Indian International Law: From a Colonized Apologist to a Subaltern Protagonist

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Abstract

Indian responses to international law have now seen three generations of scholarship. A decade into its independence, India began playing its role in what has retrospectively been referred to as Third World approaches to international law (TWAIL). The early 1990s witnessed the rise of TWAIL II. Armed with interdisciplinarity and inspired by the subaltern pathology of the state in the 1970s, TWAIL II scholars barged into areas with approaches never seen before. Bhupinder Chimni alone discovered six perspectives of international law from India. My article picks up from where Professor Anand has left off and adds a seventh ‘tribal’ tale to Chimni’s six. It is also argued that the category 'Third World' needs redefinition, as pockets of poverty are increasingly betraying geography. Indian law schools have also been evaluated vis-à-vis promotion of TWAIL. The paper covers, as comprehensively as possible, approaches and issues, direct or collateral, regarding an international law from India.

Key words

absentee colonialism; dualism as scepticism; Enlightenment as disenchantment; ‘glocal’ Third World; Indian law schools and the politics of knowledge creation; subaltern; TWAIL

1. INTRODUCTION

In comparison with its size and its reputation as the largest liberal democracy in the world, India has been relatively silent in its role in the making of modern international law (MIL). The expectation, if any, of India to play the role of protagonist in the remaking of international order, therefore, is not misplaced. The reasons for Indian reticence, as explained by R. P. Anand, are very obvious.1 The absence of sovereignty at the time of MIL creation, starting from the Hague Peace Conferences in 1899 and 1907 to the signing of the UN Charter in 1945, the reluctance of post-independence lawyers to engage immediately in a post-colonial and subaltern critique of international law, and naive Indian views on the hegemonic international order in 1950s and 1960s, crippled the possibility of India’s making a sound and emphatic contribution. ‘Independence came to India’, remarks Subrata

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Mitra, in a tone typical of nationalist observers guilty of ignoring subaltern history, ‘not as a result of a revolutionary war but protracted negotiation between the colonial ruler and the main actors in the freedom movement.’ The negotiation was multidimensional because the negotiations between the colonizer and the colonized induced conflicts among the colonized themselves, with major consequences. The post-independence regime in India was based on power-sharing among adversaries, who in the process learned to use democratic institutions in the struggle for power. However, by the time India gained independence in 1947, the opportunity was already lost. Five world powers had been nominated as the permanent members of the UN Security Council, with India left out. In theory, all sovereigns are equal. However, in practice the creation of five permanent members of the Security Council meant the creation of five super sovereigns and the rest of the world simply populated by sub or inferior sovereigns. This meant that, in practice, these inferior sovereigns were incapable of cross-fertilization, or cultivating and contributing to MIL. In fact, the infrastructure of MIL created at the United Nations, with five super sovereigns possessing the right of veto, was a post-colonial subjugation of the South that now had to get its acts attested by the North, manifesting exploitation by the forces of what I call ‘absentee colonialism’.

Homi Bhabha reconfigures colonial encounters in ways not seen in nationalist, Marxist, and colonial narratives, as something that developed interstitially between two cultures, representing hybridity and betweenness. The centuries’ long interaction of India with its colonizers began to be seen as a new seat of contestation between the civil society of the West and its incomplete project of modernizing the ‘political society’ of India. The pockets of intermediate cultures built in India both during and after the colonization period, born of the hybridity of colonial and cultural intercourses, held the country back for a few generations, before the subaltern historians and the anti-modernists began a nuanced pathology of the state and society. India, I believe, actually witnessed the rise of subaltern studies as a result of its disillusionment with the nationalist history and ‘in the wake of the growing crisis of the Indian state in the 1970s’. In India the popularity of the nation-state, along with compromises and coercion after the nationalist struggle against British rule, turned politically sensitive as ‘its program of capitalist modernity sharpened social and political inequalities and conflicts’. In the late 1970s, the Indian state resorted increasingly to repression to preserve its dominance... The state combined coercive measures with the powers of patronage and money, on the one hand, and the

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3 Ibid., at 359.
4 Ibid., at 359.
6 H. Bhabha, The Location of Culture (1994).
7 P. Chatterjee, ‘Beyond the Nation? Or Within?’ (1998) 56 Social Text 57, at 60.
9 Ibid., at 1476.
appeal to populist slogans and programs, on the other, to make fresh bid for legitimacy. These measures pioneered by the Indira Gandhi government, secured the dominance of the state but corroded the authority of its institutions. The key components of the modern nation state – political parties, the electoral process, parliamentary bodies, the bureaucracy, law and ideology of development – survived, but their claim to represent the culture and politics of the masses suffered crippling blows.¹⁰

Indian TWAIL II builds on subaltern and anti-modernist pathologies of Partha Chatterjee¹¹ and Ashis Nandy,¹² among several others. It certainly helped, as we shall see later, in shaping the contemporary Indian position on MIL. As ‘sciences and technologies of governmentality’ have spread their tentacles throughout the world in the twentieth century, ‘the critical philosophical mind has been torn by the question of ethical universalism and cultural relativism’.¹³ But a faction of Indian sociology rejects this relativism. T. K. Oommen thinks that not only is the idea of cultural relativism untenable in the contemporary world view, ‘but the notion of pristine purity of a culture and the need for its maintenance can lead to the practice of racism, slavery, untouchability, gender oppression and the like’.¹⁴ The Indian idea of world society consciously promotes cultural symbiosis as the kernel for international societal reconstruction and development.¹⁵ But, seemingly, Oommen has only been hiding his disappointments, and his sociology ignores the anthropological realities of India. The early successes of political nationalism in India translated into a belief that the ‘cultural conflicts were merely the superficial signs of the production of a richer, more universal modernity’.¹⁶ But much to the delight of an anti-relativist Oommen, this biased modernity appeared as an unfinished project of the West to the disappointment of the Indian sociologist, Yogendra Singh, seeking to intervene in the sovereignty of the Third World. My subaltern sentiments, therefore, reject MIL because

‘Colonialism’ has been the first gift of science to the non-European world… The marriage of ‘mercantilism’ and ‘civilisationalism’ on the Asian and African soil fertilised by advances in science gave birth to colonialism. This ‘couple’ conceived many a time and brought forth ‘cultural’ and ‘military’ subjugation, servility, racism and interference into the sovereignty and society… This family soon spread in the world what we now know as ‘the Empire’. The Empire accidentally found a very faithful servant: international law.¹⁷

Unfortunately, the sovereign India was born in 1947 with a congenital impotence in establishing an intercourse that was necessary to herald the recognition of India as a capable sovereign in the then state of world affairs. Hegemony, the experience of the twentieth century shows, often unbundles in the language of hierarchy.

¹⁰ Ibid., at 1476.
¹¹ P. Chatterjee, Nationalist Thought and the Colonial World: A Derivative Discourse (1986), 100, 153, 164.
¹⁵ Ibid., at 12.
¹⁶ Chatterjee, supra note 13, at 130.
¹⁷ Singh, supra note 5, at 56 (emphasis in original).
The post-colonial infrastructure of MIL was manufactured with a congenital hierarchy of ‘super’ and ‘sub’ sovereigns. Thus identifying ‘the Indian’ in a call for new international law must condemn, I believe, the hierarchy of sovereigns created by the UN system of veto. My kind of Indian advocacy would call for dissolution of the permanent membership rather than for the often demanded inclusion of India in permanent membership of the Security Council. Arguably, the domestic perspectives of India are, indeed, important in this globalizing world, as ‘there is an obvious dialectic between struggles inside third world countries and in external fora’.18 My paper and other contributions in this issue, nevertheless, are only signs of resistance and not resistance itself.

