

# International Law Scholarship in Post-colonial India: Coping with Dualism

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## Abstract

This essay seeks to sketch and evaluate international law scholarship in post-colonial India in the period 1947–2007. The exercise is undertaken to assess how Indian scholarship has coped with the dual life of international law: the fact that it is both an instrument of domination and possible emancipation. It is contended that while the dominant approach of *formalist dualism*, which critiques colonial international law but embraces the narrative of progress in the present, has made a seminal contribution to the world of international law, in particular the first articulation of Third World approaches to international law (TWAAIL), it has not adequately addressed deep systemic structures that underlie contemporary international law. It is argued that this task is performed more effectively by a *critical dualist* approach that problematizes the structure, ideology, and practices of global capitalism. The essay concludes by reflecting on the future tasks of Indian scholarship.

## Key words

dualism; futures; phases of Indian scholarship; post-colonialism

## I. INTRODUCTION: THE PERIPHERY AND INTERNATIONAL LAW

In the initial years after independence the principal dilemma of post-colonial international law scholars in India was to decide the extent to which post-colonial states should remain within the established boundaries of international law. The absence of an alternative language and requisite authority precluded the option of stepping outside the precincts of colonial international law and walking away. Mainstream liberal international law was the only game in town; even the Soviet scholars struggled with it. The periphery was thus from the very inception destined to play the role of both an insider and an outsider. The tensions that marked this duality were the birth sign of the post-colonial state. Both its colonization and liberation were, after all, regulated by international law. To be sure, it was not international law but the resistance of colonized peoples that brought independence, but its recognition as an independent sovereign state implicated the gaze of international law. Consequently, from the very beginning international law scholarship at the periphery has had to deal with the double life of international law: the fact that it is an instrument of subjugation and also of liberation, of exploitation and possible

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emancipation. It was a presence informed by an absence. How does one wield such a double-edged weapon?

The scholarship in post-colonial India has, like post-colonial scholarship in the rest of the Third World, bravely tried to come to terms with this duality.<sup>1</sup> There were, on the one hand, the insurrectionary impulse to make a fresh beginning and, on the other, the weight and force of established traditions and methods, and the rules of modern international law. However, once the outright rejection of extant international law was not seen as a serious possibility, Indian international lawyers turned to the West to learn the language of international law. For the transformation of colonial international law into a law of co-operation that would help Third World countries fulfil the aspirations of their peoples was not possible without understanding the technology of international law and engaging the Other. The process of learning and engagement was helped by the fact that in the initial decades many eminent Western international law scholars visited India (C. H. Alexandrowicz, Percy Corbett, Leo Gross, Philip Jessup, Eli Lauterpacht, Myres McDougal, Hans Morgenthau, Julius Stone, and Quincy Wright, among others), bringing the word of international law, and often introducing the incipient international law academia to known ways of critique. The dialogue with Western scholarship helped to shape a theory of formalist dualism that saw Indian scholarship advance a critique of colonial international law but embrace a narrative of progress in the present. While there was intermittent recognition of the role of power in the international system, the absence of a critical appraisal of its deep structures encouraged the espousal of varieties of formalist dualism that excluded a proper assessment of the place and role of contemporary international law in the post-colonial world order. The latter trend was reinforced by the fact that the most important names in Indian international law subsequently went to the Yale Law School for their LL.M or doctoral degrees. These include R. P. Anand, B. S. Murty, V. P. Nanda, K. V. Venkatraman, S. P. Sharma, and P. S. Rao. Those who did not take degrees there either visited or spent some time in New Haven (R. Khan and N. Rao). The Cold War slant of the New Haven approach kept Indian scholarship from exploring a 'critical' or 'left' vocabulary in evaluating the relationship between international law and the periphery. For the rest, because of its dense and prolix conceptual apparatus the real impact of the New Haven policy-oriented approach was in some ways regrettably limited.<sup>2</sup> What was best in the New Haven approach, namely its rejection of formalism, its interdisciplinary character, and its indeterminacy thesis, did not receive the attention it deserved. These elements could have combined with a critique of new forms of imperialism to advance a critical dualist approach that conceded that international law could be reformed but acknowledged the need, if a serious reform agenda were to be sustained, to evolve a persistent critique of the substratum of contemporary international law. But, because of its complex methodology, some turned away from

1 On dualism in the context of post-colonial international law scholarship in Africa, see J. T. Gathii, 'A Critical Appraisal of the International Legal Tradition of Taslim Olawale Elias', (2008) 21 LJIL 317. See more generally A. Anghie, *Sovereignty, Imperialism and International Law* (2005), 318.

2 For a critique of the McDougal-Laswell approach to international law see B. S. Chimni, *International Law and World Order: A Critique of Contemporary Approaches* (1993), ch. 3.

the New Haven approach, while others saw the policy-oriented approach as a neutral frame that could be used for clarifying and articulating national interests.<sup>3</sup>

A second major influence that shaped post-colonial international law scholarship after independence was the thinking of the leaders of the freedom struggle who were then determining the policies of the Indian state. India from the very beginning carved out a major role for itself in international affairs. It asserted its leadership early, at Bandung (1955), and became an accepted leader of the Non-Aligned Movement (NAM) and later the Group of 77 organization of developing countries (G77).<sup>4</sup> India's foreign policy was clearly articulated and delineated by an intellectual prime minister.<sup>5</sup> It was an easy course to follow, as Indian foreign policy reflected the very duality with which international law scholars were destined to grapple: on the one hand, opposition to the policies of imperialism and, on the other, an attempt to use existing international legal and institutional structures to bring about change in the international system to the advantage of Third World peoples.<sup>6</sup> Furthermore, international law scholars in India, like the intellectual community in general, saw their task as supporting the nation-building project by projecting the national interests of India in the international arena. In the circumstances the caste, class, and gender bias of the post-colonial state came to be neglected, in the long run undermining the progressive character of international law scholarship. In other words, the compromising nature of the post-colonial elite – that could neither enhance the welfare of subaltern groups nor consistently pursue policies of anti-imperialism – and the tight embrace of established traditions, methods and rules of international law turned into an Achilles heel. The Indian international law community needed to loosen the clasp of both if it were to move forward. In this respect it should have sought guidance from the Constitution of India, which *inter alia* places emphasis on the promotion of just internal and international relations.<sup>7</sup>

Against the backdrop of the complex epistemological and ontological dilemmas that confronted post-colonial scholars, this essay sets itself the modest objective

3 In the latter context see B. S. Murty, *Propaganda and World Public Order: The Legal Regulation of the Ideological Instrument of Coercion* (1968); B. S. Murty, *The International Law of Diplomacy: The Diplomatic Instrument and World Public Order* (1989); P. S. Rao, *The Public Order of Ocean Resources: A Critique of Contemporary Law of the Sea* (1975).

4 For an excellent account see V. Prasad, *The Darker Nations: A People's History of the Third World* (2007).

5 'Nehru understood independence as an opportunity to establish India as a presence on the world stage.' S. Khilnani, *The Idea of India* (1998), 178.

6 Indian foreign policy was shaped by Nehru and, according to Khilnani, 'the one insight from Nehru's intellectual engagements of the 1930s that he never abandoned was the Marxist analysis of imperialism'. *Ibid.*, at 76.

7 The Preamble to the Constitution of India talks of 'JUSTICE, social, economic and political'. Article 51 of the Constitution, contained in Part IV devoted to 'Directive Principles of State Policy', is entitled 'Promotion of international peace and security' and reads as follows:

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 organised peoples with one another; and
- (d) encourage settlement of international disputes by arbitration.

See generally P. C. Rao, *The Indian Constitution and International Law* (1993).

of reporting on international law scholarship in independent India. It deserves emphasis that the relationship of 'law and periphery' – the theme of this special issue on India and international law – can be analysed in a variety of ways. There is no unique method of deconstructing the modes by which the periphery is constituted and domination exercised over it in international law. One way of understanding the relationship between 'law and periphery' is critically to review the response of international law scholarship at the periphery, its dynamics and internal contradictions, for it offers crucial insights into that complex relationship. It needs to be remembered that the battle for the transformation of modern international law is in fundamental ways an ideological one; international law is, as is often said, what international lawyers say it is. In this regard it is not enough to look at the responses of individual scholars or judges (important as that is) but also to trace the efforts of the scholarly community in particular geographical locations. It is important to see how international law scholarship in individual Third World countries has approached the central issues of its time. Such an effort helps towards a more profound understanding of the diverse factors and influences that shape the relationship of 'law and periphery'. It also facilitates a record of international law scholarship in different countries, which in turn is crucial for the production of a democratic and inclusive global history of international law scholarship and thereby international law.

This essay therefore proposes to explore the linkage between 'law and periphery' through a critical appreciation of the intellectual history of international law scholarship in India. What beginnings did it make? What were seen as its principal tasks? How did it seek to purge international law of its colonial baggage? How did it relate to the policies of the post-colonial state? What, in short, were its weaknesses and strengths in addressing the relationship between 'law and periphery'? The essay attempts to respond to these questions by describing and explaining the different phases in international law writing in India in the period 1947–2007, through locating them in their wider historical and political contexts. While the essay admittedly covers vast ground, a fragmented history would have failed to capture the diverse ways in which Indian scholarship at different historical conjunctures responded to the relationship between international law and the periphery. It is believed that the holistic story of international law scholarship in India has lessons for all those who wield the weapon of international law on behalf of subaltern groups, classes, and states. It helps in recognizing the gaps in international law scholarship on the periphery and the possible ways in which these can be addressed.

There are distinct phases of international law scholarship that can be identified in the case of India. Some concerns preoccupy it in one period (e.g. the role of international law in ancient and medieval India) and other subjects (e.g. the law of the sea) dominate other periods. To be sure, the different phases overlap, therefore the phases that are identified are admittedly somewhat over-schematic. In any case, what follows is not a detailed account of Indian scholarship but a sketch. A single essay cannot do justice to the writings of generations of Indian scholars of international law, who include S. K. Agrawala, R. P. Anand, J. S. Bains, U. Baxi, C. J. Chacko, H. Chatterjee, B. S. Chimni, S. R. Chowdhury, B. H. Desai, R. K. Dixit, S. N. Guha Roy, R. C. Hingorani, S. P. Jagota, A. Jayagovind, R. Kapur, R. Khan, K. Krishna Rao,

V. S. Mani, K. P. Mishra, B. S. Murty, M. K. Nawaz, R. B. Pal, T. T. Poulouse, B. Rajagopal, K. Rao, N. Rao, P. C. Rao, P. S. Rao, T. S. Rama Rao, G. S. Sachdeva, K. A. N. Sastri, K. R. R. Sastri, J. N. Saxena, B. Sen, S. P. Sharma, Gurdip Singh, Nagendra Singh, Narinder Singh, S. P. Sinha, Y. K. Tyagi, S. K. Varma, and D. Wadegaonkar.<sup>8</sup> On offer, therefore, is an interpretation, a tentative one at that, of Indian scholarship in international law, an interpretation that others may contest; indeed, one of the objectives of this essay is to initiate a debate on the subject.<sup>9</sup> Be that as it may, it is worth affirming at the very outset that that the story of international law scholarship in post-colonial India is not only one of failures and disappointments but also a story of profound interventions, not the least of which has been the successful articulation, over many generations, of Third World approaches to international law (TWAII).<sup>10</sup> Its story provides unique insights into how the relationship between 'law and periphery' was imagined and coped with in a leading Third World country.

