radical reconceptualisation of the state outside the tired category of the nation-state in its reified, essentialist form.

James Scott, in his seminal work *The Art of Not Being Governed*, reminds us that until "not so very long ago" the great majority of humankind remained self-governing outside the now-conventional framework of the nation-state. The perception of the modern state as the teleological end of human progress is rather a new phenomenon. He broadly categorised the history of political development leading to the current domination of the nation-state form as "stateless era" followed by an "era of small-scale states encircled by vast and easily reached stateless peripheries". The third era was a "period in which such peripheries are shrunken and beleaguered by the expansion of state power", which is eventually followed by an era in which "virtually the entire globe is 'administered space' and the periphery is not much more than a folkloric remnant".[71] To be more specific, although the organised process of state-making and state-expansion started under colonialism, it is since the end of the Second World War that the power of the modern state to deploy what Scott calls "distance-demolishing technologies", such as railroads, all-weather roads, telephone, telegraph, airpower, and information technology, changed

68 A. Orford, *International Authority and the Responsibility to Protect* (Cambridge University Press, Cambridge, 2011).

69 B. S. Chimni, *International Law and World Order: A Critique of Contemporary Approaches*, 2nd ed. (Cambridge University Press, Cambridge, 2017) p. 347.

70 Neera Chandhoke makes the argument especially in relation to Jammu and Kashmir in India. *See generally* N. Chandhoke, *Contested Secessions: Rights, Self-determination, Democracy, and Kashmir* (Oxford University Press, New Delhi, 2012). Rein Mullerson makes the same argument in the context of Eastern Europe and the former USSR. *See* R. Mullerson, 'Minorities in Eastern Europe and the Former USSR: Problems, Tendencies and Protection', 56 *Modern Law Review* (1993) pp. 801–802.

71 Scott, *supra* note 3, p. 324.

the strategic balance of power between self-governing peoples and nation-states so drastically that there is hardly any friction of terrain for self-governing peoples to run away from the coercive governmentality of the nation-state.[72]

Before such wholesale takeover of the last remaining hideaway space by modernist and capitalist interventions as part of the civilisational discourse, Scott argues, over the course of two millennia hill peoples have been fleeing the oppressions of state-making projects: slavery, conscription, taxes, corvée labour, epidemics, and warfare. As runaway, fugitive, maroon communities, their physical dispersion in rugged terrain, their mobility, their cropping practices, their kinship structure, and their pliable ethnic identities "effectively served to avoid incorporation into states and to prevent states from springing up among them".[73] In other words, such tribal practices are a kind of resistance to the nation-state form as an embodiment of civilisation since the time of colonial rule, and the communities themselves can be described as "barbarians by design".[74] Such a refutation of the nation-state as the end product of civilisational progress strikes at the very root of attempts to reify the state by unpacking the history of how states came into being as the most dominant factor in the world order at a certain moment in time and under certain material conditions and, in turn, opens up new avenues for thinking about alternative futures for minorities in the broader scheme of global history and global governance, as indicated in the previous section.

If the past of the state is far from unambiguous, the future is not absolutely certain either. In an increasingly complex, rapid, and multi-faceted transformation of the existing global order, the future of the state is often debated. Especially at the time of the collapse of the Soviet Union, the ambitious liberal project of reimagining and reconstructing the world order raised serious questions about the future of the nation-state. Writing in 1986, Karl Deutsch predicted that so far as functional characteristics of the state, such as enforcement mechanisms, decision-making, and administration and coordination, are concerned, the state would survive until about 2200 AD.[75] In contrast, Martti Koskenniemi, in his article 'The Future of Statehood', predicted the continued survival of the state as the second-best choice in the absence of any universal understanding and agreement on a better life beyond the state.[76]

72 *Ibid.*, p. xii.
73 *Ibid.*, p. x.
74 *Ibid.*, p. 8.
75 K. W. Deutsch, 'Functions and the Future of the State', 7:2 *International Political Science Review* (1986) p. 221.
76 M. Koskenniemi, 'The Future of Statehood', 32:2 *Harvard International Law Journal* (1991) pp. 397–307.

In his 1996 work 'The Future of the State', Eric Hobsbawm acknowledged that after more than two centuries of unbroken advancement in state development, the state entered an era of uncertainty or even retreat largely due to three major factors: the growth of the transnational economy restricting the state's capacity to direct national economies; the rise of regional and global institutions to which individual states defer; and the technological revolution in transport and communications that has significantly reduced the relevance of territorial borders.[77] He, however, underscored the need for the continued presence of the state to mitigate grave inequality emanating from neoliberal economic exploitation and the ensuing need for income redistribution.[78] To some extent, the global surge in nationalist politics, putting minorities at even higher risk of political oppression, can be explained as a response to popular anxieties resulting from rising inequality.

Between the ambiguous past and the uncertain future, the state still remains the core element of global governance. But the broader point I am trying to make here is that our imagination of alternative political futures for minorities does not need to be essentially confined by a statist framework – at least at the conceptual level. A decolonial project deserves such openness of thoughts. Serious scholarly engagements with pre-colonial and pre-state modes of the organisation of socio-political life, which are still evident in many indigenous communities around the world, are important – not necessarily to return to such systems of governance but mainly to learn alternative modes of organising and managing socio-political issues within a given polity in a more egalitarian and inclusive way. It would be possible only if we break with Eurocentric worldviews and the civilisational rhetoric embedded in them. Such a research project would make significant contributions to contemporary discourse on global governance, thereby paving ways for alternative visions for minority rights. Another important aspect of decolonising the state is to expose the manner in which the state operates to create and sustain asymmetric power-relations vis-à-vis minorities, thereby establishing a form of internal-colonialism. We will return to this issue of the political economy of neo-colonial violence in Section 6.

77 E. J. Hobsbawm, 'The Future of the State', 27 *Development and Change* (1996) p. 272.
78 *Ibid.*, pp. 273–276.

4 Subaltern Resistance

In decolonising minority rights discourse, an important aspect of power-relations deserving a closer attention is resistance by the subaltern. There is a rich body of scholarship in social sciences, which articulate a wide range of subaltern resistance – beginning from rebellion to everyday forms of defiance – against political authorities.[79] Going beyond institutional and bourgeois grand narratives of South Asian history by people in positions of power, the Subaltern Studies – influenced by Marxist and Gramscian thoughts – have demonstrated how alternative forms of everyday resistance, for example, by peasants, women, prisoners, and indigenous communities, characterised anticolonial nationalist movements in India.[80] Ranajit Guha's now-classic work *Elementary Aspects of Peasant Insurgency* reinterpreted peasant insurgencies in colonial India to dismantle the proposition in elite historiography that such insurgencies were "pre-political".[81] Instead, he examined specific revolts as the principal aspects of peasant insurgency to draw out the general rules that reflected their commonality as a mode of resistance.[82] It is to be noted, however, that subaltern identities and experiences are far from homogenous

79 J. Paige, *Agrarian Revolution: Social Movements and Export Agriculture in the Underdeveloped World* (Free Press, New York, 1975); J. Scott, *The Moral Economy of the Peasant: Rebellion and Subsistence in Southeast Asia* (Yale University Press, New Haven, 1976); J. Scott, *Weapons of the Weak: Everyday Forms of Peasant Resistance* (Yale University Press, New Haven, 1985).

