

Liberal Self-determination, Postcolonial Statehood, and Minorities: The Chittagong Hill Tracts in Context

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Abstract: The post-WWII phase of international law was indeed set for reaffirming faith in certain crucial values: fundamental human rights, dignity and worth of individuals, equal rights of men and women and of nations large and small, among others. In this new era, however, progression equated to liberal values, and universalism simply meant the expansion of these values at a global scale. This ideological shift towards liberalism was soon reflected on the periphery with the emergence of new States in Africa and Asia which demonstrated preoccupation with nation-building, and as a consequence, with assimilationist projects. Against the backdrop of the right to self-determination and with the case of the Chittagong Hill Tracts in Bangladesh, this paper argues the manner in which the liberal West portrays ethnicity as primitiveness has deeply rooted implications for the way in which this image of ethnicity is then projected on the 'global other' – the periphery – wherein the process of constructing the nationhood in light of the liberal world view engenders detrimental consequences for minorities – the 'local other' within a given polity.

Introduction

This paper is premised on the argument that the ethnic dichotomy of 'self' and 'other' has informed the manner in which international law engaged with the major events of each of its developmental phases.¹ This proposition, on the one hand, is informed by the postcolonial legal scholarship, but on the other, attempts to break the silence on 'ethnicity' in the international law of this genre. Against the backdrop of the discourse on self-determination and with the case of the Chittagong Hill Tracts (CHT), in this paper I argue that the manner in which the liberal West portrays ethnicity as primitiveness² has deeply rooted implications for the way in which this image of ethnicity is then projected on the

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¹ For details, see, Mohammad Shahabuddin, "Ethnic 'Otherness' in International Law: An Alternative History of International Law from Pre-Modernity to the Nineteenth Century," *Dhaka University Law Journal* 19, no. 2 (2008): 1–34. See also, Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2005).

² See, Mohammad Shahabuddin, "'Ethnicity' in the International Law of Minority Protection: The Post-Cold War Context in Perspective," *Leiden Journal of International Law* 25, no. 4 (2012): 885–907.

'global other' – the periphery – wherein the process of constructing the nationhood in light of the liberal world view engenders detrimental consequences for minorities – the 'local other' within a given polity. The paper substantiates this claim by first responding to the following questions: How the construction of statehood in the postcolonial world was informed by the post-WWII liberal international legal order? What normative position did minorities acquire in the liberal nation building projects? And finally, what are the normative and pragmatic implications of such a legal regime for the viable accommodation of minority rights? This normative discussion is then followed by the example of the legal status of ethnic minorities under the 'liberal' constitution of the Peoples' Republic of Bangladesh, which was drawn along the line of the post-WWII international human rights instruments.

The Paradigm Shift: from 'ethnic' to the liberal notion of self-determination

The emergence of nationalism in the nineteenth century was closely associated with war. For nineteenth-century thinkers, war was the necessary dialectic in the evolution of nations. Frequent outbreaks of war and ensuing re-drawing of State-territories gave birth to fresh minority problems in Europe. States pursued the goal of establishing nation-States; but in reality, what they ended up with were multi-nation States, and in the same process, a number of nations such as the Germans turned into multi-State nations. The Peace Conference following the Great War aggravated the minority issue by drastically redrawing the frontiers in Eastern and Central Europe that followed the collapse of the old Empires. In the aftermath of the War, international law had to respond to this minority 'problem' against the backdrop of the most influential notion of the time – self-determination.

In his famous Fourteen Points, Wilson enshrined the notion of self-determination, without actually using the term, as one of the key guiding principles of the post-War international order.³ In the aftermath of the War, his first draft of the Covenant categorically mentioned in Article III the principle of self-determination along with the provision of certain territorial adjustments which was to qualify the mutual guarantee of political independence and territorial integrity among the contracting Powers.⁴

However, Wilsonian proposition of self-determination, being premised on the centrality of ethnicity in the political organisation of nation-States, faced criticism from even other American delegates as it transpired that the territorial adjustments made at the Paris Peace Conference were unlikely to satisfy all nationalist claims, and therefore, to prevent ethnic tensions to erupt. David

³ For the full text of Wilson's address to the Congress, see, Gregory R Suriano, ed, *Great American Speeches* (NY: Gramercy Books, 1993), 143–146.

⁴ See, David H Miller, *The Drafting of the Covenant* (NY: G P Putnam's Sons, 1928), vol II, 70.

Miller – an American jurist and also one of the draftsmen of the Covenant – in his comment on Wilson’s draft asserted that such a general provision of self-determination “will make that dissatisfaction permanent, will compel every Power to engage in propaganda and will legalise irredentist agitation in at least all of Eastern Europe”.⁵

Miller was not alone in criticising Wilson’s proposition. It is evident from the US Secretary of State Robert Lansing’s personal narrative of the peace negotiations in Paris that he was extremely critical of the idea of self-determination as a general principle, let alone as a *right*.⁶ Although faced with vehement opposition from other statesmen Wilson dropped the idea of self-determination in his fourth draft and also in the Covenant, Lansing found it regrettable that such opposition did not obtain from Wilson an open disavowal of the principle as the standard for the determination of sovereign authority; hence, the phrase remained one of the general bases for peace negotiation.⁷

Perhaps, Wilson himself was aware of the limitations of his policy of self-determination expressed along the ethnic line, and therefore, he had to deviate from this principle on a number of occasions. In a note written on December 30, 1918, Lansing claims that in the actual application of the principle Wilson rather relied on a number of exceptions to his own creation: millions of ethnic Germans were denied the right to self-determination and transferred to the new States of Poland and Czecho-Slovakia under the Treaty of Versailles; Austrian Tyrol was ceded to the Kingdom of Italy against the will of substantially the entire population of that region under the Treaty of Saint-Germain; Austria was denied the right to form a political union with Germany; the peoples of Esthonia, Latvia, Lithuania, the Ukraine, Georgia, and Azerbaidjan were left to the mercy of Great Russia despite their distinct identities and aspirations to become independent States.⁸

Such deviations from the principle of self-determination, so far as the German minorities were concerned, were quite obvious. The application of the principle of self-determination otherwise could have meant the unification of Germany.⁹ In fact, following the collapse of the Habsburg Empire in October 1918, the prewar representatives of the German territories of Austria-Hungary passed a draft constitution which declared that “Germany-Austria is a component part of the German Republic.”¹⁰ It was difficult for the victors of the War to see Germany

⁵ Ibid, 71.