## 2. PRE-COLONIAL INDIA, NATIONALISM, AND INTERNATIONAL LAW: THE 1950S AND 1960S

India became independent at the stroke of midnight on 15 August 1947. In the first decade after independence, international law scholars worked assiduously at researching and recording the contribution of pre-colonial India to the evolution of the law of nations. C. H. Alexandrowicz, who occupied the chair of international law at Madras University between 1951 and 1961, and a number of Indian scholars (including C. J. Chacko, H. Chatterjee, M. K. Nawaz, K. A. N. Sastri, K. R. R. Sastri, N. Singh) expended considerable energy and time on the subject.<sup>11</sup> The exercise

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- 8 Several of them have delivered the prestigious Hague lectures. For example see C. J. Chacko, 'India's Contribution to the field of International Law Concepts', (1958/I) 93 RCADI 121; K. R. R. Sastri, 'Hinduism and International Law', (1966/I) 117 RCADI 503. I thus owe an apology to generations of Indian scholars for not being able adequately to record, address, or reference their contributions. Just to illustrate the point, mention may be made of Indian scholarship on air and space law that does not find mention in the paper. See S. Bhatt, 'Some Perspectives on Space Law', (1966) 6 *Indian Journal of International Law* (hereafter IJIL) 395; S. Bhatt, 'Legal Controls of the Exploration and Use of the Moon and Celestial Bodies', (1968) 8 IJIL 33; M. Chandrasekharan, 'The Space Treaty', (1967) 7 IJIL 61; P. K. Kartha, 'Some Legal Problems Concerning Outer Space', (1963) 3 IJIL 1; S. Malik, 'Liability for Damage Caused by Space Activities', (1966) 6 IJIL 335; S. Malik, 'Registration of Space Objects', (1969) 9 IJIL 412; V. S. Mani et al. (eds.), *Air Law and Policy in India* (1994); V. S. Mani et al. (eds.), *Recent Trends in Space Law and Policy* (1996); S. N. Sinha, 'The Seventh Session of the Legal Sub-committee of the UN Committee on Peaceful Uses of Outer Space', (1968) 18 IJIL 399; D. Wadegaonkar, 'Legal Problems of Outer Space', (1969) 9 IJIL 47.
- 9 For those interested in six decades of Indian scholarship in international law, the writings may be found in the IJIL, *India Quarterly*, *Indian Yearbook of International Affairs* (hereafter IYIA), *Journal of Indian Law Institute*, and *International Studies*.
- 10 On the differences between the first and second generation of Third World scholarship see B. S. Chimni, 'Towards a Radical Third World Approach to Contemporary International Law', (2002) 5 (2) *ICCLP Review* 16.
- 11 While Alexandrowicz published a number of articles in this period in the IYIA (which he launched and edited) and the *British Yearbook of International Law*, Nagendra Singh did so in the early 1960s in the IJIL. In the case of C. H. Alexandrowicz see 'Grotius and India', (1954) 4 IYIA 357; 'Mogul Sovereignty and the Law of Nations', (1955) IYIA 316; 'The Discriminatory Clause in South Asian Treaties in the Seventeenth and Eighteenth Centuries', (1957) 6 IYIA 126; 'The Theory of Recognition in Fieri', (1958) 7 *British Yearbook of International Law* 176; 'Freitas versus Grotius', (1959) *British Yearbook of International Law* 162. This work was consolidated in his Hague Lectures in 1960. He later published his well-known work *An Introduction to the History of the Law of Nations in the East Indies (16th, 17th and 18th Centuries)* (1967).

was important from the perspective of an integral nationalism that rightly viewed the safeguarding of the unity of India as a priority task. It is often observed that it was British colonialism that gave political unity to India, for nationalism was its historical product.<sup>12</sup> This understanding has, however, always gone hand in hand with the claim that India represented an essential cultural unity from the dawn of history.<sup>13</sup> As Nehru put it, the Indian Union may be ‘an infant state’, but it ‘is not an infant country’: ‘India is a very ancient country with millennia of history behind her – a history in which she has played a vital part not only within her own vast boundaries, but in the world and in Asia in particular.’<sup>14</sup> India was to reassert this role in the period after independence. By describing a common corpus of inter-state rules of conduct in ancient India, international law scholars wanted to reaffirm the civilizational unity of India and sustain the idea that India should play a central role in world politics.

Besides suggesting that a pre-existing immanent nation had attained freedom, societies of ancient India were also imagined by international law scholars as egalitarian and just societies. The past was recalled and interpreted to service the present; ‘historical projects became projects of the state’, an integral part of the nation-building project.<sup>15</sup> The underlying suggestion was that the wisdom of the state in ancient India was now embodied in the post-colonial state that would re-create an equal and fair society. The significance of international law scholarship in this formative phase thus went beyond the rightful assertion of the presence of international law in ancient India and its contribution to the evolution and development of international law. Its untheorized assumptions with respect to ancient India, and implicitly the post-colonial state, limited the possibilities of developing a critical dualist approach.

### 2.1. Ancient India and international law

H. Chatterjee, K. A. N. Sastri, K. S. S. Sastri, N. Singh, and others contended that the ancient Indian polity (roughly from 2000 BC to AD 800) was built on the basic concept of *dharma*, which ‘links up with the Vedic concept of Rta or Cosmic Order at one end, and at the other, with the minutiae of ritualism and of ethics of social conduct of all persons without exception known as *sadharna-dharma*.’<sup>16</sup> The inclusiveness of the concept of *dharma*, subsuming the worlds of both ethics and law and their intersection, lends itself to multiple meanings that can be understood properly only in relation to the context in which it is used;<sup>17</sup> the term *dharma* is therefore difficult to translate or define.<sup>18</sup> Often, to the word *dharma* is attached a qualifying term such

12 ‘What made possible the self-invention of a national community was the fact of alien conquest and colonial subjection.’ Khilnani, *supra* note 5, 155.

13 J. Nehru, *The Unity of India: Collected Writings 1937–1940* (1941), 14–15.

14 J. Nehru, *Jawaharlal Nehru's Speeches, Volume 1: September 1946–May 1949* (1949), 234 and 236.

15 V. Lal, *The History of History: Politics and Scholarship in Modern India* (2003), 16.

16 K. A. N. Sastri, ‘International Law and Relations in Ancient India’, (1952) *IYIA* 97, at 103.

17 The meaning of ‘*Dharma* itself is relative and depends on the times and the conditions prevailing’. J. Nehru, *The Discovery of India* (1961).

18 ‘The word defies translation into English.’ R. Thapar, *A History of India* (1966) I, 46; A. Nandy, *Time Warps: Silent and Evasive Pasts in Indian Politics and Religion* (2002), 27, n. 19. For a good discussion Nandy refers us to P. V. Kane, *History of the Dharmashastra* (1946), III, 825–9.

as *sadharna* (duties applicable to all) or *varna* (caste duties) to help pinpoint the context and meaning. But there is little doubt that, when it is used in relation to the state, the word *dharma* means the law of the land. The concept of the state was itself well developed in ancient India; while not present in the early ancient period, the idea of the state evolved over time. The elements that constituted a state, or *rajya*, were identified as *praja* (the citizen body or the populace), *rashtra* (the territory of the state), *rajan* (the king), and *dharma* (laws, both divine and secular).<sup>19</sup>

The concept of *dharma* went hand in hand with the concept of *danda*. Indeed, Manu, the ancient Hindu lawgiver, identified *dharma* with *danda*, 'the word nearest to Sovereignty [also translated as 'sanctions'] in Sanskrit and perhaps best rendered into sceptre. It is the embodiment of divine effulgence which maintains kingdoms in order, indeed the whole world, including all creatures and things.'<sup>20</sup> According to Manu, 'Dandam Dharmam vidur budhah' – 'the wise recognize *dharma* in *danda*'.<sup>21</sup> Thus the relationship of *dharma* with *danda* received a particular interpretation, namely '*danda* is indeed *dharma* itself';<sup>22</sup> naked force was merely 'a weapon for the implementation of *dharma* or law'.<sup>23</sup> Kings who did not respect the rule of *dharma* were visited by the wrath of gods. In sum, the primary task of the *rajan* was to uphold *dharma*.<sup>24</sup> This stress on supremacy of the law, Singh contends, 'was meant to regulate inter-state conduct as much as the internal governance of a state'.<sup>25</sup> Thus *dharma* also 'constituted the very essence of International Law in Ancient India'.<sup>26</sup>

It is not generally known that the debate on the meaning of the existence of inter-state rules and practices in ancient India preceded independence.<sup>27</sup> In a paper presented to the Grotius Society in 1922, a British writer, W. S. Armour, challenged Indian scholars who 'argued that there was a complete system of international law in ancient India' for introducing 'terms with a history wholly modern into discussions on ancient polity. The territories of Indian Rajas could scarcely be called States at all in the modern sense of the term'.<sup>28</sup> International law scholars in post-colonial India have been ready to recognize that proper international law in the modern sense did not exist in ancient India.<sup>29</sup> But this did not mean that international law, in some fundamental sense of rules regulating collective behaviour, did not exist or did not

19 N. Singh, *Juristic Concepts of Ancient Indian Polity* (1980), 105.

20 Ibid., at 104. See generally P. Olivelle, *Manu's Code of Law* (2006).

21 K. A. N. Sastri, 'Inter-state Relations in Asia', (1953) *IYIA* 133, at 140.

22 Singh, *supra* note 19, at 16.

23 N. Singh, 'India and International Law', in R. P. Anand (ed.), *Asian States and the Development of International Law* (1972), 25, at 19. It would be interesting to compare the basis of the doctrine of sovereignty in India with that in Europe. See in the latter context Ernst H. Kantorowicz, *The King's Two Bodies: A Study in Mediaeval Political Theology* (1997).

24 Singh, *supra* note 23, at 34.

25 Ibid.

26 H. Chatterjee, *International Law and Inter-state Relations in Ancient India* (1958), 6.

27 P. Bandyopadhyay, *International Law and Custom in Ancient India* (1920); S. V. Vishwanatha, *International Law in Ancient India* (1925).

