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Dissecting the Role of Asian States in Modern International Law: Changing gears from Bilateralism to Jus Cogens.

ABSTRACT

The 21st century marked Asia's emergence as a global force to reckon with, notwithstanding this, its Human Rights track record continues to remain dismal. A large share of the Treaty and Institutions remains under-represented by the Asian States. This is based on several legitimate justifications, which are rooted both in past and present- like colonialism, post-war trials to unequal treaties. The author undertakes a journey to discover why this ambivalence is endemic amongst the Asian States through a combination of an empirical and non-empirical study, placing reliance on primary and secondary sources of law. Further, the author has delimited the research paper to an Asian theme, drawing comparisons with Europe and Africa in certain instances. In Part I the research article probes into the inherent basis as to why Asian-States remain hesitant to sign or ratify major treaties like Statute of the World Court 1945 International Criminal Court, 1998 International Covenant on civil and political rights 1966 etc. Even if an Asian State is a signatory to these so-called universal instruments, it has generally invoked reservation or declaration trumping compulsory Jurisdiction. Part II of the study traces the European conception of the civilised States an offshoot of Westphalia notion of subjugating the non-civilised States, which subsequently created an air of suspension amongst the Asian-State towards international treaties which primarily is the product of the West. In Part III, the author provides a comprehensive analysis of the lack of internal democracy in International law primarily in the realm of Customary International Law and Human Rights Law. In the final section, the researcher visualises the path forward; in a sense, the author contemplates the potential role that concepts like Dharma, Jus Cogens, and Erga Omnes could play to make international law inclusive and value-based. The study is purely doctrinal and attempts to juxtapose Asia's share experience vis-à-vis the internal structures in International Law.

Keywords: Customary International Law, Jus Cogens, Asian States, Civilized States, Dharma

Introduction

The development of Asian States in recent times is unprecedented[1]; this is attributed to several factors. Having said this, Asian States continue to display reticent towards international treaties and institutions and thus continue to remain underrepresented in major international debates.[2] This is somewhat paradoxically as law flows with the development. To put it in perspective, there is no regional organisation, unlike Europe or Africa, in human rights in Asia.[3] As pointed out by renowned scholar in International Law (hereinafter referred to as 'I.L' or international law) most of the institutions remain underrepresented for instance the scholars observe that the International Court of Justice (hereinafter referred to as 'ICJ') consist of merely 10 per cent of the Asian population, this is equally the case with other international institutions like International Criminal Court (hereinafter referred to as 'ICC') or the World Trade Organisation (hereinafter referred to as 'WTO').[4]

There are several reasons for this paradox and non-representation amongst the foremost being that the legacy of colonial experience in the Asian States.[5] The scepticism is understandable as the colonial era was characterised by economic exploitation and unilateral imposition of European ideology, resulting in the loss of numerous Asian and African States' identity. Stressing this point further, international law defended the European practice and considered I.L a gift to the Asian States. Hence the European considered themselves as masters entitled to rule the so-called not so civilised Asians and Africans.[6] The Westphalia model of nation-states merely accelerated the propaganda of the European master to shun the aspiration of the Asian States. It was not until the 19th century that the Asian states were regarded as civilised according to the European and even then it was confined to individual States like China or Japan, and in no small extent, the industrial revolution in Europe had a profound role play in the same.[7] The migration of people and the emergence of fresh ideas, technology paving way for fresh ideas and vision expanded, and many started looking far east; therefore it was until the late 19th century and early 20th century that the Asian States were regarded to belong to the international community.

