
Book Reviews

Sundhya Pahuja. ***Decolonising International Law. Development, Economic Growth and the Politics of Universality***. Cambridge: Cambridge University Press, 2011. Pp. 303. £65.00. ISBN: 9780521199032.

The book under review, which was awarded an ASIL Certificate of Merit, critically examines international law in the period following decolonization. Engaging both legal history and philosophy, the gnawing question which motivates this work, and risks getting lost under the wealth of scholarship, is: 'Why has international law failed the Third World?'. The author claims that in order to answer this question, we must trace how a development thesis has been universalized and expose the transformative dynamic of a new ruling rationality based on the twin concepts of development and economic growth. The outcome is a regulatory framework, universally applied, which has subsumed the creative promise of international law. The claim is not that international law has shifted the operation of power, but rather that international law has itself become a new mode of power. Despite affirming political equality, the Third World, by avowing economic backwardness, unwittingly endorsed a rhetoric of development and a separation of the economic from the political. Once institutionalized through the Bretton Woods Institutions and the United Nations respectively, this disembedding of economics from politics, which we know from Polanyi's *The Great Transformation* (1944) can only ever be an illusion, has facilitated a new imperialism of international economic law in the national arena. The historical repercussions are well known: the ever-expanding reach of an international technical law positioned as superior to national law, intervening, often violently, to maintain an unfavourable and asymmetric *status quo* in the name of idealized economic, political, and social models that cast themselves as universal. This pattern is well documented in Anghie's *Imperialism, Sovereignty and the Making of International Law* (2004). Anghie argues that the branding of the 'other' as uncivilized and particular does not emerge from universals, but rather animates their formation. International law, by this account, was motivated by a civilizing mission, which Anghie terms 'the dynamic of difference', and this dynamic endures under very distinctive styles of jurisprudence from 16th century naturalism to 19th century positivism to modern-day pragmatism predicated on an assumed initial consent. Pahuja looks at the most recent form of this dynamic, not so much regarding its consequences as the legal and philosophical reasons for its endurance and even stabilization into the present.

In this endeavour, Pahuja carries forward the project of Fitzpatrick's *Modernism and the Grounds of Law* (2001), the structure of which her book mirrors in some sense. Beginning with a philosophical orientation of international law, which we shall come back to, Pahuja goes on to discuss its instantiation. She chronicles the progression from the universal promise of law in the service of decolonization to the particularization of law's universality in the service of development, in three critical spheres: the nation, natural resources, and political economy respectively; that is to say (i) how decolonization led to the developmental nation state in which self-determination came at the cost of accepting an epistemological framework of self-definition; (ii) how the claim to permanent sovereignty of natural resources led to the protection and elevation of the foreign investor as a subject of international law; and finally (iii) how, following the end of the Cold War, the rule of international law became the

internationalization of the rule of law as development strategy. The old civilizing mission of colonialism under the dual mandate of exploiting resources for the mutual benefit of both colony and host nation thus persisted under the guise of nation-building and international integration. Pahuja's claim is that this was not because the Third World was misguided, unlucky, and not unified enough, but rather because its demands were deradicalized: first by the epistemic framework of international law and secondly by its moral imperative to promote economic development, before the last remnants of dissent were drowned out by debt crises and the conditionality that came with being rescued. So, in the resultant juridification of universals, we find ourselves today with what could be regarded as a global technical web founded in a scientific ideal of development that seeks to project its power over a depoliticized world.

International law produces its own categories even as it is founded on them, both constituting and translating national positive law into an idea of universal cosmopolitan law on the one hand (the post-colonial), and an idea of justice on the other (the political), and in both these operational modes, law's promise comes precisely from what Pahuja, echoing Derrida's concept of the 'cut', calls its 'critical instability'. Indeed, the word 'critical' originates from the Greek '*krinein*' which means 'to cut', thus to separate and define. Law's instability lies in the gap between what law is and the universal claim and invincible promise to which it aspires. It is this gap, not foreclosed by a particular claim or promise, which invigorates law and makes it exceed rules-plus-violence to accommodate difference. In deconstructing doctrinal debates, the critical legal school could perhaps be construed in Jungian terms as bringing light to law's subconscious shadow, and thus coming to terms with its instability. In the conflation of ends and means, of horizon and process, law has denied its shadow. The shadow of appropriation, violence, oppression, poverty, and corruption and all that international law finds abhorrent must be exposed within the law itself, for the best protection against the shadow's projection onto the world is by becoming conscious of it within. In this regard, Third World Approaches to International Law (TWAIL) have the advantage of a dual-perspective of understanding both the language and intentions of international law, whilst using this understanding to critique its darker consequences that only those who look from the perspective of disadvantage can clearly perceive. There is an irony that Pahuja's text is itself exemplary of this duality, on the one hand being a highly-structured analysis of legal history, each chapter carefully introduced and concluded in a way very helpful to the reader, whilst on the other hand criticizing the pre-formulated structuralism of law within a developmental framework. Crucially, Pahuja avoids the structuralist trap of offering solutions and thus positing a new universality, or the mistake of relativism, but rather points the way that such answers will always come from a space or openness to what is unknown, what Laclau calls an open universality. There is then an on-going duty not only to speak for, but also to direct attention to, those voices of the excluded 'other' in their plurality.