28 W. S. Armour, 'Customs of Warfare in Ancient India', (1923) 8 *Transactions of the Grotius Society* 71, at 83.

29 N. Singh, *India and International Law: Ancient and Medieval*, Vol. 1 (1973), 24 and 12. Likewise, Sastri has written, 'International Law as we understand it in the modern world cannot, in the strict sense, be said to have prevailed in ancient India.' Foreword to Chatterjee, *supra* note 26.

influence the evolution and development of international law; both the law of peace and the laws of war had a marked presence.<sup>30</sup>

## 2.2. *Dharma* and the post-colonial state

If there was a lapse, it lay in the fact that the basic legal framework of *dharma* and *danda* in ancient India was rarely explored at any length in the context of the social relations of the time. The only semblance of a critique came from a realist direction, contending that ‘neither *Dharma* nor the divine sanctions underlying the norm of *Dharma* prevented a ruler in Ancient India from pursuing the game of power politics described so vividly in *Arthashastra* [of Kautilya]’.<sup>31</sup> But, according to Sastri, ‘the tendency did not strike root, even the cultivation of *Arthashastra* [c. 350–283 BC] suffered relative neglect, and by the age of the Guptas . . . the rule became definite that *Dharma* prevailed over *Artha* in all cases of conflict’.<sup>32</sup> An idealized view of state and society in ancient India thus came to be portrayed. Left out of the story were the conflicts and the oppression that characterized these societies. Unpleasant memories were repressed.<sup>33</sup> Reference was made to actual social practices only for the sake of completeness.<sup>34</sup> There was no attempt to take cognizance of the view that ‘the Hindu tradition is basically inegalitarian’ and ‘is largely uncritical and apologetic of the established social order’.<sup>35</sup> In recent years Dalit and feminist scholarship has documented and shown the inegalitarian nature of societies in ancient India from both a caste and a gender perspective.<sup>36</sup>

The refusal or inability to distinguish between what ancient texts stated and what actual social practices were is, in the view of one set of critics, not an accident but an integral part of the nationalist discourse of the freedom movement itself. For instance, according to Guha, ‘the penetration of elite nationalism by the interests of big business came to be mediated by the classical idiom of political conciliation

30 Singh, *supra* note 29, at 24.

31 M. K. Nawaz, ‘The Law of Nations in Ancient India’, (1957) 6 IYIA 172, at 176. Mehta has recently described the teachings of Kautilya, the putative author of *Arthashastra*, thus:

While his teaching came to signify ruthlessness in a political cause, the opposite cautionary message could also be drawn. If politics requires you to be ruthless you better be sure that it is for the welfare of the subjects . . . Its Machiavellianism is directed more against holders of power. It gives an unnerving sense of what it is like to snatch snippets of order from a deeply chaotic world always threatening to go out of kilter; the legitimacy and possibility of *dharma*, paradoxically, rests on a contingent foundation of power. (P. B. Mehta, ‘Century of Forgetting’, *Indian Express*, 16 June 2009)

32 Sastri, *supra* note 16, at 104.

33 The imagined world of ancient India in which *dharma* always prevailed restored the self-confidence of a colonized nation. But this feature also lends itself to the claim of political Hinduism and its communal politics. P. Chatterjee, ‘History and the Nationalization of Hinduism’, in V. Dalmia and H. Stietencron (eds.), *Representing Hinduism* (1995), 103, at 103–4.

34 For example, on the rare occasion when Singh talks of political practice, he writes that ‘it is difficult to talk of political practice which may quite often have deviated from theory but that does not cast any reflection on the theory as such’. Singh, *supra* note 29, at 20.

35 B. Parekh, ‘Some Reflections on the Hindu Tradition of Political Thought’, in T. Pantham and K. L. Deutsch (eds.), *Political Thought in Modern India* (1986), 17, at 27–30.

36 C. Prasad, *Dalit Diary: 1999–2003: Reflections on Apartheid in India* (2004); K. Ilaiah, *Why I Am Not a Hindu* (1996); S. Rege, *Writing Caste/Writing Gender: Narrating Dalit Women’s Testimonies* (2006); U. Chakravarty, ‘Whatever Happened to the Vedic Dasi? Orientalism, Nationalism and Script for the Past’, in K. Sangari and S. Vaid (eds.), *Recasting Women* (1990).



– *Dharma*.<sup>37</sup> *Adharma* came to represent evils such as communism and Bolshevism, from which society had to be saved.<sup>38</sup> After Gandhiji assumed leadership of the movement and the nationalist elite acquired a broad base, ‘the idiom of *Dharma*’ greatly influenced elite political discourse, ‘especially the particular variety of it which refused to acknowledge class struggle as a necessary and significant instrument of the struggle against imperialism’.<sup>39</sup> Indeed, as Guha goes on to observe, ‘since Gandhism was, in this period, the most important of all the ideologies of class collaboration within the nationalist movement, it was also the one that had the most elaborate and most frequent recourse to the concept of *Dharma*’.<sup>40</sup> The discourse was carried into the period after independence. It placed the concept of *dharma* in the service of the bourgeoisie, in particular big business, which emerged as a dominant force. Thus the post-colonial Indian state was represented as standing above conflicts and classes, and the role of the working class and the intelligentsia was viewed as supporting it in its nation-building tasks. This was a continuation of the idea portrayed by the leaders (Gandhiji, Nehru) of the Indian National Congress (INC) that it was a supra-class organization and the true representative of the nation. As Gandhiji put it, the INC represented ‘no particular community, no particular class, no particular interest. It claims to represent all Indian interests and classes.’<sup>41</sup> These leaders, in Guha’s view, ‘were staking out a claim for power on behalf of the indigenous bourgeoisie. That they did so in the name of the nation was evidence of their effort to present the interest of that class as the common interest of all members of that society.’<sup>42</sup> While in later years this understanding came to be widely contested on the class, caste, and gender axes, the image of a supra-class organization, despite the abandonment of Gandhi’s unique vision for post-colonial India, proved irresistible for the intelligentsia in the first decades after independence.<sup>43</sup> It was sustained by the fact that the Nehru period (1947–64) also coincided with the gradual demobilization of the people. The right to disobedience was perceived as a denial of the validity of the state’s action and the repudiation of allegiance to the state.<sup>44</sup>

### 2.3. *Danda* and the post-colonial state

*This fact* had its impact on international law scholarship; the refusal to look at the human rights and development record of the state and the accompanying neglect

37 R. Guha, ‘Dominance without Hegemony and its Historiography’, in R. Guha (ed.), *Subaltern Studies VI: Writings on South Asian History and Society* (1992), 210, at 249.

38 *Ibid.*

39 *Ibid.*, at 246. It is, however, of note that ‘it was not until 1996, when Volume IX of *Subaltern Studies* was published, that the politics of the Dalits, historically the most disempowered segment of India’s population . . . received its first explicit articulation’. Lal, *supra* note 15, at 189.

40 Guha, *supra* note 37, at 246.

41 M. K. Gandhi, *Essential Writings* (1970), 380.

42 R. Guha, ‘Discipline and Mobilize’, in P. Chatterjee and G. Pandey (eds.), *Subaltern Studies VII: Writings on South Asian History and Society* (1993), 69, at 98.

43 Gandhiji’s desire for village republics rather than a state and his advice to avoid the Western development path was quietly given up as unrealistic. P. Chatterjee, *The Nation and Its Fragments: Colonial and Postcolonial Histories* (1994), 201–2.

44 K. M. Pannikar, *The State and the Citizen* (1956), 2, 3. On the thinking that informed the understanding see generally D. Chakrabarty, ‘In the Name of Politics: Democracy and the Power of Multitude in India’, 19 (1) *Public Culture* 35.

of social movements were informed by the assumption of a supra-class state. The disregard of these issues obviated the possibility of shaping the tools of critical dualism. It was not surprising in the circumstances that international law scholars researching ancient India did not explore in detail the social practices that constituted the meaning of *danda* – a concept ‘central to ancient Indian polity based, in its classical form, on monarchical absolutism’. For *danda*, among other things, ‘emphasizes force and fear as the fundamental principles of politics’,<sup>45</sup> an idiom mobilized by the post-colonial regime for its own ends.<sup>46</sup> In fact, ‘the new state chose to retain in a virtually unaltered form the basic structure of the civil service, the police administration, the judicial system, including the codes of civil and criminal law, and the armed forces as they existed in the colonial period’.<sup>47</sup> Once the rules and institutions that constituted the idea of *danda* in the post-colonial period were projected as resting on an overlapping social and political consensus – that is, strengthening the nation-building project – it resisted interrogation. This perspective, among other things, dictated that one did not take resistance seriously, for it was viewed as subversion of the nation-building process rather than as a manifestation of democratic discontent. As Khilnani puts it, ‘the true success of Nehru’s rule lay not in a dissemination of democratic idealism but in its establishment of the state at the core of India’s society . . . The state thus etched itself into the imagination of Indians in a way that no previous political agency had ever done’.<sup>48</sup> The fact that Nehru articulated the overlapping political consensus in the language of development and socialism made the intelligentsia even less sympathetic to oppositional stances and movements. International law scholars therefore did not come to align the language of international law with the destiny of Indian people as opposed to that of the Indian state. International law from below was an idea whose time had not yet come. The language and idiom of *dharma*, now understood as the policies of a state that could do little wrong, was seriously constraining. Seen from the topos of human rights, Santos writes with insight, the notion of *dharma* revealed a ‘strong undialectical bias in favor of harmony . . . neglecting the value of conflict as a way toward a richer harmony’; it also tended to neglect the fact that ‘human suffering has an irreducible individual dimension: societies do not suffer, but individuals do’.<sup>49</sup>

45 Guha, *supra* note 37, at 238.

46 ‘All the semi-feudal practices and theories of power which had come down intact from the pre-colonial era or were remolded, without being radically altered, under the impact of colonialism, fed in varying degrees on this idiom [*danda*]. The private feudal armies and levies, caste and territorial panchayats governed by local elite authority, caste sanctions imposed by the elite and religious sanctions by the priesthood, bonded labour and beggar, the partial entitlement of landlords to civilian and criminal jurisdiction over the tenantry, punitive measures taken against women for disobeying patriarchal moral codes, elite violence organised on sectarian, ethnic and caste lines, etc., are all instances of [coercion] framed in the idiom of *Danda*. They represent only a small sample taken from a large area of indigenous politics where almost any superordinate authority that sought support from an Indian tradition of coercion, tended inevitably to fall back on the concept of *Danda*.’ Ibid.

47 Chatterjee, *supra* note 43, at 204.

48 Khilnani, *supra* note 5, at 41. The centrality of the state has only become more acute. In the words of Nandy, ‘the demands of the state are no longer conditional in India; they have become absolute’. Nandy, *supra* note 18, at 47.

49 B. Santos, ‘Human Rights as an Emancipatory Script? Cultural and Political Conditions’, in B. Santos (ed.), *Another Knowledge Is Possible: Beyond Northern Epistemologies* (2007) 3, at 17.

#### 2.4. Medieval India and international law

Medieval India – that is, the period stretching from the eighth century AD to the period prior to British rule in India – did not receive from international law scholars the same kind of attention as ancient India. The history of medieval India may be divided into early and late periods. The latter period, associated with Muslim rule, was not seriously studied by international law scholars in India, with the exception of Singh and Alexandrowicz. Several reasons can perhaps be given for this neglect. First, the more urgent task was seen as establishing that international law had an eternal presence rather than recording the history of its practice through the centuries. Second, the source of pride was often a ‘Hindu India’, and the dominance of Islam in the late medieval period, and its description often as the dark ages, excluded it from concern.<sup>50</sup> Third, there was in this period the confused state of coexistence of two conceptions of the law of nations: one rooted in *dharma* and the other in Islam. This made the task of explication difficult – that is, unless that feature itself was treated as a distinctive practice. This was precisely Singh’s understanding and explains his interest in medieval India.