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[1] HOW ASIA TRANSFORMED FROM THE POOREST CONTINENT IN THE WORLD INTO A GLOBAL ECONOMIC POWERHOUSE THE CONVERSATION, http://theconversation.com/how-asia-transformed-from-the-poorest-continent-in-the-world-into-a-global-economic-powerhouse-123729 (last visited September 12, 2020)

[2] Simon Chesterman, *Asia's Ambivalence about International Law and Institutions: Past, Present and Futures*, 27 EUROPEAN JOURNAL OF INTERNATIONAL LAW 945–978 (2016), https://academic.oup.com/ejil/article-lookup/doi/10.1093/ejil/chw051 (last visited September 14, 2020)

[3] REGIONAL PROTECTION OF HUMAN RIGHTS IN ASIA | ヒューライツ大阪, https://www.hurights.or.jp/archives/focus/section2/1997/12/regional-protection-of-human-rights-in-asia.html (last visited September 20th, 2020)

[4] Id

[5] Id

[6] Martti Koskenniemi, *Imagining the Rule of Law: Rereading the Grotian 'Tradition,'* 30 EUROPEAN JOURNAL OF INTERNATIONAL LAW 17–52 (2019), https://academic.oup.com/ejil/article/30/1/17/5498077 (last visited Oct 14, 2020)

[7] A. Orakhelashvili, *The Idea of European International Law*, 17 EUROPEAN JOURNAL OF INTERNATIONAL LAW 315–347 (2006), https://academic.oup.com/ejil/article-lookup/doi/10.1093/ejil/chl004 (last visited September 23, 2020)

The opening of the 20th century witnessed the establishment of International institutions like the 'League of Nations'[8] for a moment it was felt that the league would ensure equal participation of the international community of State; however the entire league was hijacked by few States[9] for vested interest and thus the league ended in abject failure, further to compound the ever-increasing challenge the world was faced with the two world wars which resulted in States becoming disillusioned and losing hope in universal solidarity. The impact of these developments had a tremendous impact on the way the Asian States reacted, countries like China in the late 1930s became frustrated by the treaties that it had entered with the Europeans and popularised the phrase "unequal treaties",[10] the events that transpired in the first half of the 20th pushed the Asian States to a perennial state of discontent and scepticism thus this suspicion persists even to this date as reflected through its poor track record in its participation in treaties.

Further, the dawn of the 20th century saw the colonial mandate augmented through the mechanism of 'Mandate System'[11]which furthered Western hegemony until the late 1970s. Meanwhile, the drafting of the United Nations Charter was one-sided as the very few Asian and African State took part in the drafting process.[12] China continuously opposed power politics; China couched its foreign policy on national interest to a more considerable extent.[13] The post-world war era witnessed the growth of international bodies which until the 1970s was a dominant stay of Europeans. It was not until the decolonisation wave that the trend slowly shifted. The Bandung conference[14] in the mid-1950s sowed the seeds for the third world approaches to International Law (hereinafter referred to as 'TWAIL'). In the meantime, regional institutions emerged, including the South Asian Association for Regional Cooperation Shanghai Corporation Organisation. However, none of these regional organisations was a security forum.

In contemporary times, the participation of the Asian States plays a significant role as Asia as continent comprises more than 50 per cent of the world's population,[15] 30 per cent of landmass[16]

[8] 20TH-CENTURY INTERNATIONAL RELATIONS | HISTORY & FACTS | BRITANNICA, https://www.britannica.com/topic/20th-century-international-relations-2085155 (last visited September 23, 2020)

[9] Joseph Ebegbulem Ebegbulem, *The Failure Of Collective Security In The Post World Wars I And II International System*, 14 KHAZAR JOURNAL OF HUMANITIES AND SOCIAL SCIENCES 29–40 (2012), http://www.jas-khazar.org/wp-content/uploads/2012/02/03The-Failure-of-Collective-Security-in-the-Post-World-Wars-I-and-II-International-System.pdf (last visited September 25, 2020)

[10] UNEQUAL TREATIES WITH CHINA | EHNE, https://ehne.fr/en/article/europe-europeans-and-world/europe-and-legal-regulation-international-relations/unequal-treaties-china (last visited September 14, 2020)

[11] MANDATE SYSTEM | ENCYCLOPEDIA.COM, https://www.encyclopedia.com/humanities/encyclopedias-almanacs-transcripts-and-maps/mandate-system (last visited August 13, 2020)

[12] HISTORY OF THE UNITED NATIONS CHARTER | UNITED NATIONS, https://www.un.org/en/sections/history-united-nations-charter/index.html (last visited October 14, 2020)