2. INDIA AND INTERNATIONAL LAW: FROM AN APOLOGIST TO A PROTAGONIST

The answer to questions about the location of India as peripheral or central to the international legal imagery, notwithstanding its obvious power in contemporary geopolitical, economic, and cultural terms, rests on the possibility of exporting Indian subaltern and anti-modernist perspectives to MIL.19 Needless to say, the possibilities of the Indian contribution to MIL are immense. But from outside, the alternative narratives of MIL have been obscured by, as Bhupinder Chimni points out, a dominant Northern vocabulary which either denies their existence through subsuming them under its own banner or represents them as deviant scholarship unworthy of engagement.20 From inside, Indian historiography has been guilty of ignoring the desired role of the subaltern, the folk, and tribal studies in rereading Indian history. The colonialist, Marxist, and nationalist narratives of Indian history happily overlooked the subaltern pathology of resistance in its arrogant elitist narratives. This presented an ideological vacuum, as subalternity is explained on elitism and international order explicated on hegemony. The Indian literature bridging subaltern elitism and international hegemony was absent then and scarce even today. Since MIL could only succeed a critical intellectual revolution, voices in critical international legal thinking arose only after subalternity gained currency in India.

2.1. From 1947 to 2009: the increasing role of India in regional and global relations

Soon after its independence, India began to play up to its potential. The first prime minister of India, Jawaharlal Nehru, took a leading seat in the Non-Aligned Movement (NAM) that had the confidence of the majority of the newborn Asian and African states, and the relatively dormant Latin American sovereigns.21 The Panchsheel Agreement with China of 1954 was an internationalization of the Indian

good-neighbour policy, whose origins can be traced to the civilizational matrix of ancient India. In an indigenous discourse in the Panchsheel Agreement, India had succeeded in establishing new principles of international law. This, the readers have to appreciate, was an unprecedented Indian effort to intrude into the dominant fold of the First World to alter the vocabulary of MIL by playing its role in what some scholars identify as the politics of knowledge creation. These were the earliest state voices of resistance from the pre-subaltern India, raised in the post-colonial world which was still terrorized by the ghosts of colonization while suffering simultaneously from a cultural inferiority complex. The communist Chinese arrogance born of Security Council permanent membership, in the Sino-Indian war of 1962, however, killed the opportunity that the democratic India presented to the Third World in teaching how to alter the dominant vocabulary and offer resistance to the strong domination of language in MIL.

Later, the formation of the South Asian Association for Regional Cooperation (SAARC) marked a definitive step in Indian foreign policy, as it provided a platform for the peoples of south Asia to work together in a spirit of friendship, trust and understanding. Nonetheless, India has already paid the price for its involvement in UN peacekeeping missions, when in 1991 the then prime minister Rajiv Gandhi was assassinated by the Liberation Tigers of Tamil Eelam (LTTE), avenging India’s decision to send peacekeeping troops to Sri Lanka. In October 2008, India signed a civil nuclear deal with the United States, boosting international non-proliferation efforts. The Association of South East Asian Nations (ASEAN) signed a free-trade agreement with India in 2009, recognizing the importance of India in regional Asian trade politics. The 2008–9 global financial crisis has further increased the role of India, seen in the G20 meetings. The outreach session of the G8 summit in L’Aquila in 2009 has redefined India’s involvement in pressing issues such as the financial crisis and international trade and security.

The 2001 Doha health declaration had a definite shade of India’s ability to produce generic drugs at a rate exponentially lower than their cost of production in developed countries during national emergencies. The WTO’s Doha Round is an important outlet that showcases India’s increasing dynamic strategy, as removed from its NAM agenda, where the primary tool of international relations is the formation of alliances with new partners, Asian, Latin American, European, and African. The group of BRIC countries (Brazil, Russia, India, and China), accounting for 40 per cent of the world’s population, has certainly strengthened the voice of India at various international fora: nothing progresses unless the BRICs agree. This new Indian strategy is markedly different from its earlier policies accepting a bipolar world. India, today, is one of those rare countries in the world to have bagged a civil nuclear deal with the United States without signing the Comprehensive Test Ban Treaty (CTBT). Globalization has clearly taught India the tricks of economy- and security-related symbiotic strategy in a world that is threatened by terrorism and financial insecurity. India has, there is no doubt, turned out to be a fast learner.

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22 Singh and Singh, supra note 19, at 263.
3. **Third World Approaches to International Law and the Politics of Knowledge Creation**

The role of vocabulary and colonial narratives become rather important in the politics of knowledge creation in MIL, particularly from a non-dominant perspective. Northern MIL scholarship has always ignored the central role of colonialism in the making of MIL. But this discovery by the South, to the distaste of the North, is quite new. What the North labels as useless and archaic might be of central importance to the South. In the hegemonic project of MIL, the dominant knowledge strategy has often been carried out through the weapons of academic prescriptions of the authors from the North. The obscured interests of the North have always been ingrained in the structural methodologies of MIL, even while pretending to work towards the emancipation of the South. As Chimni observes,

[T]he diversity of the social world has not prevented the consolidation and articulation of international law in universal abstractions. Today, international law prescribes rules that deliberately ignore the phenomena of uneven development in favor of prescribing uniform global standards.23

To cut a long story short, the Northern call for dumping certain terminologies such as ‘Third World’ and so on might be suitable for the North in producing knowledge that reflects political realism but simultaneously, speaking in the language and vocabulary of justice and security, justifies the mutilation of the sovereignty of the Southern states as rightful interventionism.24 The utopia of sociological jurisprudence between two world wars, the North often eulogizes, has idealized such entities as the United Nations and the Bretton Woods institutions as the functioning of a worldwide project of Kantian cosmopolitanism. But soon afterwards the world witnessed the ‘modern encounter of cultures’ called Vietnam.25 Since then it has become clear that the drive for mastery over men is a by-product not merely of a faulty political economy but also of a world-view which believes in the absolute superiority of the human over the subhuman, seen in the formation of, for example, the super and the sub sovereigns in the United Nations.26 It has now become apparent that the dogma and apathy over a Third World that preceded colonization is but the undercurrent of a ‘corrupt science’ and a ‘psychopathic technology’, which evaluated vast Eastern civilizations such as the Indian one as a set of empty rituals, mysterious traditions, and backward existence.27 Partha Chatterjee wrote that

[The] framework of global modernity will . . . inevitably structure the world according to a pattern that is profoundly colonial; the framework of democracy, on the other hand, will pronounce modernity itself as inappropriate and deeply flawed . . . transnational

23 Chimni, supra note 18, at 5.
24 Critics allege that ‘the notion of a Third World is intellectually and conceptually bankrupt and politically it has already lost any relevance or legitimacy it once had.’ M. Berger, ‘After the Third World? History, Destiny and the Fate of Third Worldism’, (2004) 25 Third World Quarterly 9, at 31.
25 Nandy, supra note 12, at v.
26 Ibid., at vi.
27 Singh, supra note 5.
tendencies have made deep inroads into contemporary Western societies and rendered currently existing nation-state forms inadequate.\footnote{Chatterjee, supra note 7, at 68.}

One can only imagine the tenacity of Third World resistance in the absence of Edward Said’s seminal work, written in Jean-Paul Sartre’s style, which once and for all altered the course of oriental scholarship.\footnote{E. Said, Orientalism (1978).} Needless to say, the most critical voices from India in TWAIL II are inspired by the works of, among others, Partha Chatterjee, Ranjit Guha, Romila Thapar, Ashis Nandy, and Gayatri Spivak. These authors were important precursors to the TWAIL II movement that helped the new generation of political scientists and TWAIL scholars to pierce the veil of formalism maintained and sponsored by Northern scholarship.\footnote{The ‘Orient’ thread of thought goes even further than Said, to Romila Thapar, an important Indian scholar discussed in S. Pahuja, ‘The Postcoloniality of International Law’, (2005) 46 (2) Harvard International Law Journal 459, at 460, n. 5.}