The first distinguishing feature of inter-state law in medieval India, according to Singh, was ‘the absence of a uniform set of rules which would govern both types of political units, whether Aryan or Islamic’.<sup>51</sup> This gave rise to its second feature, namely its ‘truly international character’, for ‘the states establishing intercourse not only belonged to different religions but also professed different legal systems and were truly international in character’.<sup>52</sup> In other words, instead of portraying the medieval period simplistically as dominated by Islamic concepts, Singh pictures it as a period of coexistence (at least so far as state practice went) and therefore a source of pride. The rules of conduct which it engendered later interacted with European Christian civilization. It was in Singh’s view ‘a unique chapter in the history of the world, not only fascinating but illustrative of the lessons that can be learnt in the formation of composite civilization of which India is proud and the regulation of inter-state conduct on a basis of standards accepted on consent . . . governed by the principle of reciprocity’.<sup>53</sup> This portrayal tied in with the objective of the creation of a secular and plural India with the strong presence of a composite culture.<sup>54</sup> But there is much that can also be learned by the global community of international law scholars from a close study of the medieval period to contest the banal thesis of the ‘clash of civilizations’. The fact of universal application of international law compared the tradition in ancient and medieval India especially favourably with international law in the colonial period, when it was confined to Christian or so-called civilized states. In asserting this progressive tradition there was, of course, the idealist desire to affirm the unity of human civilization in the

50 B. Chandra, *Ideology and Politics in Modern India* (1994), 132.

51 Singh, *supra* note 29, at 94.

52 *Ibid.*, at 112.

53 *Ibid.*, at ix.

54 By ‘composite culture’ is meant ‘a subtle synthesis of the world-views and living habits of both Muslims and Hindus’. It has variously been described as ‘co-mingling’, a ‘sense of larger allegiance’, a ‘fusion of mentalities’. J. Alam, ‘Composite Culture and Communal Consciousness: The Ittehadul Muslimeen in Hyderabad’, in Dalmia and Stietenron (eds.), *supra* note 33, 338 at 339–40.

midst of many differences; the presence of a composite civilization and international law in medieval India merely confirmed that this was no utopian project.<sup>55</sup> It also reflected the hope that in its future application international law would not be linked to the colonial idea of difference.

In the case of late medieval India there was the additional claim that these practices paralleled those in Europe. Alexandrowicz devoted much of his attention to this period. He argued persuasively that when the European adventurers arrived in Asia, 'they found themselves in the middle of a network of states and inter-state relations based on traditions which were more ancient than their own and in no way inferior to notions of European civilization'.<sup>56</sup> Thus, according to Alexandrowicz, 'in the East Indies a confrontation of two worlds took place on a footing of equality and the ensuing commercial and political transactions, far from being in a legal vacuum, were governed by the law of nations as adjusted to local inter-State custom'.<sup>57</sup> The decision of the International Court of Justice (ICJ) in the *Right of Passage over Indian Territory (Portugal v. India)* case, wherein the Court took cognizance of a treaty of 1779 entered into between Portugal and the state of Maratha, was seen as conclusive proof of this. Some Western scholars, who were not disturbed by these claims, readily agreed with the Alexandrowicz thesis. As Keith wrote, 'it is now generally accepted that relations between European and Asian peoples before the time of Asian colonization were governed by international law'.<sup>58</sup>

## 2.5. The contribution to modern international law

The assertion that a corpus of inter-state rules and practices existed in pre-colonial India included the claim that these rules and practices influenced the development of modern international law. Scholars such as Alexandrowicz and Anand tried to show how the 'founding fathers' of international law relied on these practices (both ancient and medieval) to formulate their views. In the context of maritime law Anand, for instance, writes, 'Whatever may be said about some other rules of international law, freedom of the seas, which had formed the pith and substance of the modern law of the sea, is one principle which Europe learnt and got from Asian state practice through Grotius'.<sup>59</sup>

The evidence of the contribution of Indian and Asian practices to the development of international law was important from the perspective of assuming a non-rejectionist position towards modern international law in the post-colonial period. The facts of continuity and contribution helped to advance the view that all that was problematic in modern international law was its colonial content and not its inherent nature and character. Colonial international law, in other words, simply represented an unfortunate departure from earlier understandings of international

55 The existence of the law of nations in all cultures, and their ability to co-exist and even coalesce, underlined the essential unity of the human species. Chatterjee, *supra* note 26, preface.

56 Alexandrowicz, *supra* note 11, at 224.

57 *Ibid.*

58 K. J. Keith, 'Asian Attitudes to International Law', (1967) *Australian Yearbook of International Law* 1, at 3.

59 R. P. Anand, *Origin and Development of the Law of the Sea* (1983), 86. See also Alexandrowicz, *supra* note 11, at 65, 44.

law. It did not transform the conceptual apparatus and practices of international law in such a manner as to occlude the possibility of a universal international law. It followed that if international law was a part of all civilizations, and colonialism was an aberration, there were few reasons to question it once it proclaimed its universal outlook and application.<sup>60</sup>

### 3. THE PERIOD OF OPTIMISM: THE 1960S AND 1970S

The phase of historical scholarship therefore overlapped with a phase of optimism about the role of international law and institutions.<sup>61</sup> In the 1960s and 1970s the tension inherent in the dual character of international law was submerged in a narrative of progress. The sanguine mood was enhanced by the creation in 1959 of the Indian Society of International Law (ISIL), Nehru himself delivering the inaugural address.<sup>62</sup> A year later the *Indian Journal of International Law* (IJIL) began publication. The IJIL was a vehicle both for setting the historical record straight and for reshaping contemporary international law to meet the aspirations of India and the Third World. The moment of forgetfulness about the dualism inscribed at the heart of international law was to come to haunt the Indian international law community later. To be sure, the need to avoid ‘wishful thinking’ and ‘the failure [hitherto] to relate law to politics and action’ was recognized.<sup>63</sup> But international law scholarship, given its formalism, failed to shape a discourse of critical dualism that traced the world of ‘politics and action’ to deep structures of imperialism, now assuming the form of neo-colonialism.

#### 3.1. The imagined United Nations

In its absence there was the continuing belief that the United Nations (i.e. including the International Court of Justice, ICJ) could play a crucial role in ushering in a peaceful and just world order, and that India could, as a major Third World power, provide impetus to the process of impending change. For a time in the 1960s it appeared that faith in the United Nations was not entirely misplaced. First, the 1950s and early 1960s were a ‘golden period’ in India’s relationship with the United Nations, explaining the optimism of international law scholars. India, according to one keen observer, ‘acquired a status and influence much larger than what it could have by virtue of its economic and military strength. It was a case of power and influence without military force and economic might’.<sup>64</sup> Second, the 1960s saw the formal inauguration (in Belgrade in 1961) of the NAM, with its strong commitment

60 R. P. Anand, *New States and International Law* (1972).

61 ‘In the sixties emphasis slowly began to shift from the study of the history of the law of nations to international institutions, although research of the former was not abandoned’. M. K. Nawaz, ‘International Law Research in India’, (1972) 12 IJIL 233, at 233.

62 ‘Inaugural Address by the Hon’ble Prime Minister of India, Sri Jawaharlal Nehru, Patron’, (1960–1) 1 IJIL 5.

63 Nawaz, *supra* note 61, at 233–4. Nehru himself had noted in his inaugural address that ‘international law, if it is to be effective, has to be related to the realities of international life; otherwise it becomes merely an academic exercise of some professor or pandit sitting in a university’. ‘Inaugural Address’, *supra* note 62, at 6.

64 K. P. Saksena, ‘The United Nations in India’s Foreign Policy Strategy’, in M. S. Rajan et al. (eds.), *The Nonaligned and the United Nations* (1987), 188, at 190.

to strengthening the UN system. Third, the adoption of a spate of UN resolutions including the UN Declaration on the Granting of Independence to Colonial Countries and Peoples (1960), the UN Resolution on Permanent Sovereignty over Natural Resources (1962), the creation of the United Nations Conference on Trade and Development (UNCTAD) in 1964, and the adoption of the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in 1970 strengthened the belief that international law could be transformed through the United Nations to meet the aspirations of newly independent states. It explains the views of Indian scholars on an important debate of the time relating to the doctrine of implied powers of the United Nations. The general view, reflecting a spirit of idealism, was in favour of the doctrine.<sup>65</sup> Formalist dualism did not allow this idealism to be seriously tempered with realism. There was no attempt to lift the veil over international organizations to look at the social and political forces that dominated the United Nations; a statist framework and formalist techniques ruled out this possibility. The absence of a deep understanding of the changing forms and modes of imperialism sustained the hope that good argument and a global coalition of Third World states would enable the United Nations to usher in a peaceful and just world order. This understanding was soon put to the test. The test cases for this thinking were the role of the ICJ; the Third United Nations Conference on Law of the Sea (UNCLOS III), which was convened in 1973 to draft a new convention; and the implementation of the 1974 Declaration and Programme of Action on the New International Economic Order (NIEO). The engagements with the ICJ, the Law of the Sea and the NIEO deserve a few words each, as they help to tease out key aspects of international law scholarship in this period.

### 3.2. Focus on the International Court of Justice: a utopian role

The focus on the ICJ in this period is explained by several factors.<sup>66</sup> First, it was believed that the rule of law would prevail in international affairs only if the Court was assigned a central role. Toward this end states were exhorted to accept its jurisdiction as compulsory. Second, the fact that that exhortation clashed with national interests, given India's disputes with China and Pakistan, made it important to examine the limits of conflict resolution through adjudication. Third, the need to refute the charge that Asian states did not have a tradition of resolving disputes through adjudication called, among other things, for a study of the history of the Court. Fourth, while rejecting the charge that there was something in their culture which made Asian states reluctant to approach the Court, international law scholars had the opportunity of shifting responsibility and arguing that the principal reason for this was the colonial character of traditional international law. Fifth, India

65 R. Khan, *Implied Powers of the United Nations* (1970), 222.

66 R. P. Anand, for instance, published a spate of articles and three books on the subject: *Compulsory Jurisdiction of the International Court of Justice* (1961); *Studies in International Adjudication* (1969); and *International Courts and Contemporary Conflicts* (1974). This last work was a study which was started in 1961 and contains, according to the author, a revised version of his doctoral dissertation submitted to the Yale Law School in 1964; see preface, at xi. D. Pratap published his *Advisory Jurisdiction of the International Court of Justice* (1972); it also had begun as a doctoral dissertation, written in Oxford in the 1960s.

appeared before the ICJ in the *Right of Passage over Indian Territory* case decided in April 1960 and subsequently, in 1965, went in for arbitration in order to resolve a boundary dispute with Pakistan. The *India–Pakistan Western Boundary* case tribunal gave its adjudication in February 1968.<sup>67</sup> These cases gave a fillip to the study of the international adjudicative processes. Sixth, the interest in the ICJ manifested a larger interest in the UN system, which was expected to play a principal role in ushering in a new world order. In retrospect, given the unprecedented violence that had characterized the previous two centuries (manifested *inter alia* in colonialism, two world wars, the Holocaust, and the dropping of the atomic bombs on Hiroshima and Nagasaki) a certain degree of idealism and hope characterized the belief that the ICJ and the United Nations could usher in a peaceful world order. It was only when the United States walked out of the ICJ in 1986 in the wake of the judgment in the *Nicaragua* case that the potential of adjudication as a mode of ushering in a peaceful world order came to be seriously questioned. Thereafter the ICJ as an institution came to receive less and less attention from Indian scholars.

