Teaching Critical International Law: Reflections from the Periphery

Srinivas Burra[*]

Adopting critical perspectives to international law in the classroom offers opportunities for teachers to engage with students on economic, political, sociological, and historical dimensions of the field and its application. These critical perspectives help explore the emancipatory potential and the limits of international law. This reflection deals with some of the challenges in teaching critical perspectives of international law. This reflection is partly drawn from my own experience of teaching methods of international law for the last nine years to Master's students at a university based in India, with a student composition drawn from South Asia.[1] This reflection thus places special emphasis on teaching critical international law in a Third World classroom. 'Third World classroom' is used here in opposition to the global North classrooms all the while acknowledging the variations in the nature of the classrooms within the Third World. The geographical location of Third World is emphasised to denote specificity without ruling out the possibility of some similarities with other locations. I begin by briefly addressing what constitutes 'mainstream' and 'critique' in international law. This is followed by a discussion of some of the crucial issues involved in teaching critical international law. These issues are: the false necessity of positivism, arguments for the dispensability of the critique, lived and epistemic experiences, and the geography of the knowledge. I will be concluding with a few remarks.

Mainstream and the critique

Identifying what constitutes the mainstream and what are the underlying features of the critique is crucial to analysing how they interact with each other. Hence, it is necessary to identify the foundational constituent principles of the mainstream, despite the fact that it is 'no easy task to articulate precisely what 'mainstream' international law theory consists of'.[2] Mainstream international law is often identified with qualities of voluntarism, neutrality, and autonomy of rules. The normativity of rules is emphasized, which is-allegedly-what makes them binding law. The normativity of rules is posited as being independent of extra-legal considerations like economic, political, sociological, moral, and historical spheres.[3] These features of the mainstream prominently reflect on what is referred to as the legal positivism.[4] This strand of positivist view of international law occupies the centre stage of the field of contemporary international law and is often referred to as the mainstream of international law. Therefore, one can easily note that '[a]rguably, positivism is the basis of the mainstream school of international law today',[5] while acknowledging that 'there

---

[*] Assistant Professor, Faculty of Legal Studies, South Asian University, New Delhi.

[1] South Asian University is in certain respects unique as it is an inter-governmental university established and funded by eight South Asian states and students come from these states.

[2] Andrea Bianchi, *International Law Theories: An Inquiry into Different Ways of Thinking* (OUP, 2016) 21.

[3] Ibid, 26-27. Also see Bruno Simma and Andreas L. Paulus, 'The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View' (1999) 93:2 *American Journal of International Law* 302.

[4] See Joerg Kammerhofer, 'International Legal Positivism' in Anne Orford and Florian Hoffmann (eds.), *The Oxford Handbook of the Theory of International Law* (OUP, 2016) 407; Simma and Paulus (1999).

[5] Monica Garcia-Salmones Rovira, *The Project of Positivism in International Law* (OUP, 2013) 1. Footnote in the original is omitted here.

are vast differences between differing traditions or streams of *legal* Positivism'.[6] For my purposes, the mainstream is understood as a positivist view of international law, which points to the autonomous and neutral body of rules with a capacity to address social reality independent of any influence from other social spheres.[7]

The critical perspectives I refer to in this reflection include approaches based on analytical categories of Third World, class, gender, race, religion, and other region-specific identities like caste and their interplay.[8] A critical view of international law denotes to unraveling the myths and limits of consent, neutrality, and autonomy, which are the dominant features of mainstream international law.

The false necessity of positivism
Academic texts that discuss international legal theories often place positivism at the forefront before discussing other critical theoretical perspectives. For example, Andrea Bianchi's 'Traditional Approaches' covers positivism in the first chapter of his book.[9] The 'decision to write a first chapter on what I describe as traditional approaches is deliberate, as traditional approaches are still the 'water' that most international law 'fish' swim in'.[10] Bianchi's explanation points to the significant role positivism plays in the world of international law and cautions that 'the order implies no ranking or value judgment of any sort'.[11] Similarly, the American Journal of International Law's Symposium on Method in International Law (1999) placed positivism as the first method, to be followed by other methods. The editors explained that the essays were 'presented in chronological order based on our sense of the sequence in which the methods were originally elaborated (with the recognition that dating a method of international law is no easier than dating the solidification of customary law)'.[12]

Notably, the *Oxford Handbook of the Theory of International Law* does not follow this sequence. The editors in their introduction, while recognizing the importance of positivism state that 'the commonly recognized jurisprudential grand écoles of positivism, natural law, and realism turn out to be but shards from history that provide starting and breaking points for much more complex and differentiated narratives about what law in the international sphere is and how it works'.[13] This seems to emanate from the cautiously arrived at understanding of the editors that positivism is one theory among many. However, despite not placing positivism at the beginning, as other texts did, the editors seem to still acknowledge the prominent place positivism occupies when they refer to   its   commonly   recognized   position.