80 For example, *see* R. Guha, *Elementary Aspects of Peasant Insurgency in Colonial India* (Oxford University Press, Delhi, 1983); R. Guha, *History at the Limit of World-History* (Columbia University Press, New York, 2002); S. Sarkar, *Modern India 1885–1947* (Macmillan, Delhi, 1983); K. Jayawardena, *Feminism and Nationalism in the Third World* (1982) (Verso Books, London, 2016) pp. 73–108; P. Chatterjee, *The Nation and Its Fragments* (Princeton University Press, Princeton, 1993) pp. 116–157. *See also* G. C. Spivak, 'Can the Subaltern Speak?' in C. Nelson and L. Grossberg (eds.), *Marxism and the Interpretation of Culture* (Macmillan Education, Basingstoke, 1988) pp. 271–313; R. Guha (ed.), *A Subaltern Studies Reader 1986-1995* (University of Minnesota Press, Minneapolis, 1997); R. Guha and G. C. Spivak (eds.), *Selected Subaltern Studies* (Oxford University Press, Oxford, 1988). For a recent critique, *see* K. A. Wagner, 'Resistance, Rebellion, and the Subaltern' in P. F. Bang, C.A. Bayly, and W. Scheidel (eds.), *The Oxford World History of Empire* (Oxford University Press, Oxford, 2021) pp. 416–436. For an analysis of subaltern resistance as part of global history, *see* C. A. Bayly, *The Birth of the Modern World 1780– 1914* (Oxford University Press, Oxford, 2004).

81 Guha, *supra* note 80.

82 Wagner, *supra* note 80, p. 419.

and, therefore, internal divisions and conflicts within such groups should not be overlooked.[83]

Through anthropological studies of the Awlad 'Ali Bedouin community on the fringe of Egypt, Lila Abu-Lughod meticulously articulates how Bedouin women deploy multiple forms of everyday resistance, such as poetry, wedding singing, help of elderly women, secrecy, and so on, to continuously challenge the dominant masculine social structure.[84] In a more recent work, however, Abu-Lughod warns against the tendency to "romanticise" everyday resistance and urges, instead, to conceptualise such resistance as a diagnostic of power rather than simply celebrating the dignity and heroism of the resistor.[85] Seen through such an optic, the everyday resistance of Bedouin women then reveals the "historically changing relations of power in which they are enmeshed as they become increasingly incorporated in the Egyptian state and economy".[86] This approach to resistance builds on Foucauldian notions of strategies and structures of power. As Foucault himself notes, resistance acts as a catalyst to "bring to light power relations, locate their position, find out their point of application and the methods used".[87] It is such acts of resistance and their accompanying strategies that define and redefine relations of power and, therefore, instead of "analysing power from the point of view of its internal rationality, it consists of analysing power relations through the antagonism of strategies".[88] Putting differently, subaltern agency is at the heart of resistance and ensuing renewed power-relations.

Likewise, in recent years, we have observed a revisionist take on the concept of resistance as famously articulated by the Subaltern Studies, as noted earlier. Contrary to the previous conceptualisation of subaltern resistance as an act of "negation" outside the corpus of the state,[89] new research argues for reconceptualising subaltern resistance as an act of "negotiation" within governance apparatuses of the state in order to influence existing power

83 For this argument, *see* S. Ortner, 'Resistance and the Problem of Ethnographic Refusal', 37:1 *Comparative Studies in Society and History* (1995) pp. 173–193.

84 L. Abu-Lughod, *Veiled Sentiments: Honour and Poetry in a Bedouin Society* (University of California Press, Berkeley, 1986); L. Abu-Lughod, 'A Community of Secrets: The Separate World of Bedouin Women', 10:6 *Signs: Journal of Women in Culture and Society* (1985) pp. 637–657.

85 L. Abu-Lughod, 'The Romance of Resistance: Tracing Transformations of Power Through Bedouin Women', 17:1 *American Ethnologist* (1990) pp. 41–55.

86 *Ibid.*, p. 41.

87 Foucault, *supra* note 36, p. 329.

88 *Ibid.*

89 Guha, *supra* note, 80. For Guha, given the peasants' position and their subjugation by both the colonial state and local elites, resistance could only assume the form of 'negation'.

relations.[90] In this formulation, resistance would include even minimally apprehending the conditions of one's subordination, enduring or withstanding those conditions in everyday life, and acting with sufficient intentions and purposes to negotiate power-relations from below "in order to rework them in a more favourable or emancipatory direction".[91] While incremental improvements in material conditions through such acts of resistance are far from revolutionary, the 'failure' of such resistance needs to be distinguished from "the failure to resist".[92]

Uday Chandra identifies three conceptual frameworks emerging from revisionist scholarship on subaltern resistance.[93] "Rightful resistance", as formulated by Kelvin O'Brian and Lianjiang Li, is one, which operates through authorised channels, utilises the rhetoric and commitments of the dominant force in turn to restrict the exercise of their power, locates and exploits various axes of power within the state, and mobilises support from the wider public.[94] Closely related to the first is "lawfare", which takes the law and legal means as sites of contestation and resistance to advance subaltern interests.[95] In the words of Jean Comaroff and John Comaroff, it is a process in which "[p]olitics itself is migrating to the courts. (…) Class struggles seem to have metamorphosed into class actions".[96] And finally, Partha Chatterjee's formulation of the "political society": in contrast to civil society, which consists of the privileged bourgeoisie with citizenship rights, the majority in postcolonial states live in a political society as subjects in varying degrees of subordination.[97] The existence of political society offers subaltern groups necessary space and means to serve their interests by making claims on patrons within governmental structures,

90 *See generally* 45:4 (Special Issue) *Journal of Contemporary Asia* (2015).

91 U. Chandra, 'Rethinking Subaltern Resistance', 45:4 *Journal of Contemporary Asia* (2015) p. 565.

92 *Ibid.*

93 *Ibid.*, pp. 66–73.

94 K. O'Brien and L. Li, *Rightful Resistance in Rural China* (Cambridge University Press, New York, 2006) p. 2. *See also* A. G. Nilsen, 'Subalterns and the State in the Longue Durée: Notes from "The Rebellious Century" in the Bhil Heartland', 45:4 *Journal of Contemporary Asia* (2015) pp. 574–595.

95 For example, *see* J. Comaroff and J. L. Comaroff (eds.), *Law and Disorder in the Postcolony* (University of Chicago Press, Chicago, 2006); J. L. Comaroff and J. Comaroff, *Ethnicity, Inc.* (University of Chicago Press, Chicago, 2009).

96 Comaroff and Comaroff (2006), *supra* note 95, p. 27.

97 P. Chatterjee, *Lineages of Political Society: Studies in Postcolonial Democracy* (Columbia University Press, New York, 2011) p. 172.

by strategically using partisan electoral politics, and by engaging in seemingly uncivil or unruly forms of politics.[98]

Keeping in mind these recent scholarly developments on the concept of subaltern resistance, a close examination of everyday experiences of minorities in oppressive states would similarly reveal a complex dynamic process through which minorities' resistance to state oppression define and redefine their power-relations vis-à-vis the state. Indeed, the stories of minorities across the world are stories of historical injustice, dehumanisation, state oppression, and brutality. But, we need to consciously move beyond an exclusive focus on vulnerability per se, and engage more with the ways in which such vulnerability is produced and sustained. Many of these ways, such as liberal notions of citizenship and development, are also sites of minority resistance against state repression. Therefore, the stories of minority oppression are also stories of heroic resilience and resistance.