Pahuja's analysis necessarily includes those who do posit a new universality, such as Hernando de Soto and Amartya Sen. Unexplored, however, are the first generation Third World jurists Kéba Mbaye and Mohammed Bedjaoui, whose clarion call was for a 'right to development'. Along with Abi-Saab, who is discussed, their demands for the democratization of the international economic order were rejected and ignored. This was possible not only because of the institutional separation between the economic and political, but also, within the Bretton Woods Institutions, between 'hard' law protecting foreign investors and merely 'soft' commitments to development and the regulation of multinational enterprises. Any current attempt at harmonization (de Soto), or introducing a right to development (Mbaye), or creating a more holistic notion of development (Sen), once universalized threatens further to exacerbate the loss of autonomy by widening law's instrumentalization in the service of

economic growth, and sacrificing the interests of new 'others'. Some Third World jurists are even nostalgic for the concept of sovereignty which they inherited and the meaning of which has eroded over time. But perhaps any attempt to conceptualize values, such as the sovereignty of nations or the security of investments or the human rights of individuals, signals a lack of genuine solidarity and is a foreboding for their decline. The purpose of this book then is diagnosis, rejecting the way normative grounds have been accepted as obviously true, historically destined, or technical, and in rejecting them to sow the seeds of reinterpretive possibilities. The hope is that by throwing light on one such ground, and the history of its elevation into the twin idols of development and economic growth, we may free ourselves from its spell. Such problems, for example, as the impossibility of sustaining growth beyond environmental limits cannot be overcome by a mere adjustment of our idea of development. In becoming aware of the critical instability of international law, perhaps we may better harness its counter-imperial potential that inspired such faith among the emancipators of the Third World, who once ventured to use it as a site to redress their grievances. Pahuja, citing an invocation by Nehru given just before the stroke of midnight, refers to them affectionately as 'midnight's international lawyers'.

Development, once an afterthought in a formative speech by Harold Truman, included in full in the book's appendix, has in a Copernican turn transformed from an advocated goal into a foundational cornerstone occupying a position of objective rational truth. Perhaps this Copernican turn reflects a teleological turn in Kant, whose ideas form an important undercurrent to modern Western thought, encapsulated for example in his short essay *Idea for a Universal History from a Cosmopolitan Point of View* (1784). For, having written his *Critique of Pure & Practical Reason* (1781, 1788), Kant went on to write the *Critique of Judgment* (1790) bridging his epistemic and moral world views with an *a priori* teleology, which comes dangerously close to conflating means and ends, the end moreover a reflexive judgement based on a *sensus communis* (common sense). The parallel with the development thesis and its tripartite instantiation as told by Pahuja is striking. Nietzsche would later refer to Kant's teleology disparagingly in his *Twilight of the Idols* (1895) as a 'backdoor philosophy', the real world 'unattainable, indemonstrable, unpromisable; but the very thought of it – a consolation, an obligation, an imperative'. Nietzsche insisted rather that 'no one gives a man his qualities [not even himself] ... human beings are not the effect of some special purpose, or will, or end; nor are they a medium through which society can realise an "ideal of humanity" or an "ideal of happiness" or an "ideal of morality"'. Or an 'ideal of nation'! Even should one wish to believe in such ideal ends, Pahuja's work traces the manner of law's metamorphosis under their prescription into an unresponsive and fragmented network of power. Development, the new God of our secular age, has subsumed the critical promise of international law for genuine inclusivity and justice. This important and timely book is thoroughly researched, methodically written, and both instructive and convincing.

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