[13] Rukmani Gupta, *China's National Interests: Exploring the Domestic Discourse*, 36 STRATEGIC ANALYSIS 804–818 (2012), https://doi.org/10.1080/09700161.2012.712391 (last visited August 15, 2020)

[14] MILESTONES: 1953–1960 - OFFICE OF THE HISTORIAN, https://history.state.gov/milestones/1953-1960/bandung-conf (last visited August 20, 2020)

[15] ASIAN COUNTRIES BY POPULATION (2020) - WORLDOMETER, https://www.worldometers.info/population/countries-in-asia-by-population/ (last visited August 21, 2020)

and one-fifth of State is located in Asia.[17] Although Asia boasts of diversity, it is the individual states like India, China, and Singapore that exercise the maximum control in Asia. The Asian States favour sovereignty over human security; this is mostly to do with the experience of Asian States with Europeans. Moreover, the Asian States prefer bilateral negotiations rather than approaching the ICJ.[18] This is apparent because several States have not availed the Compulsory Jurisdiction of ICJ and instead preferred settlement of dispute bilaterally.[19] Most third-world scholars provide constructive criticism on the existing Westphalia notion of I.L, but the alternate model to the existing framework on International is lacking.

Nevertheless, the scepticism is justifiable as most of the International Institutions were established before the decolonisation wave in Asian and Africa; hence, most Asian and African States were not represented in the drafting process of these institutions. One can very well ponder and articulate in exact term that the status quo will sustain, but the world needs Asians to rise to the occasion and regionalism can be one of the alternate representations of Asia's aspiration. The paper is an attempt to highlight the hypocrisy of developed first world countries in shaping I.L to fit their story thereby sidelining the Asian States in the process, further the paper will argue that I.L can incorporate lessons from the practices of Asian States (more specifically India) and within its existing framework to be inclusive and communitarian oriented.

Role of Third World Approaches to International Law in Challenging the Stereotype

The western narrative of I.L has permeated the corpus of I.L. One reflection of this is the present-day boundary disputes which are primarily attributed to the vague colonial maps or treaties.[20] The pre-existing boundary is a constant source of dispute especially with regard to the Asian and African States. The Third World Scholars question the existing structure like boundary demarcation in I.L, which essentially trigger infighting within the Asian States.[21] Third-world scholars challenge the scholarship of I.L thereby locating the Euro-Centric State practice and providing an exhaustive critique on the existing problem of I.L, which, according to third-world scholars, is triggered by the West further their neo-liberal market ideology.[22] From a

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[16] WHAT ARE THE COUNTRIES OF ASIA BY AREA? THOUGHTCO, https://www.thoughtco.com/countries-of-asia-by-area-1434341 (last visited August 30th, 2020)

[17] *The future of Asia: Asian flows and networks are defining the next phase of globalization*, 84

[18] Chesterman, Supra 2

[19] DECLARATIONS RECOGNIZING THE JURISDICTION OF THE COURT AS COMPULSORY | INTERNATIONAL COURT OF JUSTICE, https://www.icj-cij.org/en/declarations (last visited October 13, 2020)

[20] HOW BRITISH AMBIGUITY ABOUT FRONTIER BETWEEN INDIA AND CHINA PAVED WAY FOR A POST-COLONIAL CONFLICT SCROLL.IN, https://scroll.in/article/965502/how-british-ambiguity-about-frontier-between-india-and-china-paved-way-for-a-post-colonial-conflict (last visited October 14, 2020)

[21] Larissa Ramina & Larissa Ramina, *TWAIL - "Third World Approaches to International Law" and human rights: some considerations*, 5 REVISTA DE INVESTIGAÇÕES CONSTITUCIONAIS 261–272 (2018), http://www.scielo.br/scielo.php?script=sci_abstract&pid=S2359-56392018000100261&lng=en&nrm=iso&tlng=en (last visited October 14, 2020)