During my recent research on the Rohingya minority in Myanmar, a number of such acts of resistance stood out. While the Myanmar government is using citizenship and census as tools of governmentality at its disposal to supress minorities, the Rohingya in turn are using the same tools as sites of resistance to maintain their distinct ethnic group identity against the very reality of statelessness. Under the 1982 Citizenship Law, the category of Naturalised Citizenship (green cards) can be granted to members of ethnic groups which are not one of 135 officially recognised ethnic groups of Myanmar, or to any holder of foreign registration card, or to stateless persons as long as they "speak well one of the national languages" and are of "good character" and of "sound mind". While theoretically the Rohingya are allowed to apply for citizenship following this route, giving up their status as historic inhabitants of the land is clearly a precondition. In defiance, the Rohingya leaders therefore argued that there was no reason for them to apply for naturalised citizenship, for they enjoyed full citizenship rights in the Union before the 1982 Citizenship Law. It is in this spirit of resistance that a Rohingya community leader in his oral statement before the UN Human Rights Council refuted the notion of statelessness that is often associated with the Rohingya, and claimed: "We are citizens of Myanmar. We are Rohingya. We are not stateless. Stop calling us that. We have a state. It is Myanmar. So, we want to go home to Myanmar with our rights, our citizenship, and international security on the ground."[99]

98 P. Chatterjee, *The Politics of the Governed: Reflections on Popular Politics in Most of the World* (Columbia University Press, New York, 2004) pp. 47, 59, 138.

99 Statement made by Muhib Ullah, *supra* note 13.

In an interesting study, Kazi Farzana explains how Rohingya refugees in Bangladesh use music and art as non-conventional means of communicating their coherent identity and expressing their resistance to the discrimination and oppression experienced in their country of origin, i.e. Myanmar, as well as in their exile in crowded refugee camps of Bangladesh. This informal resistance is used "to keep their memory alive, to transmit that history through verbal and visual expressions to the new generations, and to communicate information about themselves to outsiders".[100]

Likewise, Itty Abraham and Miriam Jaehn articulate how Rohingya diasporic activists use a variety of online and offline means to bring into question the legitimacy of oppressive Myanmar state. These include YouTube-based Rohingya TV, the effort to join the Confederation of Independent Football Associations (ConIFA) alternative World Football Cup tournament, the campaign to have the Rohingya script recognised by the Unicode Consortium, and the effort to build a database for undocumented Rohingyas using blockchain.[101] The authors argue that these actions can be subsumed into two kinds of politics, namely, a "politics of confrontation" and a "politics of recognition" and, taken together, they "lead to an emergent political formation, a reterritorialised, dispersed, and virtual national community that seeks to mimic some state functions without explicitly calling for self-determination or an independent nation-state".[102] If the nation is an "imagined community", to take Benedict Anderson's term, then a part of this imagination of the Rohingya-nation is happening in make-shift TV studios or on a football pitch far away from Myanmar.[103] Such a political imagination as an act of resistance dialectically produces what Abraham and Jaehn call an "immanent contradiction" to a twentieth-century political imaginary built around the "classic trinity of a national homeland, singular people, and unique language and culture".[104]

With reference to international legal norms in general, Corinne Lennox explores ways in which minority groups across the world are reshaping the international minority rights protection norms through transnational social

100 K. F. Farzana, 'Music and Artistic Artefacts: Symbols of Rohingya Identity and Everyday Resistance in Borderlands', 4:2 *Austrian Journal of South-East Asian Studies* (2011) pp. 215–236.

101 I. Abraham and M. Jaehn, 'Immanent Nation: The Rohingya quest for international recognition', 26:4 *Nations and Nationalism* (2020) pp. 1054–1068.

102 *Ibid.*, p. 1054.

103 B. Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism*, 2nd ed. (Verso Books, London, 2006).

104 Abraham and Jaehn, *supra* note 101, p. 1054.

mobilisation to achieve recognition of their identities and their rights.[105] Studying global resistance movements of indigenous peoples, Roma in Europe, Afro-descendants in Latin America, and Dalits and caste-affected groups in South Asia, she concludes that the result of such transnational social mobilisation as a mode of resistance and new norm-creation reflective of their own understanding of emancipation is a greater pluralism in global identity politics. The actions also reveal a wide range of new group-specific standards that can inform policies on multiculturalism, political participation, and socio-economic inclusion in the national and international spheres.[106] What is the most intriguing aspect of these transnational resistance movements is the efforts of some of the minority groups in question to reject the category of the 'minority' itself and to opt instead "for the construction of new identity frames and/or the adoption of other identity frames", which are unique to their experiences, and they do so "regardless of whether this impedes their access to the rights and opportunities of the minority frame".[107] In this sense, their attempts to redefine their identities can be seen as a reimagination of political belonging, as a reassertion of minority agency, and as an act of redefining relations of power between these groups and the majoritarian state – all outside the conventional framework of 'minority protection'.

In other words, the project on decolonising minority rights calls for attentiveness and responsiveness to subaltern voices, including voices of resistance, with a view to fixing the problem of democratic deficit in contemporary minority rights discourse. In this regard, global minority rights advocacy should not rely solely on protectionist rhetoric; instead, it needs to focus more on empowering minorities so that they can materialise their social, political, cultural, and economic aspirations in a way that suits their purpose. In this story of subaltern agency and resistance, so far, I have refrained from engaging with the role of law in resistance movements. The role of law in progressive politics and social movements is a complex issue and has relevance to minority rights discourse. To this, I turn in the following section.

105 *See generally* C. Lennox, *Transnational Social Mobilisation and Minority Rights: Identity, Advocacy and Norms* (Routledge, London, 2020). *See also* F. Passy, 'Supranational Political Opportunities as a Channel of Globalization of Political Conflicts: The Case of the Rights of Indigenous Peoples', in D. Della Porta, H. Kriesi, and D. Rucht (eds.), *Social Movements in a Globalizing World* (Macmillan Press, London, 1999); J. Habermas, *The Theory of Communicative Action. Vol. II, Lifeworld and System: A Critique of Functionalist Reason*, trans. T. McCarthy, 3rd corr. ed. (Polity Press, Cambridge, 1987).

106 Lennox, *supra* note 105.

107 *Ibid.*, p. 9.