⁶ Robert Lansing, *The Peace Negotiations: A Personal Narrative* (Boston: Houghton Mifflin Company, 1921), 95

⁷ Ibid.

⁸ Ibid, 98–100.

⁹ See, Mark Mazower, *Hitler’s Empire – Nazi Rule in Occupied Europe* (London: Penguin Books, 2009 [2008]), 31–33.

¹⁰ Ibid, 31–32.

pocket the benefit of their victory; “the Entente Powers had not really fought for four years merely to preside over the expansion of Germany.”¹¹ Thus, deviating from the principle of self-determination, the Treaty of Versailles insisted on the establishment of an independent Austria, wherein ethnic Germans were a majority. Later, the Permanent Court in an Advisory Opinion declared the customs union between Austria and Germany violative of the Article 88 of the Treaty of Saint-Germain and Protocol No. 1 signed at Geneva on October 4, 1922 that stipulated continuation of Austria as an independent State.¹² Additionally, Germany had to cede territories inhabited by ethnic Germans. The Versailles arrangement handed over 1.2 million Germans to Poland, 3.5 million to Czechoslovakia, 550,000 to Hungary, 250,000 to Italy, 800,000 to Romania, 700,000 to Yugoslavia, and 220,000 to the Baltic States; it had turned Germans into the largest minority population in Europe.¹³

However, during the peace negotiations, efforts were made to reconcile the classical notion of sovereignty and the ethnic notion of self-determination. As Miller asserted, since the principle of self-determination could not be generally applied,

[i]t is submitted that the contrary principle should prevail; as the drawing of boundaries according to racial or social conditions is in many cases an impossibility, protection of the rights of minorities and *acceptance of such protection by the minorities* constitute the only basis of enduring peace.¹⁴

Thus, on the one hand, instead of Wilson’s initial proposal of incorporating self-determination as a general principle, an unqualified guarantee of political independence and territorial integrity of all State members of the League was stipulated, and on the other hand, the nationalities within the new States, which were not granted the right to self-determination due to pragmatic or strategic reasons, were put under an international mechanism of minority protection. In

¹¹ Ibid, 33.

¹² *Customs Régime between Germany and Austria*, PCIJ Report (1931), Ser A/B, No. 41. However, in the dissenting opinion, Judges M Adatci, Mr. Kellogg, Baron Rolin-Jaequemyns, Sir Cecil Hurst, M Schücking, Jonkheer Van Eysinga and M Wang held the view that the numerous restrictions were imposed on Austria’s liberty of action in the Treaty of Saint-Germain; so was the case with the 1922 Protocols Nos. II and III signed at the time of the Austrian Reconstruction scheme. “They affected Austria in matters military, financial or economic, which touch most closely on the national sovereignty. None of them were reciprocal in character. Yet they were all regarded as compatible with Austria’s sovereignty and independence. *A fortiori* it seems to follow that a customs regime, such as that proposed in the Vienna Protocol, organised on a basis of parity and reciprocity, does not prejudice the independence of Austria.” See, p. 86/53.

¹³ Mazower, *Hitler’s Empire*, 33–34.

¹⁴ Miller, *The Drafting of the Covenant*, vol II, 71. *Italic in original.*

other words, the notion of the protection of minorities appeared as a fallback position where the principle of self-determination in 'ethnic' sense could not be applied.

While in the interwar period, the notion of self-determination was closely associated with the minority protection regime, in the aftermath of the Second World War, the idea of self-determination was primarily expressed through decolonisation. In fact, as Rosalyn Higgins demonstrates, much before the claim for decolonisation gained prominence in the discourse on self-determination, the mention of self-determination in the UN Charter simply meant equal rights of all States to non-interference in their internal affairs.¹⁵ It was only through the activism of the new States of Asia and Africa in the General Assembly that the concept of self-determination turned into the moral and legal force behind decolonisation.¹⁶ However, at the same time these new States were aware of the potential danger of promoting an ethnicity-defined version of self-determination that would engender the fragmentation of the Asian and African States; hence, they preferred to rely on the principle of *uti possidetis* that helped peaceful decolonisation process in Latin America between the late eighteenth century and the early nineteenth century.¹⁷

Thomas Franck sees this pattern as a reconciliatory move; in his words: "The disintegration of Spanish imperialism in America produced the norm of *uti possidetis*. The end of the German, Austrian, and Ottoman empires [in the interwar period] gave rise to self-determination. In the post-1945 era *uti possidetis* and self-determination were redefined and synthesised into a doctrine of decolonisation."¹⁸ While the ethnic notion of self-determination in the Paris Peace Conference attempted to undo established borders in order to create States along ethnic lines, the principle of *uti possidetis* cemented the territorial borders

¹⁵ Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Oxford University Press, 1994), 111–114.

¹⁶ See, United Nations General Assembly, *Declaration on the Granting of Independence to the Colonial Countries and Peoples*, Res 1514 (XV), 947th Plenary Meeting, December 14, 1960; General Assembly, *Principles which should Guide Members in Determining whether or not an Obligation Exists to Transmit the Information Called for under Article 73 e of the Charter*, Res 1541 (XV), 948th Plenary Meeting, December 15, 1960; General Assembly, *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*, Res 2625 (XXV), 25th Session, October 24, 1970. See also, Thomas D Musgrave, *Self-Determination and National Minorities* (Oxford: Clarendon Press, 1997), 69–77, 91–96.

¹⁷ See, Thomas D Musgrave, *Self-Determination and National Minorities* (Oxford: Clarendon Press, 1997), 91–96.

¹⁸ Thomas M Franck, *Fairness in International Law and Institutions* (Oxford: Oxford University Press, 1995), 147.

arbitrarily drawn by the colonial Powers¹⁹ and endorsed the multi-ethnic composition of the postcolonial States.²⁰ It is this drastic ideological shift from the conservative 'ethnic' to the liberal 'territorial' notion of statehood in post-WWII international law that we underscore in this paper in relation to minorities in postcolonial States.