### 3.3. Optimism under test: the law of the sea negotiations

The 1970s were almost entirely devoted to the law of the sea negotiations (1973–82). Every noted scholar (Anand, Khan, Mani, Nawaz) and many senior civil servants (Jagota, Rao, Dixit) wrote extensively on the subject.<sup>68</sup> From the standpoint of

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- 67 For a discussion of the award see Anand, *Studies in International Adjudication*, *supra* note 66, at 218–49; B. S. Murti, 'The Kutch Award: A Preliminary Study', (1968) 8 *IJIL* 51.
- 68 See, e.g., R. P. Anand, "'Tyranny" of the Freedom-of-the-Seas Doctrine', (1973) 12 *International Studies* 417; R. P. Anand, 'Freedom of Navigation through Territorial Waters and International Straits', (1974) 14 *IJIL* 169; R. P. Anand, *Legal Regime of the Sea-Bed and the Developing Countries* (1975); R. P. Anand, 'Winds of Change in the Law of the Sea', (1977) 16 *International Studies* 207; R. P. Anand (ed.), *Law of the Sea: Caracas and Beyond* (1978); R. P. Anand, 'Mid-ocean Archipelagos in International Law: Theory and Practice', (1979) 19 *IJIL* 228; S. C. Chaturvedi, 'The North Sea Continental Shelf Cases Analysed', (1973) 13 *IJIL* 481; V. C. Govindraj, 'Land-Locked States – Their Right to the Resources of the Sea-Bed and Ocean Floor', (1974) 14 *IJIL* 409; R. K. Dixit, 'Freedom of Scientific Research on the High Seas', (1971) 11 *IJIL*; I. C. Jain, 'Legal Control of Marine Pollution', (1973) 13 *IJIL* 411; S. P. Jagota, 'Basic Issues for the Forthcoming Conference on the Law of the Sea', (1973) 13 *IJIL* 273; D. A. Kamat, 'Recent Developments in the Law Relating to the Sea-Bed', (1971) 11 *IJIL* 9; R. Khan, 'The Fisheries Jurisdiction Case: A Critique', (1975) 15 *IJIL*; R. Khan, 'The Fisheries Regime of the Exclusive Economic Zone', (1976) 16 *IJIL* 169; R. Khan, *The 200 Mile Exclusive Economic Zone: Indian Ocean Fisheries* (1977); S. K. Kuba, 'The Conditions of Exploration and Exploitation of the Sea-Bed Activities in the Proposed Area', (1975) 15 *IJIL* 216; R. Lakshmanan, 'The International Regulation of Fisheries', (1973) 13 *IJIL* 367; V. S. Mani, 'Resources of the Sea-Bed beyond National Jurisdiction: Who Shall Exploit and How?', (1974) 14 *IJIL* 245; V. S. Mani, 'India's Maritime Zones and International Law: A Preliminary Inquiry', (1979) 21 *Journal of the Indian Law Institute* 336; R. A. Malaviya, 'Marine Pollution in India', (1979) 19 *IJIL* 344; M. K. Nawaz, 'The North Sea Continental Shelf Cases – Revisited', (1975) 15 *IJIL* 506; M. K. Nawaz, 'The Emergence of Exclusive Economic Zone: Implications for the New Law of the Sea', (1976) 16 *IJIL* 471; M. K. Nawaz, 'Alternative Criteria for Delimiting the Continental Shelf', (1973) 13 *IJIL* 25; M. K. Nawaz, 'The Limits of Coastal State Jurisdiction: Continental Shelf Fisheries and Economic Zone', (1974) 14 *IJIL* 261; R. Puri, 'India's Maritime Zones Act 1976: Its Implications in International Law', (1979) 19 *IJIL* 319; R. Puri, 'Evolution of the Concept of Exclusive Economic Zone in UNCLOS III: India's Contribution', (1980) 22 *Journal of the Indian Law Institute* 497; H. P. Rajan, 'Towards Codification of Archipelagos in International Law', (1973) 13 *IJIL* 468; K. Narayan Rao, 'Need There Be Two Parallel Legal Regimes on the Seas', (1980) 20 *IJIL* 1; P. C. Rao, *The New Law of Maritime Zones* (1982); P. S. Rao, 'Legal Regulation of Maritime Military Uses', (1973) 13 *IJIL* 425; P. S. Rao, 'System of Exploitation of the International Sea-Bed Resources', (1977) 17 *IJIL* 52; P. S. Rao, 'Public Order of Oceans: Problem and Prospects', (1977) 17 *IJIL* 216; S. P. Sharma, 'Ocean Law on the Eve of the New York Session', (1976) 16 *IJIL* 105; M. Shyam, 'International Straits and Ocean Law', (1975) 15 *IJIL* 216; N. Singh, 'The Issue of Reservations to the Proposed Law of the Sea Convention', (1979) 19 *IJIL* 76; Y. K. Tyagi, 'The System of Settlement of Disputes under the Law of the Sea Convention: An Overview', (1985) 25 *IJIL* 191.

understanding the trajectory of post-colonial scholarship, especially its boundless optimism in this period, it is crucial to understand the preoccupation with the law of the sea negotiations. First, it was an area where the law was evolving and far from settled. It was therefore felt that Third World international lawyers could contribute to its evolution and final shape. Second, it was a test case for what was seen as the transformation of international law from being a law of coexistence to a law of cooperation. The Third United Nations Conference on the Law of the Sea (UNCLOS III) was viewed as a microcosm of the possibilities the future held and the inauguration of a new era in international relations. The accelerated decolonization process and the adoption in 1974 of the Declaration for the Establishment of a New International Economic Order, along with the Charter of Economic Rights and Duties of States (CERDS) in the same year, gave further impetus to this belief. Third, the negotiations involved a number of issues which were crucial from the perspective of the poor world: rewriting traditional international law, the rejection of gunboat diplomacy, economic independence, sovereignty over natural resources, transfer of technology, financial aid, and so on. Fourth, the coming into its own of the G77 allowed the Third World to pursue the global coalition strategy which it believed was bound to secure its interests. In the First United Nations Conference on the Law of the Sea in 1958, 'although the Western maritime Powers were in a minority they dominated the Conference and, through their political influence and divisive power, controlled a majority of the votes taken and proposed most of the amendments accepted'.<sup>69</sup> The Third World was not very effective because of 'their numerous weaknesses, conflicting interests, divisions and vulnerabilities'.<sup>70</sup> The Second United Nations Conference on the Law of the Sea failed to arrive at the resolution of any problems.<sup>71</sup> This time round, Third World countries 'were determined to play an active, indeed aggressive, role in the formulation of a new law' in order to 'safeguard their economic interests as well as their national security and sovereignty'.<sup>72</sup> Indeed, the basic contradiction marking the Third United Nations Conference on the Law of the Sea was seen as that between the developed and developing countries, and not between the North and the Soviet bloc.<sup>73</sup> Fifth, there were the 'national interest' considerations, given India's long coastline. It had much to gain from the possible extension of sovereign jurisdiction over vast spaces of the ocean. Last but not least, the agenda of research in the Third World has generally been set in the West, and through the 1970s Western journals were full of writings on the subject. In summary, the law of the sea negotiations were seen as offering the possibility of transcending the duality of international law through a Hegelian moment of ascending synthesis. In this context Indian scholarship ably articulated the interests of Third World countries, especially India.

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69 Anand, *supra* note 59, 184.

70 *Ibid.*, at 185.

71 *Ibid.*, at 189.

72 *Ibid.*, at 209.

73 *Ibid.*, at 210.



When UNCLOS III adopted the Convention in 1982, it was believed, despite some arguing to the contrary,<sup>74</sup> that this was a giant step towards a just order of the oceans. It renewed the faith of the Indian international law community in international law and institutions. The refusal of the Reagan administration to sign or ratify the Convention therefore came as a setback for all those who had invested such hopes and energies in the Convention. The final blow came in 1994, when amendments to the Convention were introduced that saw some of the gains for the Third World being deleted from the text,<sup>75</sup> in particular obligations on the part of the ocean consortiums to transfer first-generation technology.<sup>76</sup> The fate of the Law of the Sea Convention revealed the basic tension that marks dualism in general. While the adoption and content of the Convention showed that international law could be transformed to meet the interests of Third World countries, it equally revealed the limits of change that could be ushered in without structural changes in the international system.<sup>77</sup> But the tools of formalist dualism did not allow a full appreciation of extant constraints. Meanwhile, disillusionment also set in on the NIEO front. There was little to show for the rhetoric of restructuring the international economic system.

#### 3.4. The neglect of NIEO issues: methodological weaknesses

But the debate around the NIEO brought sharply to the fore some methodological gaps in Indian scholarship. Surprisingly key elements of the NIEO programme did not receive the same careful attention as had UNCLOS III. Few attempts were made to examine in any detail individual issues under discussion and/or negotiation; most of the writings on the subject were confined to broad reflections.<sup>78</sup> Even there, nothing close to Mohammed Bedjaoui's classic *Towards a New International Economic Order* (1979) was published. The subject of reparations for colonial and neo-colonial exploitation, mentioned in Article 16 of CERDS, was not even touched on.<sup>79</sup> The relative neglect of developments relating to the establishment of an NIEO and the absence of quality writings (with honourable exceptions) revealed certain weaknesses in the international law scholarship of the time.

First, it pointed to the lack of a tradition in doing interdisciplinary studies. In exploring NIEO issues few attempts were made to draw on other social science disciplines; disciplinary boundaries were rarely transgressed. Thus, for instance, even at

74 See, e.g., B. S. Chimni, 'The New Regime of the Oceans: Illusion and Reality', (1982) 22 IJIL 69.

75 See Law of the Sea: Report of the Secretary General on his Consultations on Outstanding Issues Relating to the Deep Seabed Mining Provisions of the United Nations Convention on the Law of the Sea, UN Doc. A/48/950 (1994).

76 R. P. Anand, 'UNCLOS: Compromise or Mutilation?', *World Focus*, No. 177 (September 1994), 3.

77 Anand summed up the dilemmas of dualism by concluding that despite the setbacks the international community was 'better off with a universally recognized, comprehensive treaty on law of the sea with a new agreed law for the twenty-first century which in itself is no mean achievement'. *Ibid.*, at 7.

78 S. K. Agrawala et al. (eds.), *New Horizons of International Law and Developing Countries* (1983), s. III.

79 Art. 16(1) states *inter alia*:

States which practise such coercive policies are economically responsible to the countries, territories and peoples affected for the restitution and full compensation for the exploitation and depletion of, and damages to, the natural and all other resources of those countries, territories and peoples.

See generally J. Miller and R. Kumar (eds.), *Reparations: Interdisciplinary Inquiries* (2007).

the height of the NIEO debate most international law scholars remained unfamiliar with the work of dependency theorists, whose writings influenced the NIEO programme. Even in considering the legal status of UN General Assembly resolutions on the NIEO and CERDS, the doctrine of sources of international law did not invite the kind of close attention it later received from scholars such as Kennedy, using critical tools sharpened in other disciplines.<sup>80</sup> In subsequent years a few interesting writings did appear on different aspects of the NIEO: the regulation of transnational corporations and international law relating to the transfer of technology.<sup>81</sup> But even these did not always reveal a mastery of the relevant issues of political economy or even law.<sup>82</sup>

Second, the absence of serious engagement with NIEO issues highlighted once again the problems with the formalist dualist approach. Given the positivist orientation of most Indian scholars, the NIEO negotiations were not seen as an opportunity to revisit and review the nature and character of the international system and the role of international law in it. It resulted in international law continuing to be attributed powers of social transformation that it did not possess. International law could hardly be expected, however, to resolve hotly contested questions of political economy or high politics. International law at best possessed a relative autonomy from the structures of world economy and power politics. But the relationship of international law with deep structures did not receive an adequate response in the absence of a profounder understanding of the economic and political structures of global capitalism. Thus the belief that community interests could prevail over class or national interests simply represented an uncritical acceptance of the liberal narrative of progress.