4. **The Indian Legal Renaissance: The Rise of TWAIL II from TWAIL I**

In the last fifteen years, a school of critical legal discourse on public international law has emerged under the name ‘Third World approaches to international law’ (TWAIL), with many Indian scholars as its spokespersons.\footnote{See special TWAIL issue, International Community Law Review (2008) 10 (4), entitled ‘Situating Third World Approaches to International Law (TWAIL): Inspirations, Challenges and Possibilities’.} In order to locate contemporary TWAIL scholarship against the background of early post-independence scholarship, Chimni has distinguished between what might be called TWAIL I and TWAIL II.\footnote{B. S. Chimni, ‘Towards a Radical Third World Approach to International Law’, (2002) 5 (2) ICCLP Review 14, at 23; see also A. Anghie and B. S. Chimni, ‘Third World Approaches to International Law and Individual Responsibility in Internal Conflicts’, (2003) 2 Chinese Journal of International Law 77, at 79.} In fact, TWAIL II is TWAIL I with teeth to bite back. TWAIL II ‘rejuvenates the opposition to aspects of international law expressed by Third World states and intellectuals’ in the 1950s, 1960s, and 1970s, and sustains sharp opposition to the North-sponsored politics of dominant knowledge creation in today’s globalized world.\footnote{D. P. Fidler, ‘Revolt against or from Within the West? TWAIL, the Developing World and the Future Direction of International Law’, (2003) 2 Chinese Journal of International Law 29, at 30.} Ardi Imseis describes this movement rather clearly.\footnote{A. Imseis, ‘Concept Paper: Third World Approaches to International Law and the Persistence of the Question of Palestine’, 15 Palestine Year Book of International Law (2008), available at http://lawcenter.birzeit.edu/userfiles/file/yearBook/PYBL%20Vol.%20XV%20Concept%20Paper%20Final.pdf?PHPSESSID=ryonrxlahb (last visited 20 September 2009).} Although Indian scholars within the TWAIL II school are diverse in their ideology or approach, at their core they remain united. Their common ‘opposition to the unjust global order’ currently prevailing is premised on myriad themes, from Marxist to anti-modernist.
India has contributed to both TWAIL I and TWAIL II scholarship. R. P. Anand, Nagendra Singh, R. C. Hingorani, Guha Roy, S. P. Sinha, and Yash Ghai are some of the many stalwarts of the so-called ‘early thinkers’ on alternative international law. The new thinking or TWAIL II is led by Bhupinder Chimni, Upendra Baxi, and Balakrishna Rajagopal, among other prominent writers. Although the TWAIL I scholars critiqued the genealogy of MIL and its Eurocentric assumptions, they adopted a non-rejectionist stance towards many of its key doctrines. TWAIL II scholars, however, have adopted a framework critical of the deference paid by the TWAIL I generation to the newly independent post-colonial state and its right to ‘non-intervention’.

4.1. R. P. Anand of TWAIL I

The role of scholars in the making of international law, therefore, cannot be over-emphasized. The decades after Indian independence witnessed the rise of Professor R. P. Anand as an Asian voice in MIL. Through his articles in the leading First World journals such as the *American Journal of International Law* and the *International and Comparative Law Quarterly*, he tried to represent the attitude of Asian and African states in the new international order (NIO). His essays were historical and, at times, emphasized what India could offer in the NIO. Anand’s major contribution is his pioneering work in the area of the law of the sea. He was the first Asian scholar to have said that certain MIL doctrines, claimed to have been invented by Western scholars, were actually a reproduction of archived Indian knowledge. India, new scholarship demonstrates, definitely had one of the most complete sets of international laws, international relations, and diplomatic state practices on which stood the vast Maruryan empire under the prime-ministership of Kautilya. Compared with Kautilya’s advanced *Arthasastra*, brought to the fore in 1909 by Samastya, Machiavelli’s *Prince* is elementary. Grotian international law, Anand argued, was retrieved from the Dutch archives on the ancient Indian treatise.

Such a discovery was important not only for a cultural resurrection of the Indian self-image but also for the rest of the Third World, from which the North has learnt and reproduced so much, primarily due to a colonial conjugation of cultures. Colonization educated the colonizer as much as it harmed the colonized. Anand reminded the ungrateful West of its borrowed Renaissance and Enlightenment. Anand’s enquiry was instrumental in inspiring a next generation of Indian scholars

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40 Anghie and Chimni, *supra* note 32, at 83.
42 Ibid., at 393–400.
that is now identified as TWAIL II. However, a subaltern or an anti-modernist study of international society was unheard-of at the time of Anand’s early writings. He wrote in the tone of his time: in a descriptive historical style. This early Indian thinking in international law, therefore, in hindsight, appears to be the culprit of the subaltern consciousness in India, led by such scholars as Partha Chatterjee. Chimni has therefore noted that

The failure of the first generation of third world scholars to capture the intimate relationship between colonialism and international law also meant . . . the omission to critique the post-colonial state as it was only imagined as an agent of emancipation.45

TWAIL I ignored the role of factors such as ideas, images, and the social location of knowledge in shaping the perception of Northern interests while critiquing the experiences of the development of MIL.

4.2. New thinking, or TWAIL II

The 1990s saw the rise of new scholars of various aspects of international law – the rise of TWAIL II. This new thinking is ‘advanced by a group of scholars who share the common minimum aspiration of looking at the history, structure, and process of MIL and institutions from the standpoint of the peoples of the third world, in particular its poor and marginal sections’.46 The new thinkers are more versatile – armed with interdisciplinary tools – in their advocacy. They began writing on international human rights, economic law, and MIL. The advocacy of such TWAIL II authors as Chimni, Baxi,47 M. P. Singh,48 and Rajagopal49 is based on a wishful thinking that the TWAIL II community might prove robust enough to survive the dire confrontations of the politics of knowledge creation. ‘The third world approach’, Chimni opines, ‘gives meaning to international law in the context of the lived experiences of the ordinary peoples of the third world.’50 Baxi and Chimni initially chose human rights as their most liked vehicle of powerful expression for a TWAIL II project, and then moved to interdisciplinarity for the necessary systemic and epistemological enquiries into this nebulous discipline.51 Chimni has contributed to the development of a Marxian perspective on international law.52 In his ‘Six Tales from India’, Chimni outlines six distinct visions of a just world order seen in recent academic and political discourses in India. They are ‘establishment, left, Dalit, subaltern, anti-modernist, and spiritual’.53

50 Chimni, supra note 45, at 500.
52 Chimni, supra note 20.
Each of these perspectives offers a certain understanding of the state, society, globalization, and international institutions. These different perspectives, in the absence of any systematic and concerted ‘new thinking’ in the literature on international law and institutions, are germane to understanding the response of the Indian state and people to issues relating to globalization, international law, and international institutions.54

These perspectives brought international law closer to India and its political, social, and cultural diversity. The early thinkers had clearly failed to export such diverse realities of India to an international audience in their writings. By eulogizing the greatness of a native Indian knowledge system, the TWAIL I scholars sculpted their critiques mostly with the borrowed tools of Western historiography. From a theoretical perspective, new thinking on international law borrows from the postcolonial deconstructionist methodologies: the orientalism of Said,55 the anti-modernism of Nandy,56 the post-colonialism of Bhabha,57 and Spivak58 critiquing the knowledge system dished out to the colonized. The explosion of new international law scholarship from India has witnessed a deluge of articles in the Asian, European, and American international law journals and as new titles from various academic publishers. With the arrival of online journals, the speed and opportunity of academic publications has increased as never before. Many leading Indian scholars are members of the boards of international law journals and they contribute regularly to this debate.59 Even some foreign authors have begun to recognize the leading role of India in a comparative study of Indian influence on the development of various parts of international law – such as international economic law at the WTO – over a permanent member of the UN Security Council such as China.60

