INTERNATIONAL LAW IN PRE-INDEPENDENT INDIA: FROM ANCIENT TIMES TILL 1947

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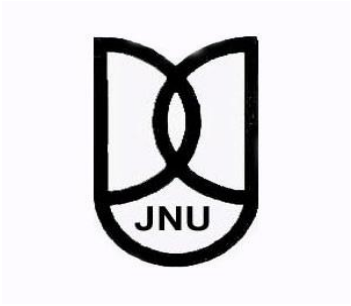

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DECLARATION

I declare that the thesis entitled **"INTERNATIONAL LAW IN PRE-INDEPENDENT INDIA: FROM ANCIENT TIMES TILL 1947"** submitted by me for the award of the degree of **Doctor of Philosophy** of Jawaharlal Nehru University is my own work. The thesis has not been submitted for any other degree of this University or any other University.

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CERTIFICATE

We recommend that this thesis be placed before the examiners for evaluation.

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In Loving Memory of

Bappa and Baba

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LIST OF ABBREVIATIONS

GA- General Assembly

IBRD- International Bank for Reconstruction and Development

ICCPR- International Covenant on Civil and Political Rights

ICJ- International Court of Justice

ICRC- International Committee of the Red Cross

IHL- International Humanitarian Law

IHRL- International Human Rights Law

ILO- International Labour Organisation

IMF- International Monetary Fund

IPC- Indian Penal Code

LGBT- Lesbian Gay Bisexual Transgender

LN- League of Nations

LNTS- League of Nations Treaty Series

PCIJ- Permanent Court of International Justice

SC- Security Council

TWAIL- Third World Approach to International Law

UDHR- Universal Declaration of Human Rights

UN- United Nations

UN- United Nations

UNTS- United Nations Treaty Series

US- United States

USSR- Union of Soviet Socialist Republics

CHAPTER I

INTRODUCTION

1. History of International Law

International law is not created in a vacuum. It is influenced by history, sociology, anthropology, economics, international relations, political science and other disciplines. Various actors in political, economic, diplomatic and academic fields play a crucial role in formulating international law (Hueck 2001: 213; Weeramantry 1997: 97). Interdisciplinarity in international law is inevitable today. It gives a better understanding of the discipline and provides viable solutions for the persisting international problems.[1]

History is one of the disciplines which is essential in interpreting international law.[2] The concepts which were formulated in the past may have a present bearing on the law. History is about accepting that there were both good and bad memories in the past and that those memories should not be suppressed (Galindo 2005: 558). We know that past cannot be changed, but a better understanding of the past can give us a good present and direct us towards a better future (Thapar 2014: 61). On a similar note, R.P Anand (2008: 5) observes, "the present cannot be properly assessed, nor future projected, without an understanding of the past". Therefore, international law needs to be truly historical (Galindo 2005: 559). History of international law needs to be paid much attention because in the present times international law "threatens to become internal law" (Chimni 2007: 511).

Earlier, the legal historians and mainstream international lawyers did not give due consideration to history in understanding international law. The legal historians overlooked the history of international law. International lawyers neglected it due to the emphasis on specialisations and functions of international law (Koskenniemi 2004: 1). The discipline was "over-simplified and distorted by international lawyers" (Lesaffer 2002: 103). The scepticism of the mainstream international lawyers towards

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1 Interdisciplinary scholars evince concern for the practical, "real world" dimensions and relevance of their work. (Armstrong 2009: 24). "These approaches reject "formalistic conceptions of law, a pre-occupation with the "State" as unitary, monolithic source and subject of law and a view of law as autonomous, neutral and objective" (*ibid* 25).

2 History helps in interpreting the law (Wilson 1887: 17).

the history of international law was because history verifies continuous change and defies the "assumption that the principles used by the jurists to challenge the world of legal phenomena were in some way eternal, beyond history" (Anghie 2004: 50-51). Moreover, it is presumed that law needs fixity.

In the recent past, we can see a turn to history in the study of international law. The revival of historiography in the study of international law is due to the vacuum created by the emphasis on pragmatism and neglect of philosophy, historiography and other social sciences (Galindo 2005: 548). The history of international law is an independent discipline today, which applies interdisciplinary tools of research. It is no more a sub-area of international law or history of law.

However, the emerging discipline of the history of international law is largely Eurocentric. Eurocentrism remains a big challenge in the discipline. Eurocentrism in the discipline needs to be challenged by alternative perspectives. It will be discussed in detail in the next section on the Eurocentric history of international law. Another inherent problem faced by the discipline is that of anachronism.

Anachronism is considered as a problem in the study of history. Some scholars pioneered by the writings of Quentin Skinner have considered anachronism as a sin for historians. According to Skinner, anachronism is a danger to the history of ideas. Skinner (1969: 3) opines that historians should not separate the contexts of the texts in which they are written. Succinctly put, the past should not be judged by the standards set in the present.

Anachronism also arises in the study of traditional legal systems. S. Rangarajan (1964: 176) points out that the writings on Hindu legal system first, separate the legal system from the contexts in which it developed over an extended period. Secondly, the jargon used for the contemporary legal system is applied in the past. He discourages both because a true assessment of the legal system can be done only by considering the context in which it developed and also the terminology of the present cannot be equated to the language of the past.

Anachronism in law cannot be avoided. Law has anachronism ingrained in it because law reflects both past lessons and future aspirations.[3] Anne Orford (2012: 2) analyses the concept of anachronism and the connectedness of law and history. "Law is a site not only for the creation of new obligations but also for the transmission of inherited obligations" (*Ibid* 9). It is tough to do away with anachronism while narrating the history of law or be that as it may, the history of international law.

The history of international law is anachronistic because it describes the past institutions in the modern nomenclature of sovereignty, human rights, diplomacy, etc. Weighing past concepts with the present scales is inescapable. International lawyers study as to "how concepts move across time and space" (*Ibid* 2). Hence, anachronism arises in their analyses. It is not possible to get rid of anachronism altogether (Koskenniemi 2013: 230). We can see a continuation or progression of the ideas of the past to the present. The Past is "being retrieved as a source or rationalisation of present obligation" (Orford 2013: 175). Therefore, some concepts that evolved in the contemporary times are being used in the study of the history of international law. At the same time, there are some concepts which were used in the past but which cannot be traced to the present. The application of contemporary concepts to the past is necessary to deal with the persisting problems. Whereas judging past only based on present concepts may lead to injustice and misinterpretation of the past. The challenge before a historian of international law is balancing both.

While connecting past to the present may lead to anachronism and misinterpretation, but at the same time, to solve problems, which exist since a long time, and were not considered wrong in the past, the use of concepts employed in the present may be inevitable.[4] Anachronism can be met by using the concept of "family resemblance" proposed by Ludwig Wittgenstein (1953) in his famous work, *Philosophical Investigations*.[5]

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[3] Law considers all three temporal aspects viz. past, present and future.

[4] One such example can be slavery which was considered as a common feature of many societies. The nomenclature may also vary from society to society. It is considered a crime today, but in the past, it was an accepted practice. The use of contemporary international law standards to evaluate past practices may lead to conclusions that the societies in the past were only oppressive without any positive aspects. At the same time, if such practices continue today, the present international law can be used to solve the problems of oppression and discrimination.

[5] Wittgenstein (1953: 31-32) compares various games like board games, Olympic games, ball games, etc. and draws similarities between them. He states, "And the result of this examination is: we see a complicated network of similarities overlapping and criss-crossing: sometimes overall similarities,

By applying the concept of family resemblance, we can also say the rules governing international relations in the past are similar to contemporary international law. Thus, these rules can be very well termed as international law. We do see some similarities, and sometimes, the similarities are missing. Yet, the principles of international law in the past are significant and cannot be nullified just because the modern international law is formulated under a particular framework of treaties. Thus, international law of the past despite some discontinuities and aberrations cannot be denied of its existence. But, its existence is not recognised by the European perspective of international law.

2. Eurocentric History of International Law

Most of the disciplines are dominated by the Eurocentric view as the Europeans wielded the cognitive power since the dawn of colonisation. European notions and concepts moulded history and law, specifically international law. Eurocentrism is manifest in international law. Treaties are considered the most important source of international law. Randall Lesaffer (2002: 136) describes that many international agreements were entered after the crises of 16th and 17th centuries which reflected the "will of the international society" and calls them fundamental treaties. For the creators of these treaties, international society meant Europe. These treaties evolved out of the will of the European powers assembled in conferences. The treaties formulated and implemented by few European countries were applied worldwide and continue to govern international relations.

European narratives dominate the fragments of international law. Amongst the fragments of international law, the history of international law is largely Eurocentric. Most of the international lawyers associate the genesis of international law to Europe. The historians of international law consider the past six to seven centuries and confine their study to Europe (Lesaffer 2002: 105). For instance, Emmanuelle Jouannet (2012: 12) begins her narration of the history of international law to the eighteenth century Europe and describes international law as truly liberal-welfarist[6]. Wilhelm Grewe

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sometimes similarities of detail. I can think of no better expression to characterize these similarities than "family resemblances"; for the various resemblances between members of a family: build, features, colour of eyes, gait, temperament, etc. etc. overlap and criss-cross in the same way." Although he used the concept of family resemblance in linguistics, it has been borrowed by other disciplines.

6 By liberal law, she means, "ensuring the co-existence of States and cooperation among them". Welfarist international law "corresponded originally to a whole set of eighteenth century

(2000) describes the international orders in the Spanish age (1494-1648), the French Age (1648-1815) and the English age (1815-1919). The European international lawyers usually trace the history of international law to 1648 because international law began to be codified and arranged after the Treaty of Westphalia. Even if pre-Westphalian history was narrated, it was again confined to European antiquity just like the writings of Wolfgang Preiser (1984) which takes the history of international law to Greco-Roman antiquity. Arthur Nussbaum (1947) rejects the international law in Indo-Chinese antiquity and recognises only European international law.

Apart from the above writings, The *Encyclopaedia of Public International Law* (published in 1984 and edited by Rudolf Bernhardt) has entries on the history of international law in different regions of the world like South Asia, South East Asia, Africa, the Far East, etc. These entries are sidelined by the elucidation of history of international law as evolved in Europe. Hence, more attention is given to the European narrative.

In addition to the above, the discipline is dealt with in detail in the *Journal of the History of International Law*. The first volume of the journal was published in 1999. Till date, there are 34 issues and 17 volumes of the journal. The Eurocentric history of international law is iterated and reiterated in such journals, and the non-European history is neglected.

An attempt has been made in compiling a global history of international law in *The Oxford Handbook of the History of International Law* (published in 2012 and edited by Bardo Fassbender and Anne Peters). It attempts to narrate a global history of international law by including different regions of the world and the interactions between them. It has included some of the themes like colonisation which are imperative for a critical approach to international law. The alternative for writing the global history of international law is by a national or local approach to the history of international law which discusses the activities of entities which are minor or principal actors but form a part of the history of international law (Peters and Fassbender 2014: 340). The handbook is an attempt of some of the international lawyers to give their national aspects of the history of international law. However, the

interventionist ideas and legal practices in which utility, happiness, the common weal and the material and moral betterment of peoples were the purpose of law" (Jouannet 2012: 1-2).

handbook could not escape criticism. It is agreed that the handbook includes the writings of non-European international law scholars on various topics, but, it is dominated by the European discourse. Furthermore, there are many generalisations made in the handbook. For instance, in the case of Islam and international law, Nahed Samour (2014: 314) points out that by dividing the narration into different regions, Islamic international law has been sidelined to Africa and Arabia whereas the handbook has neglected the pervasive nature of Islam throughout the world.

The international law formulated by the West not only glorifies itself but also attempts to dehistoricise other nations (Douzinas 2006: 37). The history of non-Europeans commences for the Europeans since the period of colonial encounter, and the narrations by the West erase the past before colonisation (Anghie 2004: 219). The historicity of non-Europeans was neglected, and European international law was imposed. The imposition of European international law was possible because of the undefined character of non-European societies and the military might of Europe (*Ibid* 64). The dissemination of European international law further blurred the non-European history of international law. Colonialism and imperialism were the means for the growth of European international law.

Colonialism and imperialism[7] eased the application of the concepts and ideas created by the Europeans to other parts of the world especially in the nineteenth century described as the *Age of Empire* by Eric Hobsbawm. One such European concept is "the nation-State system". The concept of nation-state system creates limitations for the study of the history of international law. It also forces the non-Western States to narrate the history of international law within the constraints of Western medium (Hanley 2014: 323).

Eurocentrism is inherent in the "standards of historiography". Many methodological problems arise while tracing the history of international law before 1648 and beyond Europe. One of the problems is regarding the definition of terms like 'foreign policy' and their differences from the term 'international relations'. Berg (1997: 1 quoted by Kintzinger 2012: 612) mentions that "any legal act of a ruler that

[7] "At some basic level, imperialism means thinking about, settling on, controlling land that you do not possess, that is distant that is lived on land and owned by others" (Said 1993: 5). Imperialism has had an impact on the present and will affect the future also. Colonialism, usually as a repercussion of imperialism "is the implanting of settlements on distant territory" (Said 1993: 8).

transcends the borders of his reign should be defined as foreign policy." There were many cultural practices followed in the courts of Kings by the envoys. Kintzinger (2012: 612) opines that such practices "were not able to substitute the norms of international law". We can see here that Europe set the standards of historiography by differentiating between foreign policy, international relations, cultural practices, etc. on cultural differences of Europe and its other. Thus, the rules governing inter-State relations of the non-Europeans were termed as mere cultural practices whereas the cultural practices of Europe gradually transformed into international law.

Moreover, the European perspective of the history of international law is characterised by two standard features. The first feature is the distinction made between State practice and the "discourse of international law". The second feature is the emphasis on the concepts of State and sovereignty[8] that undermine the theories, which led to the emergence of State (Craven 2012: 864).

Due to the emphasis on the concept of sovereignty, the non-European international law in antiquity is not recognised. A large number of modern scholars deny the existence of international law in antiquity and especially non-European antiquity. The basis of their argument is that the concept of sovereignty and a sense of universal community was absent in ancient polity (Bederman 2001: 12). This can be inferred as the result of the argument of international lawyers like Francisco De Vitoria who denied the existence of sovereignty among the *other* of Europe (in his case, the Indians). Sovereignty meant for them control over a defined territory (Anghie 2004: 57). A further emphasis on sovereignty and State was the characteristic of positivism that prevailed in international law in the nineteenth-century epoch.

Eurocentrism and positivism are inextricably interwoven. Positivism was one of the languages of European expansion (*Ibid* 66). Positivists prescribed that the non-Europeans could attain progress by adopting European model of institutions and laws (*Ibid* 63). The positivists denied the existence of international law in the regions

[8] Costas Douzinas (2006: 40) describes the rationale behind the concept of sovereignty as follows: "Jurisdiction is the name of the appearance of a community, the decision and determination to be in common. A community gathers itself as common or sovereign in jurisdiction, *juris dicere*: the speaking of law and law's word are the outward appearance of a community in its uniqueness. The act of setting the law as the common law is the presupposition of politics. It initiates and expresses community in its uniqueness but it also constructs the political as such. This event was later called sovereignty."

beyond Europe.[9] They excluded non-Europeans from the foundational concepts of international law viz. sovereignty, society and law (*Ibid* 63). When argued about the existence of international law among non-Europeans, the positivists put forth a counter argument that the laws of non-Europeans cannot lead to legal relations with the Europeans (*Ibid* 61). The aim of the writers who claimed that their civilisations also had international law tried to prove so because the Europeans asserted that the non-Europeans are incapable of understanding the international law which is formulated by the Europeans (Anand 2004: 11).

The predominant European approach discouraged and suppressed alternative approaches (Said 1993: xiii). Eurocentrism has mentioned the history, literature and ideas of Europe in such a manner that the rest were inferior to them (*Ibid* 51). They also assume that their culture is not dependent on other cultures (*Ibid* 134). It has belittled the indigenous traditions of the colonised peoples of the world, and its continuation aggravates international problems (Baxi 1972: 3). Continuation of Eurocentrism gives a myopic view of the history of international law because it cannot witness the existence of the principles of international law beyond Europe. It nullifies the civilisational exchanges in the history of international law.

Antony Anghie (2004: 195) recommends that the history of international law should go beyond the mainstream jurisprudence of positivism, naturalism and pragmatism as emerged out of Europe. Taking a cue from Said (1993: 22), he urges the need to narrate alternative histories, histories of the non-Europeans and the history of resistance against colonialism (Anghie 2004: 8). The need to narrate alternative histories of international law is because different civilisational and cultural perspectives will give different forms of criticising domination (Baxi 2012: 753). There is a necessity to consider "the pluriverses of the making of international law" to get rid of Eurocentrism (*Ibid* 748). The alternative histories challenge the dominant European approach. This is a form of resistance against Eurocentrism.

International lawyers narrating alternative histories have dealt with Eurocentrism in the history of international law in four ways (Koskenniemi 2013: 227). The first way is to narrate the colonial encounter subtly. The description itself is

[9] Positivism drew lines between civilised States and uncivilised States and therefore, international law was applied to civilised States only. Naturalism was not given due consideration as it did not support the civilised-uncivilised dichotomy and stood for universalism (Anghie 2004: 54-55).

very shocking so as to create an anti-colonial opinion. The second strategy is to trace the colonial origins of institutions which have been believed to be European. Third means is to use the colonial vocabulary of international law to achieve anti-colonial ends. The fourth approach is to "provincialize Europe" as suggested by Dipesh Chakrabarty. It means not considering the history of Europe as the history of the world. In the present study, the history of international law in ancient times until the Mughal rule is narrated without a colonial touch. However, the period wherein the Europeans arrived in India as traders is to be seen in the light of the impact of colonialism and imperialism. Thus, we can relatively adopt Chakrabarty's approach wherein we can see the history of India by placing Europe in the periphery. The colonial period discussed in Chapter IV of the study deals with the exploitation and atrocities committed by the British colonisers in India.

3. Alternative Histories of International Law

The Eurocentric history of international law has been challenged by alternative histories of international law. James Thuo Gathii (2012: 407) classifies the scholars of alternative perspectives into two viz. the contributionists and the critical theorists. Contributionists are the proponents of inter-civilisational/transcivilisational perspectives. The primary argument of contributionists is that international law is not exclusively a product of European civilisation whereas it is a creation of various civilisations of the world. Other civilisations, which confronted colonialism for a period, have also contributed to the formation of modern international law. Their aim is to assert the identity of States that were colonized earlier. The critical theorists as described by Gathii (2012: 408) argue for the shedding of imperialist character of international law. Critical theorists focus on the era of colonialism while describing the history of international law. They describe slave trade as an important aspect of the colonial rule. They also criticise the post-colonial State and international financial institutions.

Onuma Yasuaki challenges the Eurocentric history of international law through inter-civilisational/transcivilisational[10] perspective. He applies the perspective

[10] Onuma Yasuaki used the term *intercivilizational* in the article published in the *Journal of the History of International Law* in 2000. He adopted the term *transcivilizational* to describe his perspective of international law in the book published in 2010 (*A Transcivilizational Perspective on International Law: Questioning Prevalent Cognitive Frameworks in the Emerging Multi-polar and Multicivilizational World of the Twenty-First Century*).

in the study of the history of international law. According to Onuma, the world is not a creation of Europe whereas it is the making of various cultures and civilisations of the world. He calls for recognition of the plurality of civilisations[11]. Only the international and transnational perspectives cannot solve the problems in this multipolar world. It requires a transcivilisational perspective. The perspective aims at reflection of the interests, politics, culture and need of other civilisations (Onuma 2010: 30). Onuma (2010: 105) elucidates that the transcivilisational perspective:

> is a perspective from which we see, recognise, interpret, assess and seek to propose solutions to ideas, activities, affairs and problems that transcend national boundaries, by developing a cognitive and evaluative framework based on the deliberate recognition of the plurality of civilizations that have long existed in human history.

However, Onuma is criticised for giving a vague definition of civilisation and a mathematical understanding of civilisations. Secondly, the implementation of transcivilisational perspective is doubted because consensus cannot be reached between civilisations which will lead to further conflict. Onuma's proposal to consider General Assembly resolutions as a source of international law is also problematic because there may be two differing views of Buddhist civilisation and that of Islamic civilisation (Ahmad 2013: 717). His treatise is criticised for lack of "concreteness and contemporaneity" because he takes into consideration history and the future (Falk 2011: 836). He does not consider the impact of power-centrism of West in the contemporary world. The transcivilisational perspective is not connected to any contemporary conflict. Connecting religion, culture and civilisation to human rights has problems like discrimination against gender or minority groups (Barrow 2013: 193). Moreover, such linkage between human rights and civilisation may lead to "romanticising non-Western thought and practice" which has its own drawbacks like honour-killing, female genital mutilation etc. (Falk 2011: 838). He confines the study of history of international law to Islamic international law, Chinese civilisation and European civilisation. Hence, he neither deals with all the civilisations nor all the aspects of the mentioned civilisations.

[11] Onuma (2010: 105) says that humans belong to different civilisations at the same time. He proposes to adopt a functional definition of civilisation because adoption of a substantive definition of civilisation will be equivalent to agreeing with the *clash of civilisations* thesis proposed by Samuel Huntington (*Ibid* 83).

Another perspective dealing with the history of international law is the multicultural perspective. Yash Ghai (2009: 113) states that all societies have a dynamic culture. History of culture means the "history of cultural borrowings" (Said 1993: 261). Due to the porous nature of culture and impetus to cultural borrowings, multiculturalism as a concept evolved in the twentieth century. It is based on Hegel's philosophy of recognition (Bhandar 2009: 344). Multiculturalism considers all cultures[12] as equal. It aims at accommodating "a diverse range of cultural and religious practices and traditions" (*Ibid*).

In the contemporary times, globalisation is a means to disseminate multiculturalism due to interaction of different cultures. It creates hybrid cultures. Developing countries are sceptical about globalisation because they consider it as a kind of imperialism (Doshi 2003: 367-8). The cultural diversity within the majority of nations is overlooked due to the threat from globalisation. An emphasis on identity and ethnicity is leading to ethnic conflicts now and then. Identity revolves around ethnicity which leads to conflicts. Ethnic conflicts cause political conflicts in many parts of the post-cold war world (Kymlicka 1995: 1). It is requisite to understand other cultures to prevent such conflicts (Said 1993: 21). The problems like fundamentalism, xenophobia and others arise due to lack of legitimacy of international law. Therefore, the proponents of multicultural approach to international law call for adoption of this perspective to increase the legitimacy of international law.

Multicultural approach to the history of international law has many advocates. C. Wilfred Jenks (1958: 3) uses the term "Common law of mankind" and ponders over the question as to how the law can include concepts varying from Islamic law, Chinese law, Jewish law, Hindu law, etc. to make a truly multicultural international

[12] Margaret Mead (1943: 21) says, "we are our culture". Before Mead claimed so, culture was associated with literature, art and music (Reeves 2004: 1). Matthew Arnold associates culture with the best, which has been said and thought in the world (Arnold 1869/1994: 5). Mead's idea of culture is associated with the anthropological aspect of culture as popular now whereas Arnold's idea represents a humanistic concept. Kymlicka (1995: 18) uses the term culture similar to "'a nation' or 'a people'- that is as an integrational community, more or less institutionally complete, occupying a given territory or homeland, sharing a distinct language and history." For Edward Said (1993: xii), culture "means all those practices, like the arts of description, communication, and representation, that have relative autonomy from the economic, social and political realms and that often exist in aesthetic forms, one of whose principal aims is pleasure". He takes cue from Mathew Arnold and describes culture as "each society's reservoir of the best that has been known and thought" (Said 1993: xiii).

law. T.O Elias (1972: 33) argues for consensus as the basis of international law which reflects the legal systems and cultures of the world. Elias' contribution is towards Africa's role in the history of international law. The multicultural perspective emphasises the cultural relevance of international law (Koroma 2009: 81). International law cannot be monocultural but multicultural (Weeramantry 1997: 97). Edward McWhinney viewed UN as a reflection of multiculturalism after the process of decolonisation (UN Lecture http://legal.un.org/avl/ls/McWhinney_IL.html). The critique against multiculturalism and its application in different disciplines like the history of international law is that it encourages extremism as cultures are segregated. It also emphasises on different cultures thereby avoiding the common culture of any nation (Xanthaki 2010: 22, Thirlway 2009: 98).

The plurality existing in legal systems is analysed by contemporary legal theorists Patrick Glenn and William Twining. Glenn (2014: 378) argues that to withstand diversity, the major legal traditions of the world is to be accepted and not tolerated. A loss of one legal tradition is to be viewed as a loss to others because of their interdependence. When legal pluralism is treated as an offshoot of normative pluralism then it minimises the centrality provided to States and connects more to people (Twining 2009: 515). Will Hanley (2014: 326) emphasises on the contemplation of scholarly works on legal pluralism describing the diversity of legal systems of the world in the study of history of international law (Hanley 2014: 326). International law tries to bring uniformity and homogeneity in the domestic legal systems. Diversity is the norm and to bring uniformity in laws will be repressive and a threat to global peace (Menski 2006: 3-4). The gap between municipal law and international law is getting blurred (Kennedy 1997: 126). Hence, the history of international law from a pluralistic perspective tries to highlight diversity and preserve the same. The term pluralism recognises the existence of diverse legal systems, civilisations and cultures. Pluralism aims at legal equality whereas multiculturalism aims to go beyond this legal equality, eliminate discrimination and achieve individual freedom. Due to this difference in terminology, scholars like Gurpreet Mahajan (1998) adopt the term multiculturalism.

The third world approaches to international law or TWAIL is another perspective which challenges the Eurocentric history of international law. It views

international law from the lens of the third world states intertwined with a common colonial history of exploitation. The first generation of TWAIL scholars namely R.P. Anand, C. H. Alexandrowicz, Judge T.O. Elias, Judge Nagendra Singh, S P Sinha and others narrated the third world history of international law challenging the Eurocentric history of international law. Their basic arguments were that international law is Eurocentric and colonialism shielded the international legal principles that existed in pre-colonial past of the third world States. The efforts of the TWAIL scholars was not outright rejection of international law but to legitimise it by creating a "universal" international law reflecting the aspirations of the third world States (Chimni 2007: 501). The contemporary TWAIL scholar Anthony Anghie's (2004: 1) narration of the history of international law revolves around the central role played by colonialism and imperialism. The difference between the first generation and the second generation of TWAIL scholars is that the former did not analyse the depth of linkage between colonialism and international law thereby they failed to critique the post-colonial State (Chimni 2007: 502). They separated history from law whereas the second generation of TWAIL scholars focussed on the repercussions of past on the present (Orford 2012: 11). Furthermore, the first generation did not reflect upon the role of class, caste and gender in the discourse of history of international law (Chimni 2007: 503). Their thrust was confined to State as a subject of international law.

The Marxist perspective to the history of international law analyses the discipline through the lens of historical materialism. The critical Marxist international law scholarship "advances more meaningful definitions that distinguish the character of international law and its doctrines in different historical phases and identifies the groups/classes/states that are the principal movers and beneficiaries" (Chimni 2004: 4). The Marxist perspective links the history of international law to different phases of the evolution of "global capitalism" (Chimni 1999: 338). China Miéville (2005) narrates the history of international law from the sixteenth century through a Marxist perspective. His narration excludes "social history of legal and political thought" (Pal 2013: 8). He adopts the commodity exchange perspective of Pashukanis which takes economic base to determine the legal and political aspects (Moxon 2007: 346). His narration is confined to the European history of international law.

The history of international law is also viewed through the lens of post-colonialism. Post-colonialism in the beginning was used to refer to the period after colonisation. It gained a critical tinge in the 1980s when the just world order envisaged by the post-colonialists was not materialised (Otto 1999: vii). The problem with post-colonialism is the vast time and space considered for study (Olaniyan 1993: 744). The period considered ranges from the period of colonisation till present. The geographical space considered is all nations which underwent colonialism. Hence, historical specificity does not exist in the perspective. Tejumoa Olaniyan (1993: 746) opines that on reflection, we can see that we have left out many things in meeting the standards of historical specificity and hence, it is not required to hold it at a sacrosanct pedestal. The struggle against the post-colonial State is because of its "Eurocentric and never decolonised" form (Olaniyan 1993: 747). The Postcolonial scholars are ambivalent because of two possibilities viz. to reject international law as part and parcel of imperialism or to contemplate that the Europeans never followed the standards they upheld. Thus, we confront the problems of substituting the current vocabulary of international law with a new one and of realism which situates power above international law (Koskenniemi 2013: 224). For this Koskenniemi (2013: 224) suggests that the scholars should use the existing vocabulary to solve the existing problems in the best manner or to replace them with new ones. To counter colonialism, we also need to look at the pre-colonial history of the colonised States. Post-colonialism emphasises too much on colonialism and thereby, pre-colonial history of international law is receded to the background.

Another approach towards the history of international law is the critical approach. Critical international studies is an off-shoot of the post-modern approach (Carty 1991: 1). It criticises the positivist approach. The critical theorists analyse as to whether the language of international law with regard to universalism is correct. The critical theorists do not aim at replacing the present international order, but they support inter-cultural and inter-state dialogue (*Ibid* 2). In the narratives, we should go beyond states, empires, etc. and include the role of social classes (Koskenniemi 2013: 237). A critical history of international law should consider the contexts of narratives and the continuation of those contexts till present (*Ibid* 238). The purpose of writing history from a critical legal studies perspective is to analyse "context breaking

moments, ideas, and practices that transform what was taken for granted, as well as the accompanying hierarchies" (*Ibid* 240).

The present study on the history of international law in pre-independent India is written from an alternative perspective, the multicivilisational perspective. It challenges the Eurocentric history of international law. Before moving on to the perspective, meaning of civilisation, the clash of civilisation thesis and the features of Indian civilisation are elucidated.

4. Multicivilisational Perspective of the History of International Law

4.1 Meaning of Civilisation

Civilisation is one of the most contentious issues today because some believe it is "the epitome of human achievement", but for some, it threatens "traditional beliefs" (Mazlish 2004: x). Due to the discussions on civilisation, the UN declared 2001 as the year of the "Discourse on Civilization". The discourse of civilisation, still continues due to the increasing multipolarity in the world.

Mazlish (2004) proves through a historical study that the meaning of the term "civilisation" has different connotations. The word civilisation existed in Arabic and was called *Madaniya* which means city-ness based on the first Muslim city Medina. In the linkage between city, empire and religion and civilisations as mentioned by many scholars, there are multi-ethnic cities which reflect "universalist ideas" (Aktürk 2009: 64). The origin of the concept is associated with the European expansion beginning in the fifteenth century and got moulded in the eighteenth century with further colonisation (Mazlish 2004: 8). Thus, in the colonial era, the concept of race was linked to civilisation (*Ibid* 62). It is interconnected with modernity and its consequences (*Ibid* 12). The concept of civilisation in Germany was attached to aristocracy and etiquette, politeness, etc. in outward behaviour (Aktürk 2009: 63). Some views consider historical consciousness as a prerequisite for civilisation (Mazlish 2004: 19). Now, the status of women is also being considered to determine "the level of" civilisation (*Ibid* 157). Civilisation is a restraint to war and violence. But, the irony is that the spreading of civilisation was with the help of force (*Ibid* 158).

For John Stuart Mill, economic development is the soul of modern civilisation (*Ibid* 75) Fernand Braudel (1995: 4) treats civilization as the opposite of barbarism. Norbert Elias deals with the concept of civilisation and culture as originated in Germany, France and England. The difference in meaning of the terms was a reflection of class struggle according to him (Elias 1978: xiii). Sigmund Freud (1930: 50) in his book *Civilization and its Discontents* argues that civilisation is repressive and a cause of human unhappiness. He drew the conclusion from the fact that the interests of social cohesion are kept above personal happiness. His work was a setback for the claim of superiority of European civilisation.

The concept of civilisation has varied definitions.[13] Huntington (1996: 43) defines civilisation as follows:

> A civilization is the broadest cultural entity short of that which distinguishes humans from other species….It is defined both by common objective elements, such as language, history, religion, customs, institutions, and by the subjective self-identification of people….Civilizations are the biggest 'we' within which we feel culturally at home as distinguished from all the other 'themes' out there.

Fred Dallmayr (2006: 34) defines it as "an intricate, multi-layered fabric composed of different, often tensional layers or strands; moreover, every layer in that fabric is subject to multiple interpretations or readings, and so is the inter-relation of historical strands."

The Statute of the International Court of Justice also mentions civilisation. Initially, Article 38 of the ICJ Statute implied European civilisation.[14] Most of the

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[13] We can see that some scholars have differentiated between the concepts of culture and civilisation and others use the terms interchangeably. The concept of culture originated as a repercussion to that of civilisation. A culture was more rooted to land and agriculture and confined to a small group (Mazlish 2004: 21). For Germans, culture reflected virtue and civilisation represented superficiality (Aktürk 2009: 63). Cultures are 'complex organisms' (Gunn 2012: 201). Culture is more local, and civilisations are more widespread and claimed universality. Civilisation was characterised by "settled cities, surpluses, labor divisions, social stratifications and so on" (Mazlish 2004: 149). Forms which give a distinctive character to cultures and civilisations are aesthetic, religious and legal (Gunn 2012: 202). Freud treats both these terms as having the same connotation and describes them as "all those respects in which human life has raised itself above animal conditions and in which it differs from the life of the beasts" (Freud in *The Future of an Illusion* as quoted in Mazlish 2004: 150).

[14] Article 38, Statute of the International Court of Justice:
"1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
b. international custom, as evidence of a general practice accepted as law;
c. the general principles of law recognized by *civilized* nations;

States were colonised at the time of formulation of the Statute, and hence, their opinions were not given adequate consideration. Article 9 of the Statute call for representation of all main forms of civilisations.[15] The representation from third world to the ICJ after the process of decolonisation contributed towards changing the European authority in the ICJ to some extent.

We can see that the concept of civilisation has negative as well as positive connotations and hence, some scholars support it whereas others oppose it. However, we cannot halt the scholarly discussions on civilisation due to its negative connotations. As is discussed here, civilisation is beyond nation-State and all sort of boundaries. Hence, it needs intellectual attention so that we can find solutions for persisting problems and achieve international justice by imbuing the concept in international law. Perhaps, the need of the times is self-introspection by civilisations to solve the problems within and without them. It is because of "historicity, mobility, and adaptability that even in times of crisis, when their back, as it were, is up against the wall, civilizations can be repositories of ideas and values that were capable- at least potentially- of being widely shared even when variously expressed" (Gunn 2012: 201). The attempt should be to point out some shared values and beliefs from other cultures and civilisations which can be done by "reading, deciphering and interpreting" of other civilisations and by translating wherein the "practices, performances or purposes of one mind, culture, or civilization back into the purported idioms of our own" (*Ibid* 202-203).

For spreading the values of a civilisation, it depends on an epistemic community. The community upholds its ideas and basic features (Aktürk 2009: 65). Ibn Battuta was one of the epitomes of Islamic civilisation because he travelled far and wide and had discussions with the learned in Arabic (*Ibid*). Today, the only civilisation with a specific epistemic community spreading its canons is the Western

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d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto."

15 Article 9 of the Statute of the International Court of Justice provides:
"At every election, the electors shall bear in mind not only that the persons to be elected should individually possess the qualifications required, but also that in the body as a whole the representation of the main forms of *civilization* and of the principal legal systems of the world should be assured."

civilisation (*Ibid* 66). It is true that Western civilisation has had been prominent in the decision-making process because of the power it wields in the international sphere, but, it is to be accepted that other civilisations have also expanded today and are paving way to establish their presence in all spheres, in the context of our study, in international law.

The term *nations civilisées* was introduced in international law in the Congress of Vienna. The term "replaced Christian notions of community as 'the uniting spirit of international law'" (Duchhardt 2012: 650). Thus, the aim was to make the world a "community of civilised nations" (*Ibid*). Europe determined as to which State was to be admitted into the international society. In the Congress of Vienna, the power was wielded by the Europeans to accept, recognise or reject new States (Anand 1986: 17). Such exclusion of particular political entities from the purview of international law left two questions unanswered. First as to who were the members of international society? Secondly, how the excluded political entities from the gamut of international law were to be dealt with in international relations.

Thus, the civilised-uncivilised dichotomy arose in international law. In the history of international law, the centre-periphery dichotomy is linked to civilised-uncivilised dichotomy. The centre is described as civilised, and the periphery as uncivilised (Mälksoo 2012: 766). During the period of colonisation, "conquest and civilizing become synonyms" (Mazlish 2004: 24). Thus, the purpose of conquest was justified as an attempt to civilise barbarians. The Europeans "distinguished between the vitality of their world and the decadence of other worlds" (Onuf 2008: 423). In the instance of India, the administrators of British Raj considered themselves as superior to the race of Indians. They believed that they were bequeathing "the inestimable blessings of civilization" (Farwell 1989: 57).

The concept of civilisation can be analysed in two ways. First, it can be understood as a Eurocentric creation wherein the whole world is supposed to emulate European civilisation. Secondly, it can be considered as "a universalistic measuring rod" by which all societies can be compared, and there arises the role of comparative civilisations. In the latter view, "civilization is a particular, extended form of cultural, social order and feeling. It is also a deed, a movement, a process" (Mazlish 2004: 18). All civilisations should be treated equally without granting primacy to one single

civilisation due to technological advancement or whatsoever. The recognition of values of all civilisations need to be highlighted in this context. Civilisations have always been interactive and therefore, one civilisation cannot transplant another civilisation.

We can see that all civilisations have a universalist outlook. This is evident in religions which are part of civilisations. All the great religions assume that their religion is universally applicable and binding on others. Universality, when taken as the end is the principal reason behind conflicts arising out of religions. Thus, Islam envisions *Ummah* which is a global Muslim community. Ancient Indian texts consider whole world as a family - *Vasudeva Kutumbakam*. If we understand this universality from a humanist perspective, then it can bring peace.

In the context of the multicivilisational perspective of international law, the meaning of civilisation does not aim at an "essentialist cultural/civilizational explanation" (Chimni 2008: 250). Hence, we take into account civilisation which is beyond the boundaries of the nation-State system. It is defined by certain values which can enhance international law to counter Eurocentrism and legitimise international law. In this background, the present study culls out the features of Indian civilisation which can enhance international law.

4.2 Indian Civilisation

The Indian scholars who described Indian civilisation aimed at “talking back” to the colonialists who belittled the ancient Indian civilisation and to argue for “India’s civilisational unity in the past” (Bhattarcharya 2011: 2). The first aim led to excessive pride in Hindu civilisation, and the latter led to equating the civilisational unity to the national unity as asserted by the Europeans. Nevertheless, a cumulative result of the analyses of Indian civilisation has helped us in understanding the civilisational values of Indian civilisation.

Bankimchandra Chatterjee and R.G. Bhandarkar bring to light the better part of Western civilisation. Chatterjee appreciates the political and social values of Western civilisation. For him, the reasons behind the supremacy of Europe are nationalism and science. He advocates "for India a universalist ideal which included love for one's kins, love for the country (*swadesh priti*) and a friendly regard for the

world as a whole" (*Ibid* 36). Thus, his notion of considering the world as one is important today in the sphere of international relations and international law due to the increasing threat of fundamentalism. R.G. Bhandarkar does not support vainglorious attitude towards Indian civilisation, but, he stands for a critical approach towards the same (*Ibid* 40). He appreciates the inherent element of progress in western civilisation. Swami Vivekananda urges the need to learn from the Western civilisation. He criticised Indian civilisation for the emphasis on "occultism and mysticism" (*The Complete Works of Swami Vivekanada*; See also Nehru 1946: 341).

Mohandas Karamchand Gandhi (in Parel ed. 1997: 36) does not favour modern civilisation because of its non-recognition of religion and morality. According to him, "civilisation is that mode of conduct which points out to man the path of duty" (Gandhi in Parel ed.1997: 67). He believes that there are drawbacks in each civilisation and an attempt to change for the good will continue (Gandhi in Parel ed.1997: 71). In the book *Hind Swaraj*, Gandhi refers to Indian civilisation and not Hindu civilisation. He recognises the plurality in Indian civilisation. Similarly, Rabindranath Tagore emphasise on plurality. He views Indian civilisation as a 'syncretic' civilisation (Bhattacharya 2011: 4). He distinguishes between civilisation as *dharma* and the European civilisation. The former holds together (derived from the etymological meaning of *dharma*) whereas in the latter the "ideal of civilisation" is sidelined by the craving for material wealth and power (*Ibid* 78). The syncretic nature of Indian civilisation is also recognised by Jawaharlal Nehru emphasises in his writings. According to him only India and China has that civilisational unity within their respective civilisations despite the longue durée (Nehru 1946: 77). His book, *The Discovery of India* narrates the history of India from a civilisational perspective, unlike the other historical narrations focussing on dynasties, wars, etc.