Third, the analysis of the NIEO exposed the weakness of a statist perspective. It disallowed the consideration of the NIEO programme from the standpoint of subaltern groups and classes. The idea that a critique of the international order must go hand in hand with a critique of the internal order was alien to the formalist approach. Consequently the umbilical cord to the ideology of the post-colonial state, and to the antecedent assumption of egalitarian states in ancient India, remained to be cut. The formalist approach also explains the aversion to recording resistance to different policies of the state. This is particularly surprising in view of the political developments in India in the mid-1970s. Indira Gandhi, the then prime minister, declared emergency rule in the country in 1975.<sup>83</sup> It was resisted bravely by the people of India. An idea exists that individuals living in poor societies do not care for civil and political rights. This was firmly refuted by the vast majority of the Indian population in 1977 when they voted out the emergency rule. The Indian

80 D. Kennedy, 'The Sources of International Law', (1987) 2 *American University Journal of International Law and Policy* 1.

81 However, see A. Jayagovinda, 'Towards a Code of Conduct for the Transfer of Technology', (1979) 19 *IJIL* 257; A. Jayagovinda, 'The International Patent System and Developing Countries', (1980) 20 *IJIL* 47; V. Gaurishankar, *Taming the Giants: Transnational Corporations* (1980); B. S. Chimni, *International Commodity Agreements: A Legal Study* (1987).

82 For an important intervention see S. R. Chowdhury and K. Hossain (eds.), *Permanent Sovereignty over Natural Resources in International Law: Principles and Practices* (1984).

83 For an account of the emergency rule see D. Selbourne, *An Eye to India: The Unmasking of a Tyranny* (1977).

people galvanized themselves to affirm the need for both bread and freedom.<sup>84</sup> In 1979, two years after the emergency was lifted and Indira Gandhi's Congress Party had been defeated at the polls, the Janata Party government ratified the 1966 International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights. These developments centred attention on the relationship between rights, democracy, and development, and invited its consideration in the world of international law. Indeed, the events offered a unique prospect of reflecting on international law scholarship in the light of three decades of post-colonial experience. But this invitation to reconsider the assumptions of formalist dualism was not accepted.

While for the first time writings on human rights appeared in the IJIL and elsewhere, most of the writings left much to be desired.<sup>85</sup> International law scholarship failed to challenge the developmental ideology of the post-colonial state.<sup>86</sup> The chosen path of capitalist development was never questioned, even when its pursuit resulted in dependent development and the increased misery of the people. International law scholarship failed to focus on the rights of the working and oppressed classes. In the absence of a tradition in which international law scholarship concerned itself with peoples' struggles and social movements the opportunity was lost.

International law scholars also had not connected with the growing women's movement in the country since the mid-1970s.<sup>87</sup> The development of the Indian women's movement in this period can be traced *inter alia* to the role of women in resisting the emergency – in particular their protest against the forcible sterilization of women – the publication of the report *Towards Equality* (1975) by a committee appointed by the government, the declaration by the United Nations of the Decade for Women, the inflow of Western feminist literature, the increased visibility of the middle-class woman in the workplace, the publication of journals such as *Manushi*, which were exclusively focused on women's issues, the emergence of autonomous women's organizations, and renewed attention to the women's question within the traditional left parties. But it had little impact on either the teaching of or research into international law. The situation has not, despite the growing presence of feminist scholarship in international law literature, substantially changed even today; the absence of inter-disciplinary discourse proved critical once again.<sup>88</sup>

84 As Sen has put it, 'it is indeed remarkable that a community of voters who are ready to tolerate so much economic inequity and are so difficult to mobilize against elitist policies could be so quick to move in its rejection of tyranny'. A. Sen, 'How Is India Doing?', in R. A. Choudhary et al. (eds.), *The Indian Economy and Its Performance since Independence* (1990), 7, at 19.

85 See, however, Y. K. Tyagi, 'Third World Response to Human Rights', (1981) 21 IJIL 119; S. R. Chowdhury, *Rule of Law in a State of Emergency: The Paris Minimum Standards of Human Rights Norms in a State of Emergency* (1989).

86 Chatterjee, *supra* note 43, at 203.

87 N. Gandhi and N. Shah, *The Issues at Stake: Theory and Practice in the Contemporary Women's Movement in India* (1992), 20; N. Desai, 'From Articulation to Accommodation: Women's Movement in India', in L. Dube et al. (eds.), *Visibility and Power: Essays on Women in Society and Development* (1986), 287, at 295. See generally M. Chaudhuri (ed.), *Feminism in India* (2004).

88 H. Charlesworth and C. Chinkin, *The Boundaries of International Law: A Feminist Analysis* (2000).

#### 4. THE PERIOD OF DISILLUSIONMENT: THE 1980S AND 1990S

The 1980s and the 1990s saw a period of disillusionment set in. It was ironic that disenchantment with the world of international law coincided with its exponential expansion: new branches of international law emerged reflecting rapid developments in the world of international law, namely international trade law, international environmental law, international space law, international human rights law, international refugee law, and so on. What were earlier seen as crucial opportunities – negotiating new international laws – were now viewed with little enthusiasm; it was no longer believed that the international law of coexistence could be transformed into an international law of co-operation. It may be recalled that the 1980s saw little progress in establishing an NIEO, the refusal of the United States to ratify the Law of the Sea Convention, the collapse of the Soviet Union (an ardent supporter of Third World goals), the dissolution of the solidarity of the poor countries, and later, at the end of the decade, the general neglect of the United Nations. It generated a mood of profound disappointment with the international legal process, contrasting sharply with the optimism that had characterized the 1960s and 1970s. The disillusionment manifested itself, among other things, in the decline of the ISIL. The annual conferences became a ritual. The IJIL could not be published in the period 1990–5.<sup>89</sup> This disenchantment with the transformational potential of international law offered a fresh opportunity to rethink the structure and function of international law in relation to post-colonial societies. A more profound appreciation of the double life of international law was needed. But the methodological weaknesses – the formalist and statist orientation – which characterized international law scholarship prevented it from coming to grips with the increasingly neo-colonial character of international law and its bearing on the meaning of dualism. The articulation of critical dualism, as opposed to a formalist dualism, seriously began only in the early 1990s.

Meanwhile, it was again left to the ruling elite to take the initiative in generating ‘new’ thinking. By the mid-1980s the Indian state began to adopt a neo-liberal framework to try to reverse the poor economic performance blamed on the pursuit of an import substitution strategy. The perceived role of the state underwent change. It was no longer primarily viewed as an instrument for promoting social justice but as a facilitator of economic growth. The gross national product (GNP) model of development, so ably critiqued by Sen,<sup>90</sup> took hold. Indeed, the retreat of the state from social sectors (with moments of retrieval through struggles of the civil society) and the greater reliance on markets under the ‘guidance’ of the International Monetary Fund (IMF) and the World Bank is the story of ‘development’ in India from the mid-1980s onwards. In 1986 the General Agreement on Tariffs and Trade (GATT) Uruguay Round of trade negotiations was launched. Three new areas were brought to the negotiating table: trade-related intellectual property rights (IPRs), trade-related

89 However, the ‘gap’ in its publication was later filled by bringing out a single issue for each year between 1990 and 1995.

90 A. Sen, *Development as Freedom* (1999). For a critique see B. S. Chimni, ‘The Sen Conception of Development and Contemporary International Law Discourse: Some Parallels’, (2008) 1 *Law and Development Review* 1.

investment measures, and trade in services. Initially the greatest concern was aroused by the subject of IPRs, in particular the patents regime. For as negotiations proceeded the Uruguay Round mandate was interpreted in favour of adopting a global regime on IPRs that imposed global uniform standards as opposed to regulating trade-related IPRs – that is, essentially the problem of counterfeit goods. However, grave doubts were soon also expressed with regard to the benefits which could accrue to India from other areas that were the subject of negotiations, such as agriculture and textiles. In the next few years, in an incremental manner, public opinion was built in the country by non-governmental organizations (NGOs, such as the National Working Group on Patent Laws) and opposition political parties against the draft texts which were emerging from the negotiations and eventually the Final Act of the Uruguay Round adopted in 1994.

Critics argued that Third World countries were being compelled to cede sovereign economic space to international institutions to the advantage of the industrialized world. Some went on to suggest that it amounted to the recolonization of the Third World.<sup>91</sup> It was at this time that a new generation of Indian scholarship in international law began to take shape. Even as it acknowledged its debt to its peers an attempt was made by new scholarship to critically review the Third World approach to international law as it was theorized in the initial decades (TWAIL I). TWAIL II underlined the structural and discursive constraints in the international system and emphasized the need to shape and adopt an alternative critical vocabulary. In this milieu the present author published *International Law and World Order: A Critique of Contemporary Approaches* (1993), advancing a Marxist critique of the principal contemporary approaches to international law as a first step towards articulating a more radical critique of contemporary international law. It pointed to the deep structures of global capitalism and the character of the post-colonial state as reasons preventing the development of the Third World. The radical approach refocused attention on the practices of imperialism, critiqued the undemocratic facets of the post-colonial state, questioned the culture of international law, exposed the hegemonic agenda of international institutions (in particular the World Trade Organization and the IMF–World Bank combine), pointed to how human rights discourse was being used to entrench private rights, sought to reduce the distance of the world of international law from the lives of ordinary people, and underlined the importance of bringing together international law scholars from the Third World for collective thinking. TWAIL II, as is well known, is not a uniquely Indian phenomenon. It is being developed from diverse perspectives by a loose network of critical Third World scholars, many of whom are located in the First World (which include among others Antony Anghie, James Gathii, Karen Mickelson, Makau Mutua, Vasuki Nesaiah, and Obiora Okafor), giving it a global presence.<sup>92</sup> Beginning in 1997, the network has

91 C. Raghavan, *Recolonization: GATT, the Uruguay Round and the Third World* (1990); B. S. Chimni, 'The Political Economy of the Uruguay Round of Negotiations: A Perspective', (1992) 29 *International Studies* 135.

92 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.

held several international conferences to consider a range of issues of international law, from the most theoretical to the most concrete.

The 1990s, however, saw the Indian state implement neo-liberal policies more vigorously. The critical state of the economy, manifested in an unprecedented crisis in the balance of payments position, compelled it to turn in a big way to the IMF; coupled with the ideological vacuum following the collapse of 'actually existing socialism', the crisis appeared to leave India with no option but to pursue market-friendly policies. A New Industrial Policy was announced in 1991, inaugurating the era of sustained economic liberalization. The fact that India had to meet the conditions of the IMF, and subsequently abide by the obligations undertaken in the Final Act of the Uruguay Round (in the fields of agriculture, investment, services, intellectual property rights, etc.) ensured that there was no turning back. An extended period of low-intensity democracy was inaugurated.