Projection of the Liberal Image of Ethnicity on the Global 'Other'

The interwar arrangement of minority protection was already in decline some years prior to the outbreak of WWII and there was no enthusiasm for its continuation.²¹ Given the discriminatory character of the minority protection regime as well as the political maneuvering of the minority issue by Nazi Germany, the idea of the protection of minorities under the League became an easy victim of the widespread criticism following WWII. However, Humphrey notes that there were deeper reasons for the change in attitude towards minorities: first, the shift in political power and influence from Europe to the United States, which itself was a country of immigration; and second, the emergence of the new countries in Africa and Asia, which demonstrated a preoccupation with nation-building and consequently with assimilationist projects.²²

The post-WWII phase of international law was indeed set for reaffirming faith in and promoting certain crucial values: fundamental human rights, dignity and worth of individuals, equal rights of men and women and of nations large and small, among others.²³ In this new era, however, 'progress' equated to liberal values, and universalism simply meant the imposition of these values at a global scale. Thus, since the inception of the UN, an individualist notion of human

¹⁹ However, the option of changing territorial borders by voluntarily joining another State or by remaining in a constitutional relationship with the former colonial Power remained open. See, General Assembly, *Principles which should Guide Members in Determining whether or not an Obligation Exists to Transmit the Information Called for under Article 73 e of the Charter*, principles VI-IX.

²⁰ Franck, *Fairness in International Law*, 149.

²¹ A number of factors, according to Kunz, contributed to this shift: first, the new law was not only restricted to Europe, but not even general in Europe. It was a strictly particular international law, binding only on certain states, not on all where there were minorities. Second, there was the procedural inefficiency of the League of Nations. Third, even at the early date, opinions unfavourable to this new law were voiced. Fourth, even at an early time, it was attempted to get rid of the whole problem of minorities by way of population transfers and exchanges. See, Joseph L Kunz, "The Present Status of the International Law for the Protection of Minorities," *American Journal of International Law* 48 (1954): 284.

²² John P Humphrey, "The United Nations Sub-Commission on the Prevention of Discrimination and the Protection of Minorities," *American Journal of International Law* 62 (1968): 870.

²³ See, the Preamble of the Charter of the United Nations.

rights has become the dominant vocabulary through which the concept of 'minority' is expressed. While the minority protection regime under the League was of a hybrid nature – incorporating both collective and individual rights, under the new arrangement in the post-WWII context, it appeared convincing to replace the minority protection system with the human rights regime exclusively centred on the universal protection of individual rights.

The rationale for this shift is given in a study by the United Nations Secretariat in 1950 that concludes:

If the problem is regarded as a whole, there can be no doubt that the whole minorities protection regime was in 1919 an integral part of the system established to regulate the outcome of the First World War and create an international organisation, the League of Nations. One principle of that system was that certain States and certain States only (chiefly States that had been newly reconstituted or considerably enlarged) should be subject to obligations and international control in the matter of minorities. But this whole system was overthrown by the Second World War. All the international decisions reached since 1944 have been inspired by a different philosophy. The idea of general and universal protection of human rights and fundamental freedoms is emerging. It is therefore no longer only the minorities in certain countries which receive protection, but all human beings in all countries who receive a certain measure of international protection.²⁴

The then US Under Secretary of State, Sumner Welles, in an address delivered at the commencement exercises at the College of Negroes, Durham on May 31, 1943 justified this move towards the human rights regime by raising an 'ethical' question: "[I]n the kind of world for which we fight, there must cease to exist any need for the use of that accursed term 'racial or religious minority'. [...] is it conceivable that the peoples of the United Nations can consent to the reestablishment of any system where human beings will still be regarded as belonging to such 'minorities'?"²⁵ This ideological shift was well sketched by Joseph Kunz in 1954 when he wrote about the changing pattern of international law:

He who dedicates his life to the study of international law in these troubled times is sometimes stuck by the appearance as if there were fashions in international law just as neckties. At the end of the First World War, 'international protection of minorities' was the great fashion [...]. Recently this fashion has become nearly obsolete. Today the well-

²⁴ United Nations, *Study of the Legal Validity of the Undertakings Concerning Minorities* (1950), UN Doc E/CN4/367.

²⁵ US Department of State, *US Department of State Bulletin*, VIII, no. 206 (June 5, 1943), 482.

dressed international lawyer wears 'human rights'.²⁶

Unlike the short-lived regime of minority rights, this new era of individualist human rights, however, looked permanent, *albeit*, with a certain degree of ambivalence.

The Colonial Declaration of 1960, thus, not only reinforced the colonial borders in Asia and Africa, but also indicated the manner in which the postcolonial States would be constructed on the basis of fundamental human rights.²⁷ Subsequent General Assembly Resolutions as well as the decisions of the International Court of Justice also unequivocally declared the primacy of territorial integrity of States over the ethnic claim of self-determination.²⁸ It is against this backdrop that the legal architecture in the postcolonial States was essentially premised on the liberal international legal norms. As we shall see soon, the specific provisions of individual equality and individual freedoms coupled with the homogenous nation-building project not only alienated ethnic minority groups, but also provided justifications for their assimilation into the dominant State-sponsored culture.

The Fallacy of Human Rights Approach to the Minority 'Problem'

From a communitarian perspective, the shortcoming of the liberal-individualist human rights regime in accommodating the ethnic group phenomenon within its individualist framework is inherent. The veteran communitarian, Vernon Van Dyke, presents a historical account of how liberal political theorists like Hobbes, Locke, and Rousseau eliminated any political identity between State and individuals.²⁹ He finds the same phenomenon in the work of Rawls who puts individuals in the 'original positions' while explaining how rational individuals historically agreed to the principles of justice in a social-contractarian fashion.³⁰ In contrast, Van Dyke finds historic precedents and contemporary practices that stand against this liberal individualistic position; the establishment of the State itself is one such great historic precedence. In his words:

[T]he notion that all individuals somehow consent to the jurisdiction of

²⁶ Joseph L Kunz, "The Present Status of the International Law for the Protection of Minorities," 282.

²⁷ *Declaration on the Granting of Independence to the Colonial Countries and Peoples*, Articles 1, 7.

²⁸ See, *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*, 1970. See also, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)*, Advisory Opinion, ICJ Reports (1971), para. 52; *Frontier Dispute (Burkina Faso and Mali) Case*, ICJ Reports (1986), para. 25.