[22] TWAIL CRITICAL LEGAL THINKING, https://criticallegalthinking.com/2019/04/02/twail-coordinates/ (last visited September 11, 2020)

traditional understanding, I.L has its advent in the 16th Century Europe championed by Hugo Grotius, Samuel Von Pufendorf or Emer de Vattel.[23] Scant reference is made about the scholarly work of Asia or Africa. The Asian and African States' scholarship deficit was an opportunity for the European to import its ideology to these so-called 'uncivilised states'. According to Martii Koskonnemi;

> "The West considered I.L as a gift to uncivilised States as these States, according to the first world lacked the capacity to self-regulate and govern."[24]

Hence, the Third world scholars regard the present-day I.L, which is an offset of the practice of first-world countries lacking 'objectivity'.[25] Asian scholars regard the history and events as primarily European, for instance, the Treaty of Westphalia, 1648 AD is celebrated as a flashpoint in International relations[26] whereas the events in the third world lacks documentation or significance as most of I.L that flowed at least till the creation of League of Nation was Euro-Centric.[27] The West saw the Asian and African State from the prism of colonialism and imperialism. Therefore most of the scholarship that stems from Europeans on Asia and Africa was concerned with justifying colonialism as a civilising mission. Third world scholar like Anthony Anghie articulates in clear terms that;

> "History generates theory as well as tradition, tradition, in turn, generate rules and procedure."[28]

Third world scholars content that history is tweaked in favour of the West; hence the tradition is mostly a reflection of the European ethos. Third-world countries are not part of this exclusive tradition as they were considered uncivilised by their European counterpart. Only Civilised States can participate in I.L. Outsiders could participate if they comply with certain norms.[29]The Asian scholars have voiced the Asian States history and tradition of treaty practice and diplomatic law and demanded legitimate recognition in the I.L discourse. In short, the third world scholars insisted on having an indigenous history and yearned for accreditation from the European counterpart.[30] Which was conferred in stages post-world war because of the

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[23] Malcolm N Shaw Qc, *INTERNATIONAL LAW, Sixth edition*, 1710

[24] (PDF) HISTORIES OF INTERNATIONAL LAW: DEALING WITH EUROCENTRISM, https://www.researchgate.net/publication/254885929_Histories_of_International_Law_Dealing_with_Eurocentrism (last visited September 16, 2020)

[25] Kwadwo Appiagyei-Atua, *Ethical Dimensions of Third-World Approaches to International Law (twail): A Critical Review*, 8 AFRICAN JOURNAL OF LEGAL STUDIES 209–235 (2015), https://brill.com/view/journals/ajls/8/3-4/article-p209_2.xml (last visited September 7, 2020)

[26] THE TREATY OF WESTPHALIA | HISTORY TODAY, https://www.historytoday.com/archive/months-past/treaty-westphalia (last visited October 6, 2020)

[27] Valentina Vadi, *International Law and Its Histories: Methodological Risks and Opportunities*, 58 HARVARD INTERNATIONAL LAW JOURNAL 42 (2017)

[28] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law*, 381

[29] Id

[30] Id

decolonisation wave, by then some of the significant institutions in I.L was off and running and structures in I.L well established.

It is interesting to note that most I.L had churned most elements because of the interaction of the West with Asia or Africa.[31] I.L developed because of the West's sheer necessity to regulate the affairs in the orient; the twentieth century merely institutionalises the pre-existing colonial structures.[32]In I.L, unlike domestic law, sovereignty is distributed amongst the international community of States. The contestation of Asian States pertain to the sovereignty is apparent; the Europeans claimed the east lacked sovereignty; the seminal question was who decided the sovereignty? As I.L lacked any overarching sovereign. The colonial structures which perpetuated Western I.L failed to acknowledge the universal approach to I.L; modern I.L is continuing the oppression in several manifestations like failure to provide reparation for colonial suppression as I.L does not operate retrospectively.[33] One needs to closely examine this exclusivity to appreciate Asian and African States' reluctance to participate in modern I.L.