R. K. Mookerji (1914: 32) argues in his book *The Fundamental Unity of India* that there was unity in India long before the British united the political entities. He claims that the unity can be seen in the hymn in the *Rig Veda* invoking the rivers of India, the sacrosanct places visited by the Hindus ranging from Kashmir in the north to Kanya Kumari in the South, the concept of *chakravarti* (universal ruler who aims at aggrandising vast territories of land) and the concept of "Greater India" which had cultural relations with South-East Asia. All the aspects described above attribute unity of India to Hinduism. V.D. Savarkar also related Indian civilisation to Hinduism.

Rather than focussing on religions, Sri Aurobindo (1997: 187) attributes the uniqueness of Indian civilisation to spirituality. A challenge to communalism was put forward by Abul Kalam Azad. For him, the essence of Indian civilisation is tolerance. He recollects the Hindu-Muslim unity in the first war for independence fought in 1857 against the British. He was against the communalism and the division created by the British amongst Hindus and Muslims (Bhattacharya 2011: 127).

D.D. Kosambi published the book *The Culture and Civilization of Ancient India* in 1970. He traced the continuity of the present to ancient times. He linked the present means of production to the past (Kosambi 1970: 10). One of the problems with the argument of continuity of Indian civilisation is the differences between the Indus valley civilisation and the Vedic civilisation (Bhattacharya 2011: 119). Since a civilisation is subject to change, the basic concepts of civilisation also change over time (for instance, the discussion on *dharma* in the second chapter of this study) (*Ibid* 121). Such a change cannot overtly mean there is continuity, but Daya Krishna (2005: 44-47) applies Ludwig Wittgenstein's concept of 'family resemblance' to link the concepts of past to that of the present. Indian civilisation is peculiar according to Fred Dallmayr (1996: x). It is "a civilization where older and oldest strands of culture are overlayered by newer and more recent strands, but without being smothered or eradicated in the process".

From the above discussion, we can cull out the values of Indian civilisation as syncretic culture, tolerance, spirituality, emphasis on *dharma* or duty.[16] We can also see that the great thinkers of India point out that India civilisation is not perfect. In the present study, international law is applied as a tool to come out with solutions for problems in Indian civilisation. Similarly, in the two-way process of the multicivilisational perspective of international law, the values of Indian civilisation can enhance international law to increase its legitimacy.

4.3 Clash of Civilisations

Scholars like Oswald Spengler, Arnold Toynbee and in recent times Samuel Huntington believe that civilisations are not subject to the influence of other

[16] It is to be noted that it is not an exclusive list of civilisational values. These values existed in Indian civilisation and continue to do so. The dynamic nature of civilisation can keep adding many values according to the need of the times.

civilisations. They divided civilisations "territorially and associated with a single language and religion" (Thapar 2014: 13). The categorisation by Huntington cannot be termed as civilisation because his study is on power blocs which are based on religious beliefs (Bhattacharya 2011: 147). Samuel Huntington divided civilisations into watertight compartments which do not accept other civilisations (Said 1995: 348). His description lacks conceptual clarity (Aktürk 2009: 50). Furthermore, there is no common basis of classification (Bhattacharya 2011: 148).[17]

Civilisation is porous within and without unlike the argument of Huntington, but the prejudices on civilisation are reflected from arguments like "Muslim Practices", "Asian values" etc. (Gunn 2012: 200). We cannot claim any civilisation to be completely indigenous because in history there was international communication and exchange of ideas (Rai 1929: 188). Cultures and civilisations are interdependent and cannot assert individuality at all times (Said 1995: 348). Civilisations cannot be confined to strict markings of territories and boundaries. They are "interwoven" with the exchange of ideas (Thapar 2014: 14). They are subject to "accivilization" just like acculturation that means borrowing some aspects of different civilisations without losing its essential characteristics (Mazlish 2004: 3-4).

It cannot be denied that Europeans tried to understand and learn about the peoples they conquered. The knowledge gained in this manner was to increase the power they wielded and spread the tentacles of imperialism. In this interaction with the world, Europeans were influenced by different civilisations. The influence of different practices, about international law on other civilisations, requires thorough research. The Europeans were influenced by the Asian legal system (Anand 1986: 3). The influence has been kept clandestine due to the colonial narratives (*Ibid* 4). Now, the history of different civilisations is not written by the Europeans but by the people who belong to those civilisations.

Civilisation is threatened by the globalisation process, the local and regional factors as well (Gunn 2012: 201). There is a need to highlight and uphold the values of all civilisations so that these values are not destroyed in the long run. The concept of civilisation has had its vicissitudes, and its meaning has changed over these

[17] Huntington divides two civilisations on the basis of geography (Africa and Latin America), three are based on culture (Sinic, Western and Islamic) and the other three concentrate on the religions predominant in the region (Islamic, Hindu and Christian).

centuries of its usage. It is imperative to understand the concept in its present connotation. At present, the definition as originated in Europe is not relevant.

Huntington's primary flaw is in dividing the civilisations of the world by religions. He classified India under Hindu civilisation despite the fact that under the purview of Islamic civilisation, there are less number of Muslims than in India (Sen 2005: 54). He treated "the Muslim world and its belief systems as more or less a monolith" (Mazlish 2004: 115). He emphasised on the Christian-Muslim rivalry and avoided other perspectives (Menski 2006: 4). It is difficult to point out a separate Islamic civilisation at present which is spread by the epistemic communities and the percolating civilising process from the higher education to masses (Aktürk 2009: 66). The significance and influence of religion on all civilisations cannot be denied (Rai 1929: 189).

Mazlish (2004: 116) opines that the clash is not between civilisations but within civilisations. There are many cultures within a civilisation which crave for recognition and equality. Arjun Appadurai (2006: 25) describes clash within civilisations as a struggle between the vertebrate and cellular geopolitical systems wherein the former is represented by organisations like UN and the latter by terrorist organisations like Al Qaeda and he provides the solution of a global civil society which will not be under the control of nation-state system.

There is a difference between all civilisations and cultures. Gunn (2012: 211-212) suggests that dialogue with other civilisations and cultures, despite the differences will lead to "self-development and self-realization" of one's civilisation, culture and individuals. The exponents of dialogue between civilisations have a political and cultural agenda of reform wherein they want their civilisations to be open to the West simultaneously without losing their "cultural traditions" (Mazlish 2004: 116). The dialogue between civilisations recognises the significance of all civilisations today (*Ibid* 125). Dialogue existed earlier also to some extent. It proves that no culture is "single and pure, all are hybrid, heterogeneous, extraordinarily differentiated, and unmonolithic" (Said 1993: xxiv).

Fred Dallmayr (1996: 36) also suggests an interaction of cultures. He suggests that cultures should "undergo a mutual learning process while simultaneously preserving the distinctiveness or difference of their traditions." Dialogue restrains the

hegemony of a single culture (Dallmayr 2009: 38). Such a dialogue should be based on equality and should keep global justice as its aim (Chimni 2008: 251). The European civilisation and other civilisations have to enter into dialogue on equal footing and create a global civilisation (Mazlish 2004: 111). A cross-cultural dialogue is emphasised by Fabio Petito (2009:51). He calls for such a dialogue to constitute international law which will have a better legitimacy (Petito 2009: 57).

4.3 The Perspective

The foundation of any legal system[18] is the values inherent in its civilisation (Weeramantry 1997: 108). Judge Weeramantry considers different cultures, civilisations and legal traditions in his writings and judgments for making international law universal.[19] In the times, when the legitimacy of international law is questioned because of dominating Eurocentric approach, we have to see international law through the lens of different civilisations and connect it to their past. International law demands a multicivilisational perspective for better implementation.

International law should accept the diversity of cultural and regional legal systems, and this can be realised by the narration of alternative histories. The changing economic and political setup at the international level wherein a multipolar, multicivilisational and multicultural world is created, a truly global history of international law is an imperative. The aim to narrate a global history should highlight the "co-existence of civilisations, colonialism and resistance to colonial power" (Shapiee 2008: 3). The history of international law can be truly global if it adopts a multicivilisational perspective.

As discussed in Section 2, the concepts created by Europe dominate the history of international law. Before the formation of the nation-State system, individuals viewed international trends through “inter-religious or inter-communal perspectives” (Onuma 2010: 62). The nation-State system did not exist in antiquity.[20] There is a need to go beyond the boundaries of the nation-State system to narrate the history of international law. The discipline is studied since the treaty of Westphalia of

[18] Legal system, according to Weeramantry, includes written as well as the traditional legal system.

[19] “The most critical aspect of Weeramantry’s legal and political project that keeps resurfacing periodically is the introduction of perspectives from other systems” (Mallavarapu 2007: 117).

[20] Many scholars argue that the State of ancient and medieval India was not territorially marked because they believed in the formation of a universal State. Satish Chandra (2003: 37) argues that even the medieval Christian State was of the same character.

1648 due to the emphasis on nation-State system. Thus, State practice remains the primary concern. The "world and struggles" of peoples should be distinguished from practices of States (Chimni 2012: 29). The struggles of peoples should reflect in the discipline. In this study, an attempt is made to view the history of international law in India from a multicivilisational perspective in contrast to that of the nation-State viewpoint. It tries to include the perspective of peoples in the discipline.

Some of the basic concepts of international law with focus on the history of international law are challenged by scholars like Judge Christopher Weeramantry, R.P. Anand, Judge Nagendra Singh, C.H. Alexandrowicz and others. They argued to change the Eurocentric approach to international law. At present, scholars like Onuma and others, focussing on the civilisational approach are challenging the Eurocentric perspective.[21] The present study is a humble attempt to study the history of international law in pre-independent India from a multicivilisational approach challenging the Eurocentric history of international law.

R.P. Anand's (1983: 342) view on multicivilisational perspective is enunciated as follows. He says it is incorrect

> to assume that international law has developed only during the last four or five hundred years and only in Europe, or that Christian civilization has enjoyed a monopoly in regard to prescription of rules to govern inter-state conduct. As Majid Khadduri points out: 'In each civilization the population tended to develop within itself a community of political entities – a family of nations – whose interrelationships were regulated by a set of customary rules and practices, rather than being a single nation governed by a single authority and a single system of law.[22] Several families of nations existed or coexisted in areas such as ancient Near East, Greece and Rome, China, Islam and Western Christendom, where at least one distinct civilization had developed in each of them. Within each civilization a body of principles and rules developed for regulating the conduct of states with one another in peace and war'.

European civilisational values have been predominant in all spheres due to the heavy impact of colonisation. International law is also a creation of Europe for securing its rule in the colonies. Thus, we can see that other civilisations were not

[21] "The civilisational aspect of international law appears to be specific to Asia, and the scholarship in this area is encompassing and challenging some of the basic principles of international law" (Hegde 2013: 427).

[22] Majid Khadduri (1966: 2) says, "Earlier systems of the law of nations however, in contrast with the contemporary were not world-wide in character. Each system concerned itself essentially with regulating the relationship of entities and nations within a limited area of the world and within one civilization or more."

paid much heed. The period of colonialism is over, but, international law still continues with the ideas inculcated by Europe. International politics has changed to a large extent because of the multipolarity explicitly visible after the disintegration of Union of Soviet Socialist Republics (USSR). The emergence of different powers in the international relations cannot be managed with the European international law. It requires that other civilisations should be taken into account while narrating the history of international law and thereby, reframe the contemporary international law to make it truly multicivilisational.

The multicivilisational perspective of international law as used in the present study, calls for recognition of the plurality of civilisations. There are many civilisations apart from European civilisation. The perspective calls for recognition to all these civilisations and consider them equal to the European civilisation.

All civilisations have some predominant features in comparison to other features (Chimni 2008: 250). It is imperative to "retrieve traditions and practices from all civilisations that encourage tolerance and the peaceful co-existence of cultures and religions" (Chimni 2012: 306). Culling out principles from different civilisations and applying them to international law will result in a truly multicivilisational and universal international law.

The present study is about the history of international law in Indian civilisation. Like the division of other civilisations based on one religion and one language, Indian civilisation was believed to be characterised by Hinduism and Sanskrit (Thapar 2014: 14). Since the Indian civilisation cannot be defined by Hinduism, the term "Indian civilisation" should be used instead of "Hindu Civilisation". Similarly, the understanding of Indian culture is confined to "upper caste culture" (*Ibid* 179). This hindered the thought that the Indian civilisation is pluralistic and is an epitome of diversity. With interactions with so many civilisations, it is moulded into its present form with values which are upheld till date. Some of the emulatory values of the Indian civilisation (as will be elaborated in respective chapters) are *dharma*, non-violence, eclectic culture, etc. Heterogeneity of Indian civilisation needs to be accepted despite these common values. The following observation of Alexandrowicz (1965-1966: 306) is relevant at this juncture:

> The dynastic legitimism and to some extent inter-dynastic solidarity are two of the elements which gave some coherence to the otherwise heterogeneous network of States in the Indian sub-continent. Heterogeneity was first and foremost linguistic (as it is today), but also racial or ethnical, if we consider the differences between the Aryan North and the Dravidian South.

Heterogeneity is threatened today. The plurality of cultures is not recognised when the State takes interest in it. The State supports homogenisation of cultures so that it can ease its control over the vast population. Thus, enters the political agenda behind culture (Thapar 2014: 217). There arises a need to go beyond the nation-State system and avoid politics in the construction of international law. International law should reflect the aspirations of social classes, third world and the suppressed peoples of the world who are part of this heterogeneity.

5. India and the History of International Law

Indian history has been narrated by different set of historians like the colonialists, the nationalists, the subaltern historians and others. For the colonialists, the aim of studying histories of colonies was "to understand its alien culture, to govern its strange peoples and to exploit its wealth" (Thapar 2014: 43). They came out with orientalism[23] which speaks the language of the powerful. The narratives are "stamped with an otherness" (Malek as quoted in Said 1978: 97). It "creates the Orient, the Oriental, and his world" (Said 1978: 40). The knowledge of the Orientals was necessary for the Occident to gain power (*Ibid* 36). Orientalism has bequeathed a version of history that does not help us in understanding our past because the function of history has been to legitimise power (Thapar 2000: 164).

The British colonisers studied Indian history to strengthen the colonial rule. Rabindranath Tagore opines that real history was hidden from the people of India. Historians like Vincent Smith focussed on great personalities like Ashoka and Akbar. Their contribution to history thus confines to heroism (Thapar 1968: 325). These

[23] The term Orientalism is used by Edward Said (1978: 73) in a generic sense "to describe the Western approach to the Orient; Orientalism is the discipline by which the Orient was (and is) approached systematically, as a topic of learning, discovery and practice. He also uses the term "to designate that collection of dreams, images and vocabularies available to anyone who has tried to talk about what lies east of the dividing line. These two aspects of Orientalism are not incongruent since by use of them both Europe could advance securely and unmetaphorically upon the Orient." According to him, "Orientalism, which is the system of European or Western knowledge about the Orient, thus becomes synonymous with European domination of the Orient" (Said 1978: 197). It can "be regarded as a manner of regularized (or Orientalized) writing, vision, and study, dominated by imperatives, perspectives, and ideological biases ostensibly suited to the Orient" (*Ibid* 202).

narrations have annihilated the humanistic values (Said 1978: 110). The history books narrate the history of rulers, dynasties, wars, invasions. They never highlighted the lives of the people of India (Bhattacharya 2011: 70).

The nineteenth-century European ideas shaped the study of Indian history. The nationalist view of Indian history was a reaction to the European view. Consequently, there were two perspectives of Indian history viz. the European and nationalistic perspectives (Thapar 2014: 9). The European perspective was largely framed by the writings of James Mill. James Mill divided Indian history into three, Hindu, Muslim and British periods.[24] Such a division was "monolithic" by considering the Hindu and Muslim rule in respective periods (*Ibid* 10). The periodization continues even today. There is a dire need to change the periodisation of Indian history (the Hindu-Islamic-Christian periods)[25] because it is based on the religion of the rulers of North India at different times. Even though Ancient-Medieval-Modern periodisation is the terminology used now but the quintessence of division remains the same (Thapar 1968: 335).

Apart from periodisation, there are other limitations in the European narration of Indian history. The sources available to the Europeans for interpretation of Indian history were those written by Brahmins (*Ibid* 320). The nationalist historians of the Indian 'renaissance' period, also based their study on Brahminical texts (Thapar 2014: 30). The texts used for historical study reflect the perceptions of the elite class. Texts written by women, Dalits, etc. could not survive the test of time (*Ibid* 28). Thus, the predominant texts do not reflect the aspirations of women, dalits and the oppressed classes.

There were some generalisations and assertions made by the European historians about India (*Ibid* 10-12). First, they considered Indian economy static without any economic development and the political economy was affected by

[24] Indian history was divided into three periods according to the religion of rulers. These were called ancient, medieval and modern periods. The ancient period was ruled by Hindus, medieval by Muslims and the modern by British. Such a division was according to the rule in northern India and only based on the religion of the rulers of major dynasties. This nullifies the plurality of the ancient period which had diversity in religions. For instance, the heterodox sects of Buddhism and Jainism influenced a vast population.

[25] This is a generalisation of the religion of the leaders without taking into consideration the socio-economic aspects of history.

"Oriental despotism". Secondly, Indians did not have a sense of history, and there was no historical writing. Thirdly, Indian society always followed caste system.

In the counter-narratives, the nationalist historians eulogised Indian history, traced geographical unity of India to ancient times. They were influenced by the freedom struggle, which propagated nationalism (*Ibid* 328). *Arthasastra* of Kautilya became a tool for the Indian historians to counter many of the arguments raised on Indian history by the Europeans. They put forth, by exemplifying *Arthasastra*, that there were political institutions in ancient India, powerful monarch similar to the British monarch. Kautilya was compared to the intellect of Bismarck and Machiavelli.

The theories on history were challenged in the 1950s and 1960s. They went beyond discussions on economy and politics. They considered social, cultural, religious aspects and questions of identity (*Ibid* 15). A series of historians came up with alternative perspectives of Indian history. The most prominent perspective is known as the subaltern history. The subaltern history challenged the concepts of Europe dominating Indian history. They gave emphasis on oral histories also which gave a true picture of many societies in India.

The scholarly work of historians like Romila Thapar, Irfan Habib, Bipin Chandra, and others of the Subaltern School gave a new direction to the study of Indian history. In the field of international law, scholars like Judge Nagendra Singh, R.P. Anand, C.H. Alexandrowicz evidenced the principles of international law rules from ancient times and in contribution of the development of modern international law. Their narrative needs to be complemented with the insights drawn from the aforementioned historians.

The temporal, spatial, political and social aspects of history are sole creation of Europeans. These aspects create some of the methodological problems while narrating the history of international law as to the demarcation and delimitation of the boundaries and periodisation. The periodisation of ancient-medieval-modern India creates barriers in the proper understanding of the history of international law in India. The territory of ancient and medieval times in Indian history cannot be equated to the contemporary geographical boundaries of India. The geographical distinctions made by the colonisers could be “entirely arbitrary” because it was their imaginative geography (Said 1978: 52). The geographical boundaries drawn by the Europeans

have led to injustice against people through colonisation and denial of rights (Baxi 2012: 750). Even today, there is a struggle over geography[26] (Said 1993: 6).

When it came to assessment of political and social maturity of different nations, the civilisational aspect was a major measuring rod for the Europeans. Some Asian and African countries fitted into Austin's definition of sovereignty (Anghie 2004: 58). India exemplified such a nation. For the positivists, India was a bone of contention. There were well developed political entities in India. They fulfilled the criteria set by the positivists. Hence, the positivists added an important element of civilisation apart from other prerequisites of defined territory, a permanent population, government and independence (*Ibid* 147). After the British rule commenced, India was not recognised amongst the civilised nations.[27] The principles of international law existing in pre-colonial India were avoided as mere cultural practices and religious precepts.

International law existed since ancient times in all civilisations. Despite the dominance of European perspective, many contemporary scholars agree with this fact. According to Surya Subedi (1999-2000: 57), all ancient civilisations had mechanisms to "protect the individual's safety and dignity both in times of war and peace". The international law of pre-Westphalian phase was confined to the interaction between two civilisations or few more and vanished with the end of those civilisations. The international law of pre-Westphalian phase cannot be rejected as mere "religious precepts" or "moral obligations" (Anand 1986: 2).[28] They can very well be termed as international law.

Historical discontinuity has led to the rejection of past international law. If historical discontinuity can be cited as a reason for rejection, then the international law of today can be rejected in future by citing the same argument, but, we cannot deny that international law did not exist (*Ibid* 3). The principles, which governed the communication between Kingdoms and rules, which regulated war and commerce,

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[26] "That struggle is complex and interesting because it is not only about soldiers and cannons but also about ideas, forms, about images and imaginings."

[27] It is pertinent to note that the scale of civilisation used by the colonisers is different from the term civilisation as used in the multicivilisational perspective. The former considers only Europe as possessing a civilisation. The latter considers plurality of civilisations and calls for equality amongst civilisations.

[28] Apart from being Eurocentric, laws are legocentric in nature i.e. state made laws are given prominence over other norms (Menski 2006: 6).

are functionally equivalent to international law. We may not use the term international law (which is a modern construct) to refer to the rules which governed the political entities of ancient times in India, West Asia, etc. but those rules cannot be ignored at all just because of the problem of nomenclature (Anand 2004: 2). We cannot use any other term to replace 'international law' to describe the rules which governed inter-State relations in ancient times.[29] The term 'law of nations' was used to describe such rules of antiquity which have a closer meaning to the Latin term '*ius gentium*'. In this framework, the present study uses the term international law to refer to rules governing inter-State relations in pre-independent India. It considers Indian civilisation and not strict boundaries of nation-State because of the heterogeneity of political entities.

The periodisation in the study is also not confined to a particular period in the pre-independent history.[30] To understand the principles of international law in Indian history, the period from ancient times is important. In the pre-colonial period, the political entities in India had rules to govern their relations. Diplomacy, war, trade, were conducted on the basis of rules which can be compared to contemporary international law. The similarities of the principles can be analysed when ancient and medieval times are contemplated. The advent of Islamic rulers in India enhanced Indian civilisation to create an eclectic culture. It further enriched the principles of international law wherein the Islamic international law met with the existing principles of international law. It brought a secular character to the international law of medieval India.

The colonial period is very important in the study to show the repercussions of colonisation in political, social, religious, legal and civilisational sphere. The British rule in India sidelined the pre-colonial rules and imposed European international law. The transition from pre-colonial to colonial epoch led to sudden change. Earlier, the Europeans who came to trade had to enter into diplomatic relations with the rulers in

[29] The term international is considered as a misnomer in itself. It is disputed by many scholars. Today the term international is used widely instead of using specific terms like inter-governmental, transgovernmental and transnational (Archer 2001:1)

[30] The chapters are divided according to the periodisation in the study of Indian history. Due to overlapping time-periods, strict adherence to periodisation is not done in the study. Ancient period ends around 8th century A.D. After that early medieval period begins which is included in the medieval period. The colonial period begins with 1757 when the British East India Company gains power after the Battle of Plassey of 1757. It continues till 1947 when India becomes independent.

India; they had to obtain trade concessions; they could not commit plunder in seas and land. After, the British rule began, international law of the pre-colonial period was rejected and Indians were called uncivilised. Even though colonial India was given membership in the international organisations with the insistence of British representatives, it was in the garb of increasing the voting strength of the colonisers.

A comprehensive history of international law in pre-independent India can be understood when the whole period is taken together. Some of the practices like caste system, oppression of women and indigenous peoples etc. existed since ancient times and these exist in the contemporary Indian civilisation. The gravity of these problems can be considered when the whole time period (pre-independence) is considered. The answers lie in the contemporary international law when solutions are sought.

The literature available does not deal with a comprehensive history of international law in pre-independent India. The TWAIL scholars have dealt with in detail with some aspects of Indian history and international law. Their focus was on State practice in history and rarely mentioned the human rights perspectives. Caste, class, gender were not a part of their narration. In the contemporary developments in Indian history and international law, these aspects are inevitable. The present study is a humble attempt to fill these gaps in the existing literature. The history of international law from 1947 till present is another important period to understand the history of international law in India. Due to the vastness of the period and limitations of the present study, it is left for future research.

6. Objectives and Scope of the Study

The present study has the following objectives. First, the study attempts to narrate the history of international law in pre-independent India from a multicivilisational perspective. Secondly, it culls out the principles of international human rights law, the law of diplomacy, international humanitarian law, international trade law, the law of the sea and international environmental law that existed in pre-independent India and assess their contributions to the evolution and development of modern international law. Thirdly, it identifies and elaborates international law principles, which are prominent in the Indian civilisation that can go to strengthen the contemporary international law. Finally, the study highlights the persisting drawbacks which existed

and continue in our civilisation like the caste system, patriarchy, etc. that can be addressed by contemporary international law. The study does not consider the broader aspects of the aforementioned regimes.

7. Research Questions

i. Whether the mainstream narrative of the history of international law is Eurocentric in nature?
ii. Did principles of international law governing diplomacy, war, inter-State trade, maritime activities, and environment exist in ancient India?
iii. What are the principles of the law of diplomacy, international humanitarian law, international trade law, the law of the sea, and international environmental law practised in medieval India?
iv. How did colonialism shape modern international law?
v. What are the features of treaties entered between European trading firms and Indian rulers?
vi. What was the legal status of India in international organisations before independence?
vii. What is the need for a multicivilisational perspective of international law?

8. Hypotheses

i. The principles of international law in pre-independent India have family resemblance to the principles of modern international law.
ii. A multicivilisational perspective of international law can enhance the legitimacy of contemporary international law.

9. Research Methodology

The research methods used in the study are historical and comparative methods. It applies historical method to find out the principles of international law in pre-independent India and the basic values on which these were founded. The comparative method is used to compare the modern principles of international law with those that existed in pre-independent India.

Primary sources like epics, *Purānās*, *Dharmasāstras*, *Arthasāstras*, Quran, treaties concluded between Indian rulers and Europeans, treaties in modern

international law are used in the study. Secondary sources include treatises and articles on the history of international law, Indian history and international law. The study is largely based on secondary sources.

10. Outline of the Study

Chapter II of the study is *International Law in Ancient India*. It deals with the principles of international law in ancient India. It describes the sources of international law, stages of development of international law, and the concept of sovereignty in ancient India. It elucidates the concept of State in ancient India and the sources of international law viz. *srutis, smritis, puranas* and epics, customs and treaties. It deals with *dharma* as international rule of law and the exceptions to *dharma* viz. caste system, seclusion of women, ostracism of indigenous population, slavery. It also considers gender rights. The section on diplomacy includes the *Mandala* system and the six-fold foreign policy, diplomatic practices, categorisation of diplomats, the functions and privileges of diplomats. The chapter also analyses the international humanitarian laws in ancient India, the concept of war, the classification of war, declaration of war, the differentiation of combatants and non-combatants, treatment of wounded and the sick, the prisoners of war and other rules of warfare. The chapter attempts to link international trade law and international maritime law in ancient India. The chapter describes international environmental law principles in ancient India.

Chapter III deals with *International Law in Medieval India*. The chapter analyses the concept of international law in medieval India, features of medieval India like religious co-existence and eclectic culture, the sources and subjects of international law, international human rights law with special reference to *dalits*, women, indigenous peoples and the oppressed sections of the medieval Indian society. The chapter enunciates as to the interplay between the medieval Indian and European diplomatic relations. The other section of the chapter discusses the principles of international humanitarian law, international trade law, international maritime law and international environmental law in medieval India.

The topic of Chapter IV is *International Law in Colonial India*. The chapter deals with the political entities in colonial times comprising of the territory under the

British rule and the Princely States. It analyses the impact of colonisation on India and the means of conquest adopted by the British. The chapter also deals with the conflict of sovereignties and the divide and rule policy followed by the British. The colonial era also had the problem of caste discrimination, oppression of women and indigenous peoples, slavery, a threat to sexual subalterns. The chapter discusses these issues under the section on international human rights law. The British while ruling India did not follow the rules of diplomacy and used diplomatic means to further their conquest and to protect frontiers. Therefore, the chapter deals with diplomacy used as coercion by the British. The chapter tries to highlight the violation of international humanitarian laws in colonial India by the colonisers. The exploitation of Indian economy in the name of international trade is discussed in the chapter wherein the rules of international trade also had discriminatory tariffs. The colonial period also saw the depletion of the environment and the use of laws to exploit the environment to such an extent that the repercussions are seen even after independence of India. This aspect of colonial environmental laws are brought to light.

Chapter V is on *Colonial India and International Organisations*. The chapter discusses the anomalous position of India in international organisations and the anomalous position of princely States. It will discuss India's stance in the League of Nations, International Labour Organisation, the Health Organisation, the Bretton Woods Institutions, and the United Nations. It concisely describes the Non-Aligned Movement.

Chapter VI of the study summarises the conclusions and findings of the study.

CHAPTER II

INTERNATIONAL LAW IN ANCIENT INDIA

1. Introduction

The existence of political entities and their interactions led to inter-State relations in ancient India. Many foreign nationals visited and resided in ancient India, which proves the existence of inter-State relations (Singh 1980: 6). Inter-State relations in ancient India were given impetus by the geographical position of India, well-developed political entities and intellectual growth (Bhatia 1977: 21). States were convinced that absence of inter-State relations would lead to ostracism (Chatterjee 1958: 7). Since the cohesion of States was not everlasting, there was progress in inter-State relations and thereby international law evolved in the era (Bandopadhyay 1920: 7).

The concepts of "*Rājya* or State, and *Rāshtra*, or territory" were well developed (Singh 1980: 121). Therefore, inter-State relations in ancient India led to development of international law. L.R. Penna (1980: 175) succinctly describes the international law in ancient India:

> Ancient India was a congeries of political entities spread throughout the Indian subcontinent……Even two thousand years before a Grotius, a Rachel, or an Ayala recalled Europe to humanitarianism, ancient Indians has propounded a body of rules governing the relations between States into which the continent of India was divided.

It cannot be claimed that international law in ancient India was perfect, but denial of its perfection does not mean its non-existence (Bandopadhyay 1920: 12). In comparison to international law of other political entities of ancient times (like Rome and Greece), international law in ancient India was advanced (Bhatia 1977: 11) and more humane (Bandopadhyay 1920: 6).

International law in ancient India cannot be termed as Hindu[1] international law because there were many cultures co-existing in India. Yet, *Dharmasāstras* and *Arthasāstras* mention some of the principles of international law. There were no

[1] The term Hindu was used in Persian for the people living on the other side of the Indus river. It referred to those who were not Muslims. Hence, it took a "religious connotation" (Thapar 2014: 53). Hindu religion, like some other religions, cannot be traced to a single founder, single text or single sect. It is in itself a pluralistic religion with different rituals, texts, beliefs, etc. (*Ibid* 142-143).

specific texts dealing exclusively with the discipline. International law was an integral part of the science of statecraft or *Deshadharma*, the closest term to international law in ancient India (Chacko 1958: 122). Some scholars view it as a part of *dandaniti* (Bhatia 1977: 27). For others, it was a branch of external public law (*Ibid* 13).

Some scholars opine that international law in ancient India was universal because there was no distinction between believers and non-believers (Singh 1973: 12; Subedi 1999-2000: 54). They believe that there was no distinction between civilised and uncivilised (Bhatia 1977: 39) and between Aryans and other races (Singh 1973: 14) while applying the principles of international law. However, it is pertinent to note that the centre-periphery dichotomy was not absent in ancient India. The distinction between civilised and uncivilised can be seen in some Indian texts too. For instance, *Manusmriti* (II: 23) describes barbarians as *mlecchas*. In *Shatapatha Brahmana* those who could not pronounce Sanskrit properly are called *mlecchas* or barbarians. It proves discrimination concerning language (Thapar 2014: 46). Similarly, Kautilya promoted an alliance with wild tribes but did not give them equal status to the subjects of his Kingdom (Bhatia 1977: 39). In the beginning, there was a differentiation between Aryans and others. In later stages, there was an interaction between Aryans and Dravidians and exchange of ideas. The meaning of *Arya earlier* referred to those who composed *Rig Veda*. Gradually, with the inter-mingling with Dravidians, the connotation of Aryan changed. Thereafter, anybody who was respected in society was called Arya (Thapar 2014: 47).

The essence of international law in ancient India is the "mutual understanding and reverence for the principles laid down by *Dharma*" (Chatterjee 1958: 6). It was led by the sanction of religion or *dharma* (Bandopadhyay 1920: 7). It cannot be generalised that all the aspects of the international law were formulated by religion. There were other factors like power, humanity, etc. which formed the basis of some of the principles. For example, the concept of balance of power was well developed and followed in ancient India (*Ibid* 9).

International law in ancient India aimed at curtailing the savagery of war and "standardise international relations" (Chatterjee 1958: 3). Bhatia (1977:27) mentions the basis of international law to be the theory of utility described in *Agni Purana* i.e.

"no King becomes a friend or foe without sufficient cause, or without a due regard to his own interests for the sake of amity or discord".

In this background, the present chapter deals with the nuances of international law in ancient India. Section 2 deals with the development of international law in ancient India. It deals with the stages of development, contribution of the concept of *chakravarti* and *Vasudeva kutumbakam* in the development and also, some of the obstacles in its development. Section 3 succinctly analyses the concept of sovereignty with regard to the King and his subjects. Sections 4 and 5 describe the subjects and sources of international law in the epoch. Section 6 is a discussion on international human rights law (IHRL) interconnected to the concept of *dharma*, its connotations and its interpretation as international rule of law. It also analyses the violation of *dharma* leading to discrimination in the form of caste system, ostracism of indigenous population, inhuman practice of slavery, and patriarchy. It also deals with gender rights in ancient India. This section also proposes the use of IHRL to deal with the continuing social practices like caste system since the ancient era. Section 7 is a description of international law of diplomacy in the light of the *mandala system* of Kautilya, the diplomatic practices of different rulers, and the classification, qualifications, functions and privileges of diplomats. Espionage was equally significant as diplomacy for the ancient Indian rulers and hence, the institution of espionage is also discussed. Section 8 analyses and compares ancient international humanitarian law (IHL) to the modern IHL. It refers to the concept of war and non-violence, application of IHL, differentiation of combatants and non-combatants, protection of environment during war, treatment of prisoners of war and also wounded and the sick. It connects the issue of non-liquet in modern IHL on nuclear weapons to the ancient Indian tradition prohibiting use of hyper-destructive weapons. It also describes the outcome of war and the means of termination of war. Section 9 explains the international trade law in ancient India with the relevance of international trade, the monetary system, significance of merchant associations and finally, specific principles of international trade law. Section 10 and 11 reflect upon international maritime law and international environmental law respectively. Section 12 is the final section of the present chapter summarising the conclusion.

2. Development of International Law

Since ancient Indian epoch is itself a longue durée, international law in the period developed in six stages. First, is the Vedic period characterised by a relationship between tribes (Singh 1973: 25). Epics dominated the second epoch. They moulded the laws of war (*Ibid* 27). The third period was that of invasion by Alexander. It led to the relation of Indian states with the Greek States and Yavana States (States conquered by Alexander). The fourth was the era of Shramanic traditions i.e. of Buddhism and Jainism. They preached non-violence and aimed at minimising human suffering. The fifth stage is that of Puranas which regulated the conduct of Kings, sending of envoys, etc. Last is the era between Gupta period and the rule of Muslim Kings wherein many States disintegrated, and wars were frequent (Chatterjee 1958: 12).

The concept of *Chakravarti* (world ruler)[2] gave an impetus to the development of international law. The concept was created to envisage "one world government to establish peace" (Singh 1984: 237). The struggle to aggrandise a vast area and become a ruler of that territory led to a common ruler ruling it with common set of rules. Consequently, different political entities came under one ruler. The conqueror in ancient India allowed the people of conquered territory to follow their laws (See Section 8 on IHL). Their diversity of laws is tied together by the rule of *Chakravarti*. Therefore, under the rule, the diversity of political entities also continued along with the development of international law.

The concept of *Chakravarti* and sacrifices like Aśvamedha (horse sacrifice), Rājasūya (royal consecration) or Vājapeya (drink of strength) were interconnected (Singh 1973: 27). These sacrifices initiated further expansion. The conquest was celebrated after conducting these sacrifices (Modelski 1964: 558).

Even though the aim of real world ruler could not be achieved due to the limitations of knowledge of different continents and impediments like prejudice of civilisation, but some ancient rulers claim to have achieved the aim within the

[2] The primary aim of most of the rulers of ancient India was to become world ruler or *Chakravarti*. For some rulers, it was a path to satiate egocentrism (Subedi 2003: 352). In Buddhism, *raja-sakvitti* is the term equivalent to *Chakravarti*. His duty was to take decisions democratically without imposing his views (Dias and Gamble 2010: 16). His duty was to codify laws based on *dhamma* to achieve "international order (*Ibid* 17).

aforementioned limitations. Maitri Upanishad records fifteen *Chakravartis* (Singh 1973: 28). Judge Nagendra Singh (1980: 47, 58) points out that two rulers were believed to have achieved the goal of *Chakravarti* viz. Chandragupta Maurya and Samudra Gupta of Gupta Empire. M.K. Nawaz (1957: 180) argues that Ashoka of Mauryan Empire was the first *Chakravarti* of India.

The concept of one world also led to the development of international law in ancient India. Ancient Indians recognised that there was territory beyond India. A plethora of ancient Indian texts mention different oceans and lands (*dwipa*). Ancient Indians considered the World as one accommodating plural traditions, beliefs and civilisations. The *Rig Veda* mentions that "[t]here is one race of human beings," and this implies recognition of different traditions (Sinha 2005: 287). Atharva Veda (quoted in Horsh 2004: 432) eulogises the earth as the one "which bears people in many places, each according to its fixed domicile, with different languages and various laws (nānādharmānam)". Mahopanishad (VI: 72-73) (a part of Sāma Veda) described planet Earth as a family (*Vasudeva Kutumbakam*). *Hitopadesha* and *Panchatantra* reiterate *Vasudeva Kutumbakam*. Sangam literature has similar concept i.e. '*yaadhum oore yaavarum kelir*', translated as "to us all places are one, all men our kin" (Kaniyan Poongundran, *Purananuru*- 192). The *Mandala* system propagated by Kautilya refers to a model of international society and a proof of "integration and solidarity" (Modelski 1964: 555).

Trade transactions with people of different civilisations made ancient Indians realise the vastness of the world. Indian traders interacted with many civilisations like Persian and South-East Asian civilisations. They disseminated many ideas of Indian civilisation like spiritualism, a path to "human unity" (Chimni 2008: 259) and emulated ideas from other civilisations. Therefore, ancient Indians supported "inclusive cosmopolitanism" (*Ibid* 258).

Apart from the impetus for development of international law, there were many obstacles in the development of international law. Some aspects hindered free movement of people. It is no wonder that even today free movement of goods is encouraged but not free movement of people. In the Indus Valley Civilisation, free movement of people was not encouraged, to ensure availability of labour (Campbell 2011: 54). There were restrictions on travel imposed by *Manusmriti* (III: 158) for

preserving the caste system. This was confined to sea voyages. The rule was usually applicable to Brahmins. Since traders did not consider themselves bound by this rule, they engaged in international trade and developed some principles of international maritime law as will be discussed in Section 10 of the present chapter. Even though the concept of *Chakravarti* considered world as one, but practically, the aggrandisement was confined to Indian Territory because people of other territories were considered *Mlecchas* or barbarians (Boesche 2003: 17).