5. ENLIGHTENMENT FIGURES BUSTED: THE CURIOUS CASE OF KANT AND GROTIIUS

One of the major contributions of the new generation of Indian scholarship has been the rereading of the dominant past and reshaping history by revisiting popular European figures in post-colonial studies.61 Colonization, according to Indian sociological thought, was actually a result of Western disillusion with the Enlightenment. The disenchanted Europeans colonized the entire world on the logic of a civilizational burden without admitting their own experience of disenchantment with an Enlightenment-induced modernity. This logic of disenchantment led to an

54 Ibid., at 389.
55 Said, supra note 29.
56 Chimni supra note 53, at 396–8.
57 Bhabha, supra note 6.
unfortunate ascendancy of machine over man, West over East, whites over coloured, and science over humans, without a word of apology. Radhakamal Mukherjee had anticipated this endemic crisis of the West’s project of modernity, industrialism, and utilitarian praxis, and Yogendra Singh has further stamped it. History can tell which conflicts have sculpted the feature of early international law and how the interaction of international texts, patterns of thought, communities, and institutions in North and South have shaped MIL. A rereading of history can surprise both North and South. Implicit in the writings of the Northern historians has been their allegiance to the dominant state, power, and personal loyalty. Therefore it is always important that the readers of international law deconstruct popular history and rebuild international law’s infrastructure for a true universal emancipation of the history-less peoples.

5.1. Kant and the need to reconstruct history

For Kant property only emerges because human individuals can agree with each other upon a moral story of how objects can be taken from nature and be marked as uniquely belonging to one person or group of persons. This is how Kant sees the general social contract theory about the origin of property rights.

One has to be naive not to recognize the colonial potential of Kantian hospitality. The so-called ‘moral story’ could easily fall prey to history writing and the politics of knowledge creation of the powerful. Who will decide the ownership of the ‘objects’ taken from nature and marked as uniquely belonging to one person or group of persons? Has not MIL been used as an argument to justify the colonial accessions of lands and exploitation of the natural resources of the colonized natives? Kant closely interconnects cosmopolitan right with a guest’s right to international hospitality. Kantian cosmopolitan hospitality can be interpreted as the right of a foreigner not to be treated with hostility when in the territory of another state. But, then, can the killing of the native Indians in Latin America and the colonization of Africa and Asia be justified by his cosmopolitan right? Can Kant be used to legitimize the internationalization of property rights and hegemonic interventions, to codify a range of civil, political, social, cultural, and economic rights which, apparently, invoked on behalf of the subaltern and the tribal groups, actually further late capitalists’ ambitions? MIL, as Chimni rightly says, has a vested interest in maintaining the illusion of progress to legitimize certain First World behaviour.

TWAIL II, unlike TWAIL I, aspires to go beyond the veil of history to discover and construct a true story, for history was often plotted by those who wanted to offer themselves to their progeny as ideal forefathers. A rereading of Hugo Grotius is thus a perfect subject for this pathology. A TWAIL II perspective of Hugo Grotius is different from his proud portrayal by a First Worlder. The portrayals of Grotius by

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64 Ibid., at 65.
65 See Chimni, supra note 18, at 26.
Chimni⁶⁶ and James Bacchus⁶⁷ offer contradictory results. No wonder a Third World deconstruction of European history and ideas can potentially tarnish the image of some of the Enlightenment figures of Europe.

5.2. Grotius by Chimni
Chimni paints a Grotian world of MIL from Hersch Lauterpacht’s brush in remarking that MIL creation in Europe was essentially ‘the subjection of the totality of international relations to the rule of law’.⁶⁸ But the meaning of the rule of law varied depending on whether you were a fully sovereign state or a state that had parted with a slice of its sovereignty.⁶⁹ Chimni quotes Borchberg supporting his Grotian contention:

The divisibility of sovereignty in Grotius has captured the imagination of several researchers and…[has] significantly strengthened the legal foundations for European colonial rule in Asia and the New World. All peoples are originally free; they are even free to irreversibly sign away their liberty of choice and sovereign rights at the stroke of a pen…Grotius should not merely be simply labelled ‘prince of peace,’ ‘champion of reconciliation,’ or early advocate of the ‘freedom of maritime navigation’ as he has been for much of the twentieth century. Such views have served to distort beyond recognition Grotius’ standing among the architects of early modern colonial rule.⁷⁰

The colonial greed of such MIL lawyers obscured the native indigenous knowledge which has not been able to recover from the politics of knowledge creation even today. Unfortunately, the ancient wisdom of the colonized have paid a very high price for this Christian adventure. I call it a ‘narcissistic’ period of colonial denial of other knowledge systems defeated by a new story of progress.⁷¹ There was a method to such colonial madness – a purpose to be achieved – to find raw materials and cheap labour. Christian sympathy, while creating cheap means of production, cajoled the colonized proletariat into the arms of servitude and cultural surrender. How could the native international law and knowledge system have survived?

5.3. Grotius by Bacchus and the Aurobindo alternative
According to James Bacchus, Grotius’s tale is one of escape. His account of Grotius is full of the personal admiration of a man who has no business to look into the other side of Grotian advocacy that proclaimed colonization as an extension to the right of freedom! ‘It is the unfinished tale,’ he goes on, ‘of our own escape to freedom through the embrace and the establishment of the international rule of law.’⁷²

Our hero, Grotius…was a poet, a playwright, a theologian, a diplomat, and, not least, a renowned lawyer and jurist…Grotius was also a Christian humanist…He

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⁶⁹ Ibid., at 202, n. 10.
⁷¹ Bacchus, supra note 67, at 534.
believed...in human freedom...he had the most to say about freedom, about how freedom depends on the rule of law, and about how the hopes we have for the rule of law in an unruly world depend on having something that can truly be called international law.73

The accounts of Sri Aurobindo (1872–1950) by Chimni and Nandy pit Grotius against Aurobindo, someone who is never spoken of as an international jurist in MIL. But Aurobindo is among the few Indian thinkers to have paid explicit attention to the creation of a world-state; ‘based on a coherent theory of the evolution of human society, Aurobindo argued that the ideal of human unity would inevitably be realized’.74 Aurobindo did not dismiss material progress, and his way of thinking, therefore, does not fit the neat stereotype of the materialist West and the spiritual East.75 Evidently Aurobindo’s spiritual perspectives of sovereign and state have never been footnoted in Western scholarship. Nandy writes that Aurobindo responded to colonialism with an inclusive self-affirmation which had greater respect for the selfhood of the ‘other’ and a search for a more universal model of emancipation.76 His spiritualism handled cultural aggression and through a language of defiance sought to make sense of the West in Indian terms.77

Aurobindo symbolised a more universal response to the splits that colonialism induced...He did not have to disown the West within him to become his version of an Indian...Western culture remained a vehicle of his creative self-expression and he never thought the West to be outside the reach of God’s grace. Even when he spoke of race and evolution...not once did he use the concepts to divide humankind.78

Thus in terms of his emancipatory concerns for the subaltern people and respect for the ‘other’, Aurobindo’s sympathy was more cognate to the plurality of the world than that of a typical Grotius. His cosmopolitanism clearly pre-empted Kant’s territorial greed. Therefore one of the significant contributions of the Indian TWAIL to MIL scholarship has been its discovery of obscured sources not recognized in MIL scholarship. Using Article 38(d) of the Statute establishing the International Court of Justice and Article 31.3(c) of the Vienna Convention of the Law of Treaties 1969, these Indian sources, not otherwise recognized by MIL, could easily be cited.79

6. MARXISM, INDIA, AND INTERNATIONAL LAW: THE RISE OF THE SUBALTERN

6.1. Indian Marxists’ subaltern mistake
The Indian Marxists’ reductionist mode-of-production narratives merged undetectably with the nation-state’s ideology of modernity and progress. This congruence meant that while championing the history of the oppressed classes and their

73 Ibid., at 67.
74 Chimni, supra note 53, at 398.
75 Ibid., at 398.
76 Nandy, supra note 12, at 85.
77 Ibid., at 85.
78 Ibid., at 87.
79 See Singh and Singh, supra note 19.
emancipation through modern progress, the Marxists failed to deal with the stronghold of ‘backward’ ideologies of caste and religion in India.  