²⁹ V. Van Dyke, "The Individuals, the State, and Ethnic Communities in Political Theory," *World Politics* 29, no. 3 (1977): 343–369.

³⁰ *Ibid.*, 347–349.

the state is an obvious fiction. A more tenable position [...] is that human needs exist at various levels [...], and that the existence of needs implies a right to meet them [...]. This principle justifies individual rights, and it also justifies the rights of communities, including the communities (or the communities of communities) that constitute states. At no level are the rights absolute. At each level and between levels, rights and their exercise are limited by other rights. Within limits reached after considering the relevant rights, the meeting of the needs of community – or the promotion of the good of the community – justifies restrictions on the behaviour of individuals, whether they consent or not.³¹

His argument for *group* rights has its base on two assumptions: first, communities have rights as separate units, and in some cases, these rights are not reducible to the rights of individuals as members, and second, these rights may reflect moral claims. He exemplified the first assumption with the British practice in many of her colonies where the British administration conferred legal rights to communities – an arrangement which is “obviously communal, giving land rights to the community as such on a collective, corporate basis. To seek to reduce these communal rights to individual rights is to strain to preserve a paradigm that does not fit.”³²

While defending his second assumption that rights, which ought to be accorded to groups, should also be thought of as reflecting moral claims, Van Dyke questions: “Why should the possibility be ruled out that the authority of the state should be limited not only by the moral rights of individuals (“inalienable” or human rights), but also by the moral rights of groups?”³³ He asserts that legal status and rights, including the right to self-determination, may well be granted to groups in response to moral claims, given that often such group rights are not conflicting with individual rights. To quote him:

There is never a thought that when a people exercise its right to self-determination, the outcome might violate an individual right. No violation occurs even in the case of those who oppose the outcome. They retain the right to leave the group, but they have no right of protection against the group’s decision, and no right of redress. [...] The foregoing suggests that it is the corporate unit that enjoys the right; the most that an individual can claim is a right to participate in the corporate choice.³⁴

In a different work, he attempts to dismantle the liberal approach to the right to self-determination with the contention that although individuals have interest in being grouped, that does not necessarily mean that the related right goes to

³¹ Ibid., 350.

³² Ibid., 353.

³³ Ibid., 357.

³⁴ Ibid., 358–359.

individuals.³⁵

Van Dyke portrays the inherent drawback of liberalism in accommodating group rights with reference to the liberal response to indigenous communities. On the one hand, liberals acknowledge rights for persons belonging to indigenous communities, on the other hand, history shows that the indigenous communities are as a rule not capable of upholding either their rights or their interests in free and open individualistic competition with their more advanced counterparts. In his words:

[T]he liberal, moved by human concerns, has to favour some kind of a special, protective regime for [indigenous people] – perhaps establishing territorial reserves from which others are excluded. But this is contrary to liberal doctrine, which is at least integrationist if not assimilationist; permanent communalism is unacceptable. And so the liberal is torn. What he usually does is to say that the special measures for the indigenous are transitory, pending developments that permit integration. But if independence is impractical, permanent communalism may be exactly what the indigenous want [...]

The trouble is that the liberal has no place in his theory for peoples as distinct political units within the state. Individuals are the units, and when individuals are divided up for governmental purposes, it must be on a territorial basis and not on the basis of ethnic differences [...] There seems to be no place in the liberal's thought for the possibility that an indigenous population might want to preserve its distinctive identity indefinitely.³⁶

Thus, the way liberalism tends to respond to group identities is very often disproved by practice. This gap between theory and practice, in communitarian understanding, marks the inherent drawback of liberal-individualism. And this is exactly where communitarians take a solid stand by asserting that individualism alone cannot be a proper response to minority rights; hence the obvious conclusion as drawn by Van Dyke is that "liberalism needs supplementing".³⁷ The proposed supplement is to recognize ethnic group rights going beyond the traditional liberal-individualist notion of human rights.

Consequently, on the one hand, in the face of theoretical limitations of liberal-individualism, a distinct set of principles recognizing group rights is advocated by the supporters of minority rights regime, on the other hand, pragmatic

³⁵ V. Van Dyke, "Collective Entities and Moral Rights: Problems in Liberal-Democratic Thought," in *Group Rights – Perspectives Since 1900*, ed. J. Stapleton (Bristol: Thoemmes Press, 1995), 180–200.

³⁶ *Ibid*, 188–190.

³⁷ Van Dyke "The Individuals, the State, and Ethnic Communities in Political Theory," 344.

practices of group differentiated rights strike at the very root of the liberal theory. This exposes a move towards reconciling the liberal fantasy of a post-ethnic world with crude pragmatism that often makes ethnic accommodation obvious. As a matter of fact, the post-Cold War ethnic violence had facilitated a fresh discourse on the necessity of ethnic accommodation within liberal political philosophy itself. Indeed, there is a hope for a more accommodative international law in the 'liberal' proposition that individual and group rights are not mutually exclusive and it is possible to accommodate group rights within the liberal framework. The proponents of this argument – Yael Tamir, Joseph Raz, and Will Kymlicka, among others – acknowledge that there are compelling interests related to culture and identity, which are fully consistent with the liberal principles of individual freedom and equality, and which justify granting special rights to minorities.³⁸

Kymlicka famously advanced his theory of liberal culturalism which is based on the fact that the modern States invariably develop and consolidate a 'societal culture' which requires the standardisation and diffusion of a common language, and the creation and diffusion of a common educational, political, and legal institutions.³⁹ These societal cultures are profoundly important to liberalism as liberal values of freedom and equality must be defined and understood in relation to such societal cultures. Therefore, in his theory, while freedom and equality for immigrants require freedom and equality within mainstream institutions by promoting linguistic and institutional integration as well as by reforming those common institutions so that linguistic and institutional integration does not require denial of their ethno-cultural identities, freedom and