3. The Concept of Sovereignty

In modern parlance, Sovereignty is the "fundamental authority which controls, restrains and protects man as a member of the society" (Singh 1980: 104). In ancient Indian context, Kautilya understands sovereignty as the exercise of control over internal and external affairs by the State (Mani 2000: 34). Sovereignty rested in people, and it was embodied by the King (Singh 1973: 26). Kingship originates out of military necessity, and hence, a King was supposed to be recognised by the people (Singh 1980: 37). People's consent was a prerequisite to legitimise sovereignty (Mani 2000: 34).

In the Vedic period, the ruler was elected by the *Samiti*[3]. He was known as the "King of the *Rashtra*". The decisions taken by him were to be in consensus with the *Samiti* (Bandopadhyay 1920: 25). *Atharva Veda* and *Mahābharata* record that the King was elected (Mani 2000: 34). Later Vedic literature mentions that the people in the northern States of Virajya were called as *Virāts* (Singh 1980: 76). This implies again that the sovereignty lied in people. Buddhist Jatakas enunciates that in the Republic of Lichchavis, sovereignty lay with the Central Assembly comprising of 7,707 members (*Ibid* 78). Assemblies followed voting procedures (Singh 1980: 81). Buddhist doctrines prescribed the ruler to be elected by the people (*mahasammata*) and was considered as "a servant of the community" (*ganadasa*) (Dias and Gamble 2010: 18).

A similarity can be drawn between the meaning of sovereignty in ancient India and the developments in contemporary international law. As seen above, sovereignty lied with the people in ancient India. In present times, due to the

[3] There were two popular assemblies viz. *Sabhā* and *Samiti*. There was a council of ministers called *Ratnins*.

emphasis on human rights, the meaning of sovereignty is moulded to mean responsibility to protect people (Chimni 2012: 29).

4. Sources

Srutis, *Smritis*, *Puranas*, epics, customs, treaties or *sandhis* and also texts like *Nitisaras* and *Arthasastras* constitute sources of international law in ancient India. The Vedas and the Upanishads constitute *Srutis*. There was no direct reference to the inter-State law in the Vedic times, but there was some mechanism to control inter-tribal relations in those times. *Smritis* constitute significant sources. There are many *Smritis* viz. Manu *Smriti*, Yajnavalkya *Smriti*, Vishnu *Smriti*, Harita *Smriti*, Brihaspati *Smriti* and Katyayana *Smriti*. Manu *Smriti* gained an important status amongst these *Smritis*. *Nibandhas* are commentaries on *Smritis* which deal with some aspects of international law.

Puranas are included in the category of *Smritis*. *Puranas* and epics like Mahabharata and Ramayana indicate customs and practices of ancient India. They narrate stories of mythological character, but we can see historical consciousness in the narratives. As will be discussed in further sections, the diplomatic practices, rules of warfare, etc. can be inferred from *Puranas* and epics.

Customs are known as *acharas*. *Acharas* are of three kinds, *kulachara* (family custom), *deshachara* (custom followed in a country) and *lokachara* (local custom). To be considered as a source of law, custom, "had to be well-established, certain, unvariable and reasonable (Singh 1984: 244). If the acceptance of a particular custom was continuous, it was elevated to the position of *Deshachara* and therefore, a source of international law.

Treaties in ancient India were called *sandhis*. The agreements between States were for friendship, entering into alliances and for concluding peace after war. Usually, the treaties were bilateral in nature (*Ibid* 242). They were contractual in nature and not law-making treaties (*Ibid* 243). Nevertheless, there was a trend of treaty-making in ancient India and it was a source of international law in that epoch.

Gods were invoked in the initial part of a treaty. One of the examples is the prayers to Varuna, Indra, etc. in the treaties discovered in Boghaz-Koi in Turkey

which are linked to ancient India[4] (Sastri 1953: 135). An oath was one of the aspects of treaty making. Kautilya believes in oath as an assurance for the fulfilment of the provisions of a treaty rather than taking hostages. Oath was usually taken "by swearing by fire, water, plough, the brick of a fort wall, the shoulder of an elephant, the hips of a horse, the front of a chariot, a weapon, seeds, scents, juice (*rasa*), wrought gold (*suvarna*), or bullion gold (*hiranya*), and by declaring that these things will destroy and desert him who violates the oath" (*Arthasastra* Shamasastry 1915: 341). Thus, treaties in ancient India were based on *pacta sund servanda* which means that the obligations under the treaty were to be fulfilled because it is binding on the parties. Kautilya also argues that the change in circumstances gave one of the parties the right to reject the treaty. This aspect resembles *clausula rebus sic standibus* in modern international law (Singh 1984: 242).

Other works like Sukracharya's *Nitisara* and Kamandaka's *Nitisara* also elucidate the customs and laws of ancient India. Kautilya's *Arthasastra* is a very important source wherein he advises the ruler to use expediency to deal with matters of the State. Kautilya's *Arthasāstra* is a quintessence of all preceding *Arthasāstras*. There are many references to inter-State relations of the era in Kautilya's *Arthasāstra*. Kautilya is known for his exceptional observations and pieces of advice on the government and foreign policy (Modelski 1964: 550). One of the significant sources to ascertain inter-state relations in South India is *Tirukural*. *Tirukural* mentions regulations regarding diplomacy, principles of war, etc. (Viswanatha 1925: 19). Some other texts like *Purananuru* also give a picture of international law in South India.

5. Subjects

The political entities or States were primary subjects of international law in ancient India. The State dealt with the internal and external affairs. The State had jurisdiction over aliens within its territory. It controlled immigration and emigration (Bhatia 1977: 56). Superintendent of Passports controlled the entry of foreign nationals during the Mauryan period (*Arthasāstra* Chapter XXXIV, Book II). The concept of State in the Mauryan period (fourth century BC), the Gupta period (fourth century AD) and the

[4] The treaty was entered between the Hittite King Shubbiluliuma and the ruler of his protectorate Mattiuaza of Mitanni.

Chola period differed from each other (Thapar 2014: 19). States varied in their structures and exercise of external sovereignty (Singh 1973: 12).

There were republics apart from monarchies and oligarchies. According to *Sāntiparva* of *Mahābhārata*, republics had successful governments (Singh 1980: 76). Literature in Pali mentions sixteen *Mahajanapadas*. Jatakas refer to four republics viz., Sakyas, Mallas, Lichchavis and Videhas (*Ibid* 78). Panini's writings and Kautilya's *Arthasāstra* also mention about republics. Kautilya calls them *Sāstrapajivins* (specialising in the defence function of the State). He divides them into two viz. one which has King at its apex and the other without a King as head (*Ibid* 79). He also attributes justice and discipline to republics (*Ibid* 88). In the Mauryan era, the republics were either subjugated[5] or treated equally with the State (*Ibid* 79).

The *Mahābhārata* (as quoted in Acharya 2013: 2) classifies States into four viz. allies (Mitra), inimical States (Śatru), neutral States (Udāsina) and intermediary States (Madhyastha). Kautilya's classification of States is into three viz. *Sama* (equal in status), *Hina* (vassal States) and *Jayas* (superior kingdoms of *Chakravarti* type) (Singh 1980: 34).

There was equality of states according to the texts, but inequities were evident (Chatterjee 1958: 43). This was due to the difference in power wielded by the States. There were protectorates under different Kingdoms. Chalukyas or Solankis (ruling in eleventh to thirteenth centuries AD) had protectorates in Saurashtra (Thapar 2014: 243).

The State aimed at creating peaceful conditions by upholding *dharma*. King executed this *dharma* (Singh 1980: 112). The primary duty of a State was the protection of the people, and any Kṣatriya who could accept this responsibility could become a ruler (Sastri 1952: 100). The State was created to end chaos placing the King at its helm and through the sanction of *danda* or force (Singh 1980: 13). Sanctions could be imposed only if there was non-compliance with *dharma* (Sastri 1953: 140). Buddha did not believe in fear of sanctions of law but opined that the compliance of laws should be on the basis of "charity, love and understanding" (*Vinaya Pitaka* as quoted in Dias and Gamble 2010: 13).

[5] Ashokan Empire had seven republics under its protectorate.

In comparison with modern states, the ancient Indian State system was simple and non-secular (Poulose 1970: 179). We cannot equate the ancient Indian state to the modern nation-State system. We can draw some similarities to prove that the political entities of past had identical structures. Taking cue from Yasuaki Onuma (2000: 9) in this regard, he says

> It is true that if one defines a state as a group of humans inhabiting a defined territory, with a rule-subordination relationship within the group and a capability to hold its own with other such groups, then one can observe *interstate* relations between such states in antiquity, in the medieval Muslim region, in pre-modern East Asia and so on.

There are four prerequisites of modern State viz. a permanent population, a defined territory, government and capacity to enter into relations with other States by virtue of Article 1 of the Montevideo Convention on Statehood, 1933. The concept of a territorial State evolved early to become a characteristic of Indian polity (Sastri 1952: 97). The ancient Indian State had a demarcated territory (not very well defined), a population over which the ruler exercised control, and it entered into relations with other States. The King was advised by a council of ministers, the similarity of which can be drawn to a government. The allegiance of its population was a characteristic of ancient Indian State (Bhatia 1977: 35).

The ancient Indian State had seven elements viz. *Swami* (King), *Amatya* (Minister), *Kosa* (Treasury), *Danda* (Armed Force), *Mitra* (Allies), *Janapada* (Village Communities), and *Durga* (Forts) (Kautilya's *Arthasāstra* and *Manusmriti*). Their significance was according to a descending order, King being the most important limb of the State. Allies are considered as an integral part of the State which signifies that inter-State relations were given due weight in ancient India (Singh 1980: 29). Kautilya (*Arthasāstra* Shamasastry 1915: 511) mentions that the King should be powerful enough to wield power over the neighbouring States. He intends that the King should be able to maintain the integrity of his State and capable of entering into friendly relations with the neighbouring States. This proves inter-State relations in ancient India with State as the primary subject of international law.

6. International Human Rights Law

Human rights in common parlance are the rights granted to all humans. Human rights are an understanding of "coexistence" and reverence of all cultures (Ghai 2009: 119).

Ensuring human rights will lead to spiritual and mental well-being (Onuma 2010: 75). For Myres S. McDougall, it, in turn, ensures human dignity which is the ultimate goal (Shaw 2008: 267).

The focus of human rights has been on individuals rather than on groups. Individuals became the centre of human rights due to the nation-State system and the advent of capitalism (Onuma 2010: 382). In the modern world, an individual is linked to the State. States are violators of human rights, and hence, human rights helped in stopping violence by States on its citizens. It is incumbent on the State to protect human rights (Eisenman 2003: 141). The courts in the domestic legal system are emphasised to be the guarantor of human rights. Many States do not have a proper judiciary to focus on courts to ensure human rights. Thus, an adversarial process for human rights is not encouraged (Onuma 2010: 396).

Third world States have contributed towards the formulation of international human rights law. They have tried to solve their domestic issues by taking into light the development of human rights. Thus, their contribution should be given due weight to legitimise international human rights law (Rajagopal 2009: 60). International human rights instruments like International Covenant on Economic, Social and Cultural Rights (1966), International Covenant on Civil and Political Rights (1966) and the Vienna Declaration and Programme of Action (1993) were negotiated after the decolonisation process and with the active participation of third world States.

As stated in Article 5 of the Vienna Declaration and Programme of Action, 1993, human rights are universal, indivisible and interdependent despite their bifurcation into civil, political, social and cultural rights. It is pertinent to note that notwithstanding such inseparability the States in the West and the East focus on a different set of human rights. Since the Western States are developed socio-economically, their emphasis is on civil and political rights. The nations which are underdeveloped, stress the relevance of economic and social rights. Such a difference of emphasis also leads to the heated debate on universality and particularity of human rights.

The universality of human rights can be asserted due to the universal human nature. All human beings have some essential needs which need to be ensured by the human rights instruments. Hence, we can say there is universality in some set of

human rights (Ghai 2009: 110). Universalism is the assertion of certain values which apply to particular region or culture or civilisation to be applicable throughout the world. Onuma (2010: 428) argues that when the Asian values or the Islamic values are asserted it amounts to particularism, but the implanting of Western values in other parts of the world is universalism. We can see that all civilisations aim at universality that their values should be adopted by other civilisations. The interaction of civilisations has led to an exchange of ideas and values. It is incumbent upon all civilisations to correct their human rights violations. There is gross human rights violation in the West also but their focus on the rest veils such violations (Engle 1999-2000: 299). The West which propagates universalism had different standards of human rights for themselves and the colonised (Ghai 2009: 118). Thus, there is suspicion of the third world on the West that human rights is another language to implement their intervention over the rest (Subedi 1999-2000: 62; Onuma 2010: 372-373). Balakrishnan Rajagopal (2009: 60) views human rights as a two-edged sword with resistance in one end and power at the other. The third world adopts it with the former aim whereas the West has the latter aim of power. Thus, the universality of human rights is not rejected by the third world States (Subedi 1999-2000: 62). They try to curb human rights violations with the help of the regime.

Asian countries[6] define human rights by focussing on collective rights. The focus of Asian culture is on the communal rights (Bangkok Declaration 1993). Due to the emphasis on communal rights, Asia does not ratify many treaties or accept them with reservations. It does not mean that the Asian States are opposed to human rights (Ruskola 2010-2011: 880). Universality and particularity are two extremes which hinder the implementation of human rights (*Ibid* 890). Thus, a balance needs to be created between these (Ghai 2009: 120).

International human rights law is a means to ensure human rights to all. It can be applied by considering the culture in which it needs to be implemented (Engle 1999-2000: 302). It needs to be translated into the language which is understood by

[6] The Asian values debate is a demand to interpret human rights from an Asian perspective (Engle 1999-2000: 314). The critique of Asian values is that it is not exhaustive as Asia has diverse perspectives which cannot be confined to the so-called Asian values (Ruskola 2010-2011: 893). It is also said to be formulated to conceal the authoritarianism which was prevailing in some Asian States (*Ibid* 891).

different civilisations. Moreover, the ideological approach should be replaced by a pragmatic approach to human rights (Ghai 2009: 112).

Human rights are universal rights. Universal rights should not be dominated by western values (Koroma 2009: 82). Human rights cannot be said to be a Western idea. Accepting such an argument is refuting the practices of ancient civilisations (Subedi 1999-2000: 49). Judge Abdul Koroma (2009: 84) urges that the universal rights should be defined from the perspective of different legal traditions. A majority of civilisations of the World have violated human rights in one way or the other. Since civilisations are dynamic and subject to change, they need to be interpreted in such a manner to curtail human rights violations (Onuma 2010: 374).

We cannot conclude that there were no human rights in ancient India. Due to hierarchy, less protection was granted to lower castes and hence, exploitation was evident, and inequality persisted. Due to the large temporal span of Indian history, it is not possible to generalise the practices. Some practices which began on good note adopted exploitative character later on. They continue even today. International human rights law has solutions to these problems.

6.1 *Dharma* and International Rule of Law

According to Indian philosophy, there are four aims of life called *purushārthas* (*dharma*, *arthā*, *kāma* and *moksha*). In common parlance, *dharma* refers to rules facilitating virtuous conduct, *arthā* signifies the paraphernalia required for leading human life, *kāma* suggests the fulfilment of desires and *moksha* denotes freedom from "whatever is imperfect and binding" (Koller 1972: 131). As per Indian philosophy, *Dharma* is not the highest aim of life, but *moksha* or liberation is the highest value craved by humans (Hacker 2006: 492). Even so, *Dharma* has gained centrality amongst these four aims of life (Horsch 2004: 423).

It is a herculean task to define *dharma*. There is no equivalent term for *dharma* in English. It is a flexible term which had varied meanings in different periods of Indian history. John M. Koller (1972: 131) connects these meanings by explaining *dharma* as "rules of action". Dharma has many connotations like law, custom, duty, etc. (Raju 1939-40: 195). Hence, a historical review of the evolution of the concept is discussed hereunder.

Dharma originates from the root word *dhr* that means "to hold". Hence, the etymological meaning of dharma is "to support, sustain and hold together". Dharma did not have a jurisprudential aspect at its genesis. It has ritualistic and sociological implications (Bowles 2007: 83). In the beginning, it was associated with truth (Horsh 2004: 429). H.S. Bhatia (1977: 27) asserts that since the Vedic period *dharma* denotes law or custom. In *Satapatha Brāhmana*, *dharma* is granted a legal connotation as it means "matters regarding which people come to the King and must principally refer to legal disputes" whereas *adharma* means "something done contrary to law or the natural order of things" (Olivelle 2004: 495). Upanishads associate *dharma* with good deed (Bowles 2007: 101). Gradually, it was linked to duty. Hence, terms *rajadharma* (duty of the King), *varnashramadharma* (duty of caste), *kuladharma* (duty of family or lineage) etc. were used. The Hindu legal thought focusses on duties than on rights due to the emphasis on concepts like *karma*, transmigration, etc. (Rangarajan 1964: 185).

The transition of meaning is visible here. It changes from something which supports to that which needs to be supported (Bowles 2007: 92). During the era of early *dharmasūtras*, it was given a jurisprudential angle, but it was largely associated with obligations and religious aspects (*Ibid* 109). *Āpastambadharmasūtra* (1.20.6-8 as quoted by Hacker 2006: 485) explains *dharma* as that which is appreciated by Aryans. This proves that Aryans formulated the rules for the society. *Bhagvad Gita* explains *dharma* as that which originates from within and not imposed on beings from outside. *Rajadharma Prakaran*, a part of *Śantiparva* of the *Mahabharata* (Section XC) elucidates *dharma* as righteousness which sustains all living beings.

In Hinduism, Dharma referred to *svadharma* or *dharma* of the castes in the Brahminical order. Thus, it was an attempt to solidify caste hierarchy. It aimed at solidifying social order (Thapar 1978: 30). It was interconnected to religion, and its defiance led to social ostracism and religious condemnation (Chatterjee 1958: 6). Despite being associated with the law in a later stage, it gained a religious character because it was a means to attain salvation or *moksha* (Hacker 2006: 492). *Dharma* takes the shape of a moral concept when named as *sādhārana dharma* (general or common *dharma*) (*Ibid* 482).

Furthermore, the moral side of *dharma* is emphasised in Buddhism (*Ibid* 482). Olivelle (2004: 434) argues that *dharma* gained centrality when it was adopted by Buddhism as its main tenet. It is called *dhamma* in Prakrit. *Dhamma* is distinct because *dharma* is related to Vedas and Buddhism rejects Vedas (Hacker 2006: 493). *Dhamma* meant "a universal social ethic of equal respect for all persons and beliefs" (Thapar 2014: 144). For King Ashoka of Mauryan Empire, it was a global ethic which everyone should endeavour to achieve (Bowles 2007: 131). He considered it as a "right and moral conduct" and duty towards all human beings (Hacker 2006: 480). He considered it as a principal concept and consequently, called his edicts *dharmalipi* and pilgrimage *dharmayātrā* (Olivelle 2004:505).

Dharma gained centrality due to fear of anarchy. It was considered the basis of formation of State (Singh 1984: 241). Therefore, it was given a status above the King and the government (Thapar 1978: 31). Manu emphasises the supremacy of *dharma* with *danda* as the sanction for violating it. The centrality of *dharma* was so significant that whenever there was a difference between *Dharmasastra* and *Arthasastra*, the former was to be followed.

Dharma can be equated to the rule of law because it gained a centrality and was prescribed to be followed by the rulers. The foundation of polity was supposed to be *dharma* (Mahadevan 1953: 102). The *Rajadharma Prakaran* of *Shanti Parva* of the *Mahabharata* (Section XC) urges the king to rule according to *dharma* because it stands for the growth and well-being of all living beings. Thus, the supremacy of *dharma* did not allow the King to take arbitrary actions. The King assured to follow *dharma* while taking the coronation oath (Singh 1980: 45). King was the embodiment of *danda*, but he was not allowed to defy the rules prescribed by *Dharmasāstras* (*Ibid* 17). King was controlled by "religion, custom, pragmatism, natural justice" (Freeman 1959: 33).

The despotism of a King was checked by the council of ministers, by *Samiti* or Assembly of the people. The legitimacy of a King was tested by two set of people viz. the bards who checked and maintained the lineage in Kingdom and saints, monks, etc. (Thapar 2014: 40-41). Some policies of the King were opposed by *prayopavesa* or fasting by a priest (Singh 1980: 21).

Primogeniture was the rule in ancient India for a person to be enthroned as a King. However, some thinkers express that if a king failed to perform his duty, he could be dethroned (*Ibid* 17). Buddhist and Jain political literature reiterate this (*Ibid* 24). The primary duty of a King was the protection of the people. Hence, a King was called *Bhoopati* (protector of the country) and *Narpati* (protector of the people) (Bhatia 1977: 38). In Rig Veda, King is described as *Gopatih Janasya* (Viswanatha 1925: 52). Pallava Kings adopted the title of *Dharma Maharaja* thereby establishing the supremacy of *dharma.* The supremacy of *dharma* is exemplary when compared to the doctrine of "*Rex non potest peccare*" ("the king can do no wrong").

Divinity was associated with the King (Brekke 2006: 115). The divine nature of King has its roots in the caste system. The *Brihad-Aranyaka* Upanishad mentions that *Brahman* (creator) created *dharma* to rule the rulers (Bowles 2007: 95). On the other hand, *Dhamma* propagated by Buddhism equally applied to the ruler and the ruled (Nawaz 1957: 178). Vinaya Pitaka (Commentary on *Vinaya Pitaka*, III as quoted in Dias and Gamble 2010: 11) is interpreted as considering "*dhamma* is the King of Kings".

The "divine sanction" facilitated the maintenance of the rule of law (Nawaz 1957: 176). The King could not formulate arbitrary rules according to his whims and fancies. Law bound the King, and hence, there was the rule of law. Legislative powers of the King were limited during the Vedic age (Viswanatha 1925: 41). Legislation of King was in the form of royal edicts or *Rājasāsana*. They were supposed to comply with *dharma* (Singh 1980: 48). He could not overrule the principles established by *Dharmasāstras* (*Ibid* 110). Amongst the royal edicts, Ashoka's edicts are commendable legislations of a King which considered human rights to a large extent. They attempted to resolve problems of humans in a diverse society (Thapar 1978: 33).

King was considered as the servant of his subjects, and hence, international law dealt with the concerns of people (Bandopadhyay 1920: 12). A common sovereign did not formulate international law, but the following of *dharma* brought an order amongst nations (Viswanantha 1925: 10).

The rule of law is a concept which originated in the domestic legal sphere and was adopted in the international legal system. The International rule of law means that the actors in the international legal system should comply with international law. A

State in the international scenario could gain legitimacy for its acts only if it complied with the rule of law (Krabbe as quoted in Nussbaum 1947: 283). International rule of law can assimilate the cultural differences and the differences between the West and the rest (Chimni 2012: 302). However, the concept of the rule of law today is mainly based on what is followed in the West. It needs to incorporate what is followed by other civilisations. The concept cannot be transplanted from the West whereas the epithet should be built on the foundation laid by culture (Stromseth 2006: 82). Therefore, the rule of law should be linked to civilisational aspects to achieve it.

As aforementioned, there existed the concept of the rule of law in ancient India in the manifestation of *dharma*. It was deeply embedded in all the activities of the State. Most of the policies of the State viz. war, peaceful settlement of disputes, diplomacy, etc. were supposed to comply with *dharma*. Thus, *dharma* as international rule of law was the basis of international law in ancient India.

6.2 Violation of D*harma*

Dharma has many aspects of human rights (Subedi 1999-2000: 51). In ancient India, the stateless society (before the formation of State) protected human rights as per the *Mahābhārata* (Jain 1999: 125). As the Yuga[7] changes there is decrease in *dharma* and increase in *adharma*. As time changes, there is less compliance to *dharma*. Furthermore, exceptions and flexibility was attached to *dharma*. *Dharmasāstras* and other texts elucidate relaxation of strict adherence during the period of distress. It is called *āpad-dharma*. Like the loopholes which are exploited in the contemporary laws, whether it is domestic law or international law, the exceptions to *dharma* were exploited by those in power. These include caste system, patriarchy, ostracism of indigenous people, etc.

The political system was quite dynamic with different developments. The social system remained the same encircled by the caste system (Modelski 1964: 560). Exceptions to *dharma* were formulated by Brahmins to remain in power and gradually led to exploitation which continues till date. Brahmins were priests in the beginning, and they became jurists (Jackson 1975: 490). They maintained "their grip

[7] There are four yugas according to the cyclical theory as explained in ancient Indian texts, viz. satya yuga, treta yuga, dvapar yuga and kali yuga. According to Yuga theory, obedience to *dharma* decreases in each successive yuga. Thapar has explained the theory in detail in her works.

on the society" (Upreti 1972: 52). Since they created laws, they gave themselves certain privileges and immunities (Thapar 1978: 31). Kshatriya caste was obliged to implement laws and punish the offenders.[8] Kings could legislate, but they had to follow *dharma*. Each caste was to comply with certain norms and such conformity led to hierarchy and exploitation. To preserve caste system patriarchy was imposed on women. It also led to ostracism of indigenous people and slavery.

6.2.1 Caste System

Hierarchy, domination, subordination, alienation can be found in all societies. But, the caste system is a peculiarity of Indian civilisation. It is one of the oldest hierarchies of the world (Narula 1999). Caste system is an integral part of Hinduism. Caste system is equated to *varna* system. The literal meaning of *varna* means colour. There are four castes viz. *brāhmin* (priest), *kṣatriya* (warrior), *vaiśya* (trader) and *śūdra* (farmer and one who does all odd jobs). Endogamy is a prerequisite of the caste system (Ambedkar 1979: 8). The offspring of miscegenation of upper castes and lower castes were *panchamas*. Thereby a fifth class was added to this hierarchy and were called *panchamas*. They were considered as untouchables.[9] They were forced to do inhumane jobs like manual scavenging, cremation, etc. The castes were further divided into sub-castes.

A divine origin is attributed to the caste system. The four castes are believed to have originated from different parts of *Purusha*. *Brāhmins* from his head, *Kṣatriyas* from his arms, *Vaiśya* from his thighs and *Sūdras* from his feet. There are two diverse opinions on the origin of the caste system (Sarkin and Koenig 2009-2010: 548). One is that the caste system existed since the Vedic times. Second is that the *Brāhmins* manipulated the Vedas. Nevertheless, caste system was not always the same. It evolved according to the historical circumstances, but the foundation of caste system i.e. domination remained the same. Thapar (1978: 33) opines that the genesis of caste system was not in the hands of *Brāhmins*, but they utilised the system in their favour so as to create a theocratic society centred around them. The system meant the

[8] *Manusmriti*, Chapter VII, Verses 1-35 explains the duties of a King to maintain the social order by protecting the caste system or order of *varna*.

[9] Similar to the question of egg and chicken that remains unanswered, the genesis of untouchability also remains a mystery. The argument is that doing menial jobs led to untouchability and the counter-argument is that untouchability forced adoption of odd occupations (Eisenman 2003: 134). The practise of untouchability resulted in a continuous persecution of lower castes (Thapar 2014: 147).

division of labour at the beginning which gradually led to human rights violations (Mani 2000: 35). The caste system is associated with birth without giving an option to the lower castes to change their position (Thapar 2014: 34). The system restricted social mobility so that the *panchamas* remained labourers and a shortage of labour never arose (*Ibid* 34).[10] *Varna dharma* was the code of conduct for each caste from which they could not deviate, and it hindered social mobility.

All castes were granted some rights and immunities, but the lower castes were less protected. They were awarded severe punishments for trivial acts whereas the *Brāhmins* were spared of serious crimes or were granted less punishment. *Brāhmins* could not be awarded capital punishment in any circumstances. They were granted privileges and immunities when they adopted the role of diplomats. *Kṣatriyas* were under the umbrella of laws of war, and hence, they were given protection in the times of war and peace according to that. Traders also were subject to certain laws of trade. *Arthasāstra* prescribes minimum wages for servants (Chapter XIII, Book III). The *panchamas* were not brought under any laws, and they were exploited incessantly.

With regard to the representation of different castes in the political sphere, *Mahābharata* mentions that the people from different castes were represented in the *Mantri Parishad*. There were four Brahmins, eight Kṣatriyas, twenty-one Vaishyas, three Sudras and one Suta (mixed caste) (Singh 1980: 52). Thus, there was unequal representation of different castes in the assemblies.

Buddha was against caste system and called for equality amongst all human beings. Buddhism does not link divinity to social structure (Thapar 1978: 29). Tirukkural (verse 973) mentions that a learned person of a lower caste is equal in dignity to a person of a higher caste. Thus, Tiruvalluvar seems to be supporting social mobility.

Dr. B.R. Ambedkar brought to light the fact that caste system not only represented "social hierarchy" but also was a "reality of domination and subordination" (Thapar 2014: 13). Ambedkar opined that the divine origin and sanctity attributed to caste is the main problem which should be nipped in the bud (Keane 2007: 287). Jawaharlal Nehru attributes the civilisational continuity of India

[10] An exception to social mobility was 'sanskritisation' (Thapar 2014: 25).

to the caste system, but at the same time, he says that it "carried within it the seeds of destruction" (Nehru 1946: 219-220). The discrimination on the basis of caste continues despite attaining independence for about seven decades. Social reformers like Ambedkar, Ayyankali, Sri Narayana Guru, Jyotirao Phule, Kanshi Ram, etc. attempted to liberate our society from the evil of caste system but it is deeply embedded in our society and still exists in many corners of India. The caste system is so pervasive that it has percolated into all religions in India.

The caste system crossed religious boundaries because there are people from different castes in different religions in India. It also has repercussions throughout the world (Sarkin and Koenig 2009-2010: 548). The Indian diaspora has taken caste system with it. As there was interaction with South East Asian civilisation in ancient times, the caste system is prominent in the region even today. For instance, the caste system is followed in Bali (Lansing 1983: 41). Thus, it has crossed all religious and regional boundaries by travelling with the Indian diaspora. Dr B.R. Ambedkar's observes as follows:

> If Hindus would migrate to other regions on earth, Indian caste would become a world problem.

We can say that his predictions have come true because the European Parliament passed a resolution in 2013 “to put caste within a global rights framework” (Menon 2013).

Article 17 of the Indian constitution prohibits untouchability. Dalits are also granted protection under Protection of Civil Rights Act 1955, Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989 and Protection of Human Rights Act, 1993. The reservation policy if implemented properly can uplift the Dalits. Many Dalits are not even aware of the benefits ensured to them by the policy (Narula 1999: 265). The percolation of the caste system is so deep in Indian society that the efforts of these laws have not been fully successful in ending discrimination. The judiciary and police could not fledge its powers to protect dalits. Smita Narula (1999: 267) points out that "the rule of law lives in the shadow of caste". The existence of manual scavenging itself is proof that we could not get rid of the caste system.

2011 census counts 20.14 crore people in India as belonging to Scheduled Castes. Caste discrimination continues in different forms like untouchability, prohibition from using public wells and water sources, lynching, etc. Dalit women suffer more as violence is easily imposed on them without recourse to judicial action many times. They are given unequal wages and are sexually exploited (*Ibid* 274).

Human Rights Watch in one of its reports published in 2007 (http://www.hrw.org/reports/2007/02/12/hidden-apartheid-0) describes caste system as a "hidden apartheid". The system is a hindrance to achieving one of the most important human rights of equality amongst all human beings (Narula 1999: 328). The principle of non-discrimination is considered as customary international law (Shaw 2008: 275). Discrimination on the basis of caste is considered under the broader heading of descent based discrimination by the United Nations (Keane 2007: 282). Moreover, Article 1(1) of the United Nations International Convention on the Elimination of Racial Discrimination, 1965 defines racial discrimination as follows:

> In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

India is a party to the convention. India's stand is that caste is not descent and hence, is not covered by the scope of the convention. India still has to go miles to protect dalits from discrimination. A field presence of the Officer of the High Commissioner for Human Rights for "comprehensive reform of internal procedures of the criminal justice system" is required (Eisenman 2003: 178).

6.2.2 Indigenous people

In ancient India, the habitat of the forest dwellers was considered to be *res nullius* (Bhatia 1977: 69). The concept of *ahimsa* was encouraged in the societies due to the scepticism towards indigenous people who lived on forest produce, fishing, used the skin of animals, etc. The forest dwellers were considered as a threat to the agricultural activities (Habib 2010: 67). The people who inhabited forests were looked upon with suspicion as they did not allow the army of the king to enter their forests. As a challenge to this restriction by indigenous people, the king granted land to a person

who married into the family of a tribal chief and established an independent political entity of his own (Thapar 2014: 55). Kautilya did not recognise the wild tribes as equivalent to State despite any form of a political entity they formed for themselves (Chatterjee 1958: 19). At times, Kautilya preferred appointing people of wild tribes and forest dwellers as spies to assess the movement of enemy State (*Arthasastra*, Shamasastry 1915: 30).

In the Mahabharata, Eklavya who was a Nishada or tribal was forced to sacrifice his thumb and thereby, his archery skills to Dronacharya. Tribes were given inhumane treatment (Thapar 2014: 212). Due recognition to indigenous people was not given in ancient India. This is very similar to the civilised and uncivilised distinction. Their land was conquered. Their resources were always exploited but they were not given humane treatment.

In the beginning, modern international human rights law focussed on individual rights and were considered as a major threat to indigenous peoples' rights. It took a paradigm shift to protect indigenous peoples' rights (Engle 1999-2000: 305). United Nations Declaration on the Rights of Indigenous Peoples, 2007 and Convention concerning indigenous and tribal peoples in independent countries (I.L.O. No.169) are two significant instruments dealing with indigenous peoples. Other declarations include Indigenous Peoples Cancun Declaration on the WTO, Indigenous Peoples Seattle Declaration on Mining, Beijing Declaration of Indigenous Women 1995, the Kimberley Declaration (International Indigenous Peoples Summit on Sustainable Development), Declaration of Indigenous Peoples on Climate Change 2000, etc.

6.2.3 Slavery

In ancient India, slaves were imported from other parts of the world (Billorey 1972: 131). The writings of Periplus mention that beautiful maidservants were brought from other countries (Altekar 1987: 47). To the contrary, Megasthanes did not see the slavery in India and said there was no slavery in India. Penna (1980: 195) gives an explanation to the views of Megasthanes. He says that the slavery in India was different from that in Greece. It was more humane because slaves were allowed to work for others during their leisure time. They were granted the right to own property.

Aryans allowed slavery of Dasyus. But, normal inter-State relations were conducted between Aryans and non-Aryans like Yavanas[11], Dravidians, etc. (Chatterjee 1958: 46). Buddha did not approve of the slave trade (Dias and Gamble 2010: 19). Some of the reasons for slavery were debt, imposing a fine which if unpaid led to slavery, etc. (Campbell 2011: 55). Prisoners of war were also reduced to slaves.

Slavery exists in contemporary India in different manifestations. Human trafficking is a continuing menace, and many Indians are entrapped in it. Domestic laws prohibit slavery in the form of Bonded Labour (Prohibition) Act, 1976 and Article 23 of the Constitution of India. Yet, there is a need to implement international laws on modern forms of slavery like human trafficking.

6.2.4 Gender Rights

"Caste and wealth" determine the status of women (Thapar 2014: 260). The women belonging to upper echelons of society did not suffer much in comparison to those in the lower echelons. The latter were treated as chattels in many instances. By citing the examples of educated women like Gargi, Maitreyi, Lopamudra, Apala, Ghosa (Roy 2005: 77) who had an intellectual discussions in the Vedic period, the status of women in ancient India is considered to be high by authors like A.S. Altekar (Chakravarti and Roy 1988: WS3). Gargi does not represent all women of Vedic times. In the Vedic times, women slaves or *dāsis* were given as gifts by the *yajamānas* (the performer of sacrifices) to the priests (Thapar 2000: 80). There are instances wherein women were treated as chattels for exchange. The forms of marriage[12] suggest that women were gifted or bartered for money or kidnapped. Sons were preferred over daughters as the former performed the funeral rites of their parents (Chakravarti and Roy 1988: WS3). The status of women deteriorated in the

[11] The term Yavana refers to the people of Graeco-Roman origin and Arabs.

[12] There are eight forms of marriage prescribed by Indian texts namely Brahma, Daiva, Arsha, Prajapatya. Asura, Gandharva, Rakshasa and Paisacha. In Brahma form of marriage, the bride was married to a person learnt in Vedas by her father. In Daiva form, the daughter was married to an official priest by her father. While marrying a bride in the Arsha form of marriage, the bridegroom was gifted cows along with the bride. In the Prajapatya form of marriage, the bride and bridegroom are to perform sacrifices for Prajapati. When the bridegroom is given bride price on marriage, it is called Asura form of marriage. When the bride and bridegroom marry by mutual consent, it is called Gandharva marriage. When the bride is captivated, and marriage is concluded it is called Rakshasa form of marriage. Paisacha form of marriage is the most condemned form of marriage because the woman is embraced in her sleep.

later Vedic period wherein they were equated to *Sudras* (Ramusack and Sievers 1999: 22).

Furthermore, women were denied property rights in the Vedic period. Out of the two schools of Hindu law viz. Mitakshara and Dayabhaga, the latter grants right to property to women. *Arthasāstra* provides for rights over *stridhana* (construed as dowry). Sati was practised amongst higher caste women. Widows were immolated over the funeral pyre of their husbands. Romila Thapar (2014: 267) argues that the practice would have been encouraged to lessen the legal claimants to property.

Silappadikāram (composed during late Sangam period; Sangam period is dated as third century B.C. to third century A.D.) describes women in a patriarchal society, sometimes as helpless wives (Ramaswamy 2009: 59). *Therigatha* (poems composed by Buddhist nuns) describes the household chores done by women (Thapar 2014: 269). Women in Mahabharata were different from those of Ramayana because they did not follow the codes prescribed by the society in one way or the other, yet those women were accepted (Thapar 2014: 298).

War has always been a bane for humanity and worse for women. There were some rules of war in ancient India which added to their suffering. In the treaty called *pratigraha* entered by belligerent parties of war, women and children were kept as hostages (Bandopadhyay 1920: 78). Women had the option of marrying the person whom victor chose, or they were allowed to go back to their native State. Thus, a woman's freedom was restricted in such a situation wherein she could not decide for herself. Her return to her native State would have questioned her sanctity and led to stigma in social life. *Santana Sandhi* was another kind of treaty wherein the victor entered into marital relation with the vanquished (Bhatia 1977: 66). Marrying the victor was against the dignity of the woman.

In the peace treaties concluded to end war, Kautilya was against the keeping of hostages as he believed oath and honesty were the basis of treaties (Chatterjee 1958: 68). The reason Kautilya gave for not taking women hostages was that women would cause trouble to the victor. It is appreciated that women were not taken as hostages, but the reason provided by him is derogatory to women. Under contemporary international law, Article 34 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 1949 prohibits taking of hostages

during an armed conflict.[13] In addition, it is an offence under International Convention against Taking of Hostages, 1979.[14]

To preserve caste system, women were kept under strict control (Chakravarti as quoted in Ramusack and Sievers 1999: 2). The continuation of caste system depended on preventing inter-caste marriage and thereby, more restrictions were imposed on women by curbing their freedoms.

Religion also played a crucial role in determining the status of women. Buddhism and Jainism provided women with the choice of joining a nunnery. There are instances wherein female nuns were subordinated to male nuns by Buddha himself (Ramusack and Sievers 1999: 21). Nevertheless, they provided more rights to women in comparison to Hinduism (Thapar 1978: 33). Similarly, the influence of Shakti cult or describing power as feminine is evident in non-Aryan writings. They influenced the Aryan traditions as can be seen from Devi-Mahatmya, an integral part of Markandeya Purana which extols Durga (Ramusack and Sievers 1999: 32). Thus, these instances show that women were subjected to many injustices and simultaneously were raised to the highest pedestal and described as all-powerful goddesses.

At times, women wielded political power. Queen Didda of Kashmir ruled for twenty-three years as a regent to her son and grand-son. Prabhavati Gupta issued inscriptions when she ruled as a regent to her son in the Vakataka Kingdom in fourth century AD.

Equality between men and women is a goal of contemporary international law as reflected in the preamble of the UN Charter itself as follows:

> to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small.

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[13] Article 34 of the Geneva Convention Relative to the Protection of Civilians in Time of War, 1949 states: "The taking of hostages is prohibited".

[14] Article 1(1) of the International Convention against Taking of Hostages, 1979, states: "Any person who seizes or detains or threatens to kill, to injure or continue to detain another person (hostage) in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostages within the meaning of this Convention.