Unable to take into account the oppressed’s ‘lived experience’ of religion and social customs in India, Marxist accounts of peasant rebellions either overlooked the religious idiom of the rebels or viewed it as merely form and a stage in the development of revolutionary consciousness. Marx had failed to evaluate the salient subalternity of Indian social structure and political formation. The subaltern critique of Marx’s historical materialism has restored the importance of respecting history beyond texts. Max Weber’s *The Protestant Ethic and the Spirit of Capitalism* conceals the narrations of the Enlightenment as Western disenchantment. Such narratives of capitalism and development hide the actual story of exploitation through the idiom of modernization. Thus in its wake the colonies were to become the laboratory of colonizers’ sympathy, where the caste differences in the Indian social structure would soon reinvent themselves as a distinct Indian bourgeois-and-proletariat struggle. But Indian resistance to this ‘disenchantment-enlightenment’ dichotomy induced by modernity and exported by colonization dwells in India’s collective cultural consciousness and the way in which India has responded to modernization.

### 6.2. Ashis Nandy’s comprehensive anti-modernism

A rereading of Marx by Nandy points to the idea that Marx – no better than Grotius – entertained the thoughts of the colonies being the next step of development for Europe. It offered a way out from Europe’s feudalism and conflicts – an idea based on utter disrespect for the history and the civilization of the non-European worlds. MIL was, actually, a tool for reorganizing Europe after the Napoleonic wars. Later, in colonized India,

Colonialism replaced the normal ethnocentric of the inscrutable Oriental by the pathological stereotype of the strange, primal but predictable Oriental. . . . But the ordinary Indian has no reason to see himself as a counter-player or an antithesis of the Western man . . . the new responsibility forces him to stress only those parts of [Indian] culture which are recessive in the West and to underplay both those which his culture shares with the West and those which remain undefined by the West . . . Cultural arrogance of post-enlightenment Europe . . . sought to define not only the ‘true’ West but also the ‘true’ East.

Chimni, however, accuses Nandy of entirely ignoring the issue of gender injustice in pre-modern India. However, my understanding of Nandy leads me to believe that he has covered more ground than has actually been appreciated in TWAIL. He is the first scholar to reveal the plot behind the modern sati system in pre-modern India: sati was ‘an enforced penance, a death penalty through which a widow expiated

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80 See Prakash, supra note 8, at 1477.
82 Singh and Singh, supra note 19, at 245.
84 Ibid., at 72–4.
85 Chimni, supra note 53, at 398.
her responsibility for her husband’s death’.86 No other thinker has exposed the role of English modernity in colonized Bengal as the cause of the reinstatement of sati during the early eighteenth century. With a single stroke of the pen Nandy has exonerated the guilty self of Hindu India for a crime that it had not sanctioned, at least in modern times. He established that the laws enacted by the British for the prevention of sati were not a victory of modernity and colonial compassion against Hindu obscurantism and primitivism.87 In ‘Woman versus Womanliness’ Nandy registers the price paid by Indian woman who, by their ‘authentic innocence’, participated in a structurally violent colonial system.88 There is no better account of pre-modern Indian gender insensitivity in cultural and political psychology than in Nandy’s writings. Nandy’s anti-modernism, in his narration of Indian colonialism and colonized women, identified metropolitan Europe and colonial India as integrated aspects of a systemic whole making India a perfect recipe for exploitation. However, his main contribution has been the discovery that gender brutality in pre-modern India was a by-product of colonizers’ failed modernity and not because of Hindu obscurantism.

6.3. How Chimni rescued Marx in India?

The reductionist Marxist historians should be indebted to Chimni for his reconstructionist Marxism in the TWAIL scholarship. Chimni rightly moves away from Marx in his Marxist international theory. What the historians failed to capture in other social sciences, as discussed above, was captured by Chimni in his TWAIL while using Marxist tools to

recover Indian heritage;

offer an alternative vision and blow the whistle on the formation of empire;89 and

offer a Marxist course in international law that captures the reality of our collective existence purposely ignored by Northern mainstream scholarship.90

The new Northern Marxist scholarship of Miéville91 and Koskenniemi92 is rightly informed by Chimni’s prior works.93 In fact, in his 1993 book, Chimni criticized Soviet Marxism and, more importantly, his scholarship denounces Marxist reductionism that has plagued Indian social sciences and historiography.94 Chimni has been ploughing this field alone and only recently have scholars joined him in Marxist narratives of international law. Marxism is an accurate tool for puncturing parochial nationalism for an internationalism that identifies groups and actors based

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87 Ibid., at 1.
90 See supra note 20.
on poverty, class, and common conditions of existence, if used, without its deterministic side effects. Chimni uses this sociological tool to assert the importance of Marxism to uniting the people of the Third and First Worlds on the grounds of lived experience rather than misleading narratives of nationalism.

6.4. Chimni’s other contributions
Chimni’s other major contribution to international law has been his scholarship in the field of international refugee law. He has questioned the ‘policies and practices of UNHCR, which is both a key site of production of knowledge as well as the principal international agency in charge of offering assistance and protection’. It is worth noting that the positivist tradition ‘not merely constructed interdisciplinary but also intra-disciplinary boundaries with its refusal to take cognizance of developments in other branches of international law with a bearing on’, for example, ‘the global refugee problem’. Therefore ‘the call for a New International Economic Order (NIEO) and the struggle to codify it’, Chimni opines, ‘received little attention.’ In 2004 what Chimni had professed in his Marxist textbook idea, incidentally in the Leiden Journal of International Law, has now become true after the effects of the global financial crisis. This crisis has emerged from the United States’ subprime crisis and unregulated financial innovation by the global capitalists.

One result has been the privatization of public assets and, perhaps even more significantly, a capital-account liberalization culture that has allowed hyper-mobile finance to run roughshod over subaltern states to the benefit of TCC [transnational capitalist class]. The 1997 East Asian crisis was a manifestation of this loss of monetary sovereignty and control that severely affected the living standards of the subaltern classes.

The same subaltern peoples, from both the First and the Third Worlds, have now been victimized by the mainstream international economic law governance that scarcely heeded TWAIL scholarship. The ‘bourgeois democratic international law’ of the 1970s has transformed into ‘bourgeois imperial international law’. Reconstructionist Chimni’s Marxist analytical tool produced the right prophecy while rescuing Marxism from obscurity and shielding it from accusations of reductionism, seemingly not picked up by Northern scholarship at the beginning. Isn’t this reason enough to embrace such Indian scholarship?