³⁸ Yael Tamir, *Liberal Nationalism* (Princeton: Princeton University Press, 1995); Joseph Raz, "Multiculturalism: A Liberal Perspective," *Dissent* (Winter, 1994): 67–79; J Raz, "Multiculturalism," *Ratio Juris* 11, no. 3 (1998): 193–205. For a detailed discussion on group rights within liberalism, see, David Miller and Michael Walzer, eds, *Pluralism, Justice, and Equality* (Oxford: Oxford University Press, 1995); Jeremy Waldron, com, *Liberal Rights: Collected Papers (1981–1991)* (Cambridge: Cambridge University Press, 1993); Joel E Oestreich, "Liberal Theory and Minority Group Rights," *Human Rights Quarterly* 21, no. 1 (1999): 108–132; Steven Wheatley, "Deliberative Democracy and Minorities," *European Journal of International Law* 14, no. 3 (2003): 507–527; Max Plog, "Democratic Theory and Minority Rights: Internal and External Group Rights in a Global Democracy," *International Journal on Minority and Group Rights* 10 (2003): 52–82; Claus Offe, "Political Liberalism, Group Rights, and the Politics of Fear and Trust," *Studies in East European Thought* 53 (2001): 167–182; Eric J Mitnick, "Three Models of Group-Differentiated Rights," *Columbia Human Rights Law Review* 35 (2004): 102–144; Geoff Gilbert, "Autonomy and Minority Groups: A Right in International Law?" *Cornell International Law Journal* 35 (2002): 307–353.

³⁹ Societal culture is defined as a set of institutions, covering both public and private life, with a common language, which has historically developed over time on a given territory, which provides people with a wide range of choices about how to lead their lives.

equality for the 'national minorities' requires something more.⁴⁰ Given that these groups already possessed a societal culture and they have fought to maintain these institutions, Kymlicka argues, their demands for special language rights and regional autonomy have increasingly been accepted by liberal democracies. He then contends that group-differentiated treatment of this sort is not a violation of liberal principles, for to expect the members of national minorities to integrate into the institutions of the dominant culture is neither necessary nor fair. Freedom for them involves the ability to live and work in their own societal culture. In short, the aim of the liberal theory of minority rights is to define fair terms of integration for immigrants, and to enable national minorities to maintain themselves as distinct societies.⁴¹

While like the communitarians, Kymlicka recognises the paradoxical gap between the theory and the practice of group rights in the liberal societies – on the one hand, group-differentiated practices exist in the liberal societies in various forms for the sake of pragmatism, on the other hand, liberalism does not recognise group rights at the normative level – and urged the normative incorporation of group rights, he does so essentially within the liberal framework.⁴² What makes Kymlicka different from a communitarian is his liberal justification for group-differentiated practices in liberal democracies with the central argument that depriving minorities of their rights will be a violation of the liberal principles of autonomy and equality. Conforming to the core of liberalism, he categorically claims in relation to the rights of 'illiberal' groups that minority rights are consistent with liberal culturalism if, first of all, "they protect the freedom of individuals within the group," and secondly, "they promote relations of equality (non-dominance) between groups".⁴³

However, this liberal shift, despite its promise for a better coherence with pragmatic needs and also practice, is often depicted as counter-productive for liberalism itself. The liberal theorist Chandran Kukathas, for example, dismantles the notion of cultural rights altogether.⁴⁴ Despite his concerns for minority

⁴⁰ Kymlicka defines national minorities as groups who formed functioning societies on their historical homelands prior to being incorporated into a larger state.

⁴¹ Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Oxford University Press, 1995). See also, W Kymlicka, *Politics in the Vernacular: Nationalism, Multiculturalism, and Citizenship* (Oxford: Oxford University Press, 2001), 51–66; Leighton McDonald, "Regrouping in Defence of Minority Rights: Kymlicka's Multicultural Citizenship," *Osgoode Hall Law Journal* 34, no. 2 (1996): 292–319.

⁴² For a communitarian perspective on group rights, see, for example, Van Dyke, "The Individuals, the State, and Ethnic Communities in Political Theory," 343–369; also Van Dyke, "Collective Entities and Moral Rights: Problems in Liberal-Democratic Thought (1982)," 180–200.

⁴³ Kymlicka, *Politics in the Vernacular*, 22–23.

⁴⁴ See generally, Chandran Kukathas, "Are There Any Cultural Rights?" in *Group Rights – Perspective Since 1900*, ed. J Stapleton, 258–298. See also, Chandran Kukathas, *The*

communities, he finds it unnecessary to abandon, modify, or reinterpret liberalism. According to him, the very emphasis of liberalism on individual rights and liberty reflects not hostility to the interests of communities but wariness of the power of the majority over minorities. Thus, there is no need to look for alternatives to liberalism or to throw away the individualism that lies at its heart. Therefore, unlike Kymlicka, he finds it unnecessary to accommodate any idea of group rights to address the issues of minority. To quote him: "We need, rather, to reassert the fundamental importance of individual liberty and individual rights and question the idea that cultural minorities have collective rights."⁴⁵ This proposition heavily depends on his assumption that the basis of collective rights is the rights of individuals. For Kukathas, while the interests given expression in groups do matter, they matter ultimately only to the extent that they affect actual individuals. Therefore, groups and communities have no special moral primacy in virtue of some natural priority.

Solely relying on the primacy of individual's choice, Kukathas contends that as long as individuals choose to remain with a group, liberal or illiberal, outside society is not entitled to intervene in the internal affairs of that group. In his words: "the primacy of freedom of association is all-important; it has to take priority over other liberties, such as those of speech or worship, which lies at the core of the liberal tradition."⁴⁶ Now, if membership in a cultural community is voluntary, and if the outside society has no right to intervene in the internal affairs of that community, it follows that to remain a member of that community, individuals must stick to the rules of that community. Kukathas believes that in this way some protection is given to the cultural communities through individualism without actually deviating from basic liberal principles.

Another prominent liberal philosopher, Brian Barry, vehemently opposes the idea of promoting communal identities by the State although he recognises the role of communities and associations in human well-being.⁴⁷ He asserts that the fundamental liberal position on group rights is that individuals should be free to associate together in any way they like provided that their taking part in the activities of the group should come about as a result of their voluntary decision and they should be free to cease to take part whenever they want to.⁴⁸ In this sense, he argues, there should not be any liberal protection of 'group' rights, for "[t]he only ways of life that need to appeal to the value of cultural diversity are those that necessarily involve unjust inequalities or require powers of indoctrination and control incompatible with liberalism in order to maintain

Liberal Archipelago: a theory of diversity and freedom (Oxford: Oxford University Press, 2003).

⁴⁵ Ibid, 261.

⁴⁶ Ibid, 289.

⁴⁷ Brian Barry, *Culture and Equality* (Cambridge: Polity Press, 2001), 112–154.