Women were granted many rights by the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), 1979. The convention provides that women should be ensured human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. India is a party to the convention. She has tried to implement many of the provisions by inculcating it in the national legal system but much needs to be done to achieve equality between men and women. The major task remains to curb violence against women.

The nature of Hinduism is polytheist. Due to the diversity in deities and ways of worship the religion is in multiple ways tolerant (Vanitha 2004: 122). Out of the eight forms of marriage described in the Indian texts, *Gandharva vivaha* is one. It is not recognised by ancient legal texts, but some texts recognise it because it is a marriage out of choice (*Ibid* 125). Kamasutra[15], an ancient Indian text written by Vatsyayana, appreciates *Gandharva Vivaha* (marriage with the consent of two persons) since it is on the basis of "mutual attraction" (Vanita 2009: 54). Therefore, once could choose a life partner of one's choice and consequently, there are many instances of same-sex union in ancient India. In Kathasaritasagara, an eleventh-century text, Pulindaka, a Bandit King, gets attracted to a trader called Vasudatta. Vasudatta got married to a woman, but Pulindaka stayed with the couple. Vasudatta was in relation with Pulindaka in his past life. Vasudatta committed suicide when he recollected his past life. On receiving the news of the suicide, Vasudatta's wife and Pulindaka also committed suicide. Thus, we can see that bisexuality and homosexuality in ancient India were considered as normal. The atmosphere was not filled with homophobia and the LGBT community lived in the society with social acceptance.

7. International Law of Diplomacy

Stability of international society can be achieved by maintaining diplomatic relations between States (Jönsson and Hall 2005: 119). It is an instrument to achieve global peace. Hence, diplomacy as a means to maintain good international relations existed in history. The history of the diplomacy is traced to Europe. The current practices in diplomacy are largely moulded by European practices. But ancient civilisations

[15] Many Hindu texts support sexual desire only for procreation, but Kamasutra considers the sexual desire for hedonism. It supports a same-sex union and also, bisexuality (Vanita 2004: 122).

practised diplomacy which opened the portals of inter-State relations. Jönsson and Hall (2005: 11) have the following observation to make about ancient diplomacy:

> During the first millennium BC, China, India and the Greek city-States developed complex patterns of communication and diplomatic practices. They all displayed a pattern of some roughly equal independent polities and a shared linguistic and cultural infrastructure…….In contrast to the Greek city-States, however, both the Indian and Chinese systems looked back to an idealised empire uniting all the fragmented territories.

Ancient diplomacy was also governed by some rules. In ancient India, *mandala mandala* system, the six-fold foreign policy, diplomatic rules granting privileges and immunities constituted the law of diplomacy.

7.1 The *Mandala* System and the Six-Fold Foreign Policy

The State was a sovereign unit as well as part of the circle of States or *raj mandala* (Singh 2013: 2). Chapter VI of Book VI (Shamasastry 1915: 367), Arthasāstra describes *Mandala* system as follows:

> The conqueror, his friend, and his friend's friend are the three primary Kings constituting a circle of States. As each of these three Kings possesses the five elements of sovereignty, such as the minister, the country, the fort, the treasury, and the army, a circle of States consists of eighteen elements. Thus, it needs no commentary to understand that the (three) Circles of States having the enemy (of the conqueror), the *Madhyama* King, or the neutral King at the centre of each of the three circles, are different from that of the conqueror. Thus, there are four primary Circles of States, twelve Kings, sixty elements of sovereignty, and seventy-two elements of States.

Thus, the diplomatic ties with another State was according to the *mandala* system. Diplomacy between these States was formulated by the six fold policy. The six-fold policy includes "peace (*sandhi*), war (*vigraha*), observance of neutrality (*ásana*), marching (*yána*), alliance (*samsraya*), and making peace with one and waging war with another (*dvaidhíbháva*)" (Chapter I, Book VI of *Arthasāstra*). Vāravyādhi describes only two-fold foreign policy i.e. war and peace. Thus, Kautilya's classification is relevant even today because States are not confined to two fold policy, they apply other aspects apart from war and peace like neutrality.

Kautilya considered diplomacy as a weapon used for warfare which is always present in a manifest or latent form (Boesche 2003: 19). He recommends that equal powers should never wage war because it will lead to co-destruction. He, therefore,

recommends alliance between them. He also asks for an alliance by a weak State with a strong State so that the weaker State can prevent its destruction.

7.2 Diplomatic Practices

Recognition was granted to States by inviting them to sacrificial ceremonies[16] (Chatterjee 1958: 22) or by sending diplomats (Singh 1973: 36). Thus, diplomacy is a tool to the recognition of States and entering into long-term peaceful relations. It was also used to propagate religion, develop trade, etc. It was practised "on an elaborate scale" (Chacko 1961: 589). The King was empowered to send and receive diplomats (Viswanatha 1925: 42).

Diplomatic agents existed since the Vedic era. Rig-Veda describes Agni (Lord of Fire) as a diplomat (Bandopadhyay 1920: 34). There is a long list of ambassadors who visited India. Megasthanes[17] was send by the Greek King Seleukos Nikator to the court of Pataliputra, Heliodorus was sent by the Greek King of Taxila, Antialcidas to the Sunga court of Vidisha in the second century B.C. (Sastri 1953; 142), Ptolemy Philadelphos was sent by Dionysios from Egypt, Deimachos was dispatched by Syrian King Antiochus (Chacko 1961: 590), Embassy of Sri Lanka visited the Court of Samudra Gupta in 360 A.D. (Mani 2000: 36), Chinese Emperor Mingti (58-76 A.D.) sent diplomatic missions to study Buddhism (Bhatia 1977: 157), Cambodian diplomat visited around 220-280 A.D. (Mukherjee 2001: 205), Wang Hiuen Tse visited King Harsha's court in 645 A.D. (Singh 1973: 33).

To reciprocate the diplomatic ties, Indian Diplomats also were sent abroad. Pandyan King sent a diplomatic mission to encourage trade in the first century B.C to Augustus Ceaser of Rome. In 100 A.D. an Indian embassy was received by Roman King Trajan. King Harsha sent a mission in 641 A.D. Diplomatic missions to propagate Buddhism were sent by King Ashoka to Cyrene, Epirus, Burma, Siam (present day Thailand), Egypt, and Syria (Mani 2000: 36). He also sent his son Mahinda to Sri Lanka for spreading Buddhism (Thapar 2002: 184). Thus, Ashoka's diplomatic missions disseminated Buddhism and made it one of the major religions of the world (Penna 1980: 171).

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[16] There were different kinds of sacrifices conducted by the States. Three types were famous viz. *Aśvamedha* (horse sacrifice), *Rājasūya* (royal consecration) and *Vājapeya* (drink of strength).

[17] Megasthanes wrote *Indica* which a source of study to know historical facts.

Diplomatic relations between India and China were good as inferred from the embassies sent to China. King of Tamralipti sent a mission to China in 245 A.D. Pallava King Narasimhavarman-II sent diplomats to China in 720 A.D. (Chakravarti 1987: 150). Cholas sent embassies thrice to Sung Dynasty of China in 1020 A.D., 1033 A.D., 1077 A.D. and 1106 A.D. (*Ibid* 150). Apart from these embassies, diplomatic missions were exchanged between States. Pulakesin II of Maharashtra exchanged envoys with Persian Shah Khosru Parwiz in the 7th century A.D (Chacko 1961: 591). Chalukyas exchanged embassies with Sassaniol Kings of Persia (Mani 2000: 36).

Diplomacy was prominent in the epoch of epics (Viswanatha 1925: 39). Even though the characters in the epics are mythological, diplomatic practices can be inferred. Moreover, diplomacy was not necessarily between two States. It was between two opponents to reach an agreement regarding issues related to State. In the Mahabharata diplomats were sent by Pandavas who did not have any Kingdom, they claimed land owned by the Kingdom ruled by Dhritarashtra. Pandavas took help from rulers of several Kingdoms like Panchala ruled by King Drupada. Nevertheless, due to failure of diplomacy, war was waged. In the Ramayana, Rama sent diplomats to Ravana who abducted Rama's wife. Rama was not ruling his Kingdom at the time; he was in exile in the forest. He had allies like Sugriva who supported him to negotiate with Ravana. All these instances in the epics, prove the diplomatic practices of the times. They cannot be equated to present day diplomacy between States, but the principles of the law of diplomacy were similar.

In the Mahabharata, Vidura, Sanjaya and Krishna were the diplomats who tried to negotiate between the Pandavas and Kauravas. There is a criticism of war and the loss it incurs, by the diplomats. They tried their best to avoid war, but the Kauravas were not ready to budge from their decision, and hence, the Pandavas had to resort to war to meet their demands. The last demand of Pandavas was a province. The Pandavas further reduced their demand to five villages. Their wish was not fulfilled. The negotiators also tried to explain the internecine nature of war. Sanjaya explained that war will only result in bloodshed (Section XXV, Udyoga Parva). Krishna tried to appease King Dhritarashtra in multiple ways. He explains a King's *dharma*, advantages of adherence to *dharma*, the disadvantages of following *adharma*, a King’s choice to avoid *adharma*, existence of *adharma* as awful,

prevention of *adharma* should not be delayed, dependence of peace on both parties to negotiation, duty of the King to advise his sons and his *dharma* to protect Pandavas (Book V of *Mahābharata* as explained in Sikand 2007: 343). Krishna reiterated these to Duryodhana, but the war was inevitable. Pandavas did not possess Kingdom, but they were allies with many Kingdoms to negotiate their demands and finally, to wage war.

Kautilya encouraged diplomacy and opened the portals of his Kingdom to foreigners (Chatterjee 1958: 40). While welcoming the diplomats, King was to meet him with his ministers (*Arthasastra* Shamasastry 1915: 59). Following Kautilya's advice, Chandragupta Maurya established a Board for the welfare of foreigners and diplomats (Chatterjee 1958: 51). The King was advised by the Minister of Foreign Affairs (*Sandhivigrāhika*). Diplomats were appointed, and the missions were dispatched on *Sandhivigrāhika's* advice. The King had his discretion whether to accept the advice or not (Derret 1958: 374).

Megasthanes refers to *astunomoi* or persons who guided and took care of foreigners (Rocher 1958: 353). Thus, ancient Indian States ensured to fulfil the requirements of diplomats and treated them with respect. Similarly, Article 25 of the Vienna Convention on Diplomatic Relations, 1961 provides that it is the duty of the receiving States to "accord full facilities for the performance of the functions of the mission." It has always been the responsibility of the receiving States to ease the functions of diplomats by providing them required facilities.

Diplomats were attended by the King personally. They were conferred with their portfolios after the Council of Ministers passed a resolution on the mission (Rocher 1958: 352). The purpose of the mission was discussed in detail before it was despatched (Chatterjee 1958: 61). Diplomats carried royal writs or *sāsanas* with them (Shamasastry 1915: 41). The mission was accompanied by servants. Prior permission of the sovereign of the receiving State was compulsory for entering it (Bhatia 1977: 47). Entry to the receiving State was granted after producing the royal writ which was similar to credentials of the modern times. It mentioned the name of the *dūta*, message of the King of the sending State, the purpose of visit, etc. (Chatterjee 1958: 55). They also produced passports to the Superintendent of passports (Bhatia 1977: 47). These are very similar to the provision in Article 13 of the Vienna Convention on

Diplomatic Relations, 1961 which makes it incumbent on the diplomat to produce the credentials.[18]

The aim of ancient Indian diplomacy was not expansion whereas diplomacy was applied to avoid war. (Mathur 1962: 398). War was considered as the last option in the four-fold policy or *upayās* viz. sāma (conciliation), dāna (gift), danda (punishment) and *bheda* (dissension). This four-fold policy was applied in the internal as well as external affairs of the State. Gift in the inter-State context was foreign aid (Modelski 1964: 553).

There is no consensus on the fact whether the embassies in ancient India were permanent or temporary. It is not a matter of concern because a permanent embassy is not a prerequisite of diplomacy[19] (Berridge and James 2003: 69). But most of the authors have argued over the permanency of diplomatic missions. Singh (1973: 50) opines that the embassies were permanent because it was a part of the State to maintain inter-State relations. For Kautilya embassies stayed till they were granted permission (Shamasastry 1915: 42). Ludo Rocher (1958: 345) argues that there was no permanent embassy in ancient India. The meaning of *dūta* means messenger, and he was sent on specific missions. By going through the work of Megasthanes, Rocher concludes that there existed permanent embassies also. Even though the permanence of missions is a debatable issue but all we can conclude here is that the institution of diplomacy was quite well developed in ancient India and was not introduced to the world by Europe.

7.3 Classification of Diplomats

Arthasāstra (Shamasastry 1915: 40) classifies diplomats into following categories:-

i. *Dūta*- One who succeeded as a councillor was appointed as dūta.

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[18] "The head of the mission is considered as having taken up his functions in the receiving State either when he has presented his credentials or when he has notified his arrival and a true copy of his credentials has been presented to the Ministry for Foreign Affairs of the receiving State, or such other ministry as may be agreed, in accordance with the practice prevailing in the receiving State which shall be applied in a uniform manner."

[19] Diplomacy is defined by Berridge and James (2003: 69) as follows:
"The conduct of relations between sovereign States through the medium of officials based at home or abroad, the latter being either members of their State's diplomatic service or temporary diplomats. Thus, diplomacy includes the stationing of representatives at international organizations….It is the communications system of the international society."

ii. *Nisritārtha* were envoys who possessed the calibre of *amātyasampad* i.e. the qualifications of a Minister of the Council. He could modify his message according to the circumstances (Rocher 1958: 348).

iii. *Parimitārtha*- He was not empowered to alter the message. He possessed ministerial qualifications less by one-quarter. He was sent on specific missions.

iv. *Sāsanahara* – He could read only the royal decree without adding his version to it (Singh 1973: 54). He carried a written message called *Sāsana*. He had ministerial qualifications less by one-half.

In modern international law, the Congress of Vienna, 1815 classified diplomats into following categories (Sen 1988: 24):

i. Ambassadors
ii. Envoys and Ministers Plenipotentiary
iii. Ministers Resident Accredited to the sovereign, and
iv. Chargés d'Affaires accredited to the Minister of Foreign Affairs

Under the 1961 Convention, Ambassadors or nuncios are accredited to the Heads of State and other heads of mission of equivalent rank; envoys, ministers and internuncios are accredited to Heads of State, and Chargés d'Affaires are accredited to Ministers for Foreign Affairs.

7.4 Qualifications of Diplomats

A diplomat was required to possess high skills. Therefore, at times they were trained in educational institutions (Singh 2013: 3). Manu demands knowledge of varied subjects, noble lineage, good character, capable of reading people's mind through their body language and expressions (*Manusmriti*, Chapter VII, verse 63). *Mahabharata* adds to these qualifications, knowledge of Vedas (Udyog Parva), good memory and cleverness (Santi Parva: Section LXXVI). The epic also emphasises in eloquence (Bhatia 1977: 42). Tiruvalluvar attaches qualifications like wit, honesty, love, eloquence, knowledge, high birth, kindness, succinctness to the person holding the post of a diplomat (Tirukural: Verse 682). He should be ready to deliver the message of the King even if it costs his life (*Ibid* Verse 690). Usually, Brahmins were appointed as diplomats. Thus, the caste system was an important factor in appointments.

They helped in cultural diplomacy because they travelled to vast lands and helped in the dialogue between civilisations like between Indian and South-East Asian civilisations. The contemporary international law does not specify qualifications of a diplomat, but the States set their criteria to appoint diplomats.

7.5 Functions of Diplomats

The external relations of a State largely depended on diplomats. Manu signifies that peace and war depend on a diplomat (*Manusmriti* Chapter VII: Verse 65). The diplomat can create allies or destroy them (*Ibid* Verse 66). When King was not able to enter into treaties personally, he sent his diplomats to negotiate the treaties and the ratification was postponed for later period (Chatterjee 1958: 67).

Thus, the functions of *dūtas* were very vast (Derrett 1958: 373). H.S. Bhatia (1977: 48) succinctly puts the functions of diplomats as "(1) transmission of messages (2) maintenance of treaties (3) issue of *ultimatums* (4) breaking of peace". During peace time, diplomats looked after the welfare of their citizens in the receiving State and during war assessed the weakness of the enemy State (Sharma 1962: 409). Kautilya (*Arthasastra* Shamasastry 1915: 41) suggests that an envoy should befriend personnel of the enemy State who are in charge of boundaries, cities, country parts and wild tracts. He should analyse the fidelity of the population of the enemy State (*Ibid* 42). *Dūta Dharma* signifies that the diplomat should deliver his message even at the cost of his life (*Ibid* 41). The envoy was allowed to receive gifts on the success of his mission (*Mahabharata*: Section XCI, Udyog Parva).

There are four methods prescribed by Kautilya to perform the duties of a diplomat viz. *madhyama* (mediatory), *udasina* (neutral), *vijigishu* (conquering the King) and *ari* (enemy) (Singh 2013: 4). It means the diplomat was supposed to act according to the inter-State relations between the sending and the receiving States.

The functions of diplomats in ancient India is similar to those in contemporary times as enunciated in Article 3 of the Vienna Convention on Diplomatic Relations, 1961.[20] The contemporary diplomat and the ancient Indian diplomat represent the

[20] Article 3 of the Vienna Convention on Diplomatic Relations, 1961 provides:
i. Representing the sending State in the receiving State;
ii. Protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law;

sending State in the receiving State. They represent the interests of the sending State and its nationals. In modern times, the diplomat has to be within the contours of international law whereas the ancient Indian diplomat used discretion according to the circumstances and acted within the directions given by his King. The primary aim of both ancient Indian and modern diplomats was negotiation and promotion of friendly relations. Another important duty performed by both is the reporting of "conditions and developments in the receiving State" to the Sending State.

7.6 Privileges Granted to Diplomats

The life of a diplomat was always in jeopardy because of unpleasant news one had to deliver sometimes (Rocher 1958: 354). Therefore, attached to the obligations of the diplomats there were corresponding privileges so that they could fulfil their duties in the best possible manner. These privileges were also granted to foreign visitors (Chatterjee 1958: 65).

The diplomatic immunity was an extension of sovereign immunity. A diplomat represents the sovereign because the head of the State cannot go personally to different States every time, hence a representation in the form of a diplomat is despatched. In ancient India also, the *Dūta* was a mouthpiece of the King (*Arthasastra* Shamasastry 1915: 16). He represented the sovereign who sent him (Bhatia 1977: 49). The rationale behind granting of privileges was that the message delivered by the *dūta* was not his own.

In this context, Kautilya advises the diplomat to convince the receiving King not to punish him with death because words spoken by him are not his own but of the King who sent him (*Arthasastra* Shamasastry 1915: 41). Death was not exempted if the envoy delivered the message contrary to the instructions given to him by the King (*Mahabharata*: Section LXXII, Udyog Parva). A diplomat was not to be killed even if he was on a battlefield (Gautama 10.17-18). Since Brahmins were appointed as diplomats, they had personal inviolability by virtue of belonging to high caste.

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iii. Negotiating with the Government of the receiving State;
iv. Ascertaining by all lawful means conditions and developments in the receiving State, and reporting thereon to the Government of the sending State;
v. Promoting friendly relations between the sending State and the receiving State, and developing their economic, cultural and scientific relations.

Nītivākyamrita prohibits the killing of an envoy even if he belonged to a lower caste (Chacko 1961: 591).

Other punishments like whipping, mutilations, shaving of head and branding were permissible punishments granted to diplomats (Ramayana Canto LII, Book V: 423). In the Ramayana, Hanuman was about to be slain by Ravana, but his brother Vibhishana advised him that killing of *dūta* was against *dharma*. Hence, Ravana ordered to burn the tail of Hanuman instead. Hanuman as a retaliation burned Lanka with his tail. It was a violation of *dharma* by Hanuman. He regretted this act later because he realised it would have affected Sita also (*Ramayana* Canto LV, Book V: 423).

Even though, in ancient India punishment like death was not imposed on a diplomat, but other punishments could be inflicted on diplomats. To the contrary, contemporary international law provides more protection to diplomats as they have personal inviolability and immunity from civil and criminal jurisdiction. Article 29 of the Vienna Convention on Diplomatic Relations, 1961 grants personal inviolability to a diplomatic agent.[21] There is immunity from arrest. The receiving State is obliged to take steps to prevent an attack on the person, dignity or freedom of the diplomat. Article 31 provides for immunity from the civil and criminal jurisdiction of the receiving State.[22] Vienna Convention on Consular Relations, 1963 provides some immunity to consular officers who are in charge of the welfare of the sending States.

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[21] Article 29 of the Vienna Convention on Diplomatic Relations, 1961 states as follows:

"The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity."

[22] Article 31 of the Vienna Convention on Diplomatic Relations, 1961 provides:

"1. A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of:

(a) A real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission;

(b) An action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;

(c) An action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.

2. A diplomatic agent is not obliged to give evidence as a witness.

3. No measures of execution may be taken in respect of a diplomatic agent except in the cases coming under subparagraphs (a), (b) and (c) of paragraph 1 of this article, and

7.7 Termination of Diplomatic Services

Diplomats were sent on specific missions (Bandopadhyay 1920: 37). They were empowered to return in case of fear of death or on the failure of the mission (*Ibid* 44). According to Kautilya, they could terminate the mission on an apprehension of imprisonment (*Arthasastra* Shamasastry 1915: 43). They also arrived back to their sending State after the success of their mission. Diplomatic services were also terminated when the receiving State did not receive the mission, on the death of the sovereign of the sending State and on declaration of war (Chatterjee 1958: 62-63).

Article 43 of the Vienna Convention on Diplomatic Relations, 1961 provides that a diplomatic mission is terminated when the sending State notifies the receiving State that the function of the diplomat has come to an end, also when the receiving State notifies the sending State that the former refuses to recognise the diplomatic agent as a part of the mission.[23] Article 9 empowers the receiving State to declare a diplomat as persona non-grata, and thereby the sending State shall terminate his functions.[24] Article 44 obliges the receiving State to take adequate measures to send the diplomat back to his State when armed conflict arises.[25] It can be inferred here that the services of diplomats were terminated in ancient India as well as at present

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provided that the measures concerned can be taken without infringing the inviolability of his person or of his residence.

4. The immunity of a diplomatic agent from the jurisdiction of the receiving State does not exempt him from the jurisdiction of the sending State."

[23] Article 43 of the Vienna Convention on Diplomatic Relations, 1961 states:
"The function of a diplomatic agent comes to an end, inter alia:
(a) On notification by the sending State to the receiving State that the function of the diplomatic agent has come to an end;
(b) On notification by the receiving State to the sending State that, in accordance with paragraph 2 of article 9, it refuses to recognize the diplomatic agent as a member of the mission."

[24] Article 9 states as follows:
"1. The receiving State may at any time and without having to explain its decision, notify the sending State that the head of the mission or any member of the diplomatic staff of the mission is persona non grata or that any other member of the staff of the mission is not acceptable. In any such case, the sending State shall, as appropriate, either recall the person concerned or terminate his functions with the mission. A person may be declared non grata or not acceptable before arriving in the territory of the receiving State.
2. If the sending State refuses or fails within a reasonable period to carry out its obligations under paragraph 1 of this article, the receiving State may refuse to recognize the person concerned as a member of the mission."

[25] Article 44 of the Vienna Convention on Diplomatic Relations, 1961 provides:
"The receiving State must, even in case of armed conflict, grant facilities in order to enable persons enjoying privileges and immunities, other than nationals of the receiving State, and members of the families of such persons irrespective of their nationality, to leave at the earliest possible moment. It must, in particular, in case of need, place at their disposal the necessary means of transport for themselves and their property."

due to war. It also terminates when the receiving State declare the diplomat as unfit to hold the mission. Since, in the present world, diplomats are granted more protection and immunities from the civil and criminal jurisdiction of the receiving State, there is no fear of punishment or imprisonment in the receiving State.

7.8 The Institution of Espionage

Espionage was recognised as a significant institution in ancient India (Bhatia 1977: 44). Kautilya emphasises on espionage over diplomacy (Modelski 1964: 556). Arthasastra emphasises on the institution of espionage and dedicates chapters XI and XII of Book I to espionage. It was used for inter-State matters and intra-State affairs (*Arthasastra* Shamasastry 1915: 31). Spies were used to cause feud in other States and for assassinations (*Ibid* 553). King appointed spies on the advice of Council of Ministers (*Ibid* 24). Women were also appointed as spies (Bandopadhyay 1920: 40). Spies were exempted from punishment unless they committed gravest crimes like arson, assassination (*Ibid* 140).

Spies were sent to other States in the guise of householders, merchant, etc. to collect information. They were sent in the form of ascetics (*Mahabharata* Section CCXLII, Ādi Parva). Kautilya (*Arthasastra* Shamasastry 1915: 25) classifies spies according to their guise viz. disciple (*kápatikachhátra*), an ascetic (*udásthita*), a householder (*grihapaitika*), a trader (*vaidehaka*), an ascetic practising austerity (*tápasa*), a co-worker (*satri*), a troublemaker (*tíkshna*), a person who poisons someone (*rasada*), and a woman who lives on alms (*bhikshuki*). Spies in the guise of a householder were obliged to assess immigration and emigration and the progress of foreign spies (*Ibid* 205). A Rashtrakuta inscription mentions that the Emperor sent courtesans to his vassal States as spies (Sastri 1953: 139).

There was a comparison made between diplomats and spies in some ancient Indian texts. The Agnīpurana describes a diplomat as an open spy (*prakāsa chara*) (Bhatia 1977: 43). *Dūta* is classified as a sub-category of *Chara* in *Kāmandakīya-nītisara* (Rocher 1958: 347). Kautilya suspects diplomats and advises the King to be aware of them and engage spies to watch them (*Arthasastra* Shamasastry 1915: 44). A paradox here is that the diplomats in ancient India are equated to spies in many instances whereas high qualifications are demanded, and sanctity is attached to the office. Hence, a conclusion cannot be arrived at that all diplomats used espionage.

8. International Humanitarian Law

Pramathanath Bandopadhyay (1920: 65) argues that inter-State relations were usually peaceful. Duncan J. Derrett (1958: 361) refutes the very institution of diplomacy in ancient India and argues that peace was rare in ancient India. The opinion that war was quite frequent is substantiated by the fact that a warrior caste of *Ksatriyas* itself was created (Viswanantha 1925: 108). *Ksatriyas* were assigned with the duty to fight called *Ksatradharma*. Moreover, amongst all ancient civilisations the largest number of writings on war was produced in ancient India (Neff 2005: 14). A conclusion cannot be drawn on the basis of the existence of *Ksatriya* caste and writings on war that war was a constant phenomenon. There were restrictions on use of power by the *Ksatriyas*. For instance, Sukracharya warned the King not to destroy his army by resorting to war recklessly (Bhatia 1977: 99).

Rules of warfare were also formulated to make war a humane phenomenon. The rules of warfare were the genesis of international law in ancient India (Singh 1973: 26). These rules prove that ancient civilisations like Indian civilisation had rule of law (Bederman 2001: 8).

Even though the conventions on IHL were codified by the initiative of Europeans, but it cannot be concluded that the principles of IHL were of European origin (Sornarajah 1980: 238). International Humanitarian Law (IHL) belongs to humanity culturally and politically (Mani 2001: 59). The very existence of civilisation depends on the compliance of IHL (Singh 1959: 20). International humanitarian law gains legitimacy when it is realised that it is not a product of one civilisation (Weeramantry, *Legality of the Threat or Use of Nuclear Weapons*, 1996 ICJ Reports: 478). The compliance of IHL will automatically increase if it is linked to the religions and cultures of the world (Sornarajah 1980: 239). The existence of religious sanctions attached to the violation of IHL will lead to better compliance. This linking is the very purpose of the multicivilisational perspective of international law.

In the twenty-first century, war is being waged on an unprecedented scale. In the twentieth century itself about 100 million lives were lost in 250 officially declared wars (Nordstrom 2004: 43). The number of wars are increasing in the twenty-first century. Hence, there is a necessity for emphasis on multicivilisational perspective

and non-violence to lessen the resort to armed conflict as a means to settle disputes between States.

8.1 War in Ancient India

Sukraniti (translated by Sarkar 1975: iv, 7.220) defines war "as the affair that two parties who have inimical relations undertake by means of arms to satisfy their rival interests". For Kautilya, war is an "offensive operation" (*Arthasastra* Shamasastry 1915: 370). Kautilya is considered as an offensive realist in the modern international relations parlance yet he preferred peace over war because it was more favourable to affluence (Brekke 2006: 128). For him, utility, profit and state necessity were the concerns while waging war (Boesche 2003: 18). He advises resorting to war only if a minimum loss was assessed. Therefore, he discouraged weak Kings from resorting to war. *Kamandakiya Nitisara* (translated by Apte 1982: 61) makes it clear that both parties to the war are going to incur loss.

V.S. Mani (2001: 60) sums up the five stages of war in ancient India viz. capture of cattle owned by the enemy, a call-up for invading, bombarding the fortress of the enemy, fighting in the battlefield and triumph. The agents of war were the armed forces of the State and spies (Bandopadhyay 1920: 136). The army comprised of *Maula* (regulars), *Bhrita* (hired troops), *Sreni* (guild troops), *Atavis* (wild tribes) and recruits from the army of friendly States (Arthasastra, Shamasastry 1915: Book II Chapter XXXIII). The King was the legitimate authority to wage war, and nobody could question the power to do so (Brekke 2006: 120).

The classification of war differed according to the jurists and texts. Taking a broad classification into consideration, there are two kinds of disputes internal conflict (between soul and ego) and external dispute ranging from feud to war. The solution for former is given in the *Bhagvad Gita,* and the latter should be solved by peaceful means (Sikand 2007: 371). Kamandaka classifies war into sixteen types (Bhatia 1977: 88). Usually, fighting face to face or *Sanmukha Yuddha* was the most approved form of war. A silent war was known as *tūshniyuddha* and open warfare was called *prakāsa-yuddha*. War was classified according to the instruments of application viz. *astra, sastra* and *mantra* (Penna 1980: 191). *Astra* intends a weapon released with the help of fire or machines. *Sastra* means a weapon like a sword or a spear which caused injury to human body. According to the use of these instruments,

war was known as *āsura yuddha* (use of *astra*), *mānusha yuddha* (use of *sastra*) and *daivika yuddha* (use of *mantra*).

The fairness of both means and end was stressed in ancient India. Thus, a war was usually classified into two viz. *Dharmayuddha* (just war) and *Kutayuddha* (unjust war). In *Dharmayuddha*, the warrior is supposed to fight without desire for reward (Sinha 2005: 388). It was fought to uphold *dharma* (Subedi 2003: 346).War is just according to the ancient Indian jurists if is kept as a last resort after the failure of diplomacy and all other peaceful means, the aim of the war is virtuous and when all the rules of warfare are followed while waging war (Penna 1980: 236). *Dharmayuddha* was propagated by *dharmasastras* whereas the *Arthasastra* supported *Kutayuddha* when required. *Kūta yuddha* was fought with the help of deception and harmful weapons (Subedi 2003: 356). Such deception also led to *lobha-vijaya* or victory to satisfy greed or *asura-vijaya* or victory to fulfil revenge (Bandopadhyay 1920: 375). *Kutayuddha* was usually applied as reciprocity to guile. It was also meant for weak States (Bhatia 1977: 99). *Sukranīti* allows *Kutayuddha* for weak States (Chacko 1961: 598). Those who adopted *Kutayuddha* were out of the protection of rules of warfare. Thus, ancient Indians considered it as an exception to adopt *Kutayuddha*.

In modern Europe, classification of war is into two viz. just and unjust war. Thomas Aquinas mentions three conditions for a war to be just viz. the authority waging war should be legitimate, the aim of the war should be just, and the soldiers fighting the battle should have the right intention (Brekke 2006: 136). Thus, the prerequisites of just war are very similar in ancient India as well as in modern Europe. The just war doctrine was used by the Europeans to justify the atrocities caused by war. The aim of war was not violence whereas to succeed with inducing minimum cruelty (Penna 1980:183). It did not seek to subdue the enemy but to maintain and increase the honour of the King (Nawaz 1957: 180). At times, wars were fought to unify northern India (Singh 1980: 75).

Agni Purana mentions different causes of war like the abduction of a ruler's wife, conquering of territory, insult of an ally, death of an ally, and interruption in the balance of power in a *Mandala* (Bhatia 1977: 86-87). The adjacency of territory was a cause of war in the case of *Mandala* (Law 1920: 7). Some rulers waged war when

there was oppression of his subjects (Sinha 2005: 288). Violation of treaty obligations was one of the leading causes of war (Viswanatha 1925: 168). War was also waged in the form of humanitarian intervention. When a ruler discovered that some other ruler is exploiting his subjects he waged war to protect them (*Ibid* 128). Kamandaka (*Nitisara* Apte 1982: 17.2-3) supported interference on moral grounds. War could be waged for self-defence according to the *Puranas* (Subedi 2003: 348). It was allowed to break the enemy's strength (Chatterjee 1958: 98).

Wars fought by Tamils were either "aggressive or counter-aggressive" (Subrahmanian 1964: 400). *Purananuru* praises lofty virtues like chivalry and courage (Wigneswaram 2003: 17). Referring to *Purananuru*, Derrett (1958: 361) explains war as a normal phenomenon in ancient India because it was encouraged as a part of State policy. The reward for waging war was attainment of heaven after death. Mothers were considered proud of their martyr sons. Cowardice was believed to cause disgrace. War was justified (Gurukkal 1987: 45). It cannot be concluded that war was always encouraged as some of the poems of *Purananuru* discourage war as it caused loss to agriculture (*Ibid* 47).

At times, war was granted legitimacy by religion. A Kṣatriya who died on the battlefield was believed to attain heaven (Bhatia 1977: 89). This assurance led the warrior to fight until his last breath. In the *Mahabharata*, Bhisma equates war to sacrifice which again legitimised war because of the link to religion (Brekke 2005: 72). The law of warfare is "a gift of religion itself" (Singh 1959: 18). Religious legitimacy was further obtained when the incarnations of God were described in epics to participate in war. The party which was supported by the incarnation became infallible, and it became a just war (Brekke 2006: 116). It is also justified even if the parties supported by the incarnation deviates from the established rules of warfare.

Bhatia (1977: 94) opines that war was recognised as a legal relation between States. *Mahabharata* describes various aspects of polity and society. It deals in detail with the war fought between Pandavas and Kauravas and the prelude and epilogue of the war. The epic commences and ends with the argument on the futility of war. The internecine nature of war is asserted throughout the epic. Thus, war was not legalised as it disrupted the peace which was considered as eternal. A conclusion cannot be drawn that that war was legalised in ancient India because it was declared after due

deliberation and only as a last resort (Viswanatha 1925: 110). Dissension was the last option after the failure of all appeasement policies. The enemies were to be conquered by gifts first and not by battle (*Manusmriti* VII: 198). It is similar to the contemporary international law which does not encourage war and calls for the adoption of peaceful settlement of disputes.[26]

The outbreak of war led to the termination of diplomatic relations, suspension of inter-State relations, cessation of operation of treaties and private individuals were not supposed to maintain relations with the nationals of the belligerent State (Chatterjee 1958: 74). Treaties were not considered binding during the war unless it was for mutual interest (Singh 1973: 71). Kautilya was in favour of immigration and emigration during war, but Sukracharya was against it (Bhatia 1977: 100). For Kautilya, a State could be neutral even after the declaration of war (Chatterjee 1958: 75).

War was prohibited by the concept of non-violence or *Ahimsa*. Non-violence is propagated by Hinduism, Buddhism and Jainism. Chandogya Upanishad (III.17.4) endorses *ahimsa* to be followed by the virtuous (Habib 2010: 65). Buddhism and Jainism adopted *ahimsa* as a principal tenet. *Ahimsa* prohibits causing harm or killing of any living being. It "laid down universal conduct for tolerance, peace and cooperation" (Singh 1984: 237). The Buddhist Jataka stories exemplify that violence leads to more violence (Dias and Gamble 2010: 15). Buddhism does not allow violence amongst individuals and hence, amongst States too (Singh 1959: 18). Therefore, Buddhism does not allow war to be a part of State's foreign policy. It outlaws war fully, and hence there is no classification into just and unjust war (Weeramantry 1996: 481). It prohibits arms trade as it leads to the destruction of life (Dias and Gamble 2010: 21).

King Ashoka of the Mauryan Empire renounced war after witnessing the atrocities of the Kalinga war. He in his edicts pleads for tolerance and non-violence between different sects (Thapar 2014: 121). He adopted *dhamma vijaya* or conquest

[26] Article 2(3) of the Charter of the United Nations: "All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered."
Article 2(4) of the Charter of the United Nations: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

by *dhamma*. King Ashoka was one of the first proponents of the idea of non-use of force as is codified in Article 2(4) of the UN Charter[27] (Mani 2001: 61).

8.2 Applicability of IHL

When war was inevitable, ancient Indian jurists demanded "fair play" on the battleground (Subedi 2003: 357). They prohibited savagery during warfare (Chatterjee 1958: 85). Therefore, they elaborated the rules of warfare to be followed by the warriors. The rules of warfare were applied to everyone irrespective of religion or nationality. Derrett (1958: 370) concludes that Indians were not prejudiced against any society, people or race. There was differentiation of races in ancient India too. The Aryans called others *Dasyus*. The Mahabharata mentions that war was created for the destruction of *Dasyus* (Viswanatha 1925: 109).

Mahabharata "holds up a moral ideal of warfare" (Subrahmanian 1964: 399). There are instances of gross violations of laws of war in the epic. For instance, Yudhistir lied to Dronacharya that Aswathama was killed. Yudhistir was known for adherence to *dharma*. He referred to the death of an elephant called Aswathamma. Dronacharya thought his son was dead and this news weakened him. Thereafter, he was killed in war easily. After this incident, the chariot of Yudhistir touched the ground which was always above the surface of the earth. Thus, Yudhistir is known to have violated *dharma* which led to the loss of privilege. This instance is proof that ancient Indians did not encourage the use of deceit in warfare. Stratagems were prohibited in just war (Chatterjee 1958: 117).

Torkel Brekke (2005: 72) argues that the rules of warfare in ancient India were for a duel and not for a systematic warfare (especially in the epics). For him, there was no differentiation between private warfare and public warfare. With the difference seen in the nomenclature itself, such a conclusion cannot be reached because a private dispute was called *kalaha* and a public war was called *yuddha*. If such were the case, then there would not have existed rules like prohibition of hyper-destructive weapons. There was evident differentiation of warriors into infantry, cavalry, chariots and elephants. The rules prohibited a warrior in infantry attacking

[27] Article 2(4) of the UN Charter states that "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

that on chariots or vice-versa. Thus, we can see that there were rules for duels as well as battles. The duels usually were part of the systematic warfare. It is true that the epics concentrate on heroism, but the principles of international law can be culled out from the epics which discuss them in detail.

Brekke (2006: 119) argues that ancient Indians were concerned only about *jus in bello*. We cannot make such a conclusion because for them war was the last resort and the diplomatic practices were also well developed so that disputes could be peacefully settled. Brekke (2005: 64) asserts that ancient Indians did not discuss on the legitimate authority who possessed the power to wage war. Again this can be refuted because the King was the legitimate authority to declare and wage a war.

Apastamba recommends penances for violations of IHL (*Apastamba Dharmasutra* cited by Penna 1980: 198). The performance of penances and their very recommendations prove that there was sin attached to the violation of IHL. Hence, violation of IHL was not encouraged. Nevertheless, the violators justified violations of laws of war. In the Ramayana, Bali and Sugriva were fighting. Rama was watching by hiding behind a tree. When Sugriva was about to lose the battle, Rama killed Bali from the back. Bali condemned Rama's act as an example of cowardice. Rama justified the act because Bali deprived Sugriva of his property and wife (Ramayana Canto XVI: Book IV). Thus, violation of laws of warfare has been a common phenomenon in the past as well as in contemporary times. Adherence to the rules of warfare is tough because of the strain in inter-State relations and the lack of binding nature of the law (Singh 1973: 61). Due to the large gap between theory and praxis, violation of IHL is quite evident. Nevertheless, such instances of violations cannot deny the existence of rules of warfare in ancient India.