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97 Ibid., at 370.
98 Ibid., at 370.
99 Chimni, supra note 20, at 22.
100 Ibid., at 22.
7. A CRITIQUE OF CHIMNI: THE FORGOTTEN ‘SEVENTH’ TRIBAL TALE

However, Chimni has not included tribal experience in his ‘Six Tales from India’.\footnote{Chimni, supra note 53.} This omission of the tribal tale tells of the marginalization of the aboriginal world view in Indian TWAIL. In India, a country of subaltern, folk, and tribal majority, it took quite some time before even subalternity found its spokespersons. The tribal exclusion, therefore, might seem almost natural. But this exclusion, nonetheless, obviates the pain of tribal marginality of Indian aboriginals, despite the fact that the tribal leader Birsa Munda of Jharkhand was instrumental in the struggle against British rule. In regional literatures Munda has been elevated to the status of deity as the strong tribal voice of resistance from the jungle against the alien British rule. In part, this exclusion is the result of a disregard for Indian anthropological voices. In 2002, the Atal Bihari Vajpayee government did recognize the exclusive space for tribal culture by creating two new states, Jharkhand and Chhattisgarh, by dividing Bihar and Madhya Pradesh, albeit for predominantly political reasons.

The ancient Indian texts have registered encounters between the subaltern, the elite, and the tribal cultures at various material and philosophical levels. In ancient India, tribal states were duly recognized, and among themselves they worked as sovereigns, delimiting their territories and observing non-interference in neighbouring sovereigns’ internal affairs. In fact, the contemporary Indian attitude towards the meta-peripheral tribal existence in India, in my assessment of discriminatory Brahminical Indian society, has been more respectful than its Dalit in-house treatment. Therefore, after its independence India tried to discriminate positively towards the Dalits and the tribal people, by putting them under constitutional schedule for their emancipation. The tribals thus deserve the same sympathy as the subaltern, if not more. That a cultural identity so duly recognized in ancient texts and contemporary government could not catch the alternative vision of Chimni is rather surprising. He should have considered the tribal existence as part of the ‘lived experience’ of people of India. However, even the Indian state has been insensitive to certain aspects of tribal life, particularly those which have no political currency.

One may refer, in particular, to Article 51 of the Constitution of India, which reads, ‘The State shall endeavour to (a) promote international peace and security; (b) maintain just and honourable relations between nations; (c) foster respect for international law and treaty obligations in the dealings of organized peoples with one another’.\footnote{Government of India, The Constitution of India (1950), available at http://india.gov.in/govt/documents/english/coi_part_full.pdf (last visited 20 September 2009).} The Indian state thus gives dualist treatment to international laws. But the 2002 ruling by the Supreme Court of India to stop a road being bulldozed through the Jarawa tribe’s natural habitat in the Andaman and Nicobar Islands has not been complied with by the Indian state.\footnote{See this information at UNHCR: The United Nations Refugee Agency, available at www.unhcr.org/refworld/topic,463af2212,4974807f2,49749d133c,0.html (last visited 16 September 2009).} Today’s bourgeoisie, comprising a mixture of national and international capitalists and encouraged by new

\begin{enumerate}
\item Chimni, supra note 53.
\item See this information at UNHCR: The United Nations Refugee Agency, available at www.unhcr.org/refworld/topic,463af2212,4974807f2,49749d133c,0.html (last visited 16 September 2009).
\end{enumerate}
consumerist patterns of large masses of cash-rich middle classes, together, evidently, form a special-purpose vehicle (SPV) of corrupt modernity. This SPV has been able to hold back the Indian government from taking the necessary steps in complying with an otherwise struggling mandate of the United Nations Working Group on Indigenous Peoples (UNWGIP) on the rights and the future of the tribal peoples. The state did not take immediate steps to restore the habitat of these uncontacted tribal peoples because they are not part of the democratic process and thus are not voters. They simply have no political currency and are thus left to the mercy of international non-governmental organizations (NGOs). Unfortunately, the Indian TWAIL has, truly, failed to align the history of the subaltern with compassion for the tribes and their inward and introvert existence.

8. DUALISM AS SCEPTICISM: A MIRROR OF THE THIRD WORLD’S CONFIDENCE IN MIL

It is premised that, today, the choice of international law’s model, monist or dualist, is an expression of states’ confidence in MIL. The First World gives a monist and the Third World offers a dualist approach to MIL. Ironically, there are now instances of the First World, particularly the European Union (EU) countries, offering resistance to its very own MIL! They have been seen offering selective and sceptical deference. Historically, only the Asian, the Latin American, and the African states that could not contribute to the making of MIL have such a dualist, or sceptical, approach. An investigation into this new apathy can be quite revealing. Has MIL stopped promoting the dominance of the First World or has it spun out of the North’s control? Martti Koskenniemi is apprehensive about the new role of the EU as an empire, as the European Court of Justice was seen disrespecting public international law in the Mox Plant case104 – the EU as a sovereign whose laws override any other legal structure.105 The challenge, today, is to help the international system become truly universal, attracting the full compliance of states irrespective of its relative political power and geography. This is becoming harder because of the growing role of power and hegemony in MIL. Globalization is only shifting the location of the hegemon, which itself already exists. It is a double-edged sword and, therefore, needs to be regulated. It will not create welfare by itself. The role of power in the application MIL is directly proportional to the growth of scepticism among weaker countries. We thus need more co-operation and policy coherence to make MIL worthy of respect and compliance globally. To ensure that Indian confidence develops by each passing day, MIL has to recognize and accommodate the alternative voices of TWAIL. A detailed blueprint of how can this be achieved would, however, require another paper and would exceed the mandate of this article.

104 ECJ, Commission of the European Communities v Ireland, Case C-459/03, [2006] ECR 7.
9. **Redefining the Third World: developing TWAIL’s new ‘globa’l epistemology**

The intellectual intervention of the First World through textualism in the Third World continues unabated. While developing a critique of the First World’s dominance in sustaining a discriminatory infrastructure of MIL, the definition of ‘Third World’ has to be revised. Today’s world is populated by pockets of Third World in the First World and pockets of First World in the Third World. A revision of MIL is thus necessary, as the constitution of the transnational elite is changing. The call by First World scholars for a complete denunciation of the category known as the ‘Third World’ is, therefore, untenable. TWAIL II, in Chimni, emphatically denounces such a call and advances arguments for sustaining this category to be able to unite the poor and the marginalized of the world under one umbrella and offer timely resistance to the discriminatory praxis of MIL.106 Theoretically, I support Chimni’s insistence on maintaining this differentiation that some think is unnecessary in the era of globalization-led generalizations. Globalization should not, inherently, mandate the liquidation of identities that come with the epistemological powers of such categories as the Third World, precisely because we have not been able to come to a unanimous view on the advantages of globalization for the Third World. In my view, the redefinition of the Third World is essential because

- poverty is increasing in even the First World countries;
- ‘Third World’ can become a new currency for identifying the deprived of both the North and the South;
- such an identification can work as an antidote to sweeping policies in MIL; and
- it would lead to the restructuring of patterns of resistance with new actors, geography, and colour.

Such an identification of a Third World in the First World would lead to a restructuring of MIL with caution. The Third World has to wait for about another half a century or more before it is accommodated in international rule making. But this period is long enough to create new subaltern classes and anti-modernist support for state nihilism. The idea of the dissolution of the state under globalization is a romantic thought worthy of the poetic imagination. This is far from the prosaic reality of the continued dominance of the world through new forces of ‘absentee colonialism’. The Indian subaltern critique can be made more meaningful with the establishment of this new Third World that is perfectly heterogeneous in terms of race, colour, geography, and history.