Among a section of the Indian business class and the intelligentsia the liberalization policies injected a mood of optimism. From an international law perspective the move to liberalization heightened interest in international economic law, as corporations and other entities were confronted with the reality of its rules in the conduct of their business. The WTO dispute settlement system also aroused much interest as India became party to several disputes. It was not surprising, then, that the 1990s saw international law begin to move out of academia into law firms. New law schools, such as the National Law School of India University at Bangalore was set up in 1990 (with the aid of the Ford Foundation) to train young legal minds in India for the world of corporate practice and expanding law firms. Arguably the new law school was part of the 'entirely new infrastructure and discourse of hegemony' that was articulated by the new middle class in this period.<sup>93</sup> Academic legal thinking now came to be shaped by the 'new' law graduate, a dominant faction of the new middle class that 'occupies a strategic position in India's new economy', with a vital stake in the liberalization of the economy.<sup>94</sup> Following the success of the National Law School at Bangalore a spate of national law schools offering five-year integrated law courses have been established in different parts the country (Kolkata, Hyderabad, Bhopal, etc.). The ideological positioning of the new law schools and the turn to practice meant the loss of exceptional talent that could possibly have advanced the critical project. But the tide is turning with growing interest in critical, including TWAIL, literature.

The liberalization policies of the Indian state did not go uncontested. For instance, the environmental fall-out from neo-liberal policies came to engage the attention of an alert and active civil society. Building on the Chipko movement which had begun in the early 1970s, civil society began to address the growing environmental crisis,

93 L. Fernandez and P. Heller, 'Hegemonic Aspirations: New Middle Class Politics and India's Democracy in Comparative Perspective' (2006) 38 *Critical Asian Studies* 495, at 503.

94 Ibid. In the words of Chatterjee, 'the urban middle class, which once played such a crucial role in producing and running the autonomous developmental state of the passive revolution, appears now to have largely come under the moral political sway of the bourgeoisie'; the 'educational, professional and social aspirations of the middle classes have become tied with the fortunes of corporate capital'. P. Chatterjee, *Democracy and Economic Transformation in India* (2008), 8, 11.

leading to an interest in international environmental law. The Rio Conference (1992) gave a further fillip to its study. A chair on environmental law was instituted in the International Legal Studies Division, Jawaharlal Nehru University, by the Ministry of the Environment. But it was the NGOs, led by individuals such as Anil Aggarwal and Vandhna Shiva, and protest movements, led by activists such as Medha Patkar (to stop the construction of the Narmada dam), which offered intellectual leadership, rather than university departments. The emerging environmental law was, however, the subject of many articles in the *IJIL*. These writings were supportive of the civil society view that the interests of Third World countries were being ignored in international environmental regimes and that the principle of common but differentiated responsibility needed to be respected in climate change negotiations.

Other new academic arrivals were international refugee law and international humanitarian law, reflecting the growing significance of the two areas of international law the world over. Active promotional activities by the local offices of the UN High Commissioner for Refugees (UNHCR) and the International Committee of the Red Cross (ICRC) contributed to their presence in law schools. Thus, for example, the UNHCR instituted a chair in refugee law at the National School of Law in Bangalore and supported other centres on refugee studies such as that in Jadavpur University in West Bengal. In 2000 the first reader on international refugee law was published,<sup>95</sup> along with a number of articles protesting against the restrictive policies of the North vis-à-vis asylum seekers and refugees.<sup>96</sup> *TWAIL II* scholarship thus critically assessed these somewhat ignored developments in international law.

The decade ended with the six weeks of the bombing by NATO of the former Yugoslavia. There was a consensus in the international law community that the NATO countries had violated core principles of international law and the UN Charter; the fundamental principles of sovereignty and non-intervention have always informed and continue to inform Indian international law scholarship. The comparison of the intervention in Kosovo with Indian action in Bangladesh (1971) was squarely rejected; the Indian action was always asserted as a case of self-defence.<sup>97</sup> The disenchantment with the world of international law was by now complete. The 1980s and 1990s saw the retirement of key figures in international law scholarship in India: S. K. Agrawala, R. P. Anand, R. Khan, B. S. Murthy, T. S. Rama Rao, and others. It was truly the end of an era.

95 B. S. Chimni, *International Refugee Law: A Reader* (2000).

96 See, for instance, B. S. Chimni, 'The Geopolitics of Refugee Studies: A View from the South', (1998) 11 *Journal of Refugee Studies* 350; and B. S. Chimni, 'From Resettlement to Involuntary Repatriation: Toward a Critical History of Durable Solutions', (2004) 23 *Refugee Survey Quarterly* 55. For a set of essays published more recently on international humanitarian law see V. S. Mani (ed.), *Handbook of International Humanitarian Law in South Asia* (2007).

97 On the question of 'humanitarian intervention' see V. S. Mani, 'Humanitarian Intervention Today', (2005) 313 *RCADI* 9 Y. K. Tyagi, 'The Right of Humanitarian Intervention Revisited', (1995) 16 *Michigan Journal of International Law* 883; B. S. Chimni, 'The International Law of Humanitarian Intervention', in *State Sovereignty in the 21st Century: Concept, Relevance and Limits* (2001), 103; B. S. Chimni, 'Towards a Third World Approach to Non-intervention: Through the Labyrinth of Western Doctrine', (1980) 20 *IJIL* 243.

## 5. FROM DISILLUSIONMENT TO NEW OPTIMISM: INDIA AS AN EMERGING POWER

The liberalization policies of the 1990s saw the Indian economy grow rapidly in the first years of the twenty-first century. The reasons for this are complex, including the contribution of decades of state intervention and protectionism that preceded liberalization; what is called the sequencing problem, that is, the timing of liberalization, was inadvertently addressed successfully.<sup>98</sup> Of equal significance is the fact that the left and progressive forces in India were able to restrain the Indian state from going in for unbridled liberalization, including moving quickly towards capital-account convertibility. Be that as it may, India now saw itself as an emerging power and its foreign policy began to undergo change. Its growing profile has renewed the belief that India could use international law and institutions to its advantage, albeit only if it departed from its earlier foreign policy thinking and strategy. India is now simultaneously attempting to sustain and leverage its identity both as an emerging power and as a developing country. This policy was described in early 2009 by the then Indian foreign secretary as the policy of 'general un-alignment'.<sup>99</sup> The concept of un-alignment has obviously been used in contrast to that of non-alignment, the ideational foundation on which Indian foreign policy had been conducted since independence. The doctrine of un-alignment is a transitional doctrine that seeks to address in an imaginative and pragmatic manner the new world situation forming the backdrop to India's apparently changed economic and security interests. Its essence is the idea of running with the hares and hunting with the hounds.

The current policy thus represents a departure from the earlier anti-imperialist dualism. The non-dualist logic is symbolized by India's growing military and strategic ties with the United States, most crucially embodied in the 2008 Indo-US Civil Nuclear Co-operation Agreement. India is also beginning to share in the name of the community of democracies and the policy of un-alignment the geopolitical vision of the United States (and the G7 countries more generally). Gandhi and Nehru, with their 'idealism' (embodied for instance in the principles of the NAM), are seen as somewhat anachronistic in the contemporary era. As Nandy puts it, 'for the modern Indian, there is no longer any Indian foreign policy'; the principles of foreign policy are now seen as universal and fixed.<sup>100</sup> The idea that 'realism' and 'pragmatism' should inform the framing and conducting of foreign policy has come to prevail. But becoming part of the 'global directorate' has its costs. India has been a leader of the Third World, the NAM, and G77; a close association with the G7 club can lead to the erosion of its cultural and moral capital. It may also constrain India in independently shaping its relationship with key global players such as China, Iran, and Russia. Finally, in the process of becoming part of the global directorate India may undermine the UN system, promote and legitimize an undemocratic global club,

98 See generally D. Rodrik and M. Rosenzweig, 'Development Policy and Development Economics: An Introduction', available at <http://ksghome.harvard.edu/~drodrik/papers.html>.

99 S. Menon, Address by Foreign Secretary on India's Foreign Policy, Delhi University, 19 January 2009, available at [www.du.ac.in/du/Indias%20Foreign%20Policy.pdf](http://www.du.ac.in/du/Indias%20Foreign%20Policy.pdf), at 5.

100 Nandy, *supra* note 18, at 48.



and be held responsible for G7 decisions. To be sure, joining the G7 club also offers opportunities. India will be in a position to influence global policies in however small a way and not allow China to gain influence at its expense. Its ambition to be a permanent member of the UN Security Council may also come to be realized.

It is too early to tell what the metamorphosed foreign policy of India has signalled to the community of international lawyers. It may mean accepting the broad coincidence of ideology and interests between Western powers and India as a function of commitment to a free-market economy and liberal democratic values. Arguably, political agonism rather than facile opposition to the West offers a more constructive way of dealing with the fractures that mark the body of international law. This understanding is readily accommodated within the formalist dualist approach, given its embrace of the narrative of progress. In contrast, a critical dualist approach would caution that intimacy with the politics of empire will not help to overcome the class, gender and race divides that continue to inform international laws in the post-colonial era.

The change in the global profile of India has increased interest in Indian scholarship. A number of scholars (who include Rajesh Babu, Upenda Baxi, B. S. Chimni, Bharat Desai, V. G. Hegde, Neha Jain, C. Jayraj, Gopa Kumar, V. S. Mani, Archana Negi, Lavanya Rajamani, K. D. Raju, Luther Rangreji, Prabhash Ranjan, Shikar Ranjan, Sudhakar Reddy, Prabhakar Singh, Ravindra Pratap Singh, Manoj Sinha, T. V. G. N. Sudhakar, and Y. K. Tyagi) are attempting to understand and/or critique the new realities.<sup>101</sup> Generally speaking there is a new optimism as India acquires importance once again in world affairs, albeit the optimism is somewhat tempered with the lessons of the past. The optimism has principally translated into conflicting assessments of the benefits to be had from extant international laws and institutions (e.g. the WTO), with many writings coming to suggest that India greatly benefits from them. Second, there is the accompanying idea that the focus should be relatively less (than in the past) on critical and more on (re)constructive scholarship.

Meanwhile, however, the troubles of the Indian subaltern classes continue.<sup>102</sup> The distributional outcomes of the Indian growth story are far from desirable. While the class of Indian billionaires has grown, the poor are largely left to their own devices. What is more, the poor are increasingly the victims of policies that promote 'accumulation by dispossession'. They are being deprived of their assets and rights through an invasive commodification process.<sup>103</sup> It is a consequence of the fact that the policy space that India has in the economic and social domain has sharply narrowed, as core elements of economic sovereignty have come to be located in international economic institutions. A 'global state' is seen as emerging under the influence of a congealing transnational capitalist class (TCC) that deploys

101 In the past decade the contributions of Baxi and Tyagi in the field of international human rights law and Desai in international environment law have been significant. See, e.g., U. Baxi, *Human Rights in a Posthuman World: Critical Essays* (2007); B. Desai, *Institutionalizing International Environmental Law* (2003); Y. K. Tyagi, 'The Conflict of Law and Policy on Reservations to Human Rights Treaties' (2000) *British Yearbook of International Law* 181. For a sample of contemporary writings of Indian scholars see B. N. Patel (ed.), *India and International Law* (2005).

102 See generally P. Sainath, *Everybody Loves a Good Drought: Stories from India's Poorest Districts* (2005).

103 D. Harvey, *The New Imperialism* (2003).

international laws in order to realize its interests.<sup>104</sup> From this perspective it is no accident that it is the subaltern groups and classes that are bearing the brunt of the global financial crisis or the international trade regime or global climate change.