5 Revisiting Legal Interventions

Conventional wisdom dictates that international law is a force for good and to some extent essential for maintaining a peaceful global order. Norms of international law devised to protect individuals from human rights violations, statelessness, and crimes against humanity suggest that international law offers a solution to tragic predicaments of minorities globally. The problem would thus lie in the lack of enforcement. The dominance of the idea of 'sovereignty' in the international legal plane is usually blamed as a hindrance to the realisation of full emancipatory potential of international law in general and international human rights law in particular. As noted earlier, a growing body of TWAIL scholarship questioned these inherent assumptions about international law's emancipatory potentials by critically examining the foundational tenets of international law.[108] The colonial origin of international law, along with the role of the discipline in sustaining imperialism in the current global order, is the centrepiece of this critical inquiry. Contradicting the traditional understanding of international law, which regards colonialism and non-European societies as peripheral to the discipline proper because "international law was a creation of Europe", Anghie argues that colonialism is central to the historical development of international law.[109] From natural law discourse in the sixteenth century to the modern era of the 'war on terror', international law "has always been animated by the civilising mission, the project of governing and transforming non-European peoples".[110]

So far as minorities are concerned, international law plays a central role in the ideological function of the postcolonial state, thereby aggravating the sufferings of minorities. It does so by playing a key role in the ideological making of the postcolonial 'national', 'liberal', and 'developmental' states in relation to: continuation of colonial boundaries in postcolonial states, internal organisation of ethnic relations within the liberal-individualist framework of human rights, and the economic vision of the postcolonial state in the form of 'development' that subjugates minority interests.[111] The question, then, is how we should engage with international law. This question is especially important in the project on decolonising minority rights in order to break with

108 Anghie, *supra* note 4.

109 *See generally* Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, Cambridge, 2005); Antony Anghie, 'The Evolution of International Law: Colonial and Postcolonial Realities', 27:5 *Third World Quarterly* (2006) pp. 739–753.

110 Anghie (2006), *supra* note 109, p. 739.

111 *See generally* Shahabuddin, *supra* note 12.

a priori assumptions about the need for international legal interventions for the protection of minorities.

International law is by no means unique in this regard, and aspects of power and hegemony are embedded in the law in general. As Adebisi notes, law's pretensions to "objectivity", "neutrality", and "universality" ignore "historically contingent contemporary entanglements between power and possibility".[112] They dissimulate the origin, trajectory, and history specific to the law and, in the process, hides the way law sustains alliances with different manifestations of coercive power, which in turn protect the interests and desires of the dominant class. In other words, "law is not just an abstract tool for regulation, but it also carries within in, its own directions" to the advantage of the powerful.[113] With the claims of objectivity, neutrality, and universality, law refuses not only to engage with the workings of power but also to acknowledge the nexus between universalised yet particular Eurocentric legal knowledge and racial, class, and patriarchal power-hierarchies.[114] Thus constructed, Adebisi concludes, law and legal knowledge are central to the creation, maintenance, and reproduction of racialised hierarchies, which eventually create and sustain acute global disparities and injustices.

This is not to suggest that law does not have any emancipatory role in the struggle of subaltern groups for social justice. On the contrary, legal norms and institutions have been useful tools in subaltern resistance. *Brown* v. *Board of Education* (1954) is a landmark case not only in the history of civil rights movement in the US but also in the development of anti-discrimination jurisprudence in general.[115] Comaroff and Comaroff provide a detailed account of how class action suits, in the form of what they call "lawfare", helped indigenous groups claim rights over land and natural resources in North America or the victims of the gas leak at Union Carbide's factory in the central Indian city of Bhopal to make concerted compensation claims in US and Indian law courts since 1984 or the Bushmen of Kalahari desert in Botswana to successfully win the legal right to return to the Kalahari reserve despite the unwillingness of the state to grant them this right.[116] A rich body of scholarship has also emerged examining how subaltern groups in India engaged with legal

112 Adebisi, *supra* note 6, p. 6.
113 *Ibid.*
114 *Ibid.*
115 *Brown* v. *Board of Education of Topeka,* 347 U.S. 483 (1954).
116 *See generally* Comaroff and Comaroff (2009), *supra* note 95.

processes in their struggles against forced land acquisition by the state.[117] In the case of minorities and indigenous peoples specifically, there is a long history of these groups effectively using international courts (e.g., PCIJ),[118] regional human rights courts (e.g., African Court and African Commission of Human and Peoples' Rights, European Court of Human Rights, and the Inter-American Court of Human Rights),[119] and UN Human Rights mechanisms (e.g., Human Rights Committee)[120] to safeguard whatever limited rights they have.

What this fuss is all about then, one might ask. Having underscored the hegemonic nature of the law as a language of power as well as emancipatory potentials of the law as a vehicle of justice, I argue that minority rights discourse needs to critically reevaluate the role of law in promoting and protecting minority rights in a context specific way and should not be driven by a priori assumptions about the law's emancipatory role. Demystifying the essentiality of law in emancipatory projects opens up other potential sites of contestation, such as social movements. As critical legal scholars note, the

117 H. P. Bedi, 'Judicial Justice for Special Economic Zone Land Resistance', 45:4 *Journal of Contemporary Asia* (2015) pp. 596–617; K. Bo Nielsen, 'Law and *Larai*: The (De) Judicialisation of Subaltern Resistance in West Bengal', 45:4 *Journal of Contemporary Asia* (2015) pp. 618–639. *See also* N. Sundar, *Legal Grounds: Natural Resources, Identity, and the Law in Jharkhand* (Oxford University Press, New Delhi, 2009).

118 *Acquisition of Polish Nationality* case, PCIJ Report (1923) Ser B, No. 7; *Certain German Interests in Polish Upper Silesia* case, PCIJ Report (1926) Ser A, No. 7; *Chorzow Factory* case, PCIJ Report (1925) Ser B, No. 3 & PCIJ Report (1928) Ser A, No. 17; *Minority Schools in Albania* case, PCIJ Report (1935) Ser A/B, No. 64; *Questions Relating to Settlers of German Origin in Poland* case, PCIJ Report (1925) Ser B, No. 6.F; *Rights of Minorities in Upper Silesia* (*Minority School*) case, PCIJ Report (1928) Ser A, No. 15.

119 *Ogiek* case (*African Commission on Human and People's Rights* v. *Republic of Kenya*), African Court of Human and Peoples' Rights, Application No. 006/2012 (2017); *Centre on Housing Rights and Evictions* (*COHRE*) v. *Sudan*, African Commission on Human and Peoples' Rights, Communication No. 296/2005 (2009); *Yordanova and others* v. *Bulgaria*, European Court of Human Rights, Application No. 25446/06 (2012); *Moldovan and others* v. *Romania*, European Court of Human Rights, Application Nos. 41138/1998 and 64320/2001 (2005); *Velikova* v. *Bulgaria*, European Court of Human Rights, Application No. 41488/1998 (2000); *Anguelova* v. *Bulgaria*, European Court of Human Rights, Application Nos. 43577/1998 and 43579/1998 (2002); *The Kichwa Peoples of the Sarayaku Community and its members* v. *Ecuador*, Inter-American Court of Human Rights. Series C, No. 245 (2012); *Saramaka People* v. *Suriname*, Inter-American Court of Human Rights. Series C, No. 185 (2008); *Sawhoyamaxa Indigenous Community* v. *Paraguay*, Inter-American Court of Human Rights. Series C, No. 146 (2006).