India can take a leading seat in the ‘glocal’ world, where the skin colour of investment capitalism is changing. Albeit the real concern, as Chimni points out, is ‘the defence of global capitalism that guarantees unprecedented affluence to certain sections of the Northern and now small sections of Southern citizenry’.107 Even the proliferation of multinational corporations (MNCs) with Third World ownership...
will not create welfare and automatically reduce poverty, as can be seen in the cases of tribal exploitation in India. They need to be reined in by regular resistance with infrastructural critique of MIL by the ‘glocal subaltern’. These MNCs, irrespective of their Third World ownership, are beneficiaries of colonial international law. Chimni states that MIL’s imperial transformation from bourgeois democratic international law to a bourgeois imperial international law is taking place. A redefinition of the Third World, as stated above, on the basis of poverty, job loss, malnutrition, and access to resources and not on the nationality of the First or Third World controlled by the newly identified forces of absentee colonialism should now be the agenda of TWAIL II.

10. RECOGNITION OF TWAIL II’S CONTRIBUTION

The TWAIL II advocacy of reforming MIL has, fortunately, not gone unnoticed, and it has been gathering support even outside India. Its reflection can be seen in Balakrishnan Rajagopal’s review of Koskenniemi’s From Apology to Utopia, reissued in 2005.¹⁰⁸ He writes that

Coming from a...dramatically complex cultural repertoire and a strong tradition of anti-colonialism in India, FATU [From Apology to Utopia] did not initially register on my critical compass. It was too European, too abstracted from real world politics or questions of justice and too weak in its vision of what needs to be changed in international law. Many of its central arguments, such as the critique of indeterminacy, struck me as being interesting but largely inconsequential to the subaltern condition with which I was intensely familiar.¹⁰⁹

The 2005 edition is relatively more sensitive to subaltern perspectives. This can be classified as the recognition, albeit partial, of Indian voices in MIL. Various alternative voices in MIL, after the initial publication of the book in 1989, including TWAIL II focusing on the role of history, hegemony, and resistance, may be one of the factors in making Koskenniemi’s book sensitive to subaltern and anti-modernist perspectives. According to Rajagopal, a critique of the structural bias in MIL is hard to discuss without taking account of TWAIL II lawyers. Koskenniemi’s work is a mild articulation of similar concerns. But this aspect, Rajagopal points out, is more recent and not reflected in the 1989 edition. However, of all the Indian TWAIL II scholars, Koskenniemi mentions only Chimni in his bibliography in the 2005 edition. This highlights Chimni’s views gaining currency, recognition of an Indian voice, in an important text written by a First Worlder. But TWAIL is clearly not identical to the ‘new approaches to international law’ (NAIL) of Koskenniemi and Kennedy. Chimni clearly differentiates NAIL from TWAIL on the grounds of NAIL’s deconstructionist advocacy, ahistorical critique of sovereignty, oversight of the suppression of democratic process in the Third World, and inability to offer alternative solutions.¹¹⁰ Only stating the problem, as NAIL does, is no solution at all.

¹⁰⁸ M. Koskenniemi, From Apology to Utopia: The Structure of International Legal Argument (2005).
¹¹⁰ Chimni, supra note 32, at 23.
Another major Indian contribution to TWAIL II has been the effort of scholars to cut across disciplinary boundaries in order to cultivate an international law that is complete. The writings of Chimni, for example, bring Indian economists (Amartya Sen and Jagdish Bhagwati), political scientists (Chatterjee and Nandy), and Indian nationalist leaders (Gandhi and Sri Aurobindo) to construct an international law that is truly Indian, bringing all the disciplines together and not fudging their academic distinctions.

11. STRENGTHENING TWAIL III AND LAW SCHOOL DISAPPOINTMENTS: AN INSIDER’S VIEW

MIL did not acquire the shape that it now has on its own. The early twentieth century witnessed a concerted effort on the part of the First World scholars to establish MIL as proper law. Efforts were made to codify and catalogue MIL in the United Kingdom and in the United States. Founded in 1906, the American Society of International Law aims to foster ‘the study of international law and to promote the establishment and maintenance of international relations on the basis of law and justice’.111 The Hague Academy of International Law began in 1923, with funding received from the Carnegie Foundation in Washington, aiming to ‘further scientific and advanced studies of the legal aspects of international relations . . . in line with the peace through law movement’.112 India, therefore, needs such certainly very drastic reforms, both outside and inside, to ensure that this feeble TWAIL snowballs into a major movement of developing an alternate vocabulary and language of resistance in international law. The Indian law education system has thus a decisive role to play. Pratap Bhanu Mehta rightly claims that, in India, a broad university culture ‘at the undergraduate level discouraged any serious engagement with genuinely deep and enduring questions; and pedagogical protocols . . . forget how to connect a rich body of [Indian] text with emerging needs of social self-knowledge’.113

In the new Indian law universities (schools), in particular, the emphasis has been on corporate aspects of job opportunities. Thus the schools focus mostly on producing corporate lawyers who could be absorbed by either Indian or foreign firms. This pattern has also to do with relatively higher school tuition fees that often force students, under parental and peer pressure, to opt for high-salaried corporate positions. It is the traditional universities that are producing international law researchers and scholars. The law schools of India have religiously stuck to producing mooters only. The second aspect of this failure has been a complete lack of interdisciplinarity in the training offered by the schools’ relatively inexperienced new faculty. This paucity is reflected in a complete absence of undergraduate students’ scholarly papers in leading international journals. None of the Indian law schools have a working paper series that often help the promotion of scholarly debates via online media – a

hallmark of cutting-edge law school education in the United States and Europe. All the law schools, as part of the undergraduate curricula, ask students to produce projects – that is, an essay of 15 to 20 pages for each subject studied – generally four, in each three-month semester. How can an undergraduate student produce four original, interdisciplinary, and publishable papers every three months under the guidance of faculty which generally has no international publication experience? Those with publication experience include some of the TWAIL scholars as well as general international law and diplomacy scholars as current or former directors of the law schools.114 But their administrative preoccupations leave them with little time to guide individual students. The task at hand for Indian TWAIL II scholars is to produce new TWAIL III scholars so that the movement goes on.

Any quality research takes about a minimum of four months to be ready for publication in any international journal. If all the projects ‘produced’ in the Indian law schools were to be original, India would right away become the world centre of social and legal research, by sheer number of papers produced! No wonder students have more publications, in general, than does the faculty. Indian law schools, in that sense, are promoting not research but plagiarism, as the students have to compulsorily ‘produce’ some text for grades. This burden of plagiarism, rather than the promotion of quality research by students at the law schools, is the gift of law school education. Law school elitism, a poor copy of the successful management and engineering schools of the 1980s, is, squarely, producing law managers and not jurists.

Also significant is the number of international-quality journals and reviews published; because of the blind peer review and referee process, the frequency and quality of research articles and books published by the law school faculty do not match the hype around the law schools in India. Ironically, a personal census reveals that students have produced better research than their faculty, at least in some of the law schools. However, the schools in Bangalore, Kolkata, Hyderabad, and Gandhinagar are certainly the leaders of new reform, while the one in Bhopal is clearly lagging in terms of research and journal publications.115 International law education at the