The subjugation of Customary International Law and Human Rights

Customary International Law is relatively a recent development in I.L.[34] ; in fact, the emergence of CIL coincided with International Institutions. States tend to interpret CIL in a varied manner, thus resulting in inherent confusion and vagueness. There came a necessity for authentic guidance for the identification of CIL to prevent the proliferation of interpretation. In this regard, the ILC undertook the task to provide a list of criteria for identifying CIL,despite this few developed States having mostly dominated the formation of CIL.[35] Not every State engaged in practice could authentically determine CIL.

Third world scholars contend that the development of CIL was to augment the domination of the West and viewed the nexus between capitalism and the formation of CIL.[36] The doctrine and principles that are elevated to CIL fit into the schema of First World States. The threshold for the formation of CIL differs according to the States, for instance, if a state like the United States espouses a norm as CIL, its formation is accelerated.[37]Whereas in the context of third world States, the formation of CIL is tardy. Hence it could be stated as observed by a leading third world scholar B.S Chimni that;

"The First World State have a major say in CIL creation."[38]

[31] Koskenniemi
[32] Bill Ashcroft, *Post-Colonial Studies: The Key Concepts, Second Edition*, 305
[33] Anghie, Supra at 28
[34] Ole Spiermann, *Twentieth Century Internationalism in Law*, 18 EUROPEAN JOURNAL OF INTERNATIONAL LAW 785–814 (2007), https://academic.oup.com/ejil/article/18/5/785/398662 (last visited October 12, 2020)
[35] Id
[36] Id
[37] Id
[38] Id

The time factor and state practice requirement in the formation of CIL becomes a mere formality. To illustrate with the example in the field of International Investment Law, the Principles that have attained CIL is through the tribunals decisions rather than the opinio Juris and state practice requirement, a case of dilution of CIL. For a State to show that the CIL does not bound it, this has to be done at the initial stages in the formation of CIL, through what is termed as 'persistent objector'[39]however this opportunity is not provided to the developing States as most of this gained independence in the late 1960s by which some of the significant concepts had attained CIL status.[40] Hence newly formed States were bound by the pre-existing CIL.

Other social forces back the domination of West in the sphere of CIL, organs, institutions and courts, it is noted that the requirement of State practice is replaced by the decisions of the Courts and institutions, and the West governs the conduct of most of these institutions. For example, Fair and Equitable Treatment (FET) in investment law, emerged as CIL, even in the absence of state practice. FET was acknowledged only by the courts. The court, in turn, has failed to apply the two-element test while determining CIL. According to Mohammed Bedjaoui

"Custom formation is slow and clumsy for the third world countries, whereas its dynamic source for the developed economy."[41]

The backlash with New International Economic Order and Permanent Sovereignty over Natural Resources led to the invention of terms like 'persistent objector' to exempt the West from any consequences.[42]

The postcolonial third world scholar regard CIL as undemocratic, the absence of available State practice from the third world States are conspicuous, the opinio Juris stemming from third world states and civil societies are blatantly disregarded.[43] The lack of clarity on CIL is also reflected in the fact that there is less clarity about how much State is the majority in the formation of CIL? How long the practice for it to become CIL? What kinds of State Practice counts? How much inconsistency can be tolerated?[44]

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[39] George Rodrigo Bandeira Galindo & César Yip, *Customary International Law and the Third World: Do Not Step on the Grass*, 16 CHINESE JOURNAL OF INTERNATIONAL LAW 251–270 (2017), https://academic.oup.com/chinesejil/article/16/2/251/3867663 (last visited September 10, 2020)

[40] Chimni Supra at 35

[41] Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 THE AMERICAN JOURNAL OF INTERNATIONAL LAW 757–791 (2001), https://www.jstor.org/stable/2674625 (last visited October 3, 2020)

[42] Chimni Supra at 35

[43] AN INCLUSIVE RECONCEPTUALISATION OF CUSTOMARY INTERNATIONAL LAW: A THIRD WORLD APPROACH – CAMBRIDGE INTERNATIONAL LAW JOURNAL, http://cilj.co.uk/2020/07/07/an-inclusive-reconceptualisation-of-customary-international-law-a-third-world-approach/ (last visited October 9, 2020)