120 *Ángela Poma Poma* v. *Peru*, Human Rights Committee, Communication No. 1457/2006 (26 March 2009), UN Doc CCPR/C/95/D/1457/2006; *Gillot et al.* v. *France*, Human Rights Committee, Communication No. 932/2000 (15 July 2002), UN Doc CCPR/C/75/D/932/2000; *J. G. A Diergaardt et al.* v. *Namibia*, Human Rights Committee, Communication No. 760/1997 (25 July 2000), UN Doc CCPR/C/69/D/760/1997.

objectivity and neutrality arguments upon which the legitimacy of law rests also hinder radical social transformation. The emphasis on enforcing rights diverts attention and resources away from more effective social movement activism and ultimately reinforces the legitimacy of a system that legitimises and dissimulates structural inequality under the banner of neutral equality before law.[121] Relatedly, movements for social justice do not always need to end up in court rooms or before international human rights bodies. Instead, the immense potential of legal norms, legal vocabularies, and legal forums as *strategic tools* should be appreciated more.

In recent years, critical international lawyers have also debated the role of international law in progressive politics for social change. Interrogating international law from a Marxist perspective, building on Evgeny Pashukanis's commodity form theory of law, China Miéville vigorously argues that international law is so absolutely central to imperialism that the discipline is by design ineffective in opposing it.[122] He, thus, concludes – by embracing what B. S. Chimni calls "legal nihilism" – that "[t]he chaotic and bloody world around us *is the rule of law*".[123] In contrast, Robert Knox suggests that progressive non-state actors can take strategic advantage of legal opportunities and utilise their economic, ideological, and sometimes coercive power to turn the content of international law to their own ends, "either by constituting themselves as formal actors in the international sphere or by forcing particular states to adopt an interpretation that favours their interests".[124] Alerted to the fact that the transformative power of this legal strategy is limited by the legal form, which inhibits changes to hierarchical social structures and legitimises the structures of global capital, Knox calls for "abandoning any utopian hopes of the law's role in social transformation" and for engagement in "concrete forms of

121 For example, *see* D. Kennedy, 'Form and Substance in Private Law Adjudication', 89 *Harvard Law Review* (1976) pp. 1685–1778; R. Unger, *The Critical Legal Studies Movement* (Harvard University Press, Cambridge, 1983); M. V. Tushnet, 'An Essay on Rights', 62 *Texas Law Review* (1984) pp. 1363–1403; M. V. Tushnet, *Taking the Constitution Away from the Courts* (Princeton University Press, Princeton, 1999); D. Kennedy, 'International Human Rights Movement: Part of the Problem?' 14 *Harvard Human Rights Journal* (2002) pp. 101–126; D. Kennedy, *Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton University Press, Princeton, 2004).

122 C. Miéville, *Between Equal Rights: A Marxist Theory of International Law* (Brill, Leiden, 2005). *See also* E. Pashukanis, *The General Theory of Law and Marxism* (1924) (Taylor and Francis, London, 2001).

123 Miéville, *supra* note 122, p. 319. *See also* Chimni, *supra* note 69, p. 441.

124 R. Knox, 'Marxism, International Law, and Political Strategy', 22 *Leiden Journal of International Law* (2009) p. 433.

political commitment".[125] In other words, international lawyers need to pursue a "principled opportunism", wherein "international law is consciously used as a mere tool, to be discarded when not useful" and the "strategic question of international law's progressive potential is – as a matter of principle – reduced to the tactical, instrumental deployment of legal argument".[126]

The political scientist Michael McCann, a leading scholar of social movements, identifies a number of ways, elaborated in existing literature of law and social movements, through which law can perform this instrumental role: first, the process of agenda setting by which movement protagonists rely on legal discourses to name and to challenge existing social wrongs or injustices.[127] Second, formal legal advocacy, especially through high-profile litigation, can contribute to reconstructing the overall opportunity structure within which movements develop. "Judicial victories can impart salience or legitimacy to general categories of claims, such as equal rights, as well as to specific formulations of challenges within these broad legal traditions."[128] Third, legal advocacy often provides movement activists a source of institutional and symbolic leverage against opponents, for example, by creating the fear of financial and reputational costs emanating from lengthy litigation processes.[129] Fourth, legal tactics can also generate responsiveness to basic policy demands and secure some partial concessions by the state.[130]

The list above is, of course, far from exhaustive. There are good examples of strategic deployment of law in advancing rights of minorities. A leading international NGO, Minority Rights Group International (MRG), has established a Strategic Litigation Programme through which it helps minority and indigenous communities combat violations of their rights by holding governments directly to account for those violations before regional and

125 *Ibid.* According to Foucault, the strategies for struggle are closely connected to the relations of power, for "every strategy of confrontation dreams of becoming a relationship of power and every relationship of power tends, both through its intrinsic course of development and when frontally encountering resistances, to become a winning strategy". *See* Foucault, *supra* note 36, p. 347.

126 Knox, *supra* note 124, pp. 433–434. The leading TWAIL scholar Chimni, however, passionately argues for reform: "while contemporary international law is imperial in character the possibility and benefits of reform should not be ruled out through the struggles of subaltern groups, peoples and nations." Chimni, *supra* note 69, pp. 476–477.

127 M. McCann, 'Law and Social Movements: Contemporary Perspectives', 2 *Annual Review of Law and Social Science* (2006) p. 25.

128 *Ibid.*, p. 26.

129 *Ibid.*, pp. 29–30.

130 *Ibid.*, p. 31.

international human rights tribunals.[131] It does so by providing expert advice to those communities whose rights have been denied; by bringing individual test cases before regional, international and domestic bodies to create precedents, thereby influencing standing of other minority and indigenous groups elsewhere; by working with key stakeholders to ensure compliance of national and international legal obligations; and by building the capacity of local communities and those representing them.[132] From the above discussion on the role of law in transformative movements for social justice, the take-away point that McCann puts succinctly is also important to remember in the project on decolonising minority rights:

> Legal mobilisation tactics do not inherently empower or disempower citizens. Legal institutions and norms tend to be Janus-faced, at once securing the status quo of hierarchical power while sometimes providing limited opportunities for episodic challenges to and transformations in that reigning order. How law matters depends on the complex, often changing dynamics of the context in which struggles occur.[133]

And finally, in this discussion on the role of law in movements for social justice, there remain questions of subaltern agency and ethics of engagement that the decolonising project cannot overlook. In response to class action suits or public interest litigations, questions arose about the 'legitimacy' (as opposed to legality) of interventions by progressive courts and lawyers into deeply contested and polarising issues of politics. Put simply, the criticism was that this kind of judicial activism and activist lawyering claimed judicial standing to speak on behalf of the underrepresented while misinterpreting the latter's needs and misdirecting their dissent into legal channels.[134] The outcome is counterproductive: "turning the public against progressive values they too forcefully declared, while often overriding the interests of the very groups they purported to represent."[135] More specifically, critical legal scholars argued that protagonists of liberal legal activism possessed the privileged ability not only to define legal wrongs but also to control the direction of impact litigation. This allowed them to pursue their own political agendas in ways that were

131 Annual report of the programme available at <www.minorityrights.org/programmes/legal-cases>, visited on 19 August 2023.