114 See, for a very good account of the Indian position on various aspects of international law, from trade and human rights to the ICJ, B. Patel (ed.), India and International Law (2005).
115 While the National Law Institute University, Bhopal, after two failed attempts, is finally slated to publish the Indian Law Review after 12 years (call for papers available at www.nliu.com/NLIU-ILR-2.pdf (last visited 12 December 2009)), it is far from publishing an interdisciplinary international law journal. Nonetheless, the Bhopal law school has been relatively successful in producing mooters who have participated in major international law competitions because such efforts are fully student-driven with minimum faculty involvement. All the other Indian law schools have been able to publish at least one law journal. The National Law School of India Review is the oldest law school publication, run by students of the National Law School of India University, Bangalore, for the last 21 years. The Indian Journal of Constitutional Law, NALSAR University of Law, Hyderabad, and the Journal of Indian Law and Society of the W.B. National University of Juridical Sciences, Kolkata both have a very high-quality review process. Schools recently established in Patna, Lucknow, and Raipur have also begun to publish. Indian private law schools have also taken up the challenge of journal publication. The Jindal Global Law School started an international-quality law review, the Jindal Global Law Review, in 2009 and the KIIT Law School, Bhubaneshwar, is about to publish a yearly multidisciplinary journal named Journal of Law and Human Sciences (information available at www.kls.ac.in/journal.htm (last visited 26 November 2009)). Another peer-reviewed publication, the Indian Yearbook of International Law and Policy (IYBILP), is forthcoming in March 2010 (see http://lawlib.wlu.edu/L/index.aspx?mainid=1670) as an endeavour of academics and researchers based in India who felt that the Indian Journal of International Law (IJIL) was not serving the complete purpose for which it was originally envisaged. The IYBILP is the
Indian law schools is, clearly, student-driven, pivoted on participation in public international law moot court competitions. Such participation is mostly by undergraduate students. Postgraduates surprisingly remain mute outsiders to moot experiences. And yet these are only some of the issues ailing Indian law schools. This paper does not mandate a full-length discourse on Indian law schools’ failures as far as promoting high-quality and interdisciplinary international law scholarship is concerned. Remedial measures, therefore, have not been canvassed. But the law schools have to become part of the TWAIL III movement by acting as its seat. These law schools with excellent physical and intellectual infrastructures, harnessed through an all-India entrance examination, have the capacity to become the laboratory for such experiments.

The Indian Society of International Law remains the sole organization responsible for international law promotion in India. Is it unsurprising that India has only been able to publish one recognized journal, the *Indian Journal of International Law*, in the last fifty years? None of the major academic publishers such as Oxford University Press (OUP) or Cambridge University Press, among others, has an Indian-law-school-based international law journal publication. On the other hand, the *Chinese Journal of International Law* was taken over by OUP in its third year of publication in 2005. Two generations of TWAIL scholars have not been able to launch a law-school-based journal under one of the more recognized academic publishers. Such journals are significant platforms for debate and for developing an alternative vision of international law. With the exception of Chimni, all the significant Indian TWAIL II scholars operate from outside. Even when positioned in India they did not attempt such an initiative. This is perplexing, as we often see the TWAIL II scholars identifying ‘politics of knowledge creation’ as one of the significant issues to be addressed.

1.2. CONCLUSION

Although I have mooted for a redefinition of the ‘Third World’, I have continued to stick with the traditional ‘North’ and ‘South’ terminology in this paper because this new Third World will take some time before it becomes the dominant terminology of academic discourses. It’s the proverbial twilight period and we cannot leave one for another. One should not forget that today, ‘living in the Third world is bad breeding; becoming a Third World social scientist is even worse’. The former is

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116 The Indian Society of International Law was established in 1959 for the teaching, research, and promotion of international law with the *Indian Journal of International Law* (IJIL) as its flagship journal. See www.isil-aca.org/about-isil.html#our-society. However, given India’s size we need many more journals that provide space for Indian international law. The IJIL’s articles display an understandable hide-and-seek with quality of research and interdisciplinarity. Clearly, the Indian contributions to the IJIL are sometimes, in my view, well below the international interdisciplinary academic standards.

117 Further, from 2008 the *Chinese Journal of International Law*, available at http://chinesejil.oxfordjournals.org (last visited 20 September 2009), is included in the Social Sciences Citation Index (SSCI), ensuring even wider visibility.

like the original sin, the latter like acquired viciousness. This exercise in writing about 'Indian international law' is both. Thus discussions above that might appear collateral to TWAIL are central in their own right, with the discussant running a risk of becoming a vicious social scientist in the politics of geographical location of knowledge, both inside and outside India. Like shadows, such background stories cannot be separated from their object if some light is shed on them. Chimni has expressed disappointment over the effect of the TWAIL II movement and I also share it in my analysis of the failure of law schools to promote even armchair indigenous knowledge scholarship. Truly, a single paper by an author cannot achieve results that need the collective wisdom of many enlightened minds from various disciplines to propose a definitive alternative international order.

The ideological domination of Northern academic institutions, the handful of critical third world international law scholars, the problems of doing research in the poor world, and the fragmentation of international legal studies has, among other things, prevented it [TWAIL] from either advancing a holistic critique of the regressive role of globalising international law or sketching maps of alternative futures. It is therefore imperative that TWAIL urgently finds ways and means to globalize the sources of critical knowledge.

But the inward-looking modernity of Partha Chatterjee challenges Chimni's call for a globalized TWAIL. The Indian subaltern resistance towards the international model of governance and globalization puts at centre stage the latent colonial structure in the infrastructure of modernity. But TWAIL II has not been able to come to terms with this. The actual challenge before the Indian TWAIL II, surely, is to make up for the failed prognosis of modernity by TWAIL I and its diagnosis of globalization at the same time being critical of modernity and its role in defeating non-Western systems of knowledge. By its nature, the subaltern connotation in TWAIL has to focus 'beyond' the nation, bringing into the light the need to see the 'Third World' as a unified category of the famished of both the First and the Third World. Thus the intellectual borrowings from the 'subaltern' by the TWAIL scholars has to clarify the within/without pathology raised by Partha Chatterjee before it becomes TWAIL's language of resistance.

MIL has been a victim of the cost–benefit calculation for desired goals of Western capitalism, supported by Marxists' love of historical materialism and faulty evaluation of the Indian subaltern. I have to clarify that the inability of the post-independence nationalist historiography to capture the subaltern does not in any way mean the absence of subaltern consciousness in India. What the social sciences, blinded by flawed Marxism, could only engage in the 1970s was very well captured by the Indian fiction of nineteenth-century Bengal. Anand Math, a novel by Bankim Chandra Chatterjee published in 1882, is a rare but accurate text of the peasant struggle of Bengal. It precedes the formation of modern Indian nationalism and in fact contributes to the making of Indian nationalism. Long before the subaltern

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119 Ibid., at 14.
120 Chimni, supra note 18, at 4.
121 Chatterjee, supra note 7, at 57.
consciousness arose to absolve the guilty history of Indian nationalism as the narrative of the elite, Anand Math had given a voice to the alternative narrative of subaltern history.

The Indian nationalist Rabindranath Tagore is often accused of wilfully ignoring the subaltern struggle by his choice of the elite history of British struggle by subverting the subaltern of Anand Math.122 Tagore stands in the shoes of Karl Marx, for whom, although he wanted the proletariat of the world to unite, the key for Asian development was mixing capitalism with the exploitation of India, his embarrassing justification for colonialism. A subaltern Indian perspective questions both Marx’s sympathy for the proletariat and Tagore’s sympathy for the Indian subalterns, as the latter was part of the national Sanskritic elite, harbouring significant differences of opinion with Gandhi, for whom India’s folk and little cultures formed the last line of defence against colonialism. Tagore’s poetic nationalism was a ‘high culture’ elite nationalism. Tagore embraced the elite’s modernity whereas Gandhi rejected it for the non-elite realities of India. The post-independence scholars blindly followed the British structure of struggle to establish MIL as a proper law, ignoring the social and historical experiences of native Indian society. Indian elites’ history ignored the emotional and cognitive aspect of colonialism – the Westernized Indian forgot the narration of its Indianized Western self that developed as the antidote to the former.123 Therefore the novel resistance to MIL coming from India, as the new protagonist, ought to emerge from the subaltern periphery and tribal meta-periphery. The TWAIL from India must capture its historical guilt.