⁴⁸ Ibid, 148.

themselves".⁴⁹ Given that such cultures are unfair and oppressive to at least some of their members, he finds it hard to see why they should be kept alive artificially, especially when he assumes that with embracing liberalism, groups will give up their demand for separate cultural rights.⁵⁰

That the State does not lend any special weight to the norms of illiberal – or liberal – groups, is, according to Barry, the essence of what it means to say that a society is a liberal society.⁵¹ It is, therefore, natural that Kymlicka's emphasis on 'diversity' and 'autonomy' for minorities came under his criticism; these notions refer to policies that would systematically undercut paradoxically those rights of individuals to protection against groups that the liberal States should guarantee. His crucial question thus follows: "How can a theory that would gut liberal principles be a form of liberalism?"⁵² A more candid expression comes from him when he claims: "If a liberal is not somebody who believes that liberalism is true (with or without inverted commas), what is a liberal?"⁵³ And consequently he refuses to recognise Kymlicka as a liberal:

A theory that has the implication that nationalities (whether they control a state or a sub-state polity) have a fundamental right to violate liberal principles is not a liberal theory of group rights. It is an *illiberal theory* with a bit of liberal hand-writing thrown in as an optional extra.⁵⁴

This controversy *within* liberalism apropos the accommodation of the conservative notion of group rights indicates that perhaps it would take a bit longer for this age-old controversy between liberal individualism and conservative collectivism to reach a subtle compromise keeping their core values intact. The case of the Chittagong Hill Tracts (CHT) in Bangladesh substantiates this proposition.

The Case of the CHT

According to Bangladesh's now disputed 2011 census, of the country's more than 142 million inhabitants, just 1.2% are described as indigenous (*adibashis*).⁵⁵ Most of them live in the Chittagong Hill Tracts (CHT), while some live in the so-called plains areas of Bangladesh and are more integrated into communities dominated by the majority Bangalis. More or less, there are thirteen indigenous communities

⁴⁹ Ibid, 135.

⁵⁰ Ibid.

⁵¹ Ibid, 125.

⁵² Ibid.

⁵³ Ibid, 132.

⁵⁴ Ibid, 140. Emphasis added.

⁵⁵ UN Office for the Coordination of Humanitarian Affairs, published on the IRIN website: <<http://www.irinnews.org/report.aspx?reportid=93640>>. The UNHCR puts the number at around 1.5 % See, <<http://www.unhcr.org/refworld/topic,463af2212,469f2ca62,49749d5841,0.html>>.

in the CHT (Rangamati, Bandarban and Khagrachari Hill Districts); they are: Chakma, Murma, Tangchangya, Tripura, Murang, Mrung, Bawm, Pangkhua, Lushai, Khumi, Khyang, Mru, and Sak.⁵⁶ Yet, very recently, the Government of Bangladesh questioned the very indigenous character of the people living in the CHT. Briefing foreign diplomats and UN agencies in Dhaka on July 26, 2011, the Foreign Minister said that Bangladesh was concerned over attempts by some quarters at home and abroad to identify the ethnic minority groups as indigenous people in the CHT region.⁵⁷ In her effort to clarify some 'recent misconceptions' about the identity of the people in the CHT, she claimed that people in the CHT were 'ethnic minorities' and they should not be called 'indigenous'. Given that neither Bangladesh Constitution nor any international law recognises these people as indigenous, she also urged the editors and senior journalists from print and electronic media to take note of it. She argued that the tribal people most certainly did not reside or exist in the CHT before the 16th century and were not considered 'indigenous people' in any historical reference books, memoirs or legal documents; rather, the CHT people were the late settlers on the Bengal soil and the CHT region compared to the Bangali native ethnic vast majority residing here for more than 4,000 years, she pointed out.⁵⁸ While there is a series of studies either supporting or dismantling the indigenesness of the people in the CHT, this paper focuses on the official position of the government and exposes that the depiction of the CHT people as 'ethnic minorities' leaves them with no means of cultural protection within a legal architecture of human rights. Far from being peculiar to Bangladeshi national legal framework, this shortcoming is embedded in the liberal-individualist human rights regime that many postcolonial states unquestionably adopted in their constitutions as means of 'progress' and 'universal civilisation'.

The Constitution of the People's Republic of Bangladesh, drafted in light of liberal constitutionalism, guarantees equality. However, to address the *de facto* economic and social disparity, the Constitution permits affirmative actions "in favour of women or children or for the advancement of any *backward section of citizens*".⁵⁹ Special measures for indigenous peoples have been justified under this constitutional provision by putting them under the rubric of 'backward section of citizens'. No doubt, centuries of systematic oppression and discrimination made the hill people vulnerable, and economic affirmative action is badly needed to ameliorate their economic status. But perceiving them as backward in terms of culture and tradition is nothing short of cultural hegemony by the dominant Bengali cultural group.

It would be pertinent to mention here that during the British colonial rule, legal

⁵⁶ According to the census report of 1991.

⁵⁷ See, *The Daily Star*; see also, *The Prothom-Alo*.

⁵⁸ *Ibid*.

⁵⁹ Article 28 (4) of the Constitution. Emphasis added.

measures were taken to protect the special characteristics of life and nature of the hill people of the CHT. The 1900 Regulation formulated by the British rulers is still considered the principal instrument for protecting hill people's rights. Immediately after attaining independence from Pakistan in 1971, when the war-ravaged Bangladesh Government was preparing to adopt a constitution, an indigenous peoples' delegation led by Manobendra Narayan Larma called on Bangabandhu Sheikh Mujibur Rahman – the father of the nation – on February 15, 1972 demanding autonomy for the CHT with its own legislature. But this demand was utterly rejected; he rather insisted that there could be only 'one nation' in Bangladesh. Bangabandhu therefore reportedly asked the hill people to forget their separate identity and "become Bengalis".⁶⁰