[44] WHY I STOPPED BELIEVING IN CUSTOMARY INTERNATIONAL LAW | ASIAN JOURNAL OF INTERNATIONAL LAW | CAMBRIDGE CORE, https://www.cambridge.org/core/journals/asian-journal-of-international-law/article/why-i-stopped-believing-in-customary-international-law/B8DFADD291DD48D188A0381391B70B65 (last visited September 4, 2020)

The ICJ unfortunately in its assessment has not applied the two-fold approach in determining CIL, whereas it has applied an 'assertive approach'[45] devoid of methodology, the ILC cannot be solely relied upon as its draft, conclusion, guidelines etc. are arrived on a political basis. No real attempt is made in accessing or providing a comprehensive assessment of the evidence of state practice. There is no International legislative body to keep a check on either the opinio Juris or state practice.

International practice reflects a lack of consistent practice on CIL formation; this plays into the hands of the first world states and excludes the third world States from the process of Custom formation.[46] On the other hand, human rights encounter a different set of challenges, which is more to do with their origins.[47] As mentioned previously, third world countries consider the existing I.L as predatory, which legitimises and reproduces, sustains the plunder and subordination of the third world. The interaction of TWAIL and International Human Rights Law has had two phases in the first phase the theme was on the Right to Development famously came to be known as TWAIL 1, scholars like Keba M Baye advocated the same.[48] It advocated the potency of human rights law is to alleviate social hardship in third world States. TWAIL II, on the other hand, departed from the TWAIL I in the sense that, it critiqued the attitude of International Human Rights to promote a universal culture of human rights without sufficient views and points from the third world States.[49] In the words of the third world scholar, Makau M Matua;

"International human rights law is rooted in the arrogant Euro-Centric rhetoric and corpus."[50]

TWAIL II attempted to identify and provide a voice to the marginalised people in the third world- this included the marginalised sections of the society, namely women, peasant, workers, minorities etc.[51] The million-dollar question is human rights with its high hope and ideal, whether it has managed to transform the lives of the people in the third world or whether human rights is a farce to further the western aspiration? The TAWIL scholar seems to pick the latter, at the outset, it is to make clear to approach International Human Rights Law from I.L perspective has its own set of advantage, firstly, approaching human rights from the prism of I.L and more specifically TAWIL would enable the scholars to engage with International Human Rights Law in linking it with other disciplines that can be relevant to specific areas under study. For instance, the socio-economic right in Africa studied without analysing International Economic Law; trade

[45] DETERMINING CUSTOMARY INTERNATIONAL LAW: THE ICJ'S METHODOLOGY BETWEEN INDUCTION, DEDUCTION AND ASSERTION - EJIL, http://www.ejil.org/article.php?article=2593&issue=127 (last visited October 14, 2020)
[46] Chimni Supra at 35
[47] Opeoluwa Adetoro Badaru, *Examining the Utility of Third World Approaches to International Law for International Human Rights Law*, 10 INTERNATIONAL COMMUNITY LAW REVIEW 379–387 (2008), https://brill.com/view/journals/iclr/10/4/article-p379_5.xml (last visited September 12, 2020)
[48] Id
[49] Id
[50] Makau Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 46
[51] Badaru, Supra at 48

law cannot be comprehensive research.[52] One might be in a better position to enquire the impact of trade law on the availability of generic drug or right to food. Secondly, the Asian understanding of human rights has been traditionally rooted in the historical roots of the current dismal State of third-world countries' socio-economic rights.[53] Even today, the Asian States are pondering on the effect of colonialism on the right to food in Asia or how did the current status of cash crop economy evolve resulting massive famine etc. These alternative views are often shrugged in the course of our reading of International human rights law. The TWAIL scholars attempt to provide long-lasting solutions to some of these relevant questions which impact international law. This can ensure universality, accountability and acknowledge the third world's contribution to the making of the present-day I.L.