A cursory look at international legal theory texts illustrates the important place that is afforded to positivism in the international law literature, despite the varying explanations given by the authors and editors. Positivist mainstream presents itself as the default frame for international legal theory.

---

[6] Kammerhofer (2016) 409.
[7] The related and the arguably overlapping idea is formalism. For the relevant discussion on positivism and formalism, see Ibid.
[8] Call for papers of this symposium mentions the following critical perspectives: The Third World Approaches to International Law (TWAIL) movement, feminist, intersectional and critical race studies, deconstruction, Marxism, Indigenous legal scholarship, decolonial, post-colonial, new materialist and post-humanist approaches.
[9] Bianchi (2016) 21-43.
[10] Ibid, 14.
[11] Ibid, 15.
[12] Steven R. Ratner and Anne Marie Slaughter, 'Appraising the Methods of International Law: A Prospectus for Readers' (1999) 93:2 *American Journal of International law* 291, at 301-302.
[13] Anne Orford and Florian Hoffmann, 'Introduction: Theorizing International Law', in Anne Orford and Florian Hoffmann (eds.), *The Oxford Handbook of the Theory of International Law* (OUP, 2016) 1, at 13.

It presents itself as a necessity and occupies the central space without justification. Any attempt at teaching international law from critical perspectives then must debunk this as a false necessity. While the idea of 'false necessity' was introduced by Roberto Unger and is often presented in its variant forms as a critique of Marxist determinism,[14] I invoke it here to show how the mainstream's indispensability is presented in the legal space. The argument here is not to propose for its opposite in the form of false contingency.[15] My purpose is to illustrate the contextual and contingent factors that explain the mainstream's centrality. It is also to point out that the mainstream's central position is not a necessity but is dependent on various contingent factors such as free market economy, formal electoral democracy and rule of law. Further, positivism also plays the ideological role of serving the power of existing political and economic apparatus that determine and dictate the structures of domination in international law and international relations. This ideological role is successfully performed under the guise of the autonomy of rules and their potential to deliver justice, devoid of extra-legal considerations. International adjudication and the institutional apparatus lends support to this. Any attempt, therefore, to critically engage with international law in the classroom must disentangle these features of contemporary international law. This is a difficult, though not an impossible task.

My experience shows that the false necessity of positivism can be exposed when a historical or systemic analysis is undertaken in teaching international law. Historical analysis of international law's constitutive role in colonialism is well received by students. In a Third World classroom, this is relatively easier as students can relate to their colonial past. Similarly, a systemic analysis of hegemonic international law and institutions can be highlighted by showing, for example, the uneven membership of the UN Security Council. However, positivism remains intuitively plausible when the operation of rules of international law is examined in specific contexts, such as the necessity of consent for international treaty obligations, sovereign equality and collective security. In other words, positivism finds itself exposed in historical and systemic analysis, yet exhibits its strength in the operation of specific rules. Therefore, teaching rule analysis embedded in historical and systemic processes will have the potential to expose positivism's false necessity.

The dispensability of critique
Closely related to the false necessity of the mainstream is the dispensability of the critique. When we refer to critical perspectives or critical engagement with international law, these are often seen as 'different ways of thinking' about international law.[16] While all these perspectives are presented as different frames, an implied message is conveyed: critical perspectives are alternatives to something which is often referred to as the mainstream. Mainstream is then put on a pedestal. What is ostensible, particularly from the students' point of view, is learning the mainstream is an academic objective, as a means to remain relevant in the discipline. Critical international lawyers themselves seem to recognise this reality.[17] The process of teaching critique is often taken as another view in the academic world of ideas, with the mainstream always occupying the central position. Thus, there is a persistent need to decentre the mainstream.