After the brutal assassination of Sheikh Mujibur Rahman on August 15, 1975, martial law was imposed all over Bangladesh. During the regime of General Ziaur Rahman, the CHT Development Board headed by military personnel was formed in 1976. The Board undertook a devastating programme of settlement of hundreds of thousands of poor Bengali people in the CHT. From 1980 to 1984, as many as 400,000 Bengalis were made to settle in the CHT, and over 50,000 Chakmas were reported to have fled to the Indian state of Tripura.⁶¹ In 1947, the Bengali population in the CHT was 2.5%. It rose to 10% in 1951 and 35% in 1981.⁶² The Bengali population became almost 50% in 1991. In the Bandarban and Khagrachari hill districts, Bengalis are the majority where they account for 53 % and 52% of the total population respectively.⁶³

This effort of forced assimilation is not limited to demographic calculations only; hill people are being suppressed culturally as well. Bengali, the state language of the country, is used as the only language in the schools in the CHT. In this nation building process, a number of indigenous languages are being wiped out. Massacre of indigenous people, burning of their houses, arbitrary arrests, torture, extra-judicial executions and 'disappearances' reportedly perpetrated by or with the connivance of the military and law enforcement agencies during the years of armed conflict depict the human rights situation in the region.⁶⁴ These were "planned actions as a part of macro objective of nation building through forced

⁶⁰ Mizanur Rahman and Tanim H Shawon, eds., *Tying the Knot: Community Law reform and Confidence Building in the CHT* (Dhaka: ELCOP, 2001), 10.

⁶¹ Ibid.

⁶² W Van Schendal, "The Invention of 'Jumma': State Formation and Ethnicity in Southeastern Bangladesh," *Modern Asian Studies* 26, part. 1 (1992): 95.

⁶³ The CHT Commission, *Life is not Ours' Land and Human in the CHT Bangladesh* (Denmark & the Netherlands, 1994), 8.

⁶⁴ Ibid.

assimilation and forced expulsion".⁶⁵

On the other hand, *Parbattya Chattagram Jana Sanghati Samiti* (PCJSS) – the major political representative of the indigenous communities in the CHT – through its ideological and organizational framework undertook to organise the hill people on a nationalistic agenda. The persecution in the CHT led to the demand by the PCJSS for a separate nationhood for the hill people. This party, formed in the wake of Bangabandhu's refusal in 1972 to recognise the hill people as a community distinct from Bengalis, had since the mid 1980s been referring to the hill people as the 'Jumma nation'.⁶⁶

With a view to realising Jumma nationalism by way of autonomy for the hill people, during the period of insurgency the PCJSS set out a number of demands: i) the Constitution of Bangladesh shall recognise the CHT as a special administrative unit, with regional autonomy. The three districts of the CHT shall be merged into one unit, and the region shall be renamed Jummland; ii) Jummland shall be administered by an autonomous Regional Council, which shall be elected directly by the people on the basis of adult franchise. The Council shall be responsible for 30 subjects including, *inter alia*, general administration, law and order, police, land, education, forestry, local government institutions, and cultural affairs; iii) all lands in the CHT, except some important government establishment, shall be placed under the jurisdiction of the Council. A constitutional ban ought to be put on the purchase of land in the CHT by 'outsiders'. Deeds made to lease out land to Bengalis for rubber plantation and forestry shall be cancelled and the lands shall be placed under the Council's jurisdiction. The Constitution must ban Bengali settlements in the region. All 'outsiders' who have settled in the area since August 17, 1947 shall be withdrawn from the region; iv) service rules shall be relaxed for the hill people. Special quotas shall be reserved in government civil services for the hill people; v) parliament seats of this constituency shall be reserved for the hill people only; vi) an autonomous indigenous Police Force constituting solely of the hill people shall be formed. Quotas should be reserved in the defence services for the hill people. The region shall be demilitarised; vii) a constitutional recognition shall be given to all the small nationalities of the area; and finally, viii) all international and internal Jumma refugees should be properly rehabilitated. Members of *Santi Bahini* (SB) – the military wing of the PCJSS – and all individuals who have been implicated for association with the SB should be properly rehabilitated.⁶⁷

The power-sharing demand of the PCJSS as a whole was perceived as a threat to

⁶⁵ Meghna Guhathakurta, "Overcoming Otherness and Building Trust: the Kalpana Chakma Case," in *Living on the Edge: Essays on the Chittagong Hill Tracts*, ed. S Bhaumik (Kathmandu: SAFHR, 1997), 182–184.

⁶⁶ Schendal, "The Invention of Jumma," 121.

⁶⁷ *Dabeenama* (Charter of Demands of the PCJSS to the Government of Bangladesh), JSS Publications, 1992 and 1996.

national security by military and conservative political elites. The political government in 1993 rejected the power-sharing demand by holding that “Bangladesh is an integrated and homogenous society bound by common language and rich cultural heritage. [...] Bangladesh is a unitary state with a democratic Constitution that extends to the entire territory without exception”.⁶⁸

This official position perceives Bangladesh as a nation-state. By claiming Bangladesh a homogenous society, this position denies the existence of other cultural groups, and justifies various assimilative actions taken by successive governments. However, with the re-emergence of Awami League to power in 1997, the government put efforts to bring an end to the insurgency by initiating dialogues with the PCJSS as well as by seeking cooperation from neighbouring India who allegedly provided the SB with arms and other supports during the whole period of the insurgency. This considerably influenced the PCJSS to soften its demand for regional autonomy; instead, during the negotiations with the government, it accepted the government position that the three hill districts of the CHT – Rangamati, Khagrachari, and Bandarban – will form a regional council.⁶⁹ Following closed-door negotiations, the CHT Peace Accord between the National Committee on CHT Affairs formed by the Government of the People’s Republic of Bangladesh and the PCJSS appeared on December 2, 1997.

The Peace Accord responded, though half-heartedly, to the issues of local governance, rehabilitation, land, and general amnesty. The Accord provides for three Hill District Councils, wherein only the permanent residents of the CHT will be members.⁷⁰ There is a provision for a Regional Council in coordination with these District Councils. The Chairman of this Council shall be elected indirectly by the elected members of the District Councils. The Regional Council shall be formed with 22 members of whom two-thirds will be elected from among the ‘tribals’. The Regional Council is given the responsibility of supervising and coordinating the subjects vested under the Hill District Councils. It is to be noted here that some major subjects like general administration and law and order, education, cultural affairs, information and statistics, population control and family planning that directly relate to autonomy and preserving indigenous culture were not vested under the Hill Districts. However, it was provided that the government and elected representatives shall make efforts to maintain separate cultures and traditions of

⁶⁸ Special Affairs Division, *A Report on the Problems of Chittagong Hill Tracts and Bangladesh: Responses for their Solution* (Dhaka: Government of Bangladesh, 1993), cited in Amena Mohsin, *Politics of Nationalism* (Dhaka: The University Press Limited, 1997), 201.