132 *Ibid.*

133 McCann, *supra* note 127, p. 35 (references in the original omitted).

134 S. Cummings, 'The Social Movement Turn in Law', 43:2 *Law and Social Inquiry* (2018) p. 362.

135 *Ibid.*, p. 362.

sometimes remotely responsive to, or even in conflict with, the interests of the very groups they claimed to represent.[136]

On a more positive note, however, in recent years social science scholarship on law and social movements has registered a new trend, which Scott Cummings calls "movement liberalism", to address problems surrounding the issues of subaltern agency and ethics of engagement, which were evident in previous waves of activist lawyering. The new literature focus on articulating how lawyers put the movement itself at the centre of their involvement: by taking their cues from the community, by working closely with and following the lead of movement organisers, and by deploying law strategically and often incrementally to advance movement goals.[137] Here, lawyers engage in "legal mobilisation not impact litigation", meaning, while they do not reject litigation as a movement leverage, their legal mobilisation work expands far beyond courts, involving policy advocacy, organisational counselling, community education, and protest support.[138] In other words, within this movement-centred model of progressive lawyering, "law is a tool, but not an end it itself; courts reinforce movement efforts after their hard work is done, but do not get out ahead; lawyers support movements but do not lead them".[139]

Translating the foregoing discussion into the context of minority rights discourse, a number of themes emerge for our consideration, which are especially relevant to the decolonising project. First, while law offers an important and useful avenue to advance minority rights, given its colonial and imperial underpinnings, perhaps one needs to pause and think before readily following that avenue as the obvious choice. That moment of pause should allow one to explore and identify more effective languages and sites of contestation outside the domain of law. In short, our thinking about minority protection should not always start with the law. Second, beyond legal norms and dogmas, the strategic and tactical aspects of legal deployment should be taken seriously, which in turn necessitates a reimagination of the law itself as a point of departure. In addition to the conventional positivist understanding of the law as a body of problem-solving rules, perceptions of the law in their multiplicity need to be appreciated. As a language of power

136 D. Bell, Jr., 'Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation', 85 *Yale Law Journal* (1976) pp. 470–516; D. Bell, Jr., '*Brown* v. *Board of Education* and the Interest-Convergence Dilemma', 93 *Harvard Law Review* (1980) pp. 518–533.

137 Cummings, *supra* note 134, p. 387. *See also* M. McCann, *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization* (University of Chicago Press, Chicago, 1994).

138 Cummings, *supra* note 134.

139 *Ibid.*, p. 364.

or as an interpretative language or as a process, or a mode of communication, and so on, law offers far more strategic advantages for advocacy purposes. And finally, one needs to think closely about their positionality and reflect on why the engagement is necessary from the minority point of view, and how such an engagement might potentially affect the working, directions, and outcomes of the movement, and what happens to minorities as a result. This critical self-reflection would likely put the question of subaltern agency at the heart of our engagement with minority groups as lawyers, activists, and experts.

6 The Political Economy of Violence

Minority and majority groups, competing over resources and jobs, are not always inherently racists. We need to consider material conditions, which encourage hatred and bigotry, and political conditions, which enable discriminatory policies and practices.[140] The project on decolonising minority rights needs to take seriously the political economy of minority oppression. Historically, the state-making process is closely connected to economic exploitation of hitherto unexploited resources, primarily in minority held areas. The expansion of colonial rule and then postcolonial sovereignty to remote territories of untapped natural resources necessitated projection of state power to the farthest reaches of thus far ungoverned regions and bringing their inhabitants under firm control as part of the state-making craft.[141] There is a cultural dimension to this: bringing such peoples under the routine administration and encouraging and, if necessary, insisting upon linguistic, cultural, and religious alignment with the majority at the political core of the state.[142] Often added to such policies of economic, administrative, and cultural absorption is the policy of engulfment that facilitated settlement of a large number of majority people, thereby dramatically altering not only

140 For example, the intersection of racism and capitalism in the form of racial capitalism offers a useful framework for analysing inequality affecting marginalised groups. *See* G. Bhattacharyya, *Rethinking Racial Capitalism: Questions of Production and Survival* (Rowman and Littlefield International, London, 2018). For a historical account of the role of racial capitalism in shaping exploitative international legal order, especially in relation to labour exploitation in the colonial world, *see* A. Hammoudi, 'International Order and Racial Capitalism: The Standardization of "Free Labour" Exploitation in International Law', 35 *Leiden Journal of International Law* (2022) pp. 779–799. *See also* Ntina Tzouvala, *Capitalism as Civilisation* (Cambridge University Press, Cambridge, 2020).

141 Scott, *supra* note 3, p. 11.

142 *Ibid.*, p. 12.

the demographic composition of minority areas but also the ecosystem upon which the minority heavily rely.[143] The cumulative effect of these policies of governmentality is what Scott terms "a botanical colonisation" through which the landscape was transformed to accommodate crops, settlement patterns, and systems of administration familiar to the state and to the colonists.[144] Such a process of 'internal colonisation' to govern the periphery is propagated by the colonial and then the postcolonial state as providing 'civilisation and progress' – where progress equates to the imposition of the linguistic, agricultural, and religious practices of the dominant ethnic group on the minority.[145] 'Development' appeared as the shorthand for this phenomenon.

In a sense, the legitimacy of postcolonial states draws on the ideology of development.[146] As Chatterjee argues, if the postcolonial state had to operate very much within the territorial, political, and administrative frameworks of the colonial regime, the new regime needed a new, distinctive claim to legitimacy. The economic critique of colonial rule did not see the illegitimacy of the colonial regime in its alienness alone. Rather, the focus of the attack was on the "colonial mode" of exploitation, such as "the drain of national wealth, the destruction of its productive system, the creation of a backward economy".[147] The argument, thus, followed that the colonial mode of exploitation must be replaced by new forms of economic development delivered by the independent postcolonial state.[148]

The developmental ideology also had 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 the problem comes in the form of the ideology of the developmental state. The vision of the developmental state as a solution to the minority problem was most powerfully expressed in the writings of Jawaharlal Nehru, the first prime minister of postcolonial India. He understood the 'minority problem' as an economic issue *tout court*, and he hoped that the attainment of the political goal of the nationalist movement – i.e., the postcolonial national state, along with constitutional guarantees of fundamental rights, would create an

143 *Ibid.*
144 *Ibid.*
145 *Ibid.*, p. 13.
146 Chatterjee, *supra* note 80, p. 205.
147 *Ibid.*, p. 203.
148 *Ibid.*

environment in which the state would then be able to solve the problems of ethno-nationalism.[149]

Since the dominant elements of the postcolonial developmental state were drawn from the ideology of the modern liberal-democratic state, the developmental state, with its modernist agenda of economic progress, was believed to have the mitigating power to deal with backward ethno-nationalism through liberal constitutionalism, equal rights of citizenship, economic development, and social justice.[150] To this end, the domain of the public needed to be distinguished from that of the private; in the words of Chatterjee: "The legitimacy of the state in carrying out this function was to be guaranteed by its indifference to concrete differences between private selves-differences, that is, of race, language, religion, class, caste, and so forth."[151] Thus, in the anticolonial nationalist discourse and the political imagination of the postcolonial order, the vision of the postcolonial state with its developmental agenda appeared as the natural and obvious choice.