Although the language of human rights treaties is glossy on closer inspection, it is apparent that it is rich in contradictions. Asian States practice and norms are oppressed and silenced, especially in international trade and economic law. The labour market deregulation espoused by the international financial institutions has had a deleterious impact on the third world labour's living condition. Hence traditionally human rights like custom are manipulated to promote so-called legitimate neo-colonial objectives.

Critiquing Universal Human Rights

The internationalisation discourse of Human Rights goes hand in hand with the neo-colonialist project.[54] The Asian State question the altruistic and civilisation mission of human rights. Human rights are privileged and conceived in the West and promoted and disseminated to the third world States without consulting or getting inputs from third world States. Human Rights was not regarded as a magic wand to resolve the ills that afflict the third world States. Having said these Asian States falter in to find an alternative to the existing framework or what alternative to International human rights law can TWAIL proffer? The lack of participation of Asian State in human rights law discourse is attributed to several factors the foremost being lack of penetration at the grass-root level.[55] The knowledge production happens in the northern hemisphere, Students from the south get the scholarship from the northern developed States consequently students rarely encounter TWAIL and thereby continue with the flow of I.L as it is thought in law schools which is predominantly western-centric.[56] For greater participation, the location of knowledge production requires revamping. What is the way forward; there can be constructive critique rather than wholesome condemnation of the existing framework. TWAIL scholars ought to be involved in this dialogue to ensure a higher representative from the Asian States.[57]

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[52] Id
[53] Id
[54] Ramina & Ramina
[55] THE GLOBALIZATION OF HUMAN RIGHTS (J.-M. Coicaud et al. ed., United Nations University Press) (2003)
[56] B S Chimni, *TEACHING AND RESEARCH OF INTERNATIONAL LAW IN ASIA: SOME REFLECTIONS ON THE WAY FORWARD*, 12
[57] Badaru Supra at 48

Injecting Pluralism in International Legal System: Indian Experience

The ancient India cultural practice of international law encompassed the Hindu culture and religious tradition advocated in 'Dharma'. The State was governed by Dharma which was equivalent to the present day grundnorm, and the tenets of Dharma and rules bound everyone in ancient India duties of a king were considered 'Rajdharma'.[58] According to doyen scholar Parth Chatterjee,

"The supremacy of dharma was to regulate the inter-state and internal governance of the State."[59]

The State's governance in the sphere of diplomacy, the conduct of the war, granting asylum, etc. During ancient times, Dharma was manipulated to allow the dominant social forces to sustain the hierarchy, oppressive caste system and institutionalise patriarchy.[60] However, some aspect of Dharma can be imbibed to facilitate moral and plural conception of international law. In the words of B.S Chimni;

"Dharma's stresses on three key elements that can resonate in contemporary international law, these include a) Dharma's stress on duties, b) Foundation of non-violence, bringing about peaceful world order, c) Spiritualism- to bring about true unity of humankind, which in modern-day is accelerated by the process of globalisation, which can be touted as artificial."[61]

Medieval India was a scene of co-existence of Hindus and Islamic traditions, it was an era of the confluence of traditions and cultural, which saw the rise in conflict and tensions, the period was ripe for the emergence of 'legal pluralism', the period of Akbar preached great level of tolerance and necessitated the role of dialogue, whereas in far Europe Giordano Bruno was burnt at stake in Rome, is so-called developed western world. Thus, it is evident that India's global composite culture encouraged the practices of all faiths and espoused the idea of tolerance and peaceful co-existence, which is echoed in the United Nations Charter.