---

[14] For a discussion on the false necessity, false contingency, and determinism, see Susan Marks, 'False Contingency' (2009) 62:1 *Current Legal Problems* 1-21. Marks also discusses here Roberto Mangabeira Unger's work, *False Necessity* (Verso, 2001).
[15] Ibid.
[16] This is borrowed from the title of the book, Andrea Bianchi, *International Law Theories: An Inquiry into Different Ways of Thinking* (OUP, 2016).
[17] See Antony Anghie, 'Critical Pedagogy Symposium: Critical Thinking and Teaching as Common Sense—Random Reflections' Opinio Juris (31 August 2020), http://opiniojuris.org/2020/08/31/critical-pedagogy-symposium-critical-thinking-and-teaching-as-common-sense-random-reflections/ (accessed 30 October 2020).

A teacher with a critical perspective may be willing to undertake the task of decentering, but she may not succeed in the task by merely equating the mainstream with other diverse critical perspectives and by claiming it as one among many. Such an approach has to take place in two stages. First, this process should involve a tactical pedagogical intervention that would argue for the equivalence of various theoretical perspectives in academia. This intervention should emphasize the equal epistemological validity of all theoretical approaches, including the mainstream. The tactical pedagogical intervention should seek the academic space by overcoming the academic bureaucratic hurdles of the syllabi and the approval of the readings.[18]

In the second stage, critical intervention should acknowledge the factual reality of the mainstream's central position in the international law academy. This would involve acknowledging the centrality of the mainstream and highlighting its dependence on a particular global order. It is, in other words, necessary to accept the mainstream's centrality, before decentering it. This further requires engaging with the factors which place the mainstream at the centre. These factors include a celebration of free market economy supposedly based on individual merit and liberties, which obscures structural inequalities, formal electoral democracy without substantive participation in governance, and post-World War progressive narrative of international law based on ideas of human rights and sovereign equality which conceal the violent histories of colonial international law.

Engaging with these unspoken assumptions also helps bust the myth of the rule autonomy, which is one of the mainstays of the mainstream. As teachers, we need to acknowledge that the mainstream maintains a sophisticated doctrinal monopoly over the foundational categories of international law like statehood, sovereignty, use of force, and state responsibility. Critical perspectives need to develop a comprehensive conceptual apparatus on reimagining the definition of state, what constitutes self-defence, how to reformulate substantive sovereign equality, and so on. Presently, challenging mainstream's supremacy through alternatives is mostly at the stage of work in progress with most of the critical perspectives.[19] My own experience tells me that teaching critical perspectives as methodological categories in an abstract sense is relatively more convincing than teaching them in relation to concrete principles and rules of international law.

Lived and epistemic experiences
There are numerous critical and perceptive observations about teaching and research in the global South.[20] These observations aptly point out the structural challenges of limited resources and restricted access to information in the Third World. In addition, mainstream frameworks dominate the teaching and research of international law in general. This situation is not different in the Third World academy either. However, teaching critical perspectives in the Third World classroom in certain respects is probably easier by way of establishing a relationship between the student and what is taught. After all, the substance of some critical perspectives is directly related to the lived experience of our students. Critical analytical categories like the 'Third World', 'colonialism', 'class', 'race', and 'Third World feminism' can be conceptualized by relating them to the realities of the

---

[18] At some universities in India the syllabi prepared by the teachers need approval from institutional structures involving external experts.

[19] B. S. Chimni attempts to provide alternative formulations of some legal concepts from Marxist point of view. B. S. Chimni, 'An Outline of a Marxist Course on Public International Law' (2004) 17:1 *Leiden Journal of International Law* 1. Ntina Tzouvala reflects on unable or unwilling doctrine and challenges from TWAIL perspective. Ntina Tzouvala, 'TWAIL and the "Unwilling or Unable" Doctrine: Continuities and Ruptures' (2015) 109 *AJIL Unbound* 266.