8.3 Differentiation of Combatants and Non-Combatants

One of the basic rules in modern IHL is the differentiation of combatants and non-combatants. In ancient India, this differentiation was clearly made. Non-combatants were kept aloof from the atrocities of war because battles were usually fought on barren lands. Farmers were not affected by war (Penna 1980: 186). Old men, infants and women were not to be attacked (*Sukraniti*). Attack of Experts in special arts was prohibited. Spectators of war were prohibited from attack (Kane 1958: 210). One who went in search of fodder, one who established camps, gate-

keepers, etc. were treated as non-combatants in the epic era (Bhatia 1977: 100). Persons lacking "full enemy character" were to be treated with compassion (Chatterjee 1958: 80). Kautilya provides for protection of foreigners if they were not connected to war (*Ibid* 81). Even though Kautilya is known as an offensive realist, but he was against harming non-combatants (Mani 2001: 62). The reason given by Kautilya for this is that the people of an enemy State if conquered will be the subjects of the conqueror tomorrow. So, there are chances of rebellion in future. To avoid a rebellion, it is imperative to treat the non-combatants well. Further, by causing impediment to trade and other occupations, killing of subjects will strip the country of its population (Arthasastra Shamasastry Book XIII: Chapter 4). The population is a prerequisite of State. Non-combatants were not always spared if they interfered with the activities of combatants (Viswanatha 1925: 155).

A narrow definition of combatants was provided so as to reduce the atrocities of war (Chatterjee 1958: 90). The combatants were under the protection of rules of warfare similar to the protection provided to *hors de combat* in modern IHL.[28] Battle was allowed to be fought between two persons using the same kind of weapon. A warrior with a sword could not attack a warrior on chariot. A warrior with a protection of armour could not attack one without armour. A combatant standing on a chariot was prohibited from striking one who was standing on ground. Eunuchs and one with loosened hair were not allowed to be attacked (*Manusmriti* VII: 92). Warrior drinking water, having food or removing footwear was prohibited from being killed (Kane 1958: 210). If a warrior's weapon was broken, he was to be spared. One affected by grief, one struck with a deathly wound, one who is frightened and one who is fleeing from the battleground were not to be attacked (*Ibid* 93). One who is fighting with another combatant was not to be attacked and those who were sleeping,

[28] Article 41 of the Protocol Additional to the Geneva Conventions relating to the Protection of Victims of International Armed Conflicts (Protocol I): "Safeguard of an enemy hors de combat

1. A person who is recognized or who, in the circumstances, should be recognized to be 'hors de combat' shall not be made the object of attack.
2. A person is 'hors de combat' if:
   (a) He is in the power of an adverse party;
   (b) He clearly expresses an intention to surrender; or
   (c) He has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defending himself; provided that in any of these cases he abstains from any hostile act and does not attempt to escape.

When persons entitled to protection as prisoners of war have fallen into the power of an adverse Party under unusual conditions of combat which prevent their evacuation as provided for in Part III, Section I, of the Third Convention, they shall be released, and all feasible precautions shall be taken to ensure their safety."

naked and without weapons (*Ibid* 91). King, when left alone, should not be killed (*Sukraniti*). Perhaps, a King could be killed only by another King. Combatants who surrendered were to be left scot-free (Chatterjee 1958: 91).

One who surrendered was granted asylum. For instance, in Ramayana, Vibhishana was accepted by Rama even though he was Ravana's brother. This helped Rama in knowing the weaknesses of his enemy better in such a manner that he could win over Ravana. After the victory, he enthroned Vibhishana. Nationals of Enemy State were encouraged in the army to know the enemy's weakness (Chatterjee 1958: 77). On the other hand, if traitors were caught, they were subjected to severe punishment (*Ibid* 77).

The distinction between combatants and non-combatants has been recognised today as a part of customary international law (Henckaerts, URL: http://www.icrc.org/eng/assets/files/other/customary-law-rules.pdf). It is the obligation of belligerent parties to distinguish between civilians and combatants according to Article 48 of the Protocol Additional to the Geneva Conventions Relating to the Protection of Victims of International Armed Conflicts (Protocol I).[29] Civilians are entitled to get general protection from the dangers of military operations as per Article 51(1) of Protocol I to the Geneva Conventions.[30]

8.4 Other Principles of IHL

Protection of environment from the effects of war was considered imperative by ancient Indians. Megasthanes mentions that Indians did not destroy forests and enemy's land during war (Penna 1980: 186). Fruits and gardens were not supposed to be destroyed. To the contrary, Manu (*Manusmriti* VII: 196) advises King to destroy "grass, fuel, food and water", "tanks, ramparts and ditches" after conquering the land. The reason behind this was that the enemy should not be able to use natural resources in his favour (Viswanatha 1925: 136). Megasthanes gives a practical picture of the protection of environment during war. Hence, state practice differed from the advice

[29] "In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives."

[30] Article 51(1) of the Protocol Additional to the Geneva Conventions relating to the Protection of Victims of International Armed conflicts (Protocol I): "The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations."

of Manu. Protection of natural environment during war is prohibited by Additional Protocol I to the Geneva Conventions.[31] The United Nations Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques prohibits the application of environmental modification techniques which are capable of changing the natural processes.

There was distinction of races in the Vedic Age between Aryans and non-Aryans. When the wars were fought between these races especially between Aryans and Dasyus, Dasyus were taken as slaves by the victor Aryans (Bhatia 1977: 106). It is not clear as to whether Dasyus meant prisoners of war or domestic servants (Chacko 1961: 60). In the epic era also, prisoners of war were reduced to slaves (*Mahabharata, Vana Parva*: Chapter 111). *Agni Purana* talks against taking of prisoners, and if arrested, they were to be released after conclusion of peace treaty (Bhatia 1977: 106). Kautilya also held similar views like *Agni Purana* (*Arthasastra* Shamasastry: Book X, Chapter III). When Alexander imprisoned King Pururava, he was asked as to the kind of treatment he wished for. He replied that he expected to be treated like a King. Thus, the ancient Indian King wished to be treated like a King despite being taken as a prisoner of war. Thus, he expected good treatment to be meted out to a prisoner of war.

Women were taken as prisoners of war, and they were influenced to marry someone of the conqueror's choice. This violated the freedom and dignity of women prisoners. *Mahabharata* calls for humane treatment of women prisoners of war and with courtesy allowing them to leave when they did not wish to stay anymore (*Santiparva* 96). In contemporary IHL, Geneva Convention III Relative to the Treatment of Prisoners of War, 1949 provides definition of prisoners of war in Article 4 which does not allow civilians to be taken as prisoners of war.[32]

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[31] Article 55 of Protocol I Additional to the Geneva Conventions, 1949 states that:
"1. Care shall be taken in warfare to protect natural environment against widespread, long-term and severe damage This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.
2. Attacks against the natural environment by way of reprisals are prohibited."

[32] Article 4 of the Geneva Convention III Relative to the Treatment of Prisoners of War, 1949 states:
" A. Prisoner of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:
1) Members of the armed forces of a party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.

In ancient India, it was considered imperative to give medical treatment to the wounded and the sick during war. The army was accompanied by surgeons with medicines and surgical tools (*Arthasastra* Shamasastry Book X, Chapter III). Two Geneva conventions emphasise on the treatment of wounded and the sick viz. Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 1949 (Geneva Convention I) and Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 1949 (Geneva Convention II).

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2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory , even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:

a) that of being commanded by a person responsible for his subordinates;
b) that if having a fixed distinctive sign recognizable at a distance;
c) that of carrying arms openly;
d) that of conducting their operations in accordance with the laws and customs of war.

3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.
4) Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.
5) Members of crews, including masters, pilots and apprentices of the merchant marine and crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law.
6) Inhabitants of a non-occupied territory who, on the approach of the enemy, spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

B. The following shall likewise be treated as prisoners of war under the present Convention:

1) Persons belonging, or having belonged, to the armed forces of the occupied country, if the occupying Power considers it necessary by reason of such allegiance to intern them, even though it has originally liberated them while hostilities were going on outside the territory it occupies, in particular where such persons have made an unsuccessful attempt to rejoin the armed forces to which they belong and which are engaged in combat, or where they fail to comply with a summons made to them with a view to internment.
2) The persons belonging to one of the categories enumerated in the present Article, who have been received by neutral or non-belligerent Powers on their territory and whom these Powers are required to intern under international law, without prejudice to any more favourable treatment which these Powers may choose to give and with the exception of Articles 8, 10, 15, 30, fifth paragraph, 58-67, 92, 126 and, where diplomatic relations exist between the Parties to the conflict and the neutral or non-belligerent Power concerned, those Articles concerning the Protecting Power. Where such diplomatic relations exist, the Parties to a conflict on whom these Persons depend shall be allowed to perform towards them the functions of a Protecting Power as provided in the present Convention, without prejudice to the functions which these Parties normally exercise in conformity with diplomatic and consular usage and treaties.

C. This Article shall in no way affect the status of medical personnel and chaplains as provided in Article 33 of the present Convention."

With regard to the use of weapons in ancient India, there were many restrictions. Two kinds of weapons were prohibited in ancient India viz. poisonous weapons and weapons which caused incessant suffering (Armour 1922: 73).[33] Manu (*Manusmriti* VII: 90) prohibits use of weapons which are hidden, poisoned or tips of which are burning. Epics like *Ramayana* and *Mahabharata* prohibit the use of hyper-destructive weapons (Dissenting Opinion of Judge Weeramantry in *Legality of Nuclear Weapons Case* 1996: 256).[34] The brutal effects of nuclear weapons and the catastrophe it can cause are described in detail by Judge Nagendra Singh (1959: 20). Therefore, to prevent such irreparable destruction which can be caused by nuclear weapons, international law should strictly prohibit creation, use and proliferation of nuclear weapons.

Other rules of warfare dealt with the formalities of declaration of war, time period for battle etc. War was declared through *dutās* (Bandopadhyay 1920: 90). War was declared mutually by the parties (Subedi 2003: 354). War commenced and ended with the blowing of conch shells. Daily combat was usually between sunrise and sunset. *Dronaparva* of *Mahabharata* mentions continuation of battles at night time (Kane 1958: 211). Battles were not fought during monsoon season.

Brahmins were granted privileges and immunities, especially from capital punishment. One who killed a Brahmin was punished severely and was believed to have committed a sin. Sukracharya treated a Brahmin fighting on a battlefield at par with Ksatriya and hence, immunity was not granted (Bandopadhyay 1920: 118). In the *Mahabharata*, Dronacharya was killed by the Pandavas while fighting on the battlefield and hence, he was not granted the immunities of being a Brahmin. Otherwise, the religious heads and priests were granted immunity. In modern IHL, religious personnel are prohibited from attack during an armed conflict. Article 24 of the Geneva Convention I provides for protection to religious personnel.[35] *Agnipurana*

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[33] Poisoned arrows were prominently used during Vedic era (Bhatia 1977: 166). There is mention of weapons like *pasupatastra* and *brahmastra* used for destruction on a large scale and to cause bacteriological warfare.

[34] "Though the Court has made several observations which are noteworthy and bold" but the Court declared a non liquet on the issue of legality of nuclear weapons (Desai 1997 212-213).

[35] Article 24 of the Convention(I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field provides: "Medical personnel exclusively engaged in the search for, or the collection, transport or treatment of the wounded or sick, or in the prevention of disease, staff exclusively engaged in the administration of medical units and establishments, as well as chaplains attached to the armed forces, shall be respected and protected in all circumstances."

grants immunity from attack to temples and places of worship. Similar principle granting protection to places of worship is mentioned in Article 53 of the Additional Protocol I.

8.5 Termination of War

War was usually terminated by signing of peace treaties. Kautilya differentiated between equal (*sama*) and unequal (*hina*) treaties. He opines that treaties can be entered only between equal powers. He classified treaties entered to conclude peace and end war into the following (*Arthasastra* Shamasastry Chapter III, Book VII):

i) *Ātmāmisha*- King offered by himself for concluding peace.
ii) *Purushāntarah* – Entered with hostages other than the King.
iii) *Adrishtapurusha*- Peace treaty on a condition that the King and his army will march to a particular place.
iv) *Kapāla*- Peace agreement on payment of money.
v) *Ādishta* –Treaty on cession of a territory.
vi) *Upagraha*- Peace entered on payment of money which could be carried away on one's shoulders.
vii) *Parikraya*- Treaty entered on offering wealth.
viii) *Uchchhinna*- Peace entered by cessation of territory which is depleted of its natural resources.
ix) *Avakraya*- Peace treaty with a condition of granting the usufructs of the land to the conqueror.
x) *Paribhūshana* – Peace concluded on offering more than the land yields.
xi) *Suvarna* – Peace entered when there is *consensus ad idem* on all the provisions of the agreement. For Kautilya *Suvarna* was an ideal peace treaty.

Peace treaties were entered by taking hostages and securities. Sukra insisted on taking hostages and sureties to conclude peace treaties. Kautilya was not in support of taking hostages because he believed treaties should have oath as its basis because such treaties will be long-term and not easily breached. Violation of peace treaties by a State led to its ostracism which means sanctions were imposed on the violating State (Viswanatha 1925: 169).

State succession was a consequence of war in ancient India (Poulose 1970: 183). The aim was not to conquer the territory but to appease the population. Before entering the territory, the conquering King asked for permission of the people and ensured them that he would protect them (*Mahabharata Santiparva* Section 95). The conqueror treated the conquered territory as protectorate, vassal or dependency (Viswanatha 1925: 47). Manu advises the conqueror to fulfil the wishes of the people of the conquered State. He suggests the conqueror to worship the Gods and Brahmins of the conquered territory (*Manusmriti* VII: 201). This infers that religion and priest class played a crucial role as they wielded untrammelled power in the social and political setup of the ancient Indian State. If the conqueror wanted to rule for long, he was supposed to respect the priests and higher caste of the society and their religious practices. Manu asks the conqueror to respect the customs and laws of the conquered people to the extent that they were not against the *sāstras* (scriptures) (*Manusmriti* VII: 203). Bhisma advises the King to refrain from hostility, insolence and arrogant speech towards conquered population (*Mahabharata Santiparva* 97). Similarly, the conquered was supposed to respect and welcome the conqueror because it was better than anarchy. Kautilya suggests to enthrone the son or heir of the slain King and not to covet for the wealth of the conquered (*Arthasastra* Shamasastry Book VII, Chapter XVI). This is suggested by Kautilya in the light of *Mandala* system because conquest by one will turn the Kings of *Mandala* against him. Sukra suggests the King to use the resources available and grant a share to the conquered ruler or his heir (*Sukraniti* Sarkar: IV.7).

9. International Trade Law

The Eurocentric approach asserts that Indian economy was agricultural and colonialism brought India close to the world economy. Indian economy was described as a natural economy by the European scholars (Chakravarti 2001: 19). He refutes the European argument because there were well-developed markets and authority to administer those markets. Since Indian economy was considered as a natural economy, the study of economic history was entirely neglected. Consequently, international trade law in ancient India has also remained a neglected topic of discussion. Due to the vast changes after institutionalisation of international trade law, it is difficult to compare ancient trade laws to contemporary international trade law.

But, the roots of international trade and some rules existing in ancient times are necessary for better understanding of the discipline.

9.1 International Trade in Ancient India

Internal trade is carried within a social unit. External trade is conducted between two or more social units or between cultural boundaries (*Ibid* 16). In ancient India, external trade took place because there were trade relations between civilisations like Indus valley civilisation and Mesopotamian civilisation. *Supparaka Jataka* mentions that Indus valley had trade relations with the area around the Mediterranean Sea (Acharya 1972: 36). The civilisation had link with Afghanistan as the "etched carnelian beads" were discovered at Mundigat in Southern Afghanistan (Chakravarti 2001: 40). The overseas trade in ancient India had characteristics of “international trade and investments” in contemporary parlance (Thapar 2014: 21).

Trade relations with South-East Asian countries had an impact of Indian civilisation (Mani 2000: 41). India largely influenced the South-East Asian civilisation. Cambodia (Kambuja) and Annam (Champa) were mainly influenced (Bhatia 1977: 186). Second and Fifth Centuries A.D. saw an unprecedented trade with the South-East Asian Kingdoms like Malay Peninsula, Cambodia, Annam, islands of Sumatra, Java, Bali and Borneo. The Indians who migrated to South-East Asia did not exploit the population there but were assimilated there especially by exchanging their culture. Indians did not enter the political arena whereas confined themselves to religious, cultural and commercial fields (Mani 2000: 41). They followed "inclusive cosmopolitanism" (Chimni 2011: 40). Due to assimilation, Indian traders were granted more privileges and importance in comparison to the European who traded later (Chakravarti 2001: 8).

Trade also developed urban centres in both North and South India (Champakalakshmi 1996: 71). Development of cities is one of the prerequisites of civilisation. Hence, we can say that there was development in civilisation due to the interaction with other civilisations given impetus by trade relations. It also made the ancients realise that there were other civilisations apart from theirs. For instance, Romans realised through trade relations that there were other Empires which were capable of competing with them (McLaughlin 2010: 3).

Eleventh and twelfth centuries A.D. saw Jewish traders conducting trade in the Western coast of India. There existed exemplary peace and cooperation between Jews, Arabs and native Indians in the South. Many Arab and Iranian traders settled in Indian ports but their influence increased after the Arab conquest of Sindh in between 711 to 714 A.D. (Habib 2007: 31). Trade gave impetus to peace internally and externally. Sometimes, ambitious Kings who wanted to capture a particular port or trade hub, waged war to fulfil the aim. In most cases, trade promoted peace as will be discussed in the next Section on Merchant Associations.

Merchant was known as *vanik*, *vaṇij* or *śreṣthī*. Merchants who traded in many countries were called 'Nānādesis' (Dikshit 1987: 172). Caste system dominated the commercial field. Usually, persons belonging to Vaisya caste were traders. Brahmins resorted to trading when they were in distress, but the goods they traded were limited[36] (Kane 1958, Vol. II: 126). Thus, caste barriers were flexible during the time of distress. These were exceptions, not the rule.

Religion had tremendous influence on trade. Prayers were conducted for success in trade. *Gṛhyasūtra* prescribes a ritual to ensure success in commerce. Jains prefer trade over agriculture because agriculture led to the killing of living creatures (Chakravarti 2001: 45). The basic tenet of Jainism is non-violence, therefore, agriculture as an occupation was not encouraged for Jains. Thus, Jains were mostly traders. Vice-versa trade has also influenced religion. Propagation of religion was given impetus by trade. Priests sometimes travelled with the merchants to distant lands to spread their religion. This was basically in the case of Buddhism which travelled far and wide. Buddhist monasteries at Creek Kanheri are an evidence to this fact (Altekar 1987: 15).

International trade also influenced diplomatic relations as discussed in the Section 7.2 on international law of diplomacy in ancient India. Diplomats were sent to improve trade relations like King Pandian sent a mission to Augustus. The Aryan-Dravidian cultural divide was lessened due to vigorous trade interactions.

[36] Brahmins were restricted to trade certain goods like "fragrant things (like sandal-wood), fluids (like oils, ghee &c.), cooked food, sesame, hemp (and hempen articles like bags), kṣauma (linen), deer skin, dyed and cleanly washed clothes, milk and its products (like curds &c.), roots, flowers, frutis, herbs (used as drugs), honey, meat, grass, water, deleterious drugs (like opium, poison), animals (for being killed), men (as slaves), barren cows, heifers and cows liable to abortion". Gautmaa (VII: 15) adds to the list of prohibited items, "land, rice, *yava*, goats and sheep, horses, bulls, freshly delivered cows and oxen that are yoked to carts" (Kane 1958: 126).

The balance of trade was in favour of India. Imports were less in comparison to exports (Chakravarti 2001: 90). The accounts of Pliny are an evidence to this. He mentions that the Romans had to pay lots of gold to buy Indian luxury goods. It gradually led to economic crisis in Roman Empire. First century A.D. was a witness to the Romans visiting Tamil Nadu for trading in goods like spices, textiles and precious stones (McLaughlin 2010: 1).

The commodities of international trade varied according to the time and region. In the Indus Valley civilisation, raw materials were imported from Iran, Oman etc. and finished goods were exported. Western India was a major exporter of "spikenard costus, bedellium, ivory, agate, carnelian, onyx, stones, lyceum, cotton cloth of all kinds, silk, long pepper" (Altekar 1987: 14).

Generally, it is believed that ancient India traded in luxury goods. Ranabir Chakravarti (2001: 30) argues that ancient Indians traded in goods of daily use. For instance, Sangam literature mentions *Paratavars* (salt dealers) which proves that salt was an important commodity for trade. He cites Pliny who describes that revenue collected from salt was more than that collected from gold and silver.

The articles of trade with Arabian countries were precious stones, spices, silk, pearls, elephant tusks and slaves (male and female), etc. (Billorey 1972: 131). Goods produced in the ateliers of the King were used for export to a foreign land (Chandra 1977: 84). Teak was exported to Rome which was used to make ships there (McLaughlin 2010: 37).

Sea trade increased after the Mauryan era (about 185 B.C.). The writings available of the Gupta period focus on agriculture and neglect trade. Trade was controlled during the Gupta period. The chief merchant of the city was known as *nagaraśreṣṭī* and the leader of caravan traders was called *sārthavāha*. There was representation of the mercantile community in the district board. During the Gupta period, trade started decreasing. Roman Empire was a major importer of Indian goods and its decline affected the external trade of India (Ray 1996: 422). After the fall of Gupta Empire, trade with China was also affected because of increasing piracy and unstable political situation of China (Chakravarti 1987: 150). The trade was further affected when Huang Cha attacked Canton, a major port in China, in 878 A.D. concerning many foreign merchants (*Ibid* 150). This could not end the indirect trade

between India and China. In South India, Chola Kingdom gave importance to sea trade. They prioritised trade over agriculture. Seafaring, for them, was also a means to conquer different territories (Jain 2001: 157).

Asia and Africa were linked by Indian Ocean trade. Trade routes were trodden to Babylon, Greece, Egypt, etc. (Acharya 1972: 37). Panini's *Ashtādhyāyi* mentions *Uttarāpatha* as the main route to link India to the West (Agrawala 1987: 144). It means the overland route through the Caspian Sea. A network of maritime route connected Asia, Mesopotamia, China and India from first millennium A.D. to the tenth century forming "the first global economy" (Campbell 2011: 53).

Traders departed to China through Burma, Tibet and Bhutan (Acharya 1972: 40). Burma and China were reached through Manipur route (Chandra 1977: 2). In the second century B.C. south-western China was connected to India through Assam and Burma (Acharya 1972: 44). There were two routes from China. The northern route was through Kucha, Karashahr and Turfan. The southern route was through Yarkand, Khotan, Niya, Miran, etc. These routes are called the silk routes which linked India and China for about a thousand years (Bhatia 1977: 178). There was also a route through the Himalayas in the North-West (Chandra 1977: 2). There was an increase in trade transactions in 600 to 322 B.C. because of the improvement in means of transport (Acharya 1972: 38). It was improved further by maintaining trade routes free and safe (*Ibid* 43).

Many seals and coins are excavated which belong to ancient India. Hence, barter system was not the only form of trade. Seals in Harappa are interpreted as trade mechanisms (Chakravarti 2001: 38). Button seals of Persian Gulf were found in Lothal which means there was trade between the Persian Gulf and Gujarat. Roman coins were excavated in many parts of India which were used as bullion to buy gold and silver coins or to mint Roman coins in India (Ray 1988: 320). Silver was in great demand due to its less availability in India (Altekar 1987: 17). Use of coins proved the increased frequency of trade, especially during the Mauryan period (Thapar 2014: 96). From 600 to 1000 A.D., cowry shells replaced coins due to the decline of foreign trade.

9.2 Merchant Associations

Merchants formed associations on the basis of common interests, common goods, or according to common region. Membership was granted through an ordeal, surety or agreement (Agarwal 1982: 30). Many new merchant associations originated after the fall of Mauryan Empire. They were prominent in the Gupta age. They existed in Gujarat, Tamil Nadu, Karnataka and Kerala. *Nikama* or mercantile organisations similar to guild existed in between 100 to 250 A.D. (Chakravarti 2001: 23). They were known as *śreni*, *pūga,* etc. Mercantile associations formed abroad also had a crucial role to play in international trade. The associations like *Manigraman Cettis* and *Nanadesa Tisaiyayirattu Ainnurruvur* of South-East Asia controlled international trade to a large extent after 1000 A.D. (Chakravarti 1987: 151).

Merchant associations had multifarious functions. They increased the negotiating power of merchants and helped them wield power. They negotiated with the State authorities (Jain 2001: 364). They formulated laws which could not be transgressed by the King unless they were against the sacred law of the land or inimical to others (*Ibid* 367). They also settled the disputes between merchants. They carried goods to different parts of the nation and arranged fairs (Dikshit 1987: 172). Officers of merchant associations were in charge of the passport department in the Chalukyan Kingdom (*Ibid* 174). Some members of the associations were inducted into military forming a separate troop. In collaboration with the rulers, they established towns (Prasad 1987: 167). Merchants who travelled to distant lands also played the role of spies to collect information of the belligerent States. Such spies were called *Vaidehaka*.

Merchant associations were considered more stable than Kingdoms (Altekar 1987: 16). The power wielded by merchant associations was untrammelled percolating to different spheres. The foreign policy of a State depended on international trade. War was not totally outlawed in ancient India (Nawaz 1964: 82-83)[37] but it was considered as last resort as is elaborately discussed in Section 8 on IHL in ancient India. War had a negative impact on commerce. For instance, the

[37] M.K. Nawaz (1964: 83) describes the difference of opinion amongst the scholars. He points out that Quincy Wright opined that in the Hindu civilisation war mongering was not frequent. Whereas Adda B. Bozeman asserts that Ashoka was the only ruler in ancient India who promoted peace and renounced war as a State policy.

Superintendent of Harbours was directed by Kautilya to destroy goods which were transported to enemy territory. The rationale behind hindering trade was to weaken the enemy (*Arthasastra* Shamasastry 1915: Chapter IV, Book III). Supply of essential commodities was through trade, so this would affect the enemy's population. This is similar to sanctions imposed in contemporary times.

Due to the impact on trade and the livelihood of traders, merchant associations and traders attempted to influence the State to avoid war (Derrett 1958: 372). Some wealthy traders also played the role of mediators to prevent and terminate war. The increase in trade led to a demand for financiers like Gahapathis and later, Setthis. Gradually, Setthis wielded great power as they financed the Kings and gained the power to collect revenue (Thapar 2014: 97).

At present, the situation remains similar because of the untrammelled powers wielded by the transnational corporations intervening in all international arenas like environmental policies, human rights, etc. The World Trade Organisation is an institution which is intervening in policies of the States of the third world transgressing their sovereignty. Thus, associations of traders have always influenced the State actors, then and now.

9.3 International Trade Law in Ancient India

Due to the lucrative aspect of trade, role of the State in controlling trade increased. In the Mauryan epoch, State was the controller of production and distribution of goods. State wielded power over internal and external trade. Ranabir Chakravarti (2001: 29) attributes the very formation of State system to trade:

> As the formation of the State is to be appreciated in terms of social change, exchange of luxuries could be an efficient State-forming mechanism, especially in the case of the rise of secondary States.

Development of trade led to the development of bureaucracy. *Astunomoi* or municipal officers were in charge of markets, harbours, foreigners, etc. (Chakravarti 2001: 54). Licenses were issued to conduct internal or external trade (*Arthasāstra*, Shamasastry 1915: Chapter II, Book V). *Arthasāstra* mentions that the Director of Trade called *Panyādhyaksa* was in charge of trade within a realm (*svaviṣaya*) and abroad (*paraviṣaya*). He compared the profits earned from import and export. Kautilya suggests that the director should aim at earning profit. He was expected to have

knowledge of commodities of trade, the country of origin, freight charges and the demand of goods and the consequent impact on their prices. Kautilya favoured the director of trade to control trade because the merchants only aimed at profits and the director would control trade and arrival of merchandise.

Kautilya considered trade as a better source of income than agriculture. For Kautilya, trade was a great source of revenue, especially international trade (Chakravarti 2001: 55). He encouraged foreign trade. He suggested promotion of imported goods (*Arthasāstra*, Shamasastry 1915: Chapter XVI, Book II). Imported goods were allowed ten percent profit in contrast to five percent profit on indigenous goods (*Ibid* Chapter II, Book IV). . Imported commodities were exempt from being sued for debts (Bhatia 1977: 57).

Customs duty was imposed on foreign goods. *Śulkādhyakṣa* or Director of Tolls and Customs was in charge of imposing and collecting customs duty (Chakravarti 2001: 56). One-fifth of the value of the commodity was charged as customs duty. The Cholas realised the importance of international trade and therefore, promoted it. Kulottunga I removed the system of tolls and customs and developed the port of Viśākhapaṭṭinam. Evidence of bilateral trade agreements is also available. The Graeco-Roman traders entered into an agreement with Muziris for export of valuable goods like ivory, fine fabric, etc. via a Red Sea port. The ultimate destination mentioned in the agreement was Alexandria which charged 25% customs duty (*Ibid* 68).

Generally, traders were granted privileges. Possession of stolen property by traders (foreign or internal) was not a crime which would be considered as a crime in the case of a common man (Sircar 1972: 93). They were punished if they knew the whereabouts of the owner of the stolen property (*Arthasāstra* Shamasastry 1915: Chapter VI Book IV).

Special protection was granted to foreign traders (Bandopadhyay 1920: 50). The granting of privileges to foreign traders are evidence to the fact that international trade was given due importance. Foreign traders could be sued only if they had a membership of some guild (Chandra 1977: 83). Foreign traders who visited often were granted more privileges so as to encourage foreign trade. They were granted concession from paying tolls. King Visnusena of Gujarat issued *Stithi-Patra* or *Stithi-*

Vyavastha which described rules concerning mercantile community. One of the provisions stated that foreign merchants should be exempted from *para-resa* or offences alleged to be committed beyond the jurisdiction of the State (Sircar 1972: 98-99). Apart from the privileges, some restrictions were imposed on foreign traders. Foreign traders were allowed to enter and travel only if they possessed a passport (*mudra*) (Chandra 1977: 81). A person travelling without a passport was arrested, and his property was confiscated (*Arthasāstra* Shamasastry 1915: 202).

A fine of 54 *panas* was imposed on a trader who sold or pledged inferior quality goods, misguided about the place of origin of the goods and adulterated them. This assured the quality of the goods. The mechanism of revealing the place of origin in ancient India is similar to the rules of origin prescribed in contemporary international trade law.[38] If an article was produced in Persia, a trader could not state that it originated in Rome. The director of trade had knowledge about the country of origin of the goods and he kept a check on the details on the place of origin of goods.

It can be inferred from the above discussion that international trade was mostly controlled by customs and usages. *Arthasastra* provides a concrete account of international trade law of ancient India. State had control over some aspects of international trade, but there was not monopoly of particular kind of traders. International trade was perhaps encouraged by the ancient Indian State. There was freedom of trade in ancient India.

10. International Maritime Law

Freedom of the seas and freedom of trade were the freedoms which were adopted by Grotius from Asian sea trade. R.P. Anand (1981) sums up as follows:

> ……..whatever may be said about some other rules of international law, freedom of the seas, which has been the pith and substance of the modern law of the sea, is one principle which Europe acquired from Asia through Grotius, but only after a long struggle and for a different purpose.

Harappans were active in sea trade. Some Harappan seals depict boats or vessels. Famous harbour with a dockyard was discovered in Lothal. Harappan outposts at Suktagendor and Sotkakoh in the Makran littorals prove that Harppans had

[38] The rules of origin prescribe that the product should mention the country where it originated or was produced. The Agreement on Rules of Origin deals in detail with the aspect.

active sea trade with the Persian Gulf, the Gulf of Oman, Bahrain and the nearby islands of Failaka and Tarul (Chakravarti 2001: 40). In the Vedic period, some Rig Vedic hymns use terms like *samudra* (ocean/sea), *nau* (vessel) and *satāritranau* (vessel fitted with a hundred oars). This shows existence of some form of seafaring and ship-building. But, regular seafaring cannot be inferred from these terms (Chakravarti 2001: 43).

Later period was a witness to seafaring (*Ibid* 8). Buddhist literature iterates sea voyage (Chandra 1977: 46). Navigation began by the first century B.C. from Arabia to India (Habib 2007: 30). Panini's Sutras describe that seafaring was quite advanced (Acharya 1972: 37). Himanshu Prabha Ray (1988: 316) elucidates seafaring in ancient India as follows:

> The Periplus of the Erythraean Sea contains a mariner's account of the sea traffic between India, Arabia and Egypt in the early centuries of the Christian era. The Periplus states that large vessels plied between the market towns of Persia and Bharuch in Gujarat) and Indian vessels shared a considerable part of the commercial traffic between the ports on the west coast and the Arabian coastline as far as the entrance to the Red Sea.

Strabo gives a similar description by stating that around one hundred and twenty ships sailed from Myos Hormos to India (Chakravarti 2001: 65).

Seafaring improved during the Mauryan age, but Kautilya preferred land route over sea route because the latter is full of dangers and it is difficult to apply defence (*Arthasāstra* Shamasastry Chapter XII, Book VII). Therefore, he suggests water route near shores so that in the case of danger they can resort to ports. Asians usually were land powers and used the sea as secondary means of transport for commerce (Anand 1981: 451).

According to the accounts of Megasthanes, shipbuilding was the monopoly of the State (Chakravarti 2001: 56). In comparison to Indians, Arabs and Persians were expert in shipbuilding. They came to India to build ships (Chakravarti 1987: 151). Because of the ship-building skills, Arabs were allowed to settle in western India (Jain 2001: 157).

Superintendent of Ships was appointed for maintenance of accounts relating to navigation in oceans, mouths of rivers, artificial and natural lakes and rivers

(*Arthasāstra* Chapter XXVIII: Book II). Thus, he was in charge of internal and external navigation. For Kautilya, the jurisdiction of a State extended to high seas also (Chatterjee 1958: 35). The rule of delimitation is not described anywhere but for Kautilya, State exercised power over high seas also. C.J. Chacko (1962: 50) sums up his opinion on delimitation in ancient India in the following words:

> It is difficult to assert, however, whether the term 'sea' as used in those distant times implied the clear divisions which modern international law makes between *the territorial*, or *marginal sea*, and *high or open sea*.

Ships were supposed to carry the flags of their respective Kingdom. The ships, which did not hoist their "characteristic flag", were captured and their property was to be confiscated (Viswanatha 1925: 138). Animosity towards a State was extended to the ships. The ship was considered to be the territory of the State. This principle exists under the United Nations Convention on Law of the Sea, 1982.[39] The ship which flies the flag of the State and also, fulfils some other conditions is said to be the territory of that State. The ship without the flag of the State loses many privileges granted under UNCLOS (Shaw 2008: 545).

Villages on seashores and banks of rivers were levied special taxes called *kliptam*. The reason for taxation was that those villages earned income out of fishing, sea trade, etc. Customary tolls were imposed on traders in port-towns. Ships that touched harbour were imposed tolls. *Arthasāstra* describes sea traders as *sāmudrānām*. They were either exempted or charged fewer tolls if their goods were spoilt due to seepage of water in ships. But they had to pay more interest if they borrowed loans because they earned more profit from the external trade. They had to pay twenty panas per month per cent whereas the internal traders paid five panas per month per cent as commercial interest (*vyāvahāriki*).

Many ports were established according to the development of sea trade. Ports were a major source of revenue for the State. Kautilya describes them as *pattana*. They were the points of long-distance trade (Gurukkal 1987: 44). There were points of halt and transhipment terminals wherein the voyagers could take a fragmented

[39] Article 91 of the UNCLOS provides:
" 1. Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship.
2. Every State shall issue to ships to which it has granted the right to fly its flag documents to that effect."

voyage. Such a voyage led to the development of trade and proliferation of ports (Chakravarti 2001: 82). Establishment of ports gave an impetus to trade and led to spreading of Indian culture to Eastern Asia (Acharya 1972: 42).

Tamralipti (Modern Tamluk) was the major port in Bengal which had trade links with Ceylon, China, Sumatra and Java (Acharya 1972: 42). Sopara was a famous port in Konkan during the rule of Ashoka. During the first century, A.D. Bhrgukaccha (Broach) and Arikamedu (Pondicherry) were the famous ports (Acharya 1972: 42). There were major ports in Gujarat, Somnath being one of them in eleventh to thirteenth centuries AD (Thapar 2014: 243). Western India had an important port in Thana district called Kalyan (Altekar 1987: 14).

Many ports linked India to South East Asia and Sri Lanka. For instance, Mahāvalīpuram (Pallava Kingdom) and Kāverīpaṭṭiṇam (Chola Kingdom). These ports are described in Tamil epics *Śilāppādikāram* and *Maṇimekalai*. The famous Western ports were Somnath, Stambhaka, Cambay, Broach, Sthānaka, Sanjan, Śūrpāraka, Cemūlīya, Candrapura, Maṅgalapura, Fandarina and Quilon. Viśākhapaṭṭinam is a known port since 1098 A.D.

There is no absolute right at present to grant access to ports. If there is a provision in international law or some convention, then the State has an obligation to grant access to ports (Morrison 2012: 73). The signatory States of Convention and Statute on the International Regime of Maritime Ports, 1923 can access port of each other. Access to ports is also provided under Article 211 and Article 25 of UNCLOS, 1982.[40] International Convention on the Safety of Life at Sea 1974 (SOLAS) amended

[40] Article 211 Clause 3 of the UNCLOS states as follows:
"States which establish particular requirements for the prevention, reduction and control of pollution of the marine environment as a condition for the entry of foreign vessels into their ports or internal waters or for a call at their off-shore terminals shall give due publicity to such requirements and shall communicate them to the competent international organization. Whenever such requirements are established in identical form by two or more coastal States in an endeavour to harmonize policy, the communication shall indicate which States are participating in such cooperative arrangements. Every State shall require the master of a vessel flying its flag or of its registry, when navigating within the territorial sea of a State participating in such cooperative arrangements, to furnish, upon the request of that State, information as to whether it is proceeding got a State of the same region participating in such cooperative arrangements and, if so, to indicate whether it complies with the port entry requirements of that State. This article is without prejudice to the continued exercise by a vessel of its right of innocent passage or to the application of article 25, paragraph 2."
Article 25 provides:

in 2004 inserted the International Ship and Port Facility Security Code (ISPS Code) which requires compliance with the code so as to enter ports. There are many restrictions for access to ports under the contemporary international law for various reasons like security. With this regard, Morrison comments that some of the multilateral conventions, instead of granting access to ports, grant the right to States to deny access to ports (*Ibid* 62).

In ancient India, weather beaten ships were to be granted harbour without hesitation. Granting of refuge to ships in distress existed for about two thousand years (*Ibid* 9). Contemporary international law elaborates granting of refuge to ships in many instruments. In contemporary times, refuge is not granted in all cases. The hesitation to grant refuge is to protect the coastal areas due to the oil leakage in the ships in distress (*Ibid* 2). It is the obligation of ships to grant refuge to other ships in distress according to Article 98 of the UNCLOS, 1982.[41] Guidelines on Places of Refuge for Ships in Need of Assistance, 2003 has been issued by the International Maritime Organization. International Convention for the Safety of Life at Sea, 1974 (SOLAS) and International Convention on Maritime Search and Rescue, 1979 (SAR Convention) deal with the rescue of persons on board the ship which is in distress. Ships in distress are also exempted from the jurisdiction of the coastal State (*Ibid* 13).

Freedom of trade and navigation is restricted by piracy. Therefore, piracy is a universal crime. Extra cost is incurred on guards, arms, insurance, treading long

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"1. The coastal State may take the necessary steps in its territorial sea to prevent passage which is not innocent.

2. In the case of ships proceeding to internal waters or a call at a port facility outside internal waters, the coastal State also has the right to take the necessary steps to prevent any breach of the conditions to which admission of those ships to internal waters or such a call is subject.

3. The coastal State may, without discrimination in form or in fact among foreign ships, suspend temporarily in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security, including weapons exercises. Such suspension shall take effect only after having been duly published."