The global composite culture emerged as a result of dialogues with the equals rather than based on assimilation, import or imposition of the West, which unfortunately is the standard rhetoric of modern international law.[62] In the words of B.S Chimni,

"New forms of imperialism have found ways in the current in international law, and there is a need to purge itself of hegemonic practices."[63]

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[58] *Legitimating the international rule of law*, 290–308

[59] Deepa Das Acevedo, *Secularism in the Indian Context*, 38 LAW & SOCIAL INQUIRY 138–167 (2013), https://www.cambridge.org/core/product/identifier/S0897654600005323/type/journal_article (last visited October 9, 2020)

[60] Chimni Supra at 59

[61] Id

[62] Id

Bilateralism to Jus Cogens: The way forward

The classical conception of international law cannot address the modern challenges in international law. The classical basis of international law rests on state consent and not on the normative will,[64] hence there requires to be a shift to a value-based system of international law couched on 'solidarity'.[65]The emergence of erga omnes, jus cogens obligation, reflect a communitarian perspective of international law aims at the common good. The engagement of values in international law is quintessentially articulated in jus cogens norms,[66] these are higher norms in international law, which binds the international community of States as a whole, a State is both precluded from reserving a jus cogens norm or persistent objector and the norm binds all States irrespective of States power.[67] The apparent shift from bilateralism to communitarianism is a welcoming sign from the Asian States who as pointed out have not participated adequately in the formation of international law, the communitarian dimension of international law can ensure greater participation of third world states in the norm generation process, which until now is handmade a select few developed first world states. Hence, the researcher reckons the international institutions should actively expand these norms concepts; it is to be noted that the ILC can actively engage in this endeavour in tandem with the ICJ. If anything is to go by the recent the works of the ILC post-2010 is the reflection of the same.[68] Therefore there is a need to emphasise this normative concept to ensure greater participation of third world states.

Also, the seminal reason why the Asian States cannot relate to international law is that international law rarely articulates the happening in these States. One of the major challenges that are confronting the Asian States is poverty.[69] If anything is to go by the present system of international law address the question of poverty from the prism of international human rights (IHR), however the human rights mechanisms comes with its own set of limitations; firstly the States are free to be a party to these human rights treaties, b) Human Rights treaties is all about progressive realisation, and enforcement of socio-economic rights is incumbent on States resources, c) the State owns these rights to its people; hence there is minimal scrutiny on the State in terms of monitoring or compliance. Hence in the words of Dire Tladi,

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[63] Id

[64] See UP Expert Lecture Series, delivered by Prof. Dire Tladi, September 11, 2020 University of Pretoria.

[65] Id

[66] Thomas Kleinlein, *Jus Cogens Re-examined: Value Formalism in International Law*, 28 EUROPEAN JOURNAL OF INTERNATIONAL LAW 295–315 (2017), https://academic.oup.com/ejil/article-lookup/doi/10.1093/ejil/chx015 (last visited October 13, 2020)

[67] Kleinlein, Supra at 67

[68] See generally the Draft conclusions on identification of customary international law, with commentaries 2018, ILC work on the identification of peremptory norms of general international law.

[69] Tladi, Supra at 65

"It can be assumed that international law is agnostic to poverty."[70]

A more community-oriented international law could offer a tangible solution to the existent deficits. Here, concepts within the domain of international law and outside like the concept of Dharma or jus cogens can offer a productive narrative to mitigate the acute crisis.

Conclusion

International law scales are heavily tilted in favour of the West. The colonial legacy of international law in various manifestations has promoted the Asian States to view international law with suspicion and thereby resulted in critical voices. The growth of fields like customary international law, human rights etc. have merely cemented the western philosophy of international law rather than making international inclusive. The vast experiences of State like India has been deliberately sidelined and erased from the history of International law and instead replaced by Western narrative, unfortunately, state the colonial narrative is active the third world States even today. Moreover, the participation of Asian States in international law is not on expected lines because of several factors, one of the primary reasons being the historical injustices perpetrated by the colonial powers that remain afresh in many Asian States' minds.

The way forward could be to a) Greater push from Bilateralism to Communitarianism- this could be achieved through an expansion project within the structure of international law to concepts like jus cogens, erga omnes or customary I.L, secondly, the Asian ethos ought to be taken on board to interpret the present-day I.L and this can be achieved by rewriting the history of international law to identify the contribution of third world scholars, and c) Dissemination of I.L at the grass-root level in Asian State is a key to spread the subject beyond the specific class in the system, presently the discourse of I.L in third world State is monopolised by select few, this has to give way for diverse engagement within the Asian circles.

[70] Id