There is also an international dimension to this. Since the end of the Second World War, economic development quickly came to be seen as "the only way to understand questions of material inequality and global distribution because of its ability to maintain a hierarchy between the West and the Rest".[152] In its political role the ideology of development, despite the proclamation of formal equality, could manage to prevent substantive equality between the coloniser and the colonised through the creation and maintenance of "a scalar, or graduated, organisation of states secured by positing an ostensibly universally attainable end point in the status of 'developed'" as well as "an institutional location which created the possibility for ongoing surveillance and interventions to transform 'developing' states".[153] Although the move towards development was an international effort to find a new culture-neutral ideology of dominance, the developmental discourse was not separated from the old ideas of colonialism and its cultural categories of civilised and

149 J. Nehru, *The Discovery of India* (1946), 3rd ed. (Oxford University Press, New Delhi, 1999) pp. 382–383.

150 P. Chatterjee, *Nationalist Thought and the Colonial World* (Zed Books, London, 1986) p. 141.

151 Chatterjee, *supra* note 80, p. 10.

152 S. Pahuja, *Decolonising International Law: Development, Economic Growth, and the Politics of Universality* (Cambridge University Press, Cambridge, 2011) p. 115.

153 *Ibid.*, p. 46.

uncivilised, advanced and backward.[154] The nineteenth-century concept of world civilisation was translated into the theory of modernisation in the early twentieth century, and then into the notion of globalisation in the era that followed.[155]

International law and institutions after the Second World War found in economic development a new language of civilising mission that not only undermines the sovereignty of postcolonial states but also shapes the internal political and cultural reconfiguration of these states within the liberal ideological framework. Development has come to mean not only economic growth but also modernity symbolised by individualism and post-ethnic social organisation. Within this liberal framework, the lack of development in postcolonial states is attributable to 'backwardness' in the political, economic, social, and cultural systems in those states. The developmental state represented "universal" interests that would prevail against the "particular" interests of minorities that "were absorbed and assessed by criteria which were often externally determined and which purported, with formidable force, to be universal".[156] In the words of Ashis Nandy, "when after decolonisation, the indigenous elites acquired control over the state apparatus, they quickly learnt to seek legitimacy in a native version of the civilising mission and sought to establish a similar colonial relationship between state and society".[157] In this sense, what the liberal language of human rights has done to minorities in the field of politics, development has done in the field of economics. Working together, this is a recipe for both political and economic marginalisation of ethnic minorities in postcolonial states. The formal merger in the 1980s of development discourses with human rights, as the right to development, put the liberal individual at the centre of the development discourse while

154 Antony Anghie persuasively demonstrates how the development agenda of international financial institutions, along with modes of economic surveillance and governance technologies, has its origin in the Mandate System of the League of Nations. Anghie, *supra* note 109, pp. 115–195. *See also* A. Anghie, 'Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations', 34 *New York University Journal of International Law and Politics* (2001–2002) pp. 513–633.

155 Kuper, *supra* note 21, p. 10.

156 Anghie, *supra* note 109, p. 206.

157 A. Nandy, 'State', in W. Sachs (ed.), *The Development Dictionary: A Guide to Knowledge as Power* (Zed Books, London, 1992) p. 269.

postcolonial nationalist elites continued to argue for and maintain the centrality of the state.[158]

In the current era of neoliberal economy, the situation of minorities has worsened. Saskia Sassen argues that in the new global order since the 1980s, economic policies and programmatic interventions of international financial and regulatory institutions, such as the IMF, World Bank, and WTO, have facilitated the "systemic deepening of advanced capitalism" with a view to keeping "the increasingly privatized and corporatized economy going".[159] As a result, any competing interest in the way of corporate profitmaking is quickly, and often brutally, expelled from the system. Gross violations of human rights and the destruction of life and nature take place in the name of market liberalisation, privatisation of lands, and the promotion of foreign direct investment. Developmental interventions often come in the form of extractive industry, hydroelectric dams, infrastructure development, tourism, and reserve forests. Industrial agriculture is also added to the list as a relatively new phenomenon due to the hike and volatility in food prices following the 2007/8 crisis.[160] The communities residing on the land that is required for these development projects are subjected to forced eviction and land grabbing by the state, military, corporations, and wealthy individuals as a result.[161] It

158 *See* UN General Assembly, *Declaration on the Right to Development* (4 December 1986), UNGA Resolution No. 41/128, UN Doc A/RES/41/128; UN Economic and Social Council, *Report of the Secretary-General on the International Dimensions of the Right to Development as a Human Right* (2 January 1979), UN Doc E/CN. 4/1334; UN Economic and Social Council, *Report of the Working Group of Governmental Experts on the Right to Development* (11 February 1982), UN Doc E/CN. 4/1489.

159 Saskia Sassen, *Expulsions: Brutality and Complexity in the Global Economy* (Harvard University Press, Cambridge, 2014) p. 41. *See also* pp. 86, 214.

160 L. Claridge, *Moving towards a Right to Land: The Committee on Economic, Social and Cultural Rights' Treatment of Land Rights as Human Rights* (Minority Rights Group International, London, 2015); E. Grant and O. Das, 'Land Grabbing, Sustainable Development and Human Rights', 4:2 *Transnational Environmental Law* (2015) pp. 289–291; J. Gilbert, 'Land Grabbing, Investors, and Indigenous Peoples: New Legal Strategies for an Old Practice?' 51:3 *Community Development Journal* (2015) pp. 350–366.

161 Olivier De Schutter, former UN Special Rapporteur on the right to food, defined 'land grabbing' as "[a] global enclosure movement in which large areas of arable land change hands through deals often negotiated between host governments and foreign investors with little or no participation from the local communities who depend on access to those lands for their livelihoods". *See* O. De Schutter, 'The Green Rush: The Global Race for Farmland and the Rights of Land Users', 52:2 *Harvard International Law Journal* (2011) p. 504. *See also* N. Tzouvala, 'A False-Promise? Regulating Land-grabbing and the Post-colonial State', 32:2 *Leiden Journal of International Law* (2019) pp. 235–253; U. Özsu, 'Grabbing Land Legally: A Marxist Analysis', 32:2 *Leiden Journal of International Law* (2019) pp. 215–233.

is estimated that each year approximately "15 million people are forced to leave their homes and land to make way for large development and business projects".[162] This means that over the past 20 years, around 300 million people have been affected by development-related displacement globally. David Harvey calls this phenomenon a capitalist "accumulation by dispossession" characterised by the global misappropriation of natural resources, including land, mineral, water, and biological resources, by transnational corporations. He thus accurately identifies this phenomenon as a mode of "new imperialism" on a global scale.[163]

The supposed benefits of these development projects that are routinely propagated from a neoliberal economic standpoint – such as greater employment, better infrastructure, and growth in GDP, consumption, expenditure, or income – are often factitious. Typically, the goods and services produced, such as energy or food, are primarily meant for export,[164] and are rarely affordable by the affected communities even if accessible to them.[165] Employment opportunities for the local community are also minimal compared to the size of the investment and the disruption it brings forth. They hardly compensate for the loss in lifestyle, identity, and culture of affected communities. The people most affected by such developmental interventions are often those who are already the most marginalised in the society, such as minorities, indigenous peoples, tribal groups, small-scale farmers, and pastoralists.[166] Alexandra Hughes describes how in some cases governments have taken "explicit measures to prevent minority political participation and/or erode their distinct identities through forced assimilation", thereby rendering them less powerful against their oppressor.[167] The constrained capacity of these groups to protest is part of what makes the expropriation of their land so attractive.