⁶⁹ Mohsin, *Politics of Nationalism*, 201–202.

⁷⁰ Bengalis who legally possesses land in the Hill District and generally lives at a certain address in the Hill District are also permanent residents of the CHT according to the Peace Accord.

the 'tribals', and the government in order to develop the 'tribal' cultural activities at the national level shall provide necessary patronisation and assistance.

Regarding pending land issues, the Accord stipulates that no land within the boundaries of Hill District shall be given in settlement, purchased, sold and transferred, including giving lease without prior approval of the Council. Some government establishments are kept outside this restriction. The Accord also prohibits any acquisition and transfer of land within the boundaries of the Hill District by the government without consultation and consent of the Hill District Council. Provisions for rehabilitation, amnesty along with compensation were made in the Peace Accord.

However, to the dissatisfaction of the hill people, the Accord remained silent apropos their constitutional recognition. Instead, the term 'tribal' (the Bengali version of this word – Upajati – means sub-nation) was used to describe the indigenous peoples. The preamble to the Accord categorically mentions that the parties of this Accord arrived on an agreement "under the framework of the constitution of Bangladesh". Besides, special arrangements to facilitate political participation of hill peoples by restricting a number of human rights of majority Bengalis contradict a number of fundamental rights guaranteed to all citizens of the country. On April 12-13, 2010, the High Court Division declared illegal some important sections of the 'Chittagong Hill Tracts Regional Council Act', and found the Accord, though a political issue, a violation of the spirit of the Constitution following two separate writ petitions.⁷¹ Later, a seven-member full bench of the Appellate Division led by the then Chief Justice gave an order of stay on the HC verdict until the appeal was dissolved.

Paradoxically, the legality of peace agreements under the constitution or international law is not usually the prime concern of various contending parties of conflicts. Often, such agreements are the products of grave pragmatic needs in the absence of any better option. The CHT Peace Accord of 1997 is not any exception here. In the face of insurgency and ensuing massive violation of human rights as well as various regional and international pressures on both the government and the PCJSS, such a peace accord was a demand of time. The peace process appeared complicated when the then opposition party vehemently opposed any concessions in favour of the indigenous people, as that would go against the unitary spirit of Bangladeshi nationalism as well as the territorial integrity of the country. The party in power at that time also consistently emphasized the nation-state character of Bangladesh. Therefore, the CHT Peace Accord mainly concentrated on bringing an end to insurgency by devolving a few number of local governments, subject to newly established district and regional councils and rehabilitating the members of the *Santi Bahini* (SB) without

⁷¹ *Mohammad Badiuzzaman Vs. Bangladesh*, Writ Petition No. 2669 of 2000, reported in 7 LG (2010) HCD.

addressing the key issue of the conflict. Yet, right-wing political parties vowed to repeal it once they assumed power, which they actually did not – again for pragmatic reasons. On the other hand, a section of hill people too rejected the accord as a compromise and formed a political party – United Peoples Democratic Front (UPDF) – to carry on the struggle for the ‘full autonomy’ of the CHT.⁷² Under such delicate circumstances, no substantive progress has been made in the implementation of the Accord.

Conclusion

This brief account of the interaction between the dominant majority culture and the ethnic minorities against the backdrop of the liberal individualism highlights the inherent complexities that the projection of the liberal perception of ethnicity on the periphery engenders. This narrative also brings forth the issue of normative compatibility of current liberal legal norms with an effective response to ethnic conflicts that requires ethnic accommodation along ethnic lines in one form or the other.⁷³ This gap between the normative stance and pragmatic needs implies that international law, with its normative reliance on liberal individualism, deals with ethnic conflicts in a ‘quasi-legal’ realm.

⁷² Mohsin, *Politics of Nationalism*, 215.

⁷³ To explain the limitation of the liberal individualist approach to ethnic conflicts, Koshy describes the proceedings involving the Sri Lankan ethnic conflict before the Human Rights Commission and the Sub-Commission in which almost exclusive attention was given to the violations of core individual rights rather than to the ethnic and political structures giving rise to the conflict as such or to the related claims of some Tamil groups for an autonomy scheme. See, Ninan Koshy, “Ethnic Conflicts in Sri Lanka and the UN Human Rights System,” in *Ethnic Conflicts and the UN Human Rights System*, ed. Henry J Steiner, cited in Henry J Steiner, “Ideals and Counter-Ideals in the Struggle over Autonomy Regimes for Minorities,” *Notre Dame Law Review* 66 (1991), fn 33. Similarly, in the context of Nigeria, Osaghae registers his distrust of individualist human rights as the sole system to address ethnic conflicts, and argues that although individual rights are necessary, group rights which “regard ethnic groups as deserving of protection of justice in competition with others are also needed” for ethnic conflict management. See, Eghosa E Osaghae, “Human Rights and Ethnic Conflict Management: The Case of Nigeria,” *Journal of Peace Research* 33, no. 2 (1996): 171. Lacking these rights, he asserts, the continued existence of ethnic groups cannot be guaranteed, nor can their non-subjugation by other groups be prevented, in that the entrenchment of individual rights alone cannot serve the purposes which group rights are meant to serve (178). Using the example of ethnic tension in Nigeria, Osaghae thus concludes that there are important ethnic group interests which cannot be served by individual rights; at least some fundamental group rights such as the rights of the ethnic group to exist, to preserve and protect its language and culture, and to participate equally with others in the affairs of the State, including the sharing of power and resources, have to be recognised, which would then become “a meaningful basis for trying to redress the imbalances and inequalities among the various groups” (186). This claim is equally true for other conflict situations as well.

What is the way forward then? The shortcoming of liberal international law in accommodating the conservative ethnic phenomenon within its individualist framework is inherent, and therefore, demands a drastic remodelling of the normative relationship between ethnicity and international law. One prudent way of doing this is to rethink liberalism itself. Since international law is shaped by the dominant political philosophy of each epoch, the normative accommodation of ethnicity within liberalism is naturally expected to reorganise the normative foundation of international law vis-à-vis ethnicity.