41 Article 98 of UNCLOS, 1982 states as follows:

" 1. Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers:

(a) to render assistance to any person found at sea in danger of being lost;

(b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him;

(c) after a collision, to render assistance to the other ship, its crew and its passengers and, where possible, to inform the other ship of the name of his own ship, its port of registry and the nearest port at which it will call.

2. Every coastal State shall promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements cooperate with neighbouring States for this purpose."

routes and additional incentives to the seafarers in areas where piracy is prominent (Beckman and Roach 2012: 1). Suppression of piracy is a duty of all the States under Article 100 of the UNCLOS.[42] Piracy is defined as follows by virtue of Article 101 of the UNCLOS 1982:

> Piracy consists of any of the following acts:
> (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
> (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
> (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
> (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
> (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

The offences on ships committed within the jurisdiction of a State is called "armed robbery against ships" (*Ibid* 21). The maritime crimes which take place within the jurisdiction of a State are dealt by Convention on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 1988 and International Convention Against Taking of Hostages, 1979.

Piracy or armed robbery against ships was a common crime in the seas in ancient India.[43] The crime was a hindrance to the development of trade and the interaction between civilisations. The sea route from Rome to India was considered dangerous because of piracy (McLaughlin 2010: 40). New sea routes were trodden to reach India. Sailors were advised to be skilled in archery to protect themselves from pirates.

Kautilya advised destruction of pirate ships (*himsrika*) (*Arthasastra* Shamasatry 1915: 180). King Ashoka favoured returning of goods that were seized from pirate ships (Viswanatha 1925: 162). Ganapathi, the Kākātiya King, of the Eastern Deccan territory issued a royal decree ordering protection of traders from pirates in the port of Motuppalli (Chakravarti 1977-78). Article 105 of the UNCLOS, 1982 empowers the

[42] Article 100 of the UNCLOS states: "All States shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State."

[43] Since historical evidence is not clear as to whether the maritime crimes were committed within the jurisdiction of the State or on the high seas is not clear. Delimitation of seas was not strict in those times. Hence, for the convenience of the study, the term piracy is used in this section.

States to seize a pirate ship/aircraft or ship/aircraft seized by pirates.[44] They can take the property on the ship or aircraft. They have the right to punish pirates. The States should take into consideration the right of third parties acting in good faith. The contemporary international law considers the rights of the third parties which is very similar to Ashoka's policy which favoured returning of goods seized from pirate ships to the owners.

11. International Environmental Law

The right to environment is a significant part of international human rights law like the right to life and the right to health because the harm caused to the environment will affect all the human rights ensured by the Universal Declaration of Human Rights (Weeramantry 1997: 88). It is important to take a cue from different cultures while formulating the international environmental law which is a new discipline in comparison with the other fragments of international law (*Ibid* 96).

Due to global warming and climate change, the importance of respecting nature as valued by the ancient civilisations in revived today (Baxi 2012: 750). Ancient civilisations knew that it is not possible to rule over nature. The ancient Indian texts divide natural elements into five called *panchabhut* viz. air, water, ether, sun, and sky. Nature is to be worshipped according to Indian scriptures. Earth is considered as mother. The relationship between *prakriti* (nature) and *purusha* (man) was elucidated. According to Indian texts, man cannot control nature whereas nature controls man. For instance, the *Isopanishad* describes the perception of the environment in ancient India (Khoshoo 1987: 117):

> There are three elements in it. Number one is that the whole universe, along with its beings – the creatures – belongs to the Lord (Nature). Number two let no species, including human beings, think themselves to be superior to any other, and encroach on their rights and privileges. And the third element is that you can enjoy the bounties of nature but without greed.

Thus, *Ishopanishad* mentions the superiority of nature over man. It provides for rights not only to man but also to animals and prohibits encroachment of rights of animals

[44] Article 105 of the UNCLOS, 1982 provides that: "On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith."

by man. It also restricts use of natural resources and warns man not to exploit natural resources to satiate greed.

The concept of sustainable development was emphasised by the Brundtland Report in 1987. The Rio Declaration of 1992 gave it a pivotal position. It has thus become a focus of developing countries. Sustainable development is not an idea of the modern mind. It existed since ancient times (Weeramantry 1997: 110). Conservation was one of the aims of ancient Indians. Mahinda, Emperor Ashoka's son, advises King Devanampiya Tissa (247-207 B.C.), the tenets of Buddhism. He advises the King that all flora and fauna which exists on earth belong to the earth and are entitled to live on earth. The King, therefore, was obliged to be their protector. The King followed the advice and opened sanctuaries for the conservation of animals. This reflects the "principle of trusteeship" (*Ibid* 102).

The water conservation methods in India and China existed since ancient times. Asian traditions "inform the evolution of international law on the management of transboundary resources" (Benvenisti 2008: 282). Social adherence of communities was formed due to efforts to conserve water (*Ibid* 274). Karl A. Witfoggel (1957 quoted by Benvenisti 2008: 280) calls the ancient Indian society, Chinese society, etc. as "hydraulic society" because of its attempt to control long rivers and use gallons of water in irrigation to maximise economic growth.

Flora and fauna was conserved, protected and revered in the Indus Valley civilisation. It is proved by the seals of the civilisation engraved with wild animals like rhinoceros, elephant, tiger and wild water buffalo. Due to the end of the Indus Valley civilisation itself, these animals are extinct in the area where the civilisation prevailed (Habib 2010: 35).[45]

Protection of animals was emphasised in ancient India. One of the Edicts of Ashoka's pillars (edict V) states that after twenty-six years of his coronation many animals were stated as protected viz. tortoise, squirrels, duck, etc. and also animals with four limbs which were not edible (*Ibid* 69). In one of the inscriptions, Ashoka states that medicinal herbs and fruit-bearing trees were planted for public use. Mango

[45] There are many speculations about the culmination of the civilisation. One of the most accepted ones is that the civilisation ended due to the drought phase in 2000 B.C. (Habib 2010: 39-40).

groves known as *ambāvadikā* were planted by Ashoka and his second Queen gifted mango groves as a charity (*Ibid* 51).

Forests were considered as good source of national wealth. Charaka Samhita equates the destruction of forests to the destruction of State. Rig Veda (X.146) praises the forest goddess as mother possessing "stores of food" (Habib 2010: 69). Kautilya advises the King to set up new forests and maintain existing ones by appointment of a superintendent of forests (*Arthasastra* Shamasastry 1915: 64) Moreover, he used forests as forts or *vanadurga* (*Arthasastra* Shamasastry 1915: 67)[46]. Ashoka was against setting fire to forests or forest clearance without a purpose (Habib 2010: 60). Many Brahmins took refuge in forests for spiritual enlightenment (*Ibid*). Aranyakas or forest texts and Upanishads describe many priests resorting to forests. When this became a regular feature, many forests were cleared so that the priests have access to the general public to receive alms (*Ibid*).

In the Vedic period, Vedas mention prevention of pollution. *Rig Veda* (6:48:17) prohibits cutting of trees as they help in combating pollution. *Yajur Veda* (5: 43) forbids pollution of the atmosphere. It calls for "peace of air, peace of earth, peace of waters, peace of plants, peace of trees" (Rajamani 1995: 170).

International Environmental Law was connected to religion in ancient India. The gods in the Indus Valley were given the form of animals whereas in the Rig Veda Gods had a superhuman form (Habib 2010: 64). Sun was personified as Surya, Indra as the lord of rain, Varuna as water God and rivers were also revered. *Rig Veda* (10: 75) praises all the rivers like Ganga, Yamuna, Saraswati. In the Brihadāranyaka Upanishad (II.4.5) During the Vedic times, animals were sacrificed. This practice was opposed by Buddha. Following the teachings of the Buddha, Ashoka proscribed the mass sacrifice of animals in Rock Edict I (c. 258 B.C.) (Habib 2010: 65). *Arthasastra* and *Manusmriti* took a cue from Buddhism and Jainism. These texts prohibited the killing of animals. But they allowed the sacrifice of animals (*Ibid* 66-67).

12. Conclusion

There were some principles of international law in ancient India which are similar to contemporary international law. The development of international law was triggered

[46] He also classified forests into three namely, game-forests, elephant forests and timber-forests.

with the concepts of one world and *Chakravarti*. International law was an off-shoot of *dharma*. *Dharma* is interpreted as international rule of law. Many exceptions were drawn to the rule of law which led to the violation of human rights in ancient India. These problems continue till today, the most pervasive problem being the caste system. These problems need to be solved with the help of contemporary international human rights law.

Moreover, *dharma* was followed in diplomatic relations thereby granting privileges and immunities to diplomats. War was waged only on the failure of diplomatic negotiations. When war was inevitable, it was made sure that the rules of warfare are followed which are known as international humanitarian laws in modern parlance. International trade was actively carried in the Indian peninsula since ancient times which led to the development of international trade law as well as international maritime law. Religion was significant which led to the association of nature with man thereby the protection of the environment. Thus, we can see principles like sustainable development in ancient India which are part of the modern international law. The chapter proves that the principles of international law in ancient India have family resemblance to the principles of modern international law.

Chapter III

International Law in Medieval India

1. Introduction

The epoch of medieval India was characterised by the interaction of Islamic civilisation with the existing civilisation. This interaction gave birth to a composite culture which has now become an integral part of the Indian civilisation. Some of the European historians do not consider the interaction of civilisations but treat Islam as the "other". Those scholars attribute aspects like "despotism, intolerance, misogyny, homophobia" to Islam so that Europe can be projected "democratic, tolerant, philogynist, and homophilic" (Massad 2015: 12). Islam has many interpretations. Thus, it cannot be confined to one particular interpretation. The interpretation given by Muslims and non- Muslim commentators are different from each other (Nawaz 1959: 37).[1]

Islamic civilisation has travelled far and wide, interacted with other civilisations and assimilated with other cultures. It cannot be stereotyped to the aspects mentioned above as Europe has done. The arrival of Europeans in India led to interaction with another religion and Western civilisation. The chapter aims to capture some of the principles of international law in medieval India which were born out of the interaction of Islamic civilisation with other civilisations in India resulting in the Indian civilisation of today. Section 2 of the chapter deals with the development of international law in medieval India. While in section 3 focus is on the interaction of civilisations and religious tolerance in the medieval era. Since the rulers in the medieval era followed Islam, their inter-State relations were governed by *Siyar* and other sources of Islamic law. Section 4 elucidates the sources of international law in medieval India with focus on the sources of Islamic international law in particular. Section 5 deals with the subjects of international law in medieval India. The human rights violations which existed in ancient India continued in the form of caste system, ostracism of indigenous people, slavery, oppression of women in the medieval period

[1] Islam has diverse interpretations differing according to the schools of jurisprudence. Due to the diversity of authorities, universality is not manifest in Islam (Engeland 2006: 28). The crux of the problem is an extremist interpretation of Islamic law (*Ibid* 32). The imperatives of the times is an interaction between Islamic law and international law (*Ibid* 28).

also. Hence, Section 6 deals with international human rights law in the medieval period. Section 7 enunciates the international law of diplomacy in the medieval era with emphasis on the concept of diplomacy, the European embassies in medieval India, qualification of diplomats, functions of diplomats, privileges granted to diplomats, and termination of diplomatic services. It also analyses the institution of espionage. Section 8 is a description of international humanitarian law in medieval India. It discusses the concept of war in detail. It deals with the principles of IHL like the differentiation of combatants and non-combatants, the treatment of prisoners of war, prohibition of certain weapons etc. It also discusses the ways in which war was terminated. Section 9 is on international trade law in medieval India. International trade got an impetus with the establishment of European companies in India. Hence, the section mentions European trading companies. It also examines the monetary system and merchant associations of medieval era. With the development of international trade through seas, international maritime law developed in the medieval period. Section 10 is about international maritime law with detailed discussion on seafaring, piracy and the debate on *mare liberum* and *mare clausum*. Section 11 explains international environmental law of the epoch. Section 12 presents conclusions of the chapter.

2. Development of International Law

The diversity of the world is recognised in Quran. "Allah created humankind with diversity in race and language (Quran: 30: 22) and nations and tribes (Quran: 49: 13)" (Shapiee 2008: 15). The Prophet confirmed that the Muslims would cooperate at an international level when the need arises to protect their common interests. He collaborated with the Jews, Christians and Pagan Arabs in Madina to protect common interests (*Ibid* 11). Therefore, Islam recognises the plurality of the world and international cooperation. This recognition led to the development of international law wherever Muslims ruled.

Foreign relations in the Islamic world were dealt by the principle of *Siyar*.[2] It "reveals Islam's efforts to cope with the problem of constructing a stable and an ordered world society" (Khadduri 1966: 3). The Islamic law of nations is a part of Muslim law and not a separate subject. The Islamic law of nations regulated the

[2] *Siyar* was prescribed by Shaybānī. He is considered as the father of Muslim law of nations.

relation between Muslim and non-Muslim world until the whole world was proselytised into Islam. If the whole world followed Islam, then the Islamic law of nations to the extent of the rules governing the relation between Islamic and non-Islamic States will be nullified. Therefore, it was considered as "a temporary institution" (Khadduri 1955: 44).

There are two basic ideas of Islamic international law viz. the Caliph[3] as the head of Islamic State and universalisation of Islam. Caliph is "the chief of both civil and military authority" (*Ibid* 87). Gradually, due to the conquest of various lands, the theocratic power of Caliph was respected, but many rulers emerged in the conquered lands like India where they established their dynasties. The foundation of Caliphate was that individual Muslims were bound by Islamic law irrespective of the territory they travelled or resided. Thus, the jurisdiction of the Islamic State was personal and not territorial (Singh 1973: 92). In international legal jargon, the *de jure* leader was the Caliph but the *de facto* ruler was the head of the political entity.

Muslims aimed at proselytisation of non-believers into Islam. Wars were waged against the Arabs to achieve the objective of proselytisation. The Prophet agreed to restrict war with the Arabs by abolishing all kinds of wars except the one waged in the name of Allah (Nawaz 1959: 41). *Jihad* in the name of Allah was waged to achieve Islamisation of the non-believers. Even though *Jihad* is interpreted as war, it has different connotations[4] and cannot be generalised as a war against *Dar al-Harb*.[5] *Jihad* was later on used for political and secular purposes like aggrandisement of territory (*Ibid* 41). This is proved by the wars waged by Mahmud Ghori, Mahmud of Ghazni, Tamerlane and others that *Jihad* was not only for propagating religion bu also for invasion and to increase the political powers of individual rulers.

Theoretically, the Islamic international law is not based on consent of the parties whereas it is derived from the "divine command" in the Quran (Singh 1973: 95). This is similar to the *Smritis* of ancient India which are also considered to be divine. Gradually, treaty relations developed between Muslim and non-Muslim States

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[3] Judge Nagendra Singh (1973: 90) compares the concept of Caliph to the concept of *Chakravarti* (the concept of *Chakravarti* is discussed in Chapter II). Both are envisaged as world rulers. At the same time, the difference is that Caliph is the religious and political head whereas *Chakravarti* is the political head or ruler.

[4] The discussion on *Jihad* is elucidated in detail in Section 8 on international humanitarian law.

[5] *Dar al-Harb* is the territory ruled by non-Muslims.

which gave space to consent. In medieval India, “reciprocity and mutual respect” were the basic principle of international law. The Islamic law of nations evolved with the increasing interaction of civilisations.

3. Interaction of Civilisations

In the narratives on medieval Indian history, the advent of Islam is associated with conquest whereas the peaceful propagation of Islam is neglected. The conquest of Muhammad Bin Kasim in 712 A.D. is highlighted as the advent of Islam in India. While Islam was spread in India by the traders who landed on the west coast (Malabar region) long before Muhammad Bin Kasim's conquest.

There was interaction of Islamic civilisation and existing Indian civilisation. For instance, at the political level, the Mughal courtly culture influenced Rajputs and other Hindu rulers. The Muslim rulers followed Quranic principles. There were flexibilities in State practice while following the strict rules of Islamic law. The Hindu rulers followed the Hindu code in their inter-State relations (Singh 1973: 93). Diplomatic means led to successful interaction between Muslim and Hindu rulers. As will be discussed in Section 7 of this chapter, the inter-State relations in medieval India were largely based on "reciprocity and mutual interest" (Singh 1984: 245). Muslim rulers in the medieval epoch appointed nobles from foreign countries thereby encouraging dialogue between civilisations. They also broke the religious barriers by appointing Hindu nobles. Hindu nobles became an integral part of the administration of Sultans in the fourteenth century. Sher Shah Suri appointed nobles of Afghan origin, but he had Hindu allies, and he attempted to make Hindu and Muslim allies (Habib 2007: 113). Mughal nobility comprised of Afghans, Central Asians, and Iranians. Initially, Akbar's nobility was confined to central Asians. Gradually, when his Empire expanded, he appointed Rajputs and Indian-born Muslims in his nobility. Instead of paying the salary for their rank or mansab, they were assigned to control their ancestral territory. Akbar's finance minister was Todar Mal, a Hindu. Finance ministry is considered to be one of the most important portfolios and Akbar's trust on a Hindu to grant him the position of finance minister exemplifies co-existence of both religions in the Mughal politics. In the seventeenth century, Marathas were a part of Mughal nobility. During the epoch of Aurangzeb, the Marathas received a third of the

revenue collected all over Deccan. Formal sovereignty was granted to the Mughals by Marathas (Stein 1998: 185).

Down South, there was a coexistence of Hindus and Muslims. Many Muslim soldiers and officers were part of the Vijayanagara Kingdom. The Vijayanagara King Devaraya II (1426-46) appointed Muslim soldiers in his army. He placed Quran in his court for his Muslim employees to pay respect. Vijayanagara kingdom adopted the administrative and military framework of Delhi Sultanate (Habib 2007: 59). It demonstrates that there was interaction and exchange of ideas. Even before the arrival of Portuguese, there were some Christian rulers in India; for instance, Raja of Valiar Vattam. The Raja of Tanur or Vettat was converted to Christianity and asked for the confirmation of the Bishop in Goa in 1548. Thus, there was the coexistence of Hinduism, Christianity and Islam (Alexandrowicz 1954: 361).

The interaction of civilisations in medieval India gave birth to a "syncretic civilisation". By 1500, the interaction of Islam in India led to "the formation of a synthetic Indo-Islamic culture" (Stein 1998: 161). People lived in an eclectic society, and there was a coexistence of many sects (Raghuvanshi 1987: 68). The communities which came to India were allowed to follow their personal laws and customs. Therefore, they Muslim traders were allowed to follow their personal laws and customs in the region (Sastri 1953: 142). Similarly, Zoroasters were allowed to follow their religion and laws. Thus, a community called *Taifa* was born (Sahli and Ouazzani 2012: 396). The Jewish community in Kerala followed their customs and religion without interference from anyone (Raghuvanshi 1987: 69).

There was a visible coexistence of Islam and Hinduism at the social level as seen in the case of Bālkrishan. Bālkrishan was a Brahmin who saw the reign of Shāhjahān and Aurangzeb. He belonged to Hissar in Haryana. His memoirs describe many aspects of the epoch. He was an accountant. In that era, accounts were maintained in Persian. Even Hindus were required to have proficiency over Persian to pursue different professions. His religion did not hinder him from learning Persian from a Muslim teacher or from entering a mosque. The memoirs of Bālkrishan prove that at social level, Indians possessed a "composite culture" (Habib 2007: 252).

In the early medieval period, there was an interaction of South India with South-East Asia. The ruler of Srivijaya (present day Sumatra, Indonesia) contributed

towards the building of Buddhist *Vihara* in Nāgapattinam. Nāgapattinam was purely meant for cultural dialogue with the South-East Asia (Hall 1978: 87). Similarly, many South Indian merchants built a temple in Takuapa on the Malay Peninsula (*Ibid* 86).

The history of medieval India largely focusses on the wanton destruction of temples by Muslim rulers. The instances of destruction are highlighted, but the instances of construction are receded to the background. Amongst the medieval era rulers, Aurangzeb is known to have destroyed many temples but the *firmans* he released in favour of temples and *Brahmins* have been hidden from the pages of history (Thapar 2014: 64-65). In many cases, Muslim rulers, jurists, political thinkers and religious leaders promoted coexistence with different practices of Hindus. For instance, when Sikandar Lodhi asked permission from the Qazis to stop ritual bath of Hindus in Thaneswar district, the Qazis ruled that they were against the stopping of religious customs and destruction of temples (Chandra 2003: 47). Some rulers actively promoted the protection of other religions like Muhammad Tughluq issued a *firman* in 1325 for the protection of Jain priests (Habib 2007: 84). He celebrated the festival of Holi by playing with colours. He liked the company of yogis. In 1740, one Murad Fakir of the Maratha region, a Muslim, was in charge of the worship of village gods. He supervised the obeisances. This was done according to the *Sanad* of Malhar Rao in 1740.

Sanskrit inscriptions were established in various parts despite the rule of Sultans in Delhi. Religious coexistence was emphasised by them. The Palam Baoli inscription set up in 1276 in Delhi mentions that the rule by Ghiyasuddin Balban was a reason for Lord Vishnu to sleep in peace in his milky ocean (Habib 2007: 91). In the case of Hindu inscriptions also there are instances wherein Allah is mentioned. The Chittor Victory Tower established by Rana Kumbha in the fifteenth century is engraved with the word Allah in Arabic apart from Hindu idols.

Dārā Shukoh wrote *Majma ʻu-l Baḥrain* (‘the mingling of two oceans’) in 1654-55. He elucidates the spiritual concepts prevalent in Hinduism. He concludes that the difference between Islam and Hinduism lies in the language (Habib 2007:

187). Islam influenced Hinduism to stress on monotheism[6] (Bhattacharya 2011: 49; Habib 2007: 86). Al-Biruni sees monotheism in the Bhagvad Gita.

A bridge between Islam and Hinduism was laid down by Sufi Saints. The two sects of Sufi saints were Chisti based in Delhi and Suhrawardi of Multan. They considered "Islam as a duty implying surrender and peace" (Dietrich 2012: 120). They are not believed to be engaged in missionary (Habib 2007: 82). They brought Islam and Hinduism closer.

Akbar created *Dīn-i llāhī* which had tenets borrowed from all religions. He interacted with heads of different religions to create it. There is no evidence that Akbar wanted to create another religion (*Ibid* 185). He treated all religions as equal and granted the freedom of religion to his subjects. Akbar had a special interest in theology and comparative study of religions. He concluded his study by creating the concept of *Sulh-i Kul* which means "absolute peace" (*Ibid* 117). He understood that the creator and the creation were supposed to be linked and distinctions between religions were not real, and hence, discrimination based on religions was to be stopped. He adopted the policy of religious tolerance and abolished *jizya*. The religious co-existence supported the birth of a composite culture in the Mughal era which could withstand the test of times (Chimni 2012: 305). At present, the rise of leaders who act as demagogues encouraging religious intolerance threatens the world peace. The composite culture which evolved in India is exemplary for the evolution of a multicivilisational world by dialogue amongst equal civilisations.

4. Sources

The sources of international law in ancient India were rules of international law for non-Muslim rulers. An admixture of both the existing rules of inter-state relations and the Islamic international law determined the interaction of political entities in medieval India. Since, *srutis*, *smritis* and other sources were discussed in Chapter II. Therefore, this section will focus on the sources of Islamic international law.

Khadduri (1955: 47-48) draws a similarity between the sources of international law as per the Statute of the ICJ to the Muslim law of nations:

[6] Mahatma Gandhi believed that the contribution of Islamic civilisation to the Hindu civilisation was that the former stressed there is one God (Bhattacharya 2011: 49).

> The Qu'rān and the true Muḥammadan ḥadīths represent authority; the sunna, embodying the Arabian *jus gentium*, is equivalent to custom; rules expressed in treaties with non-Muslims fall into the category of agreement; and the fatwas and juristic commentaries of text-writers as well as the utterances and opinions of the caliphs in the interpretation and the application of the law, based on analogy and logical deductions from authoritative sources, may be said to form reason.

Sharia or Islamic law is the main source of international law. It includes the teachings of the Quran and *Hadith* and Sunna. It means "path" or "way". It means the way shown by Allah (Shapiee 2008: 8). It is a comprehensive law that prescribes rules for individual and collective lives. *Sharia* prescribes rules for the personal and professional life of Muslims (*Ibid* 3). Theoretically, *Sharia* accommodates pluralism (*Ibid* 4).

The Quran is the primary source of Islamic law. It is the revelation of God to Prophet Mohammed in a time span of 23 years. Even though the Quran is a religious scripture, but there is the elucidation of law in it. After the revelation made to the Prophet, the question of the formulation of new laws was left unanswered (Khadduri 1955: 34). Thus, there were different schools of law. The four orthodox schools amongst *Sunnis* are the *Hanafi*, *Mālikī*, *Shāfii* and *Hanbali*.[7] *Shia* sect of Islam has two schools of law namely, *Ja'fari* and *Zaidi*.[8]

Other sources of Islamic law are s*unna*, *ra'y*, *ijma* and *qiyas*. *Sunna* is the sayings and actions of Prophet Mohammed. Sunna in a literary form is *hadith*. The opinions of jurisconsults are called *ra'y* which complements *Sunna*. *Ra'y* can be equated to justice, equity and good conscience (Singh 1973: 102). *Ra'y* turned out to

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[7] The *Hanafi* School of jurisprudence was founded by Abū Hanīfa an-Nu'man ibn Thābit. Amongst the other schools, Hanafi has the largest number of followers. The rulers of Delhi Sultanate and Mughal rulers followed this school. It considers Quran and *Hadith* as the most important source of Islamic law. When these are silent, it applies *Qiyas* which means analogy. *Qiyas* is the most important contribution of the School.
The founder of *Mālikī* School is Malik Ibn Anas. The School follows Quran as the primary source of Islamic law. It considers consensus as a source when decisions cannot be arrived from the basic sources like Quran and Hadith.
Shāfii School was founded by Al-Shafi'i. The feature of this school is that it does not consider *Istihsan*. *Istihsan* means the personal opinion of Islamic legal scholars. Since Islamic law is considered to be divine, the opinion of human beings is not accepted by this school.
The founder of *Hanbali* School is Ahmad ibn Hanbal. Due to the flexibility adopted by Jurists to favour the rich and the influential, Hanbal called for a literal interpretation of Quran and *Hadith*.

[8] Ja'far al-Sadiq was the sixth Shia Imam who founded the *Ja'fari* school. This school does not differ much from the Sunni Schools, but one major difference is in the case of temporary marriage.
The *Zaidi* school was founded by Zayd ibn Alī. It condemns *Taqiya* or concealment of religion during the threat of persecution. The followers of this school have legal and ethical obligation to stand against unjust rulers.

be contentious and it was avoided because it meant that law could be created by man in contrast to divine law (Khadduri 1955: 29). *Ijma* is the opinion of jurists agreed upon over a question of law. It is the accord of followers of Islam. It was created by the tradition of Mālik who wrote the legal book *al-Muwatta* comprising of Muhammadan traditions. It was approved by seventy jurist-theologians (*Ibid* 31). *Ijma* was also criticised because of its involvement of law making by man (*Ibid* 31). *Qiyas* is the analogical deduction. It is considered as a source of Islamic law in case the Quran, *Sunna* and *Ijma* are vague on a question of law. The analogy "must conform to the general spirit of the law" (*Ibid* 33). Generally, the Western sources of law are positive or formal and exclude individual reasoning. "The importance of the Islamic position is not simply to authorize individual reason in the form of analogy, but to exclude more affirmative forms of reasoning" (Glenn 2014: 186).

The Quran does not overtly mention custom as a source of law. *Sunna* and *Athar* signify customary law. Initially, *Sunna* meant customary law but, later on, it was known as the tradition of Prophet. *Athar* means the traditions of Prophet and his successors. Local customs also fell under the purview of *Athar*.

Siyar or international law is a part of Sharia. *Siyar* or Islamic international law includes rights of diplomats, environment, humanitarian law, and human rights (Ali 2007: 89). From a multicivilisational perspective of international law, *Siyar* can offer "moral and ethical values that modern international law is lacking" (Hamid 2009: 67).

The contribution of jurists to Islamic law is immense, and hence, it can be called as "jurist's law" (Badr 1982: 56). Islamic law is not purely based on these primary and secondary sources but is influenced by the State's power (Ali 2007: 93). According to Zia-ud-Din Barani, a famous political thinker of the Delhi Sultanate era, whenever there was a conflict between State made laws and *Sharia*; the former overrode the latter (Chandra 2003: 46). The State practice in medieval India did not strictly follow *Sharia* but deviated from them due to the plurality of Indian society (Singh 1973: 147). Hence, the treaties entered with non-Muslim States played a crucial role in medieval India.

Treaties comprise an important source of Islamic international law. Out of the four means to maintain peace and order, Sharia mentions treaty making (other means are negotiations, exchange of envoys and trade) (A/Salam 2006: 71). The Quran

encourages Muslims to enter into treaties with peace-loving nations (Shapiee 2008: 12). The *Sharia* recognises a treaty if it is entered after following proper procedure viz. negotiations, drafting of the treaty and finally, signing and ratification (A/Salam 2006: 64). Negotiations are used for the clarification of "complicated disagreements" (*Ibid* 62). They were encouraged by the Muslim State in case the other party agrees to enter into peace. The State with which the Islamic State entered into treaty was called *dar al-sulh* (the world of peace) or *dar al-ahd* (the world of covenant).

A treaty was treated as a tie or *aqd* (Singh 1973: 176). The Muslims States which constitute *Ummah* are supposed to base their relations with other States on mutual consent (Quran 4:49 and 42:38 as quoted in Shapiee 2008: 8). Moreover, a treaty was supposed to be entered by a person authorised to do so. Treaty entered by an unauthorised person was considered null and void. The treaties were negotiated by the diplomat of the States, and hence, ratification by the heads of the States was considered a prerequisite to implementing the treaty (Singh 1973: 188). Humayun's letter to Bahadur Shah of Gujarat emphasises the ratification of treaties. The provisions of the treaty were to agree with Islam. Oral agreements were also considered to be valid. Written treaties were authenticated by the seal of Qazi which was equivalent to taking oath on the Quran (*Ibid* 177). The language used was usually Persian, and the initial part was Arabic.

Oath was considered as binding even if there were religious differences between the parties. About oaths, the Quran (16: 94) states as follows:

> fulfil the covenant of Allah when you have made a covenant, and do not break oaths after making them…

Babur entered into a treaty with the Shah of Persia to protect Shia faith in Samarkand. He adhered to his oath despite his personal dislike of the faith. In State practice, treaties were considered as binding between the Islamic and non-Islamic States without worrying about the faith of the parties (Singh 1973: 175). According to the Quran (9: 7), the Islamic State was bound by the treaty between the Islamic and non-Islamic States if the latter did not breach the provisions. In case one of the parties breached the treaty, the violator was shunned (Singh 1973: 176). Violation of treaty led to use of force by the aggrieved party. According to many treaties, it was incumbent on the parties to perform the obligations mentioned therein. Abu Bakr al-

Siddiq, the first Caliph, states that if a treaty is signed, he asks the parties to fulfil their obligations (A/Salam 2006: 58).

Treaties are of different kinds under Islamic law. There exists the agreement of non-aggression called *Al-Ahd*. Peace treaties are called *Al-Aman*. *Al-Aman* is an assurance given by a Muslim to a non- Muslim granting protection for one year in Islamic territory. By virtue of *Al-Aman*, the non-Muslim could enjoy all freedoms which were not prohibited under Islamic law. *Al-Aman* helped in the interaction of Islamic and non-Islamic civilisations (Sahli and Ouazzani 2012: 397). There was recognition of Hindu political entities in medieval India by the Muslim States on the basis of treaties.

Treaties were not distinguished as law-making treaties or contractual treaties. Due to the political heterogeneity in medieval India, the State practice of treaty making cannot be generalised. The treaties in medieval India were contractual, but the commonalities in the treaties can be considered as a source of international law. They attempted to lay down rules for the secession of territories and settlement of disputes. Usually, treaties were about commerce, war, peace and capitulations. The treaties concluded in medieval India aimed at binding the parties to the agreement.

Alliance treaties were entered between States. Theoretically, a Muslim State was not supposed to make a non-Muslim State an ally (*Ibid* 401). Treaties were also signed before any conflict arose between the Islamic State and *dar al-sulh*.[9] Some treaties were entered for the exchange of territories. Babur and Alam Khan concluded a treaty according to which Delhi was to be given under the control of Alam Khan. In return, Babur was to receive the territory of Lahore and the area west of it.[10] Treaties were also signed for "political settlements" (Singh 1973: 181). Akbar was known to enter into treaties to make political settlements. He signed a treaty in 1569 A.D. with the Ruler of Bundi who controlled the fort of Ranthambore. The treaty exempted *jizya*. It also exempted sending of females in vassals of Bundi to the Meena Bazar at the royal palace held during the festival of Nauroza. It granted the privilege to enter

[9] Considering the concept of recognition in international law, *dar al-sulh* was in a better position in comparison to *dar al-harb* because of the recognition of the former. *Dar al-harb* was not granted recognition. Usually, the Caliph did not recognise any other political entity because his post was considered to be supreme. In medieval India, the Muslim rulers recognised some of the Hindu political entities like the Rajputs even though recognition was not granted by the Caliph.

[10] This treaty did not come into force because of breach of obligations by Alam Khan. Under the influence of Daulat Khan, Alam Khan broke his alliance treaty with Babur and joined Daulat Khan.

Diwan-i-Aam or hall of audience, fully armed. It was also agreed that the sacred places of Bundi would be given due reverence.

Some treaties were concluded for the safe conduct of aliens. For instance, Bhima II of Chalukya dynasty entered into a treaty with Prithviraj Chahamana wherein the former ensures the safety of pilgrims. Many treaties concluded peace, post-conflict. Sometimes, the holding of hostages was one of the provisions of those treaties.

Treaties were to be signed for entering into commercial relations with the rulers. Mughal Kings issued *firmans* for allowing foreigners to trade in their territory. The foreign companies negotiated the commercial treaties following the international law of those times, but, ultimately the provisions were issued by the Indian rulers in the form of *firmans* (*Ibid* 187).[11]

Medieval Indian rulers granted concessions to the foreign merchants who settled their disputes according to their laws. In the eighteenth century, Muslim merchants were granted such rights in the West Coast of India. Europeans were also granted capitulations which gradually became a part of their treaties (Sinha 1967: 19). Portuguese entered into capitulation treaties with the rulers of the West Coast of India in the early sixteenth century.

5. Subjects

State was the primary subject of international law in medieval India. Judge Nagendra Singh (1973: 107) categorises the subjects of international law in medieval India into two. First, he considers the political units of *Aryavarta*[12] including the Kings and the vassal States. Secondly, he mentions the Caliph. Caliph's power was not given much importance with the rise of different political units like Mughals, Bahamani Kingdom, etc. The Islamic State was subject to the Imam and Caliph in theoretical terms. Jurists like Ibn Khaldun and Ibn Rushd recommended a number of caliphs if the territory of Dar al-Islam is too vast. When it came to politics and territorial expansion, religion was considered secondary (*Ibid* 209). Hindu rulers interacted with the Caliph (*Ibid*

[11] *Firman* does not mean an order made by the superior to an inferior party, but it is the ratification by the Ruler that the treaty binds him (Singh 1973: 192).

[12] *Aryavarta* means the region where Aryans resided. While considering the subjects of international law in medieval India, there were regions beyond *Aryavarta* and rulers beyond *Aryans*. Hence, we cannot confine the study to Aryans and *Aryavarta*.

112). The civilisations, the legal systems, and the religions they professed were different.

The hold of Caliph over the Muslim rulers in India gradually reduced. In 871 A.D., Arab Chiefs established political units independent of Caliph in Multan and Mansurah. The Caliph conferred Mahmud of Ghazni with the title of Amir. Mahmud acted independent of Caliph in his conquests. Therefore, the Caliph did not confer him the title of Sultan despite suppressing an uprising in Sistan. In 1229 A.D., Caliph declared Iltutmish as the Sultan of India. Iltutmish was a slave by birth and wished to gain legitimacy by adopting the title. Caliph also recognised the entities in Malwa and Deccan. They were recognised as Kings but not as Sultans. Thus, recognition by Caliph was considered important by the Islamic political units. Arab Caliphate vanished in the sixteenth century. This brought a drastic change in the political units of Islam.

Some States recognised the Caliphate. But the Mughals did not pay allegiance to the religious rulers (Chandra 2003: 35). They had to compromise with the religious leaders because of the interests of the State (*Ibid* 56). Abul Fazl, in the court of Akbar, supported allegiance to the ruler and not to any religious body (*Ibid* 52). Thereby, he refrained from making distinctions between *dar-al-Islam* and *dar-al-harb*. Thus, the ideal State according to Fazl was secular, based on human values and justice.

The Muslim rulers had inter-State relations with Hindu rulers. The Marathas were treated as equals by the Mughals but were discriminated by the Rajputs (Chandra 2003: 54). The balance of power of the Mughal State held many political entities together with Mughal State in its centre. Out of these entities, Marathas were very powerful (*Ibid* 193).

The cooperation amongst States in medieval India increased. In the eighteenth century, there was a confederation of States in the Indian sub-continent. The confederation was formed under the leadership of the Peshwa of Poona. B.N. Patel (2012: 513) compares the confederation with international organisations.

The concept of State under Muslim thought was influenced by the writings of Abū Yūsuf Yāqub (731-98), Al-Fārābi (d.950), Al-Māwardi (991-1031) and Al-Ghizāli (d. 1111). There was an influence of Iranians and Byzantinians on the Islamic

rulers in India. The Turkish rule in India introduced Ādāb-ul-Harb written by Fakhr-i-Mudabbir. Ādāb literature or "Mirrors for Princes" emphasised "justice and equity" within the frontiers of Islam and also mixed with expediency (Chandra 2003: 34). Panchatantra influenced Ādāb literature. Here we can see the influence of Hindu texts on Islamic literature and vice-versa, the "Islamic thinking of Sultanism" influenced the Hindu concept of State (*Ibid* 34).

Francois Bernier[13] who visited India in 1656 and stayed till 1668 compared the Mughal State with the European State. He concluded that the Indian State aimed at annihilation of all private property whereas the European State protected private property. The Mughal State did not claim the ownership of land whereas it interfered in agriculture to the extent of the collection of tax but did not bother about private property as such. European State was not concerned about tax collection as it was under the aegis of estate owners (Habib 2007:123). Many scholars use the term "Oriental despotism" to describe the medieval era.[14] Such a conclusion cannot be drawn from the argument put forth by Bernier. The Mughal polity did not have the tendency to be totalitarian (Hasan 1970: 35). There was control over arbitrariness because of the "systematization of the polity" (Ali 1993: 703).

There are two counter arguments that the social institutions like caste and religion played a pivotal role wherein the role of State was receded to the background, whereas some scholars argue that the power of the State was quite centralised (*Ibid* 703-704). The polity was quite centralised in the Mughal era, and there was a well-developed bureaucracy. However, the pivotal role of caste and religion cannot be denied

According to the Muslim political thinkers, the primary duty of the State was to maintain "the existing social order" (Chandra 2003: 38). In the latter half of the fourteenth and fifteenth centuries, there was a critical approach towards the State due to "popular monotheistic movements and popular Sufism" (*Ibid* 47). The proponents of these movements questioned the State and its indifference towards the

[13] Bernier visited the court of Aurangzeb and observed the social and political setup of India.

[14] European scholars describe the rule before colonialism as oriental despotism. It implies that there was no private property and all the property vested in the State. Irfan Habib (2007: 123) clarifies that the Mughal rulers did not claim universal ownership of property. *Jagirdars* or *zamindars* were appointed to collect taxes from the peasants. The State was more concerned with extracting the "agricultural surplus" (*Ibid* 124).

discrimination in Indian society and the social order. Kabir challenged the hierarchy and was an exponent of equality of man. Nanak envisaged a State which stood for "righteousness and equality" (*Ibid* 48). The Sufis especially, Chistis kept aloof from the affairs of the State.