[20] For example see B.S.Chimni, 'Teaching, Research and Promotion of International Law in India: Past, Present and Future' (2001) 5 *Singapore Journal of International & Comparative Law* 368; B.S.Chimni, 'Teaching and Research of International Law in Asia: Some Reflections on the Way Forward', https://cil.nus.edu.sg/wp-content/uploads/2018/07/CHIMNI-TEACHING-AND-RESEARCH-OF-INTERNATIONAL-LAW-IN-ASIA-23-MAY-2018.pdf (accessed 17 May 2020).

historical past and the present in the global South. This seems to be possible because '[i]n the Third World, there is an acute sensitivity to the role of international law in regulating or, more to the point (and to the experience), exacerbating unequal global power relations'.[21] However, this experiential link between the students and strands of critical knowledge systems may not always result in the adoption of critical perspectives over a positivist approach.

One's learning does not take place in a vacuum. It is an interactive process between what one already knows and what one is learning to know. Thus, learning and unlearning takes place in complex ways. In this complex process, what emerges as a student's priority for attaining knowledge is what already dominates the epistemic universe of international law. As pointed out in the previous sections, it is the mainstream view that dominates the international law academy globally. Because of the mainstream's central position in the academic learning of international law, a student would be inclined, or even feel compelled to primarily focus on gaining the expertise of the mainstream, so that she remains relevant in the discipline and the discipline remains relevant to her career. There is also a tendency among international law teachers in the Third World to believe that, while critiquing the subjugation of the Third World, certain reformist measures can make the international law better for the Third World peoples.[22] The Third World classroom experiences this dichotomy between the lived experience and epistemic aspirations of students. From my personal experience I hesitate to insist on the larger utility of maintaining an organic link between lived experience and epistemic ambition because of the uncertain path it may lay at the professional level in the field dominated by the mainstream. This hesitance stems from the fact that, as rightly observed, it is very difficult to build a successful career in international law by being a non-positivist.[23]

The geography of knowledge
Legal knowledge is often presented in a universalist and neutral manner. However, geographical specificity plays, in addition to other factors, a constitutive role in defining what makes up knowledge in a particular context. This is not to argue that the same set of knowledge constituents would produce mutually exclusive or contradictory views in two different locations. Rather, I want to underline that geographical location has the potential to generate a particular view of the author who produces it on a given issue. So far as international law is concerned, geography plays an important role, at least in two ways. This is in the form of where the knowledge is produced and where it is received. Geopolitical categories like the First World-Third World and global North-global South are important analytical tools to understand the inner dynamics of what are referred to as meta categories of 'global'. Similar geographical spatialisation would also inform biases, preferences, perceptions, and realities in the process of knowledge production.

B. S. Chimni suggests that 'the geographical location of an author has an important influence on how different theories of international law and world order are received and evaluated'.[24] Similarly, the location where the produced knowledge is received would also inform us of the nature of the knowledge systems there and also would help us understand the impact of location of production of knowledge on the location of its reception. Anthea Roberts elaborates on how international law appears in domesticated versions in different states. With teaching and learning international law,

[21] Mohsen al Attar and Vernon Tava, 'TWAIL Pedagogy-Legal Education for Emancipation' (2009) XV *The Palestine Yearbook of International Law* 7, at 8-9.
[22] Chimni (2018) 3-4.
[23] Jan Klabbers, 'Book Review, Antonio Cassese, Five Masters of International Law: Conversations with R-J Dupuy, E Jimenez de Arechaga, R Jennings, L Henkin and O Schachter.Oxford: Hart Publishing, 2011' (2011) 22:4 *European Journal of International Law* 1175, at 1176.
[24] B. S. Chimni, *International Law and World Order: A Critique of Contemporary Approaches* (Second Edition, CUP, 2017) xi.

Third World states seem to be generally following the texts produced in their former colonisers. In this vein, Anthea Roberts states that '[t]extbooks often flow from core to semiperipheral and peripheral states and along language and ex-colonial lines. Accordingly, students in peripheral and semiperipheral states end up learning international law through books imported from their ex-colonisers'.[25] As she rightly points out, the implication of this is that 'students who study from these imported textbooks are likely to receive much less information about how their state interacts with the international legal system than those who study from nationalised local textbooks'.[26]