---

162 UNCHR, *Report of the United Nations High Commissioner for Human Rights, Economic and Social Council* (2014), UN Doc E/2014/86, para. 5; UNCHR, *Report of the Special Rapporteur on the Right to Food: 'Large-scale Acquisitions and Leases: A Set of Minimum Principles and Measures to Address the Human Rights Challenge'* (2009), UN Doc A/HRC/13/33/Add.2, p. 1.

163 *See generally* D. Harvey, *The New Imperialism* (Oxford University Press, New York, 2003).

164 Das and Grant, *supra* note 160, p. 293.

165 The Burma Environmental Working Group (BEWG), *Burma's Environment: People, Problem, Policies* (June 2011) pp. 53–56.

166 Claridge, *supra* note 160.

167 A. Hughes, *PRSPs, Minorities and Indigenous Peoples – An Issue Paper* (Minority Rights Group International, London, 2005) p. 10.

This is why the self-congratulatory liberal celebration of liberalising the international system and downsizing the state did not excite minorities for long. States being the traditional oppressor of minorities, there was ostensibly a hope that the weakening of states would open new avenues for minorities to assert influence in the functioning of the state. In reality, whatever vacuum in the sovereign domain was created in the process of the state submission to the neoliberal economy was quickly filled by transnational actors. In fact, the neoliberal economic system itself was designed to make this happen. Minorities are now in a precarious position where for survival they need to simultaneously resist the state and the corporations, who have converging vested interests vis-à-vis minority lands and resources. This is a global phenomenon. Therefore, global action and solidarity is required to put the brakes on this monstrous neoliberal invasion. As part of the project on decolonising minority rights discourse, it is also essential to problematise and challenge the dominant idea of 'development' as the ultimate end of human progress, to counterbalance its tendency to commodify, and to expose its capacity to articulate state power in terms of economic growth rather than welfare.

7 Conclusion

As I have argued throughout the paper, contemporary minority rights discourse needs to engage more closely with the issues of power-relations and subaltern agency to decolonise conventional thinking within the discipline. To substantiate this proposition, I have analysed five key areas of relevance to the decolonising project and made a number of critical interventions. First, there is a general sense of 'primitive otherness' embedded in the way minorities are conventionally conceptualised as a category. An alternative paradigm is needed beyond the conventional 'vulnerability framework', which considers minorities agency-less entities in constant need of external protection, to empower minorities ensure their own protection. Second, as a prerequisite for decolonising minority rights discourse, a critical examination of the reification of the state itself is necessary and in this regard rehistoricising the state from minority perspectives is needed. Third, subaltern resistance is a crucial element of relations of power and should, therefore, constitute the core of minority rights discourse. Fourth, given the hegemonic nature of the law as a language of power as well as emancipatory potentials of the law as a vehicle of justice, minority rights discourse needs to critically scrutinise the role of law in promoting minority rights in context specific and strategic ways. At the same time, other possible sites of contestation, such as social movements, need to

be explored. And finally, the political economy of violence against minorities – through the ideology of developmentalism – needs adequate attention in contemporary minority rights discourse.

Thoughts and ideas presented here are far from exhaustive. For example, the issue of intersectionality needs to be revisited to explore how such an approach can help the decolonising agenda. We need to acknowledge that minorities are not the only victims of the hegemonic state and neo-liberal economic forces. Minorities, understood as non-dominant groups, are often economically deprived, but the fate of the poorest section of the society is shared beyond ethnic lines. Although there are cases of market dominant minorities in some societies, such as the ethnic Chinese across Southeast Asia or the Lebanese in West Africa, these 'elites' are rather exceptions. While they also face a certain degree of discrimination, they hardly relate to the life experience of their poorer co-ethnics. The capitalist economic structure locally and globally marginalises the poor in general, and the minority's ethnic identity on top of their economic disadvantage creates new avenues for further oppression by the hegemonic state. Therefore, in this project on decolonising minority rights, we need to consider intersectionality with a renewed emphasis on class factors – in addition to race and gender – to make a better sense of vulnerability, subjugation, and so on.

In addition, the issue of reparations for colonial atrocities and historical injustice is gaining attention. UN special rapporteur on racism and xenophobia, Tendayi Achiume, in a recent report specifically raised the issue of "human rights obligations of Member States in relation to reparations for racial discrimination rooted in slavery and colonialism" and also argued that failures to redress the racism of slavery and colonialism are linked to contemporary racially discriminatory effects of structures of inequality and subordination.[168] Given that indigenous peoples and minorities suffered historical injustice by colonial powers or subsequently by postcolonial nation-states, and more recently by transnational corporations, the issue of reparations should also be part of the decolonising agenda in minority rights discourse. As a matter of fact, the *Proposal for a Draft Global Convention on the Rights of Minorities* (2023) includes a provision acknowledging the link between colonialism and minority rights, and calls upon states parties to work towards recognising,

168 T. Achiume, *Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Racial Intolerance* (2019), UN General Assembly, UN Doc A/74/321.

reconciling, and redressing historical injustice against minorities.[169] Once necessary political commitments are in place at the state level, supported by civil society campaign, progress can be made in this regard and the demand for reparations can be materialised. To that end, the provision in the Draft Convention, albeit weak, can serve as a useful legal tool – in the strategic sense.

However, here again, one needs to be aware of international law's duality. As Anghie demonstrates, historically it is the powerful Western colonial powers and corporations therein, who successfully advanced international legal arguments for reparations *from* postcolonial states for the 'loss' of the former's economic interests due to the latter's actions such as nationalisation or even liberation.[170] As we know, the "slaves of Haiti, having defeated Napoleon's army and liberated themselves, then had to pay reparations to France for engaging in the effrontery of winning their freedom".[171] Also, it is trickier to talk about reparations for historical injustice against minorities while such injustice is very much an ongoing process under new forms of imperialism, including neoliberal economic violence and ensuing environmental catastrophe.

My ideas on decolonising minority rights discourse, as presented in this paper, are reflective, rather than prescriptive. These can also be seen as an invitation to further research in this field or, at least, as a conversation starter. At the same time, I am mindful of the limits of such a project, given the hegemonic structure of global governance within which minority rights discourses are produced. I conclude with the hope that researchers interested in minority rights issues would be encouraged to identify and investigate other relevant areas of concern regarding the link between decolonisation and minority rights in general, and to explore other innovative ways of decolonising contemporary minority rights discourse in particular. This paper offers a framework for systematically thinking about decolonial promises of minority rights discourse.

169 Article 12: "The respect for the protection and fulfilment of the rights of minorities in many States is intrinsically connected to colonial rule and decolonisation processes. States Parties shall, therefore, take the necessary measures to recognise, reconcile, and redress historical injustices and work closely with relevant States and organisations to that effect." For the full text of the Draft Convention, *see* F. de Varennes, *Report of the Special Rapporteur on Minority Issues* (2023), Annex I, UN General Assembly, UN Doc A/HRC/52/27.

170 Anghie, *supra* note 4, pp. 87–96.

171 *Ibid.*, p. 95.