But the present situation is a complex one, with contradictory pulls and pressures on the Indian state. The demands of electoral democracy, cumulative civil society initiatives, and political mobilization by the left parties have resulted in government initiatives such as the National Rural Employment Guarantee Act (2005) and the Right to Information Act (2005) that have advanced the welfare of subaltern groups and classes.<sup>105</sup> There is also a trend to use international fora to further the agenda of the subaltern groups. Thus, for instance, sections of the Dalit community used the Durban World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (2001) to draw global attention to the plight of dalits in India by claiming that the discrimination against them on the basis of descent has a family resemblance to discrimination on the basis of race.<sup>106</sup> The tribal community has not been as effective, however, in using the discourse on indigenous peoples to draw attention to its concerns. The pressures emanating from civil and political societies are often overcome by the state through its invoking the vocabulary of 'national interest' and 'national security'. The Indian state has insured itself against growing social contradictions and tensions by arming itself with coercive powers. It allows the state, especially in the post-September 11 situation, to deal harshly with the resistance of Indian people.<sup>107</sup> But given the continuing assumption of a supra-class state, the adoption of a formalist approach, and the new optimism, dominant international law scholarship has failed to address the concerns of the marginalized sections of the Indian people or seriously to explore the relationship of social movements and international law. But the story of resistance to the violence of international and domestic legal structures is beginning to be told as international law from below. It is to be hoped that this narrative will become an integral part of the story of international law chronicled by international law scholars in India.<sup>108</sup>

## 6. FUTURES: THE TASKS AHEAD

If there is one lesson that emerges from the story of post-colonial international law scholarship in India, it is that post-colonial states and scholars cannot be for or against

104 B. S. Chimni, 'International Institutions Today: An Imperial Global State in the Making', (2004) 15 EJIL 1.

105 The National Rural Employment Guarantee Act is 'the first law' in India that puts 'economic and social rights in a legal framework', guaranteeing a certain minimum days' employment. A. Roy and N. Dey, 'Dalits, the Poor and the NREGA', *The Hindu*, 28 August 2009.

106 See the National Campaign on Dalit Human Rights, available at [www.ncdhr.org.in/aboutncdhr/index.html](http://www.ncdhr.org.in/aboutncdhr/index.html). See also National Human Rights Commission, *National Seminar-cum-Public Consultation on Racism, Racial Discrimination, Xenophobia and Related Intolerance: A Report* (2001). While the grievances of the Dalit community are entirely legitimate, the few who equate discrimination on the basis of caste with that of race may heed the voices of Bourdieu and Wacquant, who have cautioned that 'the recent, as well as unexpected, discovery of the "globalization of race" results, not from a sudden convergence of forms of ethno-racial domination in the various countries, but from the quasi-universalization of the US folk concept of "race" as a result of the successful world wide export of US scholarly categories'. P. Bourdieu and L. Wacquant, 'The Cunning of Imperial Reason', in L. Wacquant (ed.), *Pierre Bourdieu and Democratic Politics* (2005), 178, at 187.

107 U. K. Singh, *The State, Democracy and Anti-terror Laws in India* (2007), 317.

108 B. Rajagopal, *International Law from Below* (2004).

international law. The reconstitution of the relationship of 'law and periphery' has to take place from within the prison house of international law. Once there is the recognition that international law plays a constitutive role, dualism becomes the mode of being of law. In the circumstances, as Chatterjee puts it in the context of modernity, scholars from the periphery cannot be for or against international law, but can 'only devise strategies to cope with it'.<sup>109</sup> Indian scholarship has over the years successfully shaped such strategies; despite its weaknesses Indian international law scholarship has, since the middle of the last century, been at the forefront of articulating a Third World approach to international law and made seminal contributions to different branches of international law. Yet much work remains to be done. The destabilization of the categories 'centre' and 'periphery' to realize a just world order calls for a continuous process of deconstruction and reconstruction. In evolving strategies for the future it may be helpful to think of the global order in terms of two possible models of global governance (reflecting the original dualist dilemma): the empire model and the inclusive cosmopolitan model. For Indian scholars who reject the politics of empire and seek to promote a vision of inclusive cosmopolitanism, there are at least four challenges that lie ahead.

First, a review of six decades of post-colonial scholarship points to the need for developing a theoretical outlook that embraces interdisciplinary scholarship as a way of understanding deep global structures and the location of international law and institutions within it; its absence proved debilitating when trying to understand the international lawmaking process and the working of international institutions such as the United Nations and ICJ, or to engage effectively in debates on the NIEO or critically assess particular international legal regimes (be it the law of the sea, international economic law, international environmental law, or international human rights law), especially from the perspective of subaltern groups and classes. A self-conscious and rigorous theoretical approach, that of critical (as opposed to formalist) dualism, would help to avoid both the overestimation and underestimation of international law and its institutions. It would also facilitate a critique of the assumption of a supra-class state pursuing 'national interests' that has informed much Indian scholarship. The need to grasp the transformation of the nature and character of the Indian state over the past six decades is essential to an appreciation of its changing foreign policy and the metamorphosis of its approach to international law and institutions. The *dharma* of the neo-liberal Indian state, along with the instruments of *danda* used against subaltern groups and classes, awaits a thorough critique. This critique can only be fleshed out in the matrix of the political economy of capitalist globalization that imposes both structural and ideational constraints on realizing a just world order. Such a theoretical approach would also enable a critical understanding of the growing role of international institutions in the present unequal global order.

The second related and overlapping challenge is to overcome the fragmentation of international law thinking resulting from the spatial expansion of international

109 P. Chatterjee, *A Possible India: Essays in Political Criticism* (1997), 280.

law. The exponential growth of international law has engendered a troubling specialization which prevents concern with the big picture, compounding the problem of the lack of interdisciplinary scholarship. Individuals devote themselves to the study of particular branches of international law, often without possessing a working knowledge of other branches or familiarity with theoretical approaches that help them to understand and critique the shape of the emerging unity of international law. A principal way of contesting the politics of empire is to understand its global designs and underscore the alienation of international law from subaltern groups and classes in both the First and Third Worlds.<sup>110</sup> This endeavour should also be an integral part of TWAIL II efforts to engage with the idea of global justice and its bearing on international law and institutions. In so doing, as the Dalit engagement with the Durban conference on racism showed, the Fraser thesis that global justice is not merely about the principle of distributive justice but equally about the principles of recognition and representation, and the interface and dialectic between them, needs to be underscored.<sup>111</sup>

Third, in arguing the case for inclusive cosmopolitanism, Indian international law scholarship needs to dig deep into India's heritage, and also its understanding and practice of alternative modernity.<sup>112</sup> As Khilnani puts it, 'the future of Western political theory will be decided outside the West. And in deciding that future, the experience of India will loom large.'<sup>113</sup> The effort has to go beyond uncritically mining Indian ways of life and traditions for the nation-building project. It is time to recover historical episodes, insights, and practices that enrich the discourse on inclusive cosmopolitanism. An episode from Asian history narrated by the Princeton historian Sheldon Pollock exemplifies the point. Pollock compares and contrasts the spread of the Sanskrit language and culture in Asia with that of Latin in its first millennium. Historically, Sanskrit language and culture spread through the Asian region in the first millennium unaccompanied by violence (in contrast to the spread of Latin, which was disseminated through imperialism). Sanskrit culture was not spread through

the actions of a conquest state. It was made, instead, by the circulation of traders, literati, religious professionals, and freelance adventurers. Coercion, co-optation, juridical control, and even persuasion are nowhere in evidence. Those who participated in Sanskrit cosmopolitan culture chose to do so, and could choose to do so.<sup>114</sup>

The underlying idea of peaceful intercourse between different civilizations cannot but be a key element of any form of inclusive cosmopolitanism. But the idea of inclusive cosmopolitanism would be vitiated without a simultaneous critique of

<sup>110</sup> See B. S. Chimni, 'The Past, Present and Future of International Law: A Critical Third World Approach', (2007) 8 *Melbourne Journal of International Law* 499.

<sup>111</sup> N. Fraser, *Scales of Justice* (2009). See also B. S. Chimni, 'A Just World under Law: A View from the South', (2007) 22 *American University International Law Review* 199.

<sup>112</sup> S. Kaviraj, 'An Outline of a Revisionist Theory of Modernity', (2005) 46 (3) *European Journal of Sociology* 497.

<sup>113</sup> Khilnani, *supra* note 5, at 198.

<sup>114</sup> S. Pollock, 'Cosmopolitan and Vernacular in History', (2000) 12 *Public Culture* 591, at 603. Pollock goes on to state that while 'power, for example, was interested in culture but not in a way that necessarily reduced culture to an instrument of legitimation, as Weberian sociology might lead us to suppose a priori. Here and elsewhere we need to theorize Indian cosmopolitanism from its effects.' *Ibid.*, at 603–4.

the inegalitarian dimensions of the notions of *dharma* and *danda* in ancient and modern India. To put it differently, there is an urgent need to articulate an inclusive Indian approach to international law and institutions through a critical engagement with its past and present.

Finally, Indian scholarship has the task of retrieving evolved visions of the future of global order articulated by Indian thinkers. These should be retrieved, not necessarily to signal approval, but to expand the universe of discourse to ensure cognitive reciprocity between the West and the non-West. One example is the extraordinary vision of Sri Aurobindo, leader of the first phase of the Indian freedom movement, who later turned to spiritualism.<sup>115</sup> According to Sri Aurobindo, human unity is inevitable but, minus the value of spiritualism, would yield only mechanical human unity. His view contrasts with that of Kant, whose basic idea was that 'even without any inner, moral improvement, man will improve his outward legal conduct. In the end, a moral attitude will come to prevail'.<sup>116</sup> Sri Aurobindo surely recognized that, for a democratic world state to be established, appropriate normative and institutional conditions need to be created. But in his view this normative and institutional architecture had to be informed by the idea of the spiritual transformation of individuals and collectives. In other words, Sri Aurobindo's thinking does not fit the neat stereotype of materialist West and the spiritual East. He combined materialism and spiritualism in a unique mixture, and departed from the idea that 'the empirical world and finite individuals are illusory'.<sup>117</sup> Indian scholarship must, in other words, resist the pressure 'to be obverse of the West'.<sup>118</sup> Thus, in insisting that spiritual transformation should form the basis of a future democratic world order and state, Sri Aurobindo was concerned with the limits of reason rather than with its rejection; there is thus the possibility of shaping a new *dharma* for our times, a *dharma* that combines critical materialism with freedom-enhancing spiritualism. It is this kind of thinking that makes Nandy state that 'India is not non-West, it is India.'<sup>119</sup> It signals, among other things, the fact that another world is possible, but it requires both external transformation (in structures of global capitalism) and inner changes (different forms of spiritualism), albeit without doubt the structural transformation of global capitalism is of primary importance.

115 For a detailed analysis see B. S. Chimni, 'Retrieving "Other" Visions of the Future: Sri Aurobindo and the Ideal of Human Unity', in B. G. Jones (ed.), *Decolonizing International Relations* (2006), 197.

116 K. Jaspers, *Selected Essays: Philosophy and the World* (1963), 106.

117 J. N. Mohanty, *Explorations in Philosophy: Essays by J. N. Mohanty*, ed. B. Gupta, Vol. 1: *Indian Philosophy* (2001), 67.

118 A. Nandy, *The Intimate Enemy: Loss and Recovery of Self under Colonialism* (1983), 73.

119 *Ibid.*