The jurisdiction of the Islamic State extended over the individuals. The individuals in an Islamic State were classified according to their belief viz. believers (*Iman*), non-believers (*Kufr*) and apostates (*Murtadd*). Different legal status was granted to individuals under the Islamic State viz. Harbi, Musta'min and Dhimmi. Harbi referred to a resident of *dar al-harb*. *Harbi* was also of two categories viz. one with scriptures like the Jews and Chritians and the other who worshipped idols and believed in many Gods. The *Harbis* were permitted in the Islamic State if they were granted *Aman* or safe conduct. One who was permitted to enter the Islamic State with an *Aman* was called *Musta'min*. On payment of poll-tax or *jizya*, a *Musta'min* was declared as *dhimmi*. A *Musta'min* could enter into trade relations but under the constraints of the law. The granting of *Aman* encouraged the interaction of Muslim and non-Muslim States. It was similar to the passport of modern times (Singh 1973: 141). Jews and Christians who lived in the land ruled by the Muslims are called *Dhimmis*. *Dhimmis* were non-believers who were protected in the Islamic territory (protection of the right to life and property) provided they paid *jizya*. *Dhimmis* were permitted to follow their religion and customs, provided they did not act in conflict with the Islamic law and against the Muslims. They could convert to Islam or pay *jizya. Jizya* was exempted for the elderly, the physically and mentally challenged, the children and the monks (Sahli and Ouazzani 2012: 396). The payment of *jizya* reduced the State paying it into a vassal State or a feudatory. Many Islamic rulers used *jizya* as a means of collecting revenue (Avari 2013: 71; Nawaz 1959: 46). Idolators were granted protection if they resided outside the Arab Peninsula. Many medieval Indian rulers treated *Dhimmis* equally with Muslim rulers in medieval India, exemplified by Akbar. The contribution of Islam is in the protection of *Dhimmis* and the treatment of prisoners of war (Sahli and Ouazzani 2012: 405).

The jurisdiction of the State for the rulers of India was personal. It was not territorial. Thus, the law was the privilege of the State to be applied to its nationals (Nawaz 1954: 158). It cannot be concluded that religion was the determining factor for exercising jurisdiction by the Islamic State because it exercised jurisdiction over

the non-Muslims residing in the territory of Islamic State. The territory was also considered as an important aspect to determine the jurisdiction of a State (Singh 1973: 136). The jurisdiction of modern State extends to the territory, individuals residing in the territory and the modern State has extended it to territorial sea (*Ibid* 136).

Abul Fazl described sovereignty as *farr-i īzadī* or God's light, and the sovereign was the parent of his subjects. He was supposed to make them contended. Hence, it was his duty to maintain peace between the religions (Habib 2007: 186). Thus, the sovereign was the protector of his people.

6. International Human Rights Law

6.1 Caste System

Despite the change in leaders, there was no change in some of the basic structures of Indian society the best example being the caste system. Those in power (in the ancient and medieval era) were concerned about social peace to the extent that they considered the poor class as a menace to the order of the society (Chandra 2003: 40). Caste system was not dared to be abolished by the political rulers. They wanted status quo in social order so that they could exploit the farmers and their produce (Habib 2007: 60). Zia-ud-Din Barani justified that lower class should be distanced from the political power. He even compared them to animals (Chandra 2003: 41).

Early medieval India possibly strengthened the caste system by strict adherence to texts like *Manusmriti* (Habib 2007: 7-8). In the early medieval India, the untouchables were gradually transformed to "landless proletariats" (*Ibid* 4). In medieval India also, dalits and lower class lived lives of penury due to the policies of the rulers. People of lower castes were oppressed due to menial jobs, begar or forced labour and untouchability (*Ibid* 159).

Caste system affected not only the social order but also the economic order of Indian society. A major hindrance to the growth of money economy in India was caste system (Chandra 2003: 245). With regard to economy, the *jagirdars* and *zamindars* exploited the peasants and labourers who belonged to the lower castes. Land called *jagirs* was granted to some individuals called *jagirdars* by the Mughal Emperors. To maintain centralisation of power, *jagirs* were transferred from one *jagirdar* to another. This affected the peasants because the *jagirdars* tried to exploit the peasants during

their control over the *jagirs* (Habib 2007: 155). *Zamindars* were the owners of land and performed the function of tax collection on behalf of the State. Usually, the term, *Zamindar*, was used for groups who wielded power over agriculture and land. They owned a huge area of land and employed many peasants who belonged to the lowest echelons and were landless labourers (*Ibid* 135). There existed *Khud Kashts* or peasant proprietors. The increasing power of *zamindars* and *Khud Kashts* led to exploitation of *muzāriān* or cultivators. Peasants were exploited by the *zamindars*. Since *zamindars* also belonged to a particular caste, their role was crucial in solidifying caste system. There were many revolts by peasants due to the suppression by rulers and *zamindars*. *Jat* peasants who paid allegiance to Guru Gobind Singh revolted against Aurangzeb due to increase in tax. In 1672, a peasant community called *Satnamis* rebelled. Their rebellion was suppressed to such an extent that they were erased from the narration of history (*Ibid* 127). Shāh Walīlullāh (1702-1762), a jurist, attributed the decline of Mughal Empire to the exploitation of peasants and craftsmen and the extravagance of the rulers and nobles (*Ibid* 191).

It cannot be generalised that all rulers in medieval India were inhumane treatment to the lower castes. Muhammad Tughlaq's blunders with the economy are brought to light, but his compassion towards the poor, lower castes is not highlighted. Muhammad Tughlaq conferred high offices to the people denounced by Barani. He also gave important positions to traders, lower castes who were converted to Islam and foreigners like Uzbeks, Mongols, Khurasanis etc. The attempt of Muhammad Tughlaq to include people who were prohibited from gaining positions and nobility should be appreciated because he went against the political and social thinkers to do so. It was a challenging task for a ruler of those times.

Abul Fazl divided the human society into four viz. warriors, traders, learned and working class. By placing learned in the lower echelons of society, Fazl tried to decrease their self-proclaimed importance (Chandra 2003: 49). The attempt of Fazl is to be appreciated because he tried to challenge and change the then existing social order which was based on the exploitation of labourers. He tried to degrade the position of the learned but at the same time by placing labourers in the lowest echelon did not help in their upliftment. Fazl also encouraged the appointment of nobles according to their qualifications and skills without considering their caste.

Unlike northern India, southern India did not have strict classification of caste into four. There existed Brahmins and Shudras which led to decentralised political entities in southern India (Habib 2007: 7).

Caste system was challenged by many thinkers like Basava, Namdev and others. Basava created the Lingayat sect. He considered that Para Shiva as the only God. He condemned caste system. The sect granted higher status to women. Priesthood was not confined to Brahmins. A similar sect called Siddhars was born in Tamil Nadu. In Maharashtra, the *abhang* or songs of Namdev are known to be against the caste system. In Assam, Shankardev challenged the Brahminical rituals and created a sect of worshipping Krishna. During the Bhakti movement in the fifteenth and sixteenth centuries, poets like Kabir challenged the basis of caste system viz. "purity and hierarchy" (*Ibid* 160). Kabir was a weaver whose poems are still recited in most parts of India. He challenged the caste system and six schools of Hindu philosophy. He was followed by Ravidas and Sain who belonged to deprived sections. Dadu was also similar to Kabir in his outlook. Tukaram, a peasant, was the devotee of Vitobha of Pandharipur in Maharashtra. He attempts to bridge the gap between different castes and between Hinduism and Islam by addressing his God as Allah in his *abhangs* or devotional songs. Another proponent of the movement was Kanakadas who belonged to Kurub or shepherd caste. Later on, rituals were associated with the proponents and a Brahminical heritage, which was an attempt to negate the very message of these seers.

6.2 Indigenous People

There are many tribes in India like *Banmanas* or forest folk, *Nanga* tribes etc. Some tribes in the Mughal period resorted to trade and sometimes, ill-gotten gains because of the incapacity to produce all the required goods through "subsistence farming" (Chandra 2003: 64). *Nahmardis* who belonged to the Baluchistan-Sind area carried on the barter system. In exchange for camels, horses, carpets they bought grains, cloth and weapons. The Naga tribes of South-East of Assam bartered aloeswood (agalloch, aromatic and resinous wood) in exchange for grain and salt. They paid allegiance to the King of Assam (Habib 2010: 91). As per the accounts of historian Bhimsen in 1690, he encounters a forest tribe in the Andhra region which did not interact with the outside world and stopped entry of outsiders by gathering “in large numbers” (*Ibid*

104). The indigenous tribes in medieval India were economically backward and sometimes, resorted to theft for their livelihood. Usually, they led a secluded life with rare interactions with other communities.

6.3 Slavery

Slavery existed since ancient times in India as discussed in Chapter II. A virtuous Muslim was expected to free slaves to attain heaven (Khadduri 1955: 130). Despite such a provision in the Islamic law, slavery was practised on an unprecedented scale in the thirteenth and fourteenth centuries; there existed slave markets (Habib 2007: 62, 156). Citizens who did not pay taxes, women, prisoners of war were taken as slaves. Slaves were converted to Islam in many instances. They were treated as domestic servants or labourers (*Ibid* 81).

Slavery was not a general practice in medieval India. Some rulers supported slavery whereas others opposed it. Firoz Tughluq possessed 1,80,000 slaves. His minister Khan Jahan Maqbul had about 2000 women slaves (*Ibid* 62). Akbar condemned slave trade (*Ibid* 117). In 1582, Akbar declared that Imperial slaves would be known as '*chelas*' henceforth (Chatterjee 1999: 15). Marathas called enslaved women as daughters of the State (*rajbeti*) (*Ibid* 18).

6.4 Gender Rights

Islamic law prescribes rights and duties for women. Some rules seem to be restrictions on women. For instance, the testimony given by a woman is half the value of that given by a man in financial transactions (Quran 2: 282). Some scholars opine that the reason behind this law is that women usually are not active in financial transactions (Ali 2007: 86).

There are some rights in Islamic law which can be termed as human rights of women. Islamic law prohibited female infanticide and upheld inheritance rights for women (Habib 2007: 31). Apart from ownership of moveable property, some women from upper castes also owned immovable property like *zamindari* (*Ibid* 164). They were granted the right to education. Islam prescribes them to read and write (*Ibid* 63).

There were many strong women in medieval India who wielded political power. Raziya Sultan was one such strong character. She ruled Delhi succeeding her

father Iltutmish from 1236 to 1240. Tarabai, the Maratha ruler Raja Ram's widow, was well known for her excellence in polity and governance. She led Marathas to success during her rule. In the Mughal period, Humayun's sister Gulbadan Begum was an educated woman. She was given due respect. Similarly, Noor Jahan, the Queen of Jahangir, was famous for her wisdom. Jahangir consulted Noor Jahan in political matters. He consulted her during Qandahar crisis with Safavid Persia in 1622 (Farooqi 2004: 73). He had also appointed women painters in his court. One of them was Nādira Bānū. Women in Mughal royalty and nobility received education in bureaucratic skills, literary and artistic professions.

In the medieval era, women faced many challenges. Women from upper castes Hindus suffered from many drawbacks like seclusion, prohibition of widow remarriage, *sati*, etc. Caste system instead affected the status of women (Habib 2007: 8). It generated practices like *sati* especially amongst upper castes. The first case of *sati* or immolation of widow (or self immolation of a widow)[15] is recorded to be in 316 B.C. The victim was widow of an Indian captain in Iran. The seventh century poet Bana criticized the practice of *sati* but it was practiced in many parts of India by eleventh century A.D. Akbar was against *Sati* system (Habib 2007: 117). Mughal State interfered when a woman was forced to practice *Sati* (*Ibid* 124). During the rule of Jahangir, an act of *Sati* took place twice or thrice a week in Agra (*Ibid* 164). According to the accounts of Francois Bernier, the governor of the Mughal Empire, tried to convince the widow who wished to immolate herself, not to commit *Sati*. He sometimes asked the women in his household to appease her not to commit *Sati*. If the negotiations failed and there was no other way, he allowed the widow to commit *Sati* (Sen 2001: 17).

The rule of *Sati* and prohibition of widow remarriage was not seen throughout India. Communities like Jats, Ahirs and Mewatis allowed widow remarriage. Khasis and Gharos of Meghalaya and some communities in Kerala were matrilineal. Seclusion of women was prevalent, especially amongst upper castes. Women of higher castes were secluded and veiled as mentioned in *Tashrīh-ul Aquwān*. But it was not common throughout India because Ahom queens did not cover their faces and appeared before the public.

[15] *Sati* system was one of the evils wherein a widow immolated herself in the funeral pyre of her husband.

Granting of property rights to women was an issue in pre-independent India. Women amongst the lower castes were not granted inheritance rights in the medieval epoch. Usually, amongst the peasant class in Bengal, the death of the peasant without a male heir led to the confiscation of his daughters and wife by the *jagirdars* and *zamindars* (Habib 2007: 162).

During Mughal era, women were active in agriculture. They were part of farms with men. Sometimes, they earned equal wages. The wages of women who were employed for weeding and transplanting were equal to that of men in District Purnea of Bihar in 1810 (Moosvi 2008: 137). Certain occupations were usually that of women like beating rice. They also fetched water for domestic purposes. They were called *Panibharin* in Bhagalpur (Bihar) whose occupation was filling water in pitchers and supplying it to households for two paisas per pitcher (*Ibid* 140). Other work done by women was spinning, cattle rearing, making milk products, etc. They played a crucial role in the construction of buildings. The dancing profession was usually a domain of women (*Ibid* 244). Women from specific castes were granted training especially for performance in royal courts.

In 1624, in middle Himalayas women worked as cultivators and men as weavers. In the textile industry, women separated seeds and fibre cotton. The inn-keepers (*bhatyārīs*) were usually women who also prepared food for the visitors in the inn. They also sold bangles by visiting households. In some professions, gender does not determine the profession like pottery, sweeping, ornament making, preparation of tobacco and weaving of platters out of leaves (*Ibid* 149).

Women also participated in trade. A man in Surat bequeathed his trade to his wife while going to Mecca. She claimed successfully the right to trade after her husband's death. The Mughal government granted land grants to the proprietors of village land in Uttar Pradesh. Such grants were issued by a woman appointed by Jahangir to process and recommend such grants. The post was continued in the times of Shah Jahan and was called as '*Sadru-n Nisa'*.

Women led the Bhakti movement by breaking the strict social norms (Thapar 2014: 272-273). Meera from Rajasthan, Andal from Tamil Nadu and Lalla from Kashmir contributed towards the movement. Sanchi Honamma was a poet in the court of Chikkadeva Rāya of Mysore (ruled from 1672-1704). In her magnum opus,

Hadibadeya Dharma (‘Tenets for Chaste and Devoted Wives') she contests for gender equality. Thus, women in medieval era faced discrimination, at the same time many women fought for their rights and against social stigmas.

LGBT rights were granted and protected, in many instances, in the medieval era. There are many versions of Ramayana apart from Valmiki’s Ramayana with modifications in the stories. A famous version in Bengal is a fourteenth century Bengali text, *Krittivasa Ramayana*. The version narrates a story of two women bearing a child named Bhagiratha out of their union. The union of the women was considered to be divine (Vanitha 2004: 126).

The medieval Indian rulers granted rights to transgender. The Indo-Muslim rulers appointed transgender in their harems (Sircar 1974: 93). There are pieces of evidence of homosexual relations between the young boys kept in harems of Muslim rulers (Joseph 1998: 150). Transgender were also part of the political and administrative setup, sometimes holding high positions (Michelraj 2015: 18). Transgender were sent for negotiations to end war. The primary reason for their appointment as diplomats was because they were given a special status and inherent personal inviolability (Irvine 1962: 214). Thus, the rights of transgender were protected in medieval India.

7. International Law of Diplomacy

7.1 The Concept of Diplomacy

In theoretical terms, Islam considered the state of war as a normal state (Khadduri 1955: 239). When it came to State practice, the Islamic State entered into diplomatic relations with the non-Islamic States. Ambassadors were sent with secret messages which were to be delivered to the monarch in a clandestine manner (Farooqi 2004: 81). The messages were in written or oral form. Ambassadors were despatched with Royal letter drafted by the *vizier* or chief *Munshi* attached to the office of *vizier* (*Ibid* 81). The rulers addressed each other with long titles (*Ibid* 81). After greeting the Emperor, the diplomat presented the credentials and the letter sent by the sending State. The diplomat was gifted with a robe, a turban, a sash and maintenance allowance. He was permitted to watch court proceedings (*Ibid* 84). Ottomans also treated the Mughal envoys well. They were welcomed by *Chaush Bashi* (Chief of Protocol) in Istanbul. They were to stay at the place of high imperial official and were

served food from the royal kitchen (*Ibid* 84). Sometimes, ambassadors were accompanied by soldiers, members of family, attendants, etc. Hajji Yusuf Agha, Ottoman Ambassador to India in 1744 was accompanied by his son Amin Pasha (*Ibid* 79). In 1786, 900 attendants, soldiers, cooks and interpreters escorted Tipu Sultan's ambassadors to the Ottoman Empire (*Ibid* 79).

Babur and Humayun dispatched diplomats after consultation with advisors (*Ibid* 73). The final decision was taken by the Emperor himself, and he was not bound by the opinion of his advisors (*Ibid* 75). Sometimes, personal grudge overruled national interest in diplomatic relations. For instance, the women from Mughal household who went on a pilgrimage to Mecca and Medina were not treated properly by the Ottoman Empire. Akbar treated the Ottomans indifferently at a high cost of entering into an agreement with the Portuguese in 1573 accepting the Portuguese naval superiority over Indian Ocean (*Ibid* 75). Thus, reciprocity played a crucial role in Mughal diplomacy.

Diplomats were promoted to a higher rank by the Mughals and were given travel expenses before they travelled (*Ibid* 78). If they incurred more expenses and in the case of expediency were supplied with money through the traders who travelled to the receiving state (*Ibid* 78). Here, we can see a link between the traders and diplomats.

The diplomat carried gifts for the receiving State. Among the gifts sent from India included rare birds and animals. Tipu Sultan's embassy to Istanbul included 20 langurs, 20 peacocks, one black and one white elephant and three parrots (*Ibid* 82). This is termed as animal diplomacy in modern terms. For instance, China presents pandas to select foreign countries to promote conservation of pandas and as a tool of diplomacy (Hartig 2013: 49). So, in medieval India animal diplomacy as a diplomatic tool existed.

Funeral diplomacy was practised in the Mughal era. Diplomats were sent on the death of a sovereign of another State (*Ibid* 80). Non-observance of funeral diplomacy was evidence to strained relations between the States. Akbar apologised to Shah Abbas I on his failure to pay condolences on the death of Shah's grandfather and brother (*Ibid* 80).

Diplomacy in the Mughal era was based on protecting the territorial integrity of the Empire because of the powerful political entities surrounding it (*Ibid* 60). Hence, diplomatic relationships were established with Safavids of Persia, Uzbeg Central Asia and the Ottoman Empire. Akbar focussed on diplomacy to protect the borders of North and hence, entered diplomatic relations with "the Persians and their Uzbek enemies" (Stein 1998: 168). The factor of Islam influenced diplomacy in Mughal era (Farooqi 2004: 60). Safavids were Shia Muslims while Uzbeks, Ottomans and Mughals were Sunni Muslims. The Mughals entered into diplomatic relations with these rulers. Sometimes, the clash of interests was evident in the relationship of Mughals and Safavids (*Ibid* 60). There were Persian nobles in Mughal court who favoured Safavids, and the Safavid-Mughal link was necessary to contain the rising Uzbeg power (*Ibid* 61). Abdullah Khan Uzbeg (r. 1561-98) proposed an alliance of Mughal, Uzbeg and Ottoman to conquer Persia, but Akbar did not assent (*Ibid*). Religion did not play much role in Mughal diplomatic relations because of the constraints of the Mughal State (*Ibid*). The rulers did not encourage alliance when their territorial integrity was challenged. Jahangir entered into an alliance with Uzbeg and Ottoman when Shah Alam I of Safavid Empire seized the fort at Qandahar in 1622. Shah Jahan again revived the alliance when Shah Alam II of Safavid Empire captured the fort in 1648. The fort was significant for defence and trade, hence, was a cause of disagreement between the Mughals and the Safavids (*Ibid* 62). Mughals had a fascination for Central Asia as it was their ancestral land (*Ibid* 63). Uzbegs ridiculed the religious toleration of Mughals among the Afghan tribes of Mughal Empire, and the Mughals disliked them for this reason (*Ibid* 63). Due to this, Mughals considered diplomacy as a solution. Akbar entered into an agreement with the Uzbeks to fix Hindukush as the boundary between Mughal and Uzbeg Empires in 1587. The agreement had provision to maintain territorial integrity and non-interference (*Ibid* 63).

Ottoman and the Mughal diplomatic relation was confined to the alliance against Persia (*Ibid* 66). Persians did not bother Akbar, and hence, he did not appease the Ottomans. Jahangir and Shah Jahan sought help from the Ottomans. Hence, Shah Jahan dispatched diplomats to Istanbul in 1637 and 1652. Nadir Shah of Persia was a threat to Mughals and Ottomans alike. Hence, embassies were sent by sea between them (*Ibid* 66). The Portuguese threat to Indian trade and Hajj pilgrimage brought

Mughals and Ottomans closer to each other (*Ibid* 67). Except for Akbar, Mughals did not send ambassadors to Europe. Akbar sent a diplomatic mission to King Philip II of Spain and Portugal in 1582. The mission was terminated due to the departure of Ambassador Sayyid Muzaffar (*Ibid* 68).

There was no foreign office which dealt exclusively with the external affairs. The King was assisted by *Vazir* and councillors, who were in charge of different portfolios like defence, finance, etc. The external affairs of the State were discussed with the *Vazir* and councillors, depending upon its significance. A proper ministry of foreign affairs was established in the Deccan under the rule of Mohammed the First, son of Bahaman Shah in the late fourteenth century A.D. He appointed *Vazir-i-Ashraf* or the Minister of Foreign Affairs and Master of Ceremonies. There was a minister of ceremonies in Delhi Sultanate and Mughal Empire, but an office of the minister of foreign affairs was not separately established. The *Vazir* who was responsible for Imperial Archives took care of the foreign affairs of the Empire. The Marathas under the rule of Shivaji appointed eight principal ministers called *Ashtapradhan* but did not appoint a specific Minister holding the portfolio of external ministry. Similarly, the Poona ruler appointed *Dabir* or *Sumant* for taking care of foreign affairs. Aurangzeb's enthronement saw many diplomats visiting to congratulate him, but there is no evidence as to the appointment of an officer in charge of external affairs (*Ibid* 72). The diplomats who came to visit India were presented to the Emperor by eight officials who examined their credentials and explained the manner in which obeisance was to be paid to the Emperor (*Ibid* 72). *Khan-i-Saman* (Officer in Charge of Imperial Household) was responsible for introducing diplomats to the ruler (*Ibid* 73). Ministers were consulted on the matter of external relations of the State, but in most of the above instances, a specific external affairs ministry was not formed.

The Mughal rulers asked one of the *Mansabdars* to take care of the correspondence with foreign rulers (Farooqi 2004: 72). During Akbar's reign, Abul Fazl and Hakim Abul Fath were in charge of foreign affairs. They were known for their writing skills and political prudence (*Ibid* 72). Jahangir and Shah Jahan appointed officers who were responsible for foreign affairs (*Ibid* 72).

In the medieval period, permanent embassies (as exist today) were not established. From the advent of the Europeans in India until the end of the eighteenth

century, diplomatic exchanges were on *ad hoc* basis (Alexandrowicz 1967: 186). C. H. Alexandrowicz (*Ibid*) classifies some missions as "semi-permanent" due to the prolonged period of negotiations. The embassy of Sir Thomas Roe, sent by the English to the Mughal Court was sent to the Mughals to negotiate a trade agreement, and hence, it was of a temporary nature.

An impetus was given to diplomacy due to the weakening of Mughal power. It became truly multicivilisational. The Mughals abolished *Jizya* in 1713 for treating Hindus and Muslims at par. For the appeasement of Marathas, the grandson of Shivaji, namely Sahu was released from imprisonment in 1748 by Bahadur Shah. Rajputs were promoted to the rank of governors.

The Kings throughout India practised diplomacy. There was a strong alliance between Ceylon and Pandyans in the medieval South India. This was further strengthened by matrimonial alliances (Subrahmanian 1964: 403). Virarajendra of Chola Empire in 1068 A.D. helped a Sumatran King when he was dethroned due to a civil war (Sastri 1953: 145). A Portuguese tourist assessed Vijayanagara Empire to be as vast as Rome in 1520. Portuguese exchanged diplomats with the local rulers also (Sinha 1967: 18).

In the early medieval India, the rulers of the South sent diplomatic missions to faraway lands like China and South-East Asia. The primary motive behind the mission was commerce. The Chinese inscription in the Taoist monastery in Canton (situated on the south coastline of China) describes Kulōttunga Chola as the patron of the monastery (Hall 1978: 95). The dialogue of civilisations is visible in this instance, as the Indian King became a patron of the monastery in China.

7.2 European Embassies in Medieval India

After Renaissance, the interaction between Europe and India increased through missionaries, traders, etc. (Thapar 1968: 318). The Europeans came to India with varied interests. The Portuguese interests in India were primarily religious and political than commercial (Sastri 1953: 147). The Dutch, the British and the French were influenced by commercial interests. The English gradually aimed at political power.

The Portuguese advent initially was in South India. The Portuguese were welcomed by the Zamorin for trade on the Malabar Coast. The Portuguese King sent sixteen vessels led by Alvarez in 1500 A.D. to India. A treaty was signed between the Zamorin and the Portuguese permitting the latter to establish a factory in Calicut. The Portuguese got into an alliance with the Kings of Cannanore and Quilon against the Zamorin. The King of Cannaore sent a diplomat to the King of Portugal who was welcomed on board by Alvarez. The envoy carried the message of offering free trade in the Kingdom to the Portuguese. The Portuguese appeased the Vijayanagara rulers by supplying them horses (*Ibid* 11).

The Dutch were successful because of their talent in shipbuilding. They successfully caught hold of spice trade as well as paved path for textile trade (*Ibid* 11). The Dutch diplomats exchanged information about their country and convinced the Mughal to grant trade concessions in Bengal, and the tax in Surat was cut by 1% (Farooqi 2004: 70). The Mughals were suspicious about Europeans because of the Portuguese attack over Indian pilgrims and the English and Dutch pirates (*Ibid* 71). They were also sceptical about the demands of trade which were evidently harmful (*Ibid*).

The British despatched Sir Thomas Roe as the first proper ambassador to India (Sinha 1967: 18). Prior to Sir Thomas Roe's mission to the Mughal Court, other diplomats visited India to obtain permission to trade and establish factories (Zaheer 1996: 1). Father Monserrate visited in 1580, and stayed till 1582 during Akbar’s rule in India. He was chosen as a tutor to Prince Muradat. He escorted Akbar for his military campaign in Kabul. Ralph Fitch stayed in India from 1583 to 1591. He carried a letter from Queen Elizabeth to Emperor Akbar. He was caught by the Portuguese before entering the Mughal territory. He could never delivered the letter from the Queen to the Emperor. His aim was to explore trade prospects in India. He described the trade practices of India in his book "Principal Navigations" (1598-1600). John Mildenhall was next to Fitch to visit the Mughals. He requested for concessions to be granted to the English East India Company to trade in Mughal India. He was asked to inform Queen Elizabeth to send an embassy to Mughal Empire. Mildenhall was granted some concessions that did not satisfy the Company, and therefore, it despatched William Hawkins to Mughal Empire. Hawkins was granted certain concessions in expectation that he will be an ambassador at the

Mughal court. Hawkins could not continue as ambassador in the court due to his apprehensions and Portuguese conspiracy. He fled to England in a ship which had arrived at Surat. This episode was followed by the arrival of Thomas Best who was granted permission by the local authorities to establish a factory in Surat in 1612. Other merchants tried to connect with the Mughals viz., Thomas Kerridge, Paul Canning and William Edwards. William Edwards in his correspondence with the Governor of East India Company (December 1614) expressed that the Mughals do not encourage merchants but only ambassadors. These instances prove that the English tried hard to gain trade concessions but in vain. The Mughals expected the English rulers to send ambassadors to negotiate with them rather than sending merchants. Thus, the Mughals emphasised on diplomacy for negotiations with the English Empire.

Finally, a "royal ambassador", Sir Thomas Roe was sent by King James I to the Mughal Court of Jahangir. In the credentials despatched with Sir Thomas Roe was a letter written by King James I to respect the law of the nations while negotiating a treaty and to receive his envoy in the same manner as "received in civilised countries" (Alexandrowicz 1967: 194). Ambassadors were required to salute the Mughal King by prostrating before him called *sijda* (Farooqi 2004: 84). Sir Thomas Roe was asked to do genuflections before the Mughal Emperor. Roe refused to do so, but he replied that he would follow the customs of Europe in addressing the King. He bowed to the King as followed by English ambassadors. Mughals were reluctant to treat the English on the basis of equality (Singh 1973: 172). The Mughals favoured the Ottoman and Persian diplomats. Despite the differentiation between Europeans and other ambassadors, Jahangir treated Sir Thomas Roe with gifts and invited him to parties. In his memoirs, Roe mentions that he was given better treatment than Turkish or Persian envoys. His accounts also prove that the Empire granted privileges to the diplomats. Some diplomatic rules Roe learnt from a Persian ambassador, Mahomet Roza Beag. One of the rules prohibited two ambassadors from different States in the Mughal Court to enter into negotiations without the knowledge of the Emperor (Alexandrowicz 1967: 195).

Sir Thomas Roe aimed at breaking Portuguese monopoly in the East Indian trade. He had two aims viz. to conclude a treaty and to collect the money owed by the ministers of the Mughal Empire (Carey 1984: 47). When Roe expressed his intention

of concluding a treaty on trade in India, the Emperor referred to Asaf Khan who was in charge of foreign trade. The articles of the draft treaty took the shape of *firman* issued by the Prince of Surat. Asaf Khan did not agree with all the articles of the draft. He obtained permission to establish a factory at Baroach. Roe stayed in the Mughal Court till 1618.

Due to Gujarat famine in 1630-31, the British realised the necessity to open trading centres in the East. Hence, the British agent at Masulipatam, John Norris, sent an expedition headed by Ralph Cartwright, to take permission from the Governor of Orissa, Agha Muhammad. The governor granted permission in 1633, and soon, Cartwright with Thomas Colley began the construction of a factory in Hariharpur. James Bridgman in his letters written to the English East India Company (C.E. 1650) emphasised the maintenance of diplomatic relations with the Governor of Hugli by giving them presents. He advised presenting the Nawab of Cuttack with sword blades and cloth worth £10 (Sarkar 2014: 156). He also advised them to give chief gifts like glasses, clocks, globes, etc. Thus, the British understood the diplomatic practices in medieval India and tried to follow them to achieve their commercial ends.

For the British, diplomacy was a means to establish trade and build factories in India. In reciprocity, the Mughal rulers permitted the Europeans as far as their sovereignty was recognised and fees was paid (Avari 2013: 111). Shah Jahan's daughter got burns and to cure her he sent for an English doctor. Surgeon Boughton cured the Emperor's daughter and as a reward was granted a *firman* to trade and establish factories in Bengal (Lawford 1978: 41). Prince Suja executed the *firman* by granting permission to the British to establish a factory in Patna and were allowed to trade free of taxes on annual payment of 3000 rupees. This was continued in the times of Aurangzeb.

Aurangzeb was annoyed by the behaviour of the British in Surat. They committed piracy and maltreated the Governor of Surat. In December 1688, the Governor of Surat arrested the factors Harris and Gledman. Sir John Child, the Governor, realised the importance of diplomacy and negotiations with the Mughal Emperor and sent two envoys to the Mughal Court. The envoys were not treated well. They were presented before the Emperor with tied hands. They were asked to return the amount they owed to the subjects of the Empire. Sir John Child was ordered to

leave the Empire within nine months. Thus, the acts of the British affected their reputation in England as well as in India (Carey 1984: 55). Despite such a past, Aurangzeb welcomed a British envoy on 28 April 1701, namely Sir William Norris. His mission was with regard to the establishment of new East India Company. Due to the dispute between the old and the new company, the emissary could not obtain the required *firman*. Aurangzeb despatched a letter and present for the King of England with the envoy. The Emperor gave the ambassador special treatment without forcing him to follow strict rules of his Court.

The diplomatic practices in medieval India after the advent of the Europeans were initially multicivilisational (before they started wielding political power). While entering into trade relations with the Mughal King, Queen Elizabeth gave respect to the ruler. The respective charters issued for the East India Companies granted the authority to establish diplomatic relations. Hence, the Europeans also started embassies wherein they received envoys of native rulers. The interaction between the ambassadors was multicivilisational because it "followed partly European and partly Asian diplomatic usages" (Alexandrowicz 1967: 185). Gradually, Indians were demeaned as "inferior, backward and uncivilised" (Anand 1986: 19). The initial multicivilisational approach was overshadowed by colonisation in the later period.

7.3 Qualifications and Functions of Diplomats

Men of good looks, education, high status, loyalty, good voice, intelligence were appointed as ambassadors in medieval India (Farooqi 2004: 76). The Mughal court constituted of nobles of Persian, Central Asian origin. They were sent on diplomatic missions to Persia and Central Asia (*Ibid* 76). Men who were well acquainted with Arabic and Persian were sent as envoys to Istanbul (*Ibid* 77). Sufi saints were also sent as envoys by the Ottomans to the Mughal Empire. Sayyid Mohiuddin who was descendent of Sheikh Abdul Qaddir Jilani was sent in 1649 to Shah Jahan's court to influence him to withdraw his forces from Central Asia. Prince Dara Shukoh influenced his father in his decisions as he was a follower of the Saint. This was the motive behind appointing the saint as an envoy by the Ottoman ruler (*Ibid* 77).

In contemporary times, different States have set different criteria for appointment of diplomats but the functions performed by diplomats are mentioned in Article 3 of the Vienna Convention on Diplomatic Relations, 1961 as explained in

Chapter II. The primary function of a diplomat in the medieval period was to promote friendship and cooperation between the states. Diplomats were also sent to maintain friendly relations even though there was no military or other political reason for the mission. They were despatched "as a token of friendship" (Singh 1973: 164). After Akbar had been enthroned, the Shah of Persia sent his nephew Saiyid Beg as ambassador to continue friendly relations with the Mughals. He stayed for two months in Agra and was gifted with a horse and a robe with the permission of the Emperor. Shah Abbas Khan of Persia sent an envoy to the Court of Jahangir to maintain friendly relations with the Mughals. The Shah sent many valuable gifts with the envoy. The diplomat was given a grand welcome which left Sir Thomas Roe astonished as he was in the court of the Mughals at that time. In return, a diplomat was sent by Jahangir to the Shah's Court in Persia.

Diplomats also helped in negotiating peace treaties. They also initiated peaceful settlement of disputes and facilitated trade (Farooqi 2004: 79). They were expected to gather information about the receiving state (*Ibid* 79). Envoys were despatched for concluding alliance treaties with powerful States (Singh 1973: 159). After Babur defeated Ibrahim Lodhi and began his rule, he approached Hasan Khan by sending a diplomat to enter into an alliance with him. In the meanwhile, Rana Sangha of Mewar also approached Hasan Khan for an alliance. Hasan Khan chose alliance with Rana Sangha.

7.4 Privileges Granted to Diplomats

Quran and Sunna prescribe privileges and immunities for diplomats. Some of the privileges are "immunity from prosecution and freedom from arbitrary arrest and detention" (Bassiouni 1980: 610). Quran mentions *Aman* or safe conduct concerning diplomatic immunity (*Ibid* 610). Envoys were to be treated well even if the sending State had treated the Prophet and Muslims unjustly (*Ibid* 612). However, a diplomat who does not follow the Islamic law of diplomacy is expelled (*Ibid* 619). All schools of Islam believe in the concept of *Aman* or safe conduct which is the foundation of diplomacy between non-Islamic and Islamic States (*Ibid* 619). In the Mughal era, a diplomat was provided with a *dastak* or safe conduct testimonial to facilitate free movement in the host State (Farooqi 2004: 80).

A diplomat was granted the privilege of personal inviolability. The envoys who entered the enemy camps and territory during the war were also immune from being attacked (Singh 1973: 160-161). The Mughal ruler Humayun received the diplomat sent by Sher Khan (Sher Shah Suri) before the Battle of Chausa in 1539 with warmth. The negotiations for peace were welcomed, and the diplomat was granted immunity[16]. Kashinath, a diplomat of the Marathas sent to Ahmad Shah Abdali during the Battle of Panipat in 1761, was granted immunity.

Diplomacy was based on reciprocity and equality in the medieval period. In the early medieval period, around 710 A.D., Muhammad ibn Qasim sent a diplomat, Maulana Islami to the court of Dahir. This act of diplomacy was to show equality between the two political entities. Dahir treated the envoy well and granted all immunities. Sovereign equality of States is the basis of modern diplomacy.[17]

One of the immunities was from searching the baggage of the diplomats. On arrival of Sir Thomas Roe at Surat in 1615, the customs officials demanded to search the baggage of the diplomat. When the King was informed about this, he was excused from search and granted the privilege. Also, the personal property of the envoy was exempt from taxation (Farooqi 2004: 80). This tax exemption was utilised by the ambassadors from Yemen, Ethiopia and Mecca to introduce merchandise (Bernier 133-134). Under contemporary international law, Article 23 of the Vienna Convention on Diplomatic Relations provides for tax exemption in the receiving State.[18]

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[16] Even though in this instance, diplomacy was used as a deceit to mislead Humayun. Sher Khan despatched the diplomat as a trick to deviate Humayun, and with it, he defeated Humayun on next day.

[17] The Preamble and Article 11, Clause 2of the Vienna Convention on Diplomatic Relations, 1961 emphasise on equality of States. The second paragraph of the Preamble of the Convention states, "*Having in mind* the purposes and principles of the Charter of the United Nations concerning the sovereign equality of States, the maintenance of international peace and security, and the promotion of friendly relations among nations". Article 11 Clause 2 of the Convention provides, "The receiving State may equally, within similar bounds and on a non-discriminatory basis, refuse to accept officials of a particular category."

[18] Article 23 of the Vienna Convention on Diplomatic Relations, 1961 provides: "1. The sending State and the head of the mission shall be exempt from all national, regional or municipal dues and taxes in respect of the premises of the mission, whether owned or leased, other than such as represent payment for specific services rendered.
2. The exemption from taxation referred to in this article shall not apply to such dues and taxes payable under the law of the receiving State by person contracting with the sending State or the head of the mission."

Immunity to diplomats in transit was not granted in medieval India. In an instance, the envoy was halted on route to his destination wherein he was forced to reveal the message he was carrying (Singh 1973: 166). Mahmud Shah of Gujarat sent two envoys for taking help from Rana Sanga of Mewar and Babur. The ruler of Durgapur grabbed the message from the envoy, and it never reached Babur. Contrary to this, under Article 40 of the Vienna Convention on Diplomatic Relations, 1961, immunity to diplomats in transit is ensured.[19]

The Portuguese did not respect the personal inviolability of Indian diplomats. For instance, Vasco da Gama cut the hands and ears of the envoy sent by Zamorin. He severed the diplomat's limbs, packed them and sent them to the Zamorin with a message to make curry out of them. The brutality with which Vasco da Gama dealt with the diplomat was a clear violation of the immunity of diplomats as hailed in Asia as well as in Europe. Such violation is incomparable to any other incident in the history of Asia and Europe (*Ibid* 170).

7.5 Termination of Diplomatic Services

Threat to diplomat's life, dishonesty, returning the sending State's gifts by the receiving State etc. led to termination of diplomatic services in the medieval period. The Jam of Kathiawar sent his diplomats to the General of Akbar's army namely Khan Khanan. The diplomat put forth that Jam was not against the Mughals even though he had taken money from the enemy of Mughals, Muzaffar. He even stated that he was ready to commission the Army against Muzaffar. Khan Khanan realised that the envoys were not honest and therefore, he sent them back. In this instance, the diplomatic relations were terminated, and the diplomats were sent back due to their dishonesty. In contemporary international law under Article 9 of the Vienna Convention on Diplomatic Relations of 1961, the receiving State can reject to receive a diplomat or send the diplomat back by stating the reason of *persona non-grata*. This aspect is dealt in detail in Chapter II.