This situation does not seem to be much different within the critical perspectives of international law either. Critical streams like TWAIL scholarship, which specifically theorize the Third World are predominantly by scholars currently located in the global North, even though some of them are originally from the global South. While this scholarship is influenced by individual scholars like R. P. Anand, their methodological formulation primarily took place in the institutions of the First World. As James Gathii has observed: 'TWAIL has intervened in the production of knowledge in North America, Europe and Australia. In the last couple of years, it has started making inroads in the third world, particularly Asia but much less so in Africa and Latin America'.[27] For example, one can see that several TWAIL conferences were organized in the First World, and only recently, two conferences held in Cairo, Egypt (2015) and Singapore (2018).[28] Overall, those who produce critical scholarship either are predominantly trained in the global North or are working there. It is, then, a uniting factor of the mainstream and the critical perspectives that the leading ideas of both streams predominantly originate from the first world, with a few exceptions.[29]

While this situation is reflective of lopsidedness in knowledge production, it does not necessarily pose a challenge to teaching critical perspectives in the global South. However, it is still likely that the critical scholarship coming from the global North may not be adequately attentive to the issues of the global South which need attention. Some examples include: Indian state's hegemonic role at the regional level, curtailment of rights and aspirations of people of Kashmir, caste discrimination, discrimination against lower caste women and Third World feminism, and majoritarianism. Critical scholarship needs to establish linkages between Kashmir and Palestine, Dalit Lives Matter and Black Lives Matter movements, Dalit feminism and Black feminism, and Ramjanmabhoomi/Babri Masjid and Hagia Sophia for example. Drawing these links would make critical scholarship truly attentive to the realities and struggles of the Third World and, therefore, a more organic presence in the Third World classroom.

Antony Anghie suggests that in order to address eurocentrism we need to focus on local history and its relationship to international law when teaching in a particular country.[30] This is possible when there is adequate scholarship, particularly related to international law and produced in different locations. Decentralised knowledge production has the potential to generate knowledge that better exposes the global hierarchy and oppression in their local manifestations. However, I em-

[25] Anthea Roberts, *Is International Law International?* (OUP, 2017) 152.
[26] Ibid.
[27] James Thuo Gathii, 'The Agenda of Third World Approaches to International Law (TWAIL)' in Jeffrey Dunoff and Mark Pollack (eds.), *International Legal Theory, Foundations and Frontiers,* (Cambridge University Press, 2019) https://ssrn.com/abstract=3304767 (accessed 17 May 2020).
[28] Usha Natarajan, John Reynolds, Amar Bhatia & Sujith Xavier, 'Introduction: TWAIL - on praxis and the intellectual' (2016) 37:11 *Third World Quarterly* 1946, at 1946-1947.
[29] While my information about the background of TWAIL scholars at global level is not comprehensive, with a lone exception of B. S. Chimni, I don't find many examples from South Asia, whose educational training and work experience are based in the global south and made substantive contribution to the critical scholarship in the last few decades.
[30] Anghie (2020).

phasize that geographical location is addressed in this reflection mainly to underline the importance of material conditions in which scholarship is produced. One needs to be wary of geographical fetishization of knowledge.

Conclusion

There are several challenges to teaching critical perspectives, in general. Since the positivist mainstream occupies the central place in everyday life of contemporary international law, critical perspectives are always seen as alternatives that can be dispensed with in teaching. Career and publishing opportunities primarily revolve around the mainstream of international law, which are, inter alia, compelling factors for students to opt for it. A significant strength of the mainstream is its sophisticated doctrinal apparatus on important constitutive elements of international law like the state, sovereignty, and use of force. This allows international law to present itself as a self-contained explanatory regime of what it is. Even as critical perspectives maintain theoretical sophistication, their counter-narratives on specific issues are mostly a work in progress.

Geography of knowledge production and its reception also have notable impact on teaching critical international law. Whilst every theoretical perspective is a product of certain social processes. Hence it is contextualized that 'the normativity of positivism is adapted to the conditions and philosophical foundations of modern capitalism'.[31] Similarly, '[c]ritical legal scholarship often depends on the disposition of the times'.[32] While these structural factors certainly determine scholarship and teaching, the classroom provides, though in a limited way, relative autonomy for human agency in an immediate sense of creative interventions. This relative space can be utilized to underline the need for critical perspectives in understanding international law. This can be realized, overcoming all odds, with creatively woven theory into the world of rule normativity of the mainstream.

---

[31] Rovira, (2013) 1.

[32] B. S. Chimni, 'The World of TWAIL: Introduction to the Special Issue' (2011) 3:1 *Trade Law & Development* 14, at 15.