[19] Article 40 Clause 1 of the Vienna Convention on Diplomatic Relations 1961 provides: "If a diplomatic agent passes through or is in the territory of third State, which has granted him a passport visa if such vis was necessary, while proceeding to take up or to return to his post, or when returning to his own country, the third State shall accord him inviolability and such other immunities as may be required to ensure his transit or return. The same shall apply in the case of any members of his family enjoying privileges or immunities who are accompanying the diplomatic agent, or travelling separately to join him or to return to their country."

Diplomats left without the permission of the receiving head of the State in the case of a threat to life. This indicated the "strained relations" with the States (Singh 1973: 173). Similarly, diplomats who were sent back without return gifts to the sending State were not considered to be a good sign of the diplomatic relations. Such a termination of diplomatic relations was considered to be the beginning of hostility between the States. It was followed by a declaration of war. War was one of the major reasons for termination of diplomatic relations. Shah Jahan in 1631 A.D. was about to suppress the rebel Khan Jahan. He sent a diplomat to Golconda. The diplomat went back to the Mughal Emperor with gifts which stopped him from marching the army. Whereas, early discharge of diplomatic relations was considered to be a sign of good relations between the states. Shah Jahan had dismissed Sayyid Muhiuddin in two months of his arrival (Farooqi 2004: 85).

7.6 The Institution of Espionage

There are three kinds of crimes under Islam viz. hudd, quesas and taazir.[20] Espionage is considered as a Taazir offence (Bassiouni 1980: 623). Taazir crimes cause tangible loss to the victim and are rehabilitative (*Ibid* 624). A *harbi* who entered the Islamic State through *aman* or safe conduct and committed spying was killed (Khadduri 1955: 107). Even if the offender was a woman, then she was liable to be killed, but a child was spared as *fay'*.

Spying was a covert function of diplomats that the sending and receiving States utilised, but they were also cynical about diplomats who visited them (*Ibid* 245). Spying was recognised as an institution. Spies were active during peace and war. The information provided by them was encouraged without considering whether they were mere gossips (Irvine 1962: 213). Head spy called *Darogah-i-harkārah* was appointed in medieval India. He was a person of knowledge and experience. Mughals appointed *Akhbar Nawis* (*Akhbar* means news and *Nawis* means writer). They gathered information for the rulers. Thus, the State used spying but it was considered as a crime.

[20] Hudd offences are the violations of the rules in Quran and Hadith. It includes rape, drinking alcohol etc. Quesas offences are those wherein retaliation is allowed. It includes murder. Taazir offences are those which have no mention in the Quran or Hadith. The ruler can use discretion to award punishment in taazir offences.

8. International Humanitarian Law

The United Nations Charter prohibits the use of force or threat to use of force against the territorial integrity or political independence of any State [Article 2(4)]. The Preamble to the Additional Protocol I to the Geneva Conventions reminds the States not to use force or threat to use of force as mentioned in the U.N. Charter. To the contrary, international humanitarian law (IHL) does not focus on the prevention of armed conflict, but it is applied once an armed conflict breaks. International Humanitarian law has two main purposes. The first is that it attempts to minimise the brutalities of war by limiting the "means and methods of conducting military operations". Secondly, it bifurcates the belligerents from civilians and prohibits the former from attacking the latter (Gasser 1993: 3). This section will attempt to explain whether these purposes were fulfilled in medieval India.

The principles of international humanitarian law are imbued in the scriptures which were followed by the rulers of medieval India whether they were Hindu rulers or Muslim rulers. Muslim rulers followed the Quran and other Islamic Schools of Thought. Islamic humanitarian law was formulated by Prophet Mohammed when the Islamic State commenced interactions with other political entities (Engeland 2006: 3). Hadith contains many international humanitarian principles similar to the principles of modern international humanitarian law. State practice in medieval India also encouraged adherence to the principles of international humanitarian law.

8.1 War in Medieval India

The medieval Indian rulers gave emphasis on the organisation and maintenance of military. Akbar combined "nobility, bureaucracy and military" into one service by allocating a "numerical rank" namely *mansab*. This system was introduced in 1574. The soldiers were the supporters of the integrity of the Mughal Empire (Habib 2007: 158).

There were around 4 million soldiers who constituted the cavalry and infantry maintained under the aegis of *zamindars* according to *Ain-i Akbari* (*Ibid* 157). Many soldiers were peasants. The cavalry of the State was diverse comprising of Central Asians, Iranians, Afghans and Rajputs in the seventeenth century. In the battle of

Katrah in 1774, the commander of the artillery of Hāfiz Rahmat Khān was a Spaniard. In 1815, some Portuguese artillery men served the Nizām.

A peculiar feature in medieval India was the alliance between the Hindu and Muslim rulers in wars. For instance, in the 1526 Battle of Panipat, in opposition to Babur, Ibrahim Lodhi allied with the Raja of Gwalior.

The flag of the ruler or noble was carried on elephants while going for battles. As a sign of sovereignty, cymbals and drums were played in the battlefield. Few cruel practices were attached to war. Sometimes, subordinate commander of the army was supposed to collect the heads of the slain before announcing success in the battle. This practice existed in Central Asia wherein pyramid of heads of the slain was formed (Irvine 1962:242). Akbar built such a pyramid in the Battle of Panipat in 1556-7. Contrary to this practice, the jurists of Islamic Schools of Thought advise giving due respect to the dead bodies. Ahmad Shah Abdali returned the dead body of Biswas Rao to his family after the Battle of Panipat in 1761.

In the interaction of civilisations, some of the practices of the Hindus influenced the Islamic community. *Jūhar* was the practice among Hindus wherein women and children were killed to escape abduction by the victor. This practice was advised by some Mughals under Khwājah Asa'd Khān when they lost the battle against the Marathas.

According to some scholars, one of the causes of war in medieval India, was to obtain booty and the resources (Ali 2003: 262). Muslim warriors claimed booty acquired in a war with non-Muslims because the latter did not accept Islam and they had the right to "original acquisition" with the Imam's permission (Khadduri 1955: 118-119). The spoils of war were divided after winning it (*Ibid* 120).

Differentiation between *jus ad bellum* and *jus in bello* does not exist in Islam (Engeland 2006: 7). The basic purpose of war according to the Islamic doctrine called to spread the Islamic faith (Khadduri 1955: 102). The doctrine of *Al-Siyar* divided the Muslim world into that of non-believers and believers of Islam. *Dar al Islam* exists according to Islam, but the concept of *Dar al Harb* was a creation of the "classicists to justify a permanent state of war" (Engeland 2006: 8). Due to this division, any relation between Islam and others was ascertained on the basis of war (Sahli and

Ouazzani 2012: 391). *Dar al-harb* was to be conquered to transform it into *Dar al-Islam*. The conquest was called *Futuhat*. *Futuhat* is similar to colonisation because it aims at spreading Islam in the conquered territory (*Ibid* 395).

With regard to the origin of war, Ibn Khaldun mentions war among the Arabian tribes as one of the categories of war. The second classification made by him is that of "feuds and raids". The third type of war is *Jihad*. The fourth category is "against rebels and dissenters" (Singh 1973: 210). He categorises the third and fourth type of war as just wars (Khadduri 1955: 71).

Jihad is an Arabic term which means “struggle” or “striving”. In religious parlance, it means propagating faith in Allah (*Ibid* 55). *Jihad* can be fulfilled in four ways namely, by heart, tongue, hands and the sword (*Ibid* 56). *Jihad* by heart is spiritual in which a person is closer to the right and distancing oneself from evil. To fight against one's evil tendencies is the best form of *jihad* (Hamid 2009: 71). *Jihad* by tongue and hands is to support the right and to correct the incorrect. *Jihad* by sword is the one fought for *Allah* and surrendering life for His cause. The Prophet propagated *Jihad Al-Kabir* which means *Jihad* through the Holy Quran and hence, propagation of Islam reigns over *Jihad* by a sword. *Jihad* is not a means to spread religion as per the following verse in Quranic Ayat (Quran as quoted by Hamid 2009: 71):

> Let there be no compulsion in religion. Truth stands out clear from error.

Another classification of war is *jihad* against believers and *jihad* against non-believers. *Jihad* against believers is divided into three types viz. “*jihad* against apostasy (*al-vidda*), *jihad* against dissension (*al-baghi*) and thirdly, *jihad* against secession (*al-muharitun*)” (Singh 1973: 211). *Jihad* was also declared against offenders like robbers.

The aim of Jihad is to not to universalise Islam by coercive conversion (Engeland 2006: 6). Islam is a religion of peace. Peace is the "state of nature" according to Islam and war can be waged only as an exception to fight "oppression, injustice and transgression" (Hamid 2009: 78). Majid Khadduri (1955: 53-54) argues that the Arabs were at war and Islam institutionalised "war as part of the Muslim legal system and made use of it by transforming war into a holy war designed to be

ceaselessly declared against those who failed to become Muslims." Anicee Van Engeland (2006: 9) disagrees with Khadduri that *Jihad* is waged with the aim of propagating Islam, but it is not so because the Quran is against violence propagated to convert to Islam (Quran 2: 256). War was not to be waged to convert to Islam. Quranic principles prohibit coercive conversion to Islam.

Just war according to Islam is the one waged for self-defence[21] (Quran 2: 190; 22: 39). The quintessence of Jihad is self-defence (Hamid 2009: 67). The Prophet supported *jihad* for self-defence because "the Islamic community was in danger of extirpation" (Nawaz 1959: 33). This aspect is evident from the Quran (2: 190): "Fight in the cause of Allah those who fight you, but do not transgress limits; for Allah loveth not transgressors". Some *Ulemas* consider *jihad* for self-defence (Sahli and Ouazzani 2012: 392). The Sunni schools of jurisprudence which developed between the seventh and twelfth centuries interpreted *Jihad* as constituting both defensive and offensive war (Hamid 2009: 75). *Jihad* definitely did not outlaw war, but the truth about *jihad* lies in between the extreme positions of *jihad* as defence and *jihad* as an expansionist policy (Nawaz 1964: 84).

Quran mentions that war should be waged as a last resort and that too humanitarian principles should be followed (Engeland 2006: 8). It insists on the use of force only on the failure of peaceful methods (Singh 1973: 208). There should be other options apart from war i.e. war should be the last resort. Those options would include conversion to Islam, migration to Muslim territory and get equivalent rights with Muslim migrants, coming under the jurisdiction of Islamic State and pay *jizya* (A/Salam 2006: 57). The non-believers[22] were offered to accept Islam or poll tax (*jizya*). If one of these were not accepted, then *jihad* was declared.

Jihad was the responsibility of the whole community and not that of individuals. Being the responsibility of a community, it was controlled by the State (Khadduri 1955: 61). "Islam outlawed all forms of war except *jihad*" (*Ibid* 62). Jihad is declared to protect the oppressed[23] (Quran 4: 75) and Islam (Quran 22: 40). The

[21] The *ribāt* is guarding the frontiers of the *dar al-Islam*. This was a defence mechanism which was chosen by the Prophet over *jihad* (Khadduri 1955: 82).

[22] There are two kinds of unbelievers of Islam those who repeatedly violated the treaties with the Muslims and those who entered into treaties with Muslims and respected them. The Muslims were allowed to attack the former but not the latter (Hamid 2009: 81).

[23] The aim of jihad is to bring a just world (Engeland 2006: 7).

basis of *jihad* was to prevent Muslims from killing their kinsmen and protecting Islam (Singh 1973: 210). The purpose of *Jihad* was "to preserve the unity of the Muslim world" (Sahli and Ouazzani 2012: 392). *Jihad* was an important factor to save Islam from external attacks. Gradually, with the increasing inter-State relations *jihad* was temporarily suspended which could be revoked at the discretion of Imam (Khadduri 1955: 65). The Islamic jurists also emphasised that *jihad* did not mean permanent war with the non-Islamic States (Singh 1973: 210). This change was "a process of evolution dictated by Islam's interests and social conditions" (*Ibid* 66). Jihad was the function of Imam, and since Imam did not exist in later stages, *jihad* as a permanent factor was not emphasised (Singh 1973: 210).

Jihad is conceived as war today. The meaning of *Jihad* at its genesis was different from what it is conceived today. The Western interpretation of *Siyar* is due to the assumption that the relation of Muslims with non-Muslims is based on *Jihad*. The basis of *Siyar* is peace and *Jihad* is misinterpreted as a continuous war between *dar al-Islam* and *dar al-harb*. The Hanafi jurists, Awza 'i, Malikand and others opined that war was waged between *dar al-Islam* and *dar al-harb* when the latter "came into conflict with Islam" (Hamid 2009: 74). The very existence of treaties between Islamic and non-Islamic States in Arabia proves that permanent war was not a feature of inter-State relations in the Islamic world (Nawaz 1959: 37). The interpretations of classicists, view *Jihad* as a war waged to establish the universality of Islam (Engeland 2006: 11). It also aimed at establishing a world State or Islamic State. Islamic State was considered to be a universalistic State which did not recognise the existence of other States except as an inferior political entity (Khadduri 1955: 51). Violence is considered as the ingredient of *jihad* by analysing this eighth-century application and interpretation.

In the medieval period war was not only waged by the rulers but India became a battleground for wars between the Europeans. The competition for capturing the Indian trade was evident between the Europeans in India. There was rivalry between Dutch and British for trade which led to warfare. The British aimed at increasing their military and naval power to confront their European rivals in India (Krishna 1984: 59). In 1619, Netherlands and Britain signed a treaty of defence with a grand ceremony, but peace was disrupted again (Farwell 1989: 15). In 1645, the British helped Sri Ranga Raya of the Vijayanagara Empire to fight against the Dutch

(Mahalingam 1953: 164). The rivalry between the French and the British was reflected in the Carnatic wars. Finally, the French East India company was confined to Pondicherry.

There were some British who aimed at territorial aggrandisement at the beginning of their trade relations with India. Sir Josiah Child proclaimed war against Aurangzeb in 1686 and met with a disastrous defeat. The irreparable consequence of the war was the losing of trade to the Dutch (Rothermund 1988: 13). This defeat did not change the military ambitions of the Company. The higher officials of the Company instructed the officials in India to pursue further the strengthening of military power in India (Krishna 1984: 64). The British used force to coerce the officers of Indian origin and the governors of Bengal. They acted indifferent to the Nawab after the death of Aurangzeb by not paying the taxes and strengthening Fort William with more soldiers and construction of new bastions (*Ibid* 64). In the wars fought by Europeans in India, there was violation of international humanitarian law principles. They resorted to piracy and plunder. In 1626, six English ships arrived in Bombay plundered the town and set houses on fire. The English tried to capture Bombay from the Portuguese (Krishna 1987: 137). Setting fire to houses means the destruction of property of the civilians which is against the humanitarian principles. The issue over Bombay was finally settled between the British and the Portuguese after the matrimonial alliance between the royal families of both States.

Considering the concept of war in medieval India, it was chosen to settle inter-State disputes, for the aggrandisement of territory and to spread Islam (Singh 1973: 214). Initially, during the rule of Delhi Sultanate wars were fought to spread religion. Humayun quotes the authority of *Hafiz-Damishqi* as follows:

> "War is legitimate if it is fought to:-
>
> (1) Lay the foundation of a dynasty;
> (2) Protect the existing dynasty;
> (3) Defend against aggression;
> (4) Appeal for help from one state to another;
> (5) As a love of conquest; but this is not a good cause for it may mean an unwarrantable attack or plunder.
>
> But with me, it is none of these. I have merely distributed money and collected men with the desire to make a holy war and to raise the standard of faith." (Singh 1973: 214).

Thus, Humayun also gave emphasis on spreading religion over other purposes of war. This aspect changed during the rule of Akbar who used war for territorial expansion. Nevertheless, war in medieval period was waged on the basis of religious sanctions and the principles of international humanitarian law like differentiation between combatants and non-combatants, treatment to prisoners of war etc.

8.2 Differentiation of Combatants and Non-Combatants

Under contemporary IHL, it is incumbent on the belligerent States to distinguish between combatants and non-combatants according to Article 48 of the Protocol Additional to the Geneva Conventions Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (as discussed in detail in Section 8.3 of Chapter II). There was a clear distinction between civilians and combatants during a war in medieval India whether the war was between the Islamic States or between Islamic and non-Islamic States (Singh 1973: 215). The Muslim rulers followed the Islamic principles which mention principles of international humanitarian law. According to some Shafii and Hanafi jurists, the ambit of non-combatants was quite vast. It included adult males who are not active participants in a war. For instance, merchants, doctors, nurses, workers, peasants, etc. (Khadduri 1955: 104). Visually or mentally challenged people were granted protection during war according to *Kitab al Mabsut* (Singh 1973: 216). Monks or Priests were not to be attacked during war according to *hadith*. As discussed in Chapter II, Protection of priests as non-combatants is provided under Article 24 of the Geneva Convention I of 1949 (also discussed in Chapter II).

The Vijayanagar and Bahmani Empires fought a war in the fourteenth century in which many non-combatants were killed. After the war, Bukka of Vijayanagar and Muhammad I of Bahmani Kingdom concluded a treaty providing for the distinction between civilians and combatants and prevention of killing of non-combatants. This treaty was not followed to the letter of the agreement but minimised the atrocities of future wars (Sastri 1952: 103).

Some jurists in Kharaji sect held that women and children who were idolators could be killed during a war. This was an exception. Most of the texts prohibited such acts. One Hadith says "Do not kill an old person, a child, a woman; do not cheat on the booty, do well: God likes the ones who act right" (Quoted in Engeland 2006: 5).

Abu Bakr al-Siddiq advised his soldiers that children, women, aged and infirm should not be hurt. When the ally of Ibrahim Lodhi, Vikramajit (Ruler of Gwalior) was killed in the Battle of Panipat, the wives and Children of Vikramajit were captured in the fort of Agra by the supporters of Humayun. When this news reached Humayun, he ordered their release. Sher Shah Suri treated Haji Begum, Humayun's wife with utmost respect when Shah captured her. He sent her back to Agra. Akbar and the Marathas under Shivaji never attacked women and children of the enemy State. Akbar sent his general Adam Khan to aggrandise Malwa. Baaz Bahadur was defeated in the battle, and his harem was captured by Adam Khan. Roopmati was asked by Adam Khan to accept him as her lord. Roopmati tried to flee but in vain. By the time Adam Khan tried to approach her, she had died. This incident astonished Akbar who made a declaration that women and families of the conquered States should not be considered as spoils of war. The States should take cue from the rulers of the history. The killing of women in conflicts has been highlighted as a persisting problem today which has caught the attention of the United Nations, international organisations and especially human rights organisations. For prosecution of the killing of women in armed conflict, with reference to the genocide of Yazidi women, French Minister Laurence Rossignol urged the United Nations to adopt the term '*femicide*'.

Abu Bakr al-Siddiq suggests that the combatants should restrain from killing cattle unless and until for flesh. He asks them not to burn wheat fields, not to cut fruit trees and not to commit arson. With regard to the environment and living beings, there are different opinions of jurists. Ibn Hazm was against the killing of animals. To the contrary, Abu Hanifa approved the destruction of churches, houses, animals and trees because they were incapable of retaliation.

8.3 The Treatment of Prisoners of War

Under Islamic law, the prisoners of war were to be treated humanely. They were to be allowed the right to worship their religion during captivity (Sahli and Ouazzani 2012: 394). One Hadith states, "Prisoners are your brothers and companions. It is because of God's compassion that they are in your hands. They are at your mercy, so treat them well" (Quoted in Engeland 2006: 5). Thus, Islamic law brings under its purview the protection of prisoners of war which is one of the important principles of the

international humanitarian law of today under Geneva Convention III Relative to the Treatment of Prisoners of War of 1949.

However, the treatment meted out to the prisoners of war differed according to the schools of Islamic law (Khadduri 1955: 127). The first course of action recommended was the execution of the prisoners. Abu Yusuf of the Hanafi school of Islamic jurisprudence, opines consideration of Muslim interests and expediency before adopting this method. Awzā‘ī observes that the captives were to be given an opportunity to convert to Islam. The second method was to release the prisoners after extracting ransom. The third course was to exchange the prisoners for Muslim prisoners. The fourth was to reduce them to slaves.

In medieval India, there were different kinds of treatment meted out to the prisoners of war. Captives of war were in many instances converted to Islam. A Kakatiya noble of Andhra region was converted to Islam and was known as Khwaja Jahan Maqbul. He became the minister of Muhammad Tughluq and Firoz Tughluq (Habib 2007: 81). In another instance, Akbar captured the fort of Mandu. Sultan Bahadur escaped to Gujarat. Sadr Khan and Sultan Alam Lodi took refuge in the fort of Sungar. When they left the fort, they were produced before Akbar. Sadr Khan was imprisoned. Sultan Alam Lodi's foot was amputated as ordered by the Emperor. The differential treatment meted out to both was because Sadr Khan did not revolt whereas Sultan Alam protested. The treatment of prisoners of war depended on the ruler and the role of the prisoner in the enemy State's army or a rebel group (Singh 1973: 222). There are instances otherwise wherein the prisoners of war were dealt with brutality. The Maratha captives of Battle of Panipat, 1761 were killed by the supporters of Ahmad Shah Abdali. It was revenge for the slaying of Mian Qutb Shah and Abdus Samad Khan by the Marathas.

8.4 Other Principles of IHL

Use of certain kinds of weapons are prohibited under Islamic international law. In the multicultural approach adopted by Judge C.G. Weeramantry in his dissenting opinion in the *Legality of Nuclear Weapons* case (1996: 481), he connects the Islamic law principles to justify prohibition of use and proliferation of nuclear weapons. Under Islamic law, application of poison over the arrows was not encouraged, otherwise, the

limitations of the use of weapons are not clear (Singh 1973: 216). Khalil, the jurist, affiliated to Maliki School prohibited use of poison over arrows and in warfare.

In the Mughal warfare, stratagem was not applied usually. Deceit was also discouraged (Irvine 1962: 255). Violations of IHL were not regular but the principles of IHL were not always adhered. For instance, Babur used artillery to destroy his enemy States. He aimed at the destruction of the enemy and did not ponder over the gravity of destruction (Singh 1973: 217). *Al-Awzai* and *Al-Thawri* Schools allowed unrestricted destruction. Surprise attack and assault at night ("*Shab-Khūn* or night blood, or *shab-gir* or night-seizing") were carried out sometimes for defeating the enemy (Irvine 1962: 257). Traps were laid by hidden men against the rulers of enemy State.

It was a rule in medieval India that if there are causes to wage a just war, notice must be given to the opponent party before waging war. The notice was to comply with Islamic law. Three days prior notice was to be given before declaration of war. An invitation to convert to Islam was to be given before waging war (Khadduri 1955: 96). It was incumbent on the Imam to declare war on behalf of the State (*Ibid* 94). Another rule prohibited sale of goods which would increase the military strength of opponent (Sahli and Ouazzani 2012: 401).

War in medieval India terminated on the death of the ruler, on conclusion of peace treaties, etc. Death of a ruler led to fleeing of his army (Irvine 1962: 235). War terminated if the ruler died on the battlefield. Peace treaties also terminated war. Peace treaties aimed at a truce or temporary peace for the Muslim States (Sahli and Ouazzani 2012: 402). Negotiations were carried to achieve peace and end a war. The negotiators for State were usually Darvesh (men who had performed religious penances) and transgender. When peace was concluded, it was usually signalled with a white flag.

At times war resulted in plunder by the victor's army in medieval India. After victory in the Battle of Hasanpur in 1720, the Mughal army looted camels, horses and cattle. The conquered territory was ransacked many times by the conquerors. The conquered were forced to follow the new ruler and accept the laws declared by him (Singh 1973: 232). This was not the general rule. Babur treated the people of India as

his subjects and won their support by ruling them peacefully. Akbar also believed in appeasement of conquered populace for better administration and peaceful rule.

9. International Trade Law

9.1 International Trade in Medieval India

International trade at the beginning of the medieval period was confined to textiles and costly raw materials. Textiles were the major products of export. The export route to Persia was through Kabul. Cotton cloth of Gujarat was exported to Ceylon and Maldives. Bengal muslin was exported to Red Sea ports and China. The increasing demand for cloth which required certain skills like printing and dyeing was encouraged by the manufacturers (Moosvi 1987: 390). In the areas near sea or river, goods like grains were exported to foreign lands (Rothermund 1988: 4). For instance, Bengal rice was exported to Sri Lanka. Rice was also transported from Gujarat to East Africa or the Persian Gulf. The agriculture and production of Afghanistan depended on the markets in India (Habib 2010: 91).

The statistics on foreign trade in Mughal India is largely mentioned in European sources with a tinge of Eurocentrism in it (Moosvi 1987: 375). However, foreign trade was given importance and encouragement by Mughals. Imports comprised largely of silver, precious stones, metals like copper, vermilion, pearls, silk and wool, and horses. Horses were imported from Central Asia (especially Afghanistan) and Persia for the cavalry which was maintained by the State as well as *mansabdars*. Spices were imported from South-East Asia and Sri Lanka.

The medieval Indian Empires in India encouraged free trade. They did not interfere in promoting foreign trade like the Western States. The European States like Spain and Portugal encouraged its merchants to search a new path navigating to India for trade. Queen Elizabeth wrote to Akbar to receive the English men and permit them to trade. The policies of Mughal rulers were vague with regard to support to trade and industry (Chandra 2003: 245). Nevertheless, the centralisation of power, better communications system and stable currency were an impetus to the growth of the economy in Mughal India (*Ibid* 270). Royal family and nobles largely invested in foreign trade due to high profits they could earn (*Ibid* 275). Prince Dara, Governor of Thatta, entered into trade relations with the Red Sea ports. Shah Jahan also encouraged trade. He granted loans to Indians and Europeans from mint and treasury

to conduct trade. To the contrary, trade was a very meagre source of income for the Marathas because they were feudal in nature (*Ibid* 205).

In the medieval period, free trade was carried on except for some monopolies. The freedom of trade included the conclusion of treaties and fulfilling the obligations under them (*Ibid* 279). There was freedom of trade in the Malabar Coast with an active trade carried out by Muslims, Chinese, Arabs, etc. The Chinese merchants had their factory in Calicut in the fifteenth century. Many Chinese ships unloaded linen and brass wares and carried spices loaded in their ships. The Portuguese arrival in India in 1498 gradually led to the disruption of trade between the Red Sea, Persian Gulf and India (Habib 2007: 142). In 1513, Albuquerque attacked Adel with an aim to disrupt the trade between India and the Arab region, but in vain. Zamorin was against the discouragement of Muslim traders by Portuguese because according to him there was freedom to trade (Mathew 1983: 45). He expressed in clear terms that the port of Calicut will always be open for traders whether they are Muslims or non-Muslims (Mathew 2014: 269). The Portuguese tried to hinder the freedom of trade in India and create their monopoly.

Speculation was involved in foreign trade (Rothermund 1988: 4). For instance, there was freight insurance wherein the owner of the goods promised to share the profit with the financier if the goods reached the destination safely. Future trading was also practised. Promissory notes were extensively used. There was no institutionalisation of the credit system in the medieval period, but credit was granted on personal relations (*Ibid* 5). Apart from the small merchants, there were traders who carried big business. Rich merchants, despite the high risk involved in the same, financed international trade in medieval India. Virji Vora had a capital of 8 million rupees. Abdul Gafur owned more ships than the East India Company. The coming of English did not affect the existing Indian trade initially (Chandra 2003: 235). The merchant capital in India was at a rise to such an extent so as to finance some European companies and the traders. The last years of the seventeenth century saw the merchant capital to have developed at an unprecedented rate (*Ibid* 67). Until the mid-eighteenth century, the Indian trade was independent of the European traders in the Indian Ocean (Ray 2014: 231). Indian merchants possessed better information networks in comparison to the East India Company. But, the latter's success was due to the defence technology it possessed (Habib 2007: 142). Some Hindu traders did not

like the Muslim rulers, and hence, they traded with Europeans. They earned high profits from the same (Pandey 1967: 18).

Trade amongst nations led to the transfer of technology. For instance, the cotton gin was sent to China from India around the thirteenth century. Similarly, bow-scutch was exported to the Arabian region in the eleventh century, and it was further exported to Western Europe in the early fifteenth century (Habib 2007: 15). Transfer of technology was carried out from other countries to India and vice-versa too. Geared *saqiya* or Persian wheel was introduced in India from West Asia by about fifteenth century. It helped improve irrigation (*Ibid* 66-67). Similarly, the arrival of spinning wheel, treadle loom and ideas of cloth printing from China was beneficial to the textile industry (Habib 2007: 68). The spinning wheel and treadle loom were introduced in India in the fourteenth century through Iran and Central Asia. Paper was introduced in the thirteenth century (*Ibid* 70). The Chinese introduced the use of compass that improved navigation (Rothermund 1988: 10).

Merchant associations facilitated international trade in early medieval and medieval periods. The trade in early medieval South India was facilitated by organisations like *maniramam*, *erivirapattinam*, and *nagaram* which transported the goods to ports for connecting them further to the international maritime routes (Hall 1978: 79). The power of Chola rulers like Rajaraja I and Rajendra I depended on their strong links with merchant associations (Rothermund 1988: 9). The inscription erected during the rule of Rajendra III in the thirteenth century, at Gandagōpālapaṭṭinam in Nellore mentions that the *ūr* assembly and a merchant organisation was in charge of the collection of taxes from ships and boats (Hall 1978: 91). In the medieval period, with the influence of Europeans, merchant associations were based on religion, family connections etc. (Chandra 1997: 195).

9.2 European Trading Companies

Pope Alexander II divided the world between the Spanish and the Portuguese in 1493. In 1507, Don Francisco Almeida led a fleet of twenty-two vessels comprising of 1500 men. He was given the title of Viceroy of India (Lawford 1978: 15). Zamorin granted permission to Pedro Alvares Cabral to build a factory at Calicut. Since 1550, they received tributes from Asian trade. The rulers who permitted the Portuguese to trade

and establish factories were dependent on the Portuguese who issued cartazes[24] for the ships to navigate (Mathew 2014: 271). Ships without cartazes were seized by the Portuguese (Malekandathil 2010:69). Thus, there was a role reversal of the Portuguese and the Indian rulers. The Portuguese justified the issuance of cartazes by the Papal Bull which allowed them to conquer the territories they discovered. Further justification of the issuance was given by using terms like "discovery, usucaption or occupation, conquest and prescription" (Mathew 2014: 271).

The Portuguese were discouraged from staying in the Malabar (Habib 2007: 114). This phase of the history is narrated in *Tuhfat al-Mujahidin* by Zainu'ddin Makhdum in 1583. Therefore, Goa was envisaged as a naval base by the Portuguese (Alexandrowicz 1954: 364). Portuguese considered Goa for conquest because they were in dire need of a colony to equalise their bargaining power with the Indian rulers of Vijayanagar, Cochin, Travancore, Calicut and Madurai. Goa was under the rule of Yusuf Adil Shah, the ruler of Bijapur. It constituted of Hindu population which supported Albuquerque, the Portuguese head of Portuguese expedition to India, who attacked the Muslim ruler in February 1510. Albuquerque conquered it and established a royal monopoly of the Portuguese King. The Portuguese Estado da India headquarters was in Goa. The Portuguese led by Albuquerque achieved "complete supremacy at sea" and developed Goa into Portuguese capital (Lawford 1978: 15).

The Portuguese attempted to convert the Goans to Christianity forcefully at the beginning of their advent in Goa. Albuquerque envisaged Goa as a place where next generations were of mixed blood born of the inter-marriage between the Portuguese and the Goans. He planned to evict all non-Christians from Goa after all generations turned Christian after marriage with Goans. The plan was not fully fruitful. Gradually, there was a cross-cultural relationship between the Portuguese and the Goans (Figueirido 2012: 423). Religious intolerance was prominent in 1540 in Goa. A plethora of methods were used for converting Hindus to Christianity. Some were persuasive whereas others were coercive means of conversion. Many Hindus supported the Portuguese. They had diplomatic and economic ties with the Portuguese. They were also declared as nobles owing allegiance to Portugal (*Ibid*

[24] Cartazes were the passes for the ships to enter the areas controlled by the Portuguese. It mentioned the name of the ship, details of cargo, its place of origin and the destination where it was supposed to be delivered and the authority which issued them. The Portuguese also charged an amount to issue them. All the rulers including Akbar were supposed to collect cartazes.

425). The interaction between the Portuguese and the Goans was “neither outright rejection nor total acceptance of the foreign (Portuguese) culture by the people of Goa” (*Ibid* 426). It gave birth to an Indo-Portuguese culture of Goa.

Dutch sent many ships after 1574, but then, the Dutch East India Company (VOC) was finally established in 1602. Dutch East India Company was granted untrammelled powers of conquest and sovereign powers to wage war and conclude peace treaties with the Eastern princes, to build forts, to appoint governors, establish judiciary (Krishna 1987: 135). Thus, the Dutch East India Company was in the form of a sovereign body functioning in the East. The Dutch entered into a capitulation treaty with the King of Cochin in 1663, by virtue of which they were granted "certain jurisdictions over the Dutch and the Christians" (Sinha 1967: 19). The Dutch East India Company also levied taxes, even by using force. The Dutch textile trade grew very fast in comparison to the Portuguese spice trade (Rothermund 1988: 12).

Amongst the European trading companies, the British East India Company succeeded in trade in India. The success of English was in establishing profitable Indian textile trade in Europe (Habib 2007: 143). Queen Elizabeth issued a charter on 31 December 1600 to the English East India Company to trade. No other English merchant was allowed to trade in India. If caught, their goods were confiscated and sold; the consequent income was to be shared equally by the company and the Crown. The constitution of the company was not changed for about two centuries thereafter. The directors of the company ruled sitting in India House in Leadenhall Street, London. The company during its commencement of operation did not aim at conquest (Krishna 1987: 133). William Digby (2012: 77) also opines the same. But, we cannot deny the fact that British aimed at the conquest of India. Conquest was a latent aim which was hidden by the covert aim of commerce for the first sixty years of the English East India Company (Krishna 1987: 134). However, they could not conjecture the vastness of the Empire and the stability of it (Krishna 1984: 65). The Company was given powers which imbued in power to develop into a State (Kemal 2012: 99). Initially, the English East India Company derived its powers from the Charter issued by the British Crown and the *firmans* issued by the Mughal rulers (*Ibid* 98). Due to the military and political powers granted to the Company, it was superior

to other corporations (Kemal 2012: 101).[25] The Charter of 1600 granted vast administrative powers to the Company along with the power to establish a criminal justice system. With these powers clearly mentioned in the charter, we can see that conquest was the aim of the company, and it could not carry it out at the very arrival of the British in India because of the well-established political entities in India. They had to wage war to do so or adopt some appeasement policies, and therefore, they chose the latter peaceful means for the same. It was not granted untrammelled powers all of a sudden, but it gradually transformed itself into a political body (Krishna 1987: 134). The English learnt from the experiences of the predecessors, the Dutch and the Portuguese that for a long-term commerce there need to be "fortified factories, naval and military supremacy and State aid" (*Ibid* 135).

The British monarch, Queen Elizabeth was against intrusion by the Company in the trade carried out by other Christian powers (Lawford 1978: 17). This was not followed because inter-European rivalry for trade in India was obvious. The company apart from aiming conquest also foresaw its supremacy over other rival European powers (Krishna 1987: 134). King James I, with a provision to withdraw it on three years notice, renewed the charter forever in 1609. King Charles I granted a charter to one more company, a rival to the East India Company, to trade in India. Later on, under Cromwell's rule, both the companies were amalgamated. Charles II granted almost untrammelled powers of the sovereign to the company by granting the company, "the right to coin money, command forts, raise an army, form alliances, make war and peace, and exercise criminal and civil jurisdictions" (Farwell 1989: 15). In 1668, the King transferred the island of Bombay to the company for an annual rent of £10 in gold. It was the first territory under the full sovereignty of the English East India Company (Kemal 2012: 102). Despite the annexation for a further time, Portuguese law was followed in Bombay.

Factories were established by the English with the primary function of unloading the goods brought in ships from England and load them with raw materials like silk, muslin, etc. The raw materials were called "the investment" (Lawford 1978: 18). The English established a factory at Fort St. George in the East coast of India with the endeavour of Francis Day. The place was opted due to the cheap supply of

[25] A detailed discussion on the status of British East India Company is done in Chapter IV of this study.

cloth, ease of establishment of the harbour and the pacific conditions (Mahalingam 1953: 160). It was ruled by a feudal lord under the Vijayanagara Empire namely Damarla Venkatappa Nayaka. The constant feud between the Portuguese and the Dutch in the area encouraged him to befriend the English to secure his position. He also had commercial interests (*Ibid* 160). Venkatappa granted permission to Francis Day to establish a factory and a fort in Madras. The cowl issued by Venkatappa to the English granted power to mint coins. Venkatappa ensured to retain his sovereignty over the area (*Ibid* 162). Since ancient times, the Asian countries allowed the traders to apply their personal laws to solve their disputes (Anand 1986: 27).

The British textile trade in Bengal reached its zenith in the seventeenth century. Due to the opposition of British textile workers against the printed materials, there was an embargo imposed on them. Therefore, demand for plain white cotton textile increased which was mostly produced in Bengal. In the initial years of the eighteenth century, demand for Bengal textile increased. Due to the influx of foreign exchange, the Nawab of Bengal gained power and was free from the power wielded by the Mughals over him. Thereby, he centralised his government and dismissed the fiefdoms of Mughals in Bengal.

The gradual wielding of political and revenue extracting power of the English East India Company led to its success over other European rivals in the Indian ocean trade. Finally, the Portuguese were confined to Goa, the French were limited to Pondicherry and the Dutch eventually departed from India. The struggle between Europeans for supremacy in Indian Ocean trade is a proof of the significance of the Indian Ocean trade in "international trade and balance of power" (Mathew 2014: 274).

9.3 Monetary System

Jean Bodin argues that issuing currency should be the sole right of the sovereign (Helleiner 2003: 19). In India, the sovereign issued currency in the Mughal period. The minting of coins was well organised (*Ibid* 48). Whereas in Europe the monopoly over the minting of currency was introduced in the nineteenth century. They controlled the circulation of foreign currencies within their Empire by encouraging the foreign merchants to exchange their currency for Mughal currency.

In the early medieval South India, silver and gold coins were used for international trade (Hall 1978: 77-78). In South India, coins depicting gold hun (pagoda) were used which were replaced by Mughal coins in the seventeenth century. The Mughal Empire issued trimetallic coins which were circulated in the economy. Silver was imported from abroad to mint silver coins (Rothermund 1988: 5). The silver coins minted by the Mughals were accepted throughout the world due to its best quality. High denomination business transactions were dealt with coins made of silver and gold.

Low denomination business transactions were carried out in copper, almonds and cowries. Copper coins were also circulated for small transactions. Copper coins were produced in Mughal era by employing many labourers. The value of copper coins and cowries fluctuated from place to place and time to time. There was persisting inflation (*Ibid* 6). The official value of the coins was not fixed after the rule of Akbar, but the value of rupee fell in relation with gold and copper in the seventeenth century (Habib 2007: 140).

In the beginning of the seventeenth century, the English East India Company used cowries as the means of exchange. This proves the equal value of currency in the foreign exchange. Due to high competition, in the 1630s trade was a combination of barter system and currency (Sarkar 2014: 159). British inaugurated a mint to coin money in 1658, which shot up the value of silver.

The Europeans assessed the wealth of a nation by the gold and silver it possessed. Import of gold and silver was prominent in India (Habib 2007: 61). The Mughal currency was made of silver which transformed the import of silver into coins. The Europeans did not appreciate import of these metals in India (*Ibid* 144). The Europeans always confronted the crisis caused by bullions due to the money circulated in Asian trade (Ray 2014: 231).

9.4 International Trade Law in Medieval India

In the early medieval South India, the thirteenth-century inscriptions from Mannārgudi, Tanjāvūr mention that customs and tolls were levied in the warehouses called *cārigai-kōṭṭai* (Hall 1978: 90). The revenue earned from international trade led to the encouragement of trade by the rulers of the early medieval South India (*Ibid*

97). Unlike the later Empires, the Chola Empire's revenue depended mainly on the customs duties levied on foreign trade rather than on agriculture (Rothermund 1988: 9).

Islamic law deals with some of the principles of trade law which were followed by the Muslim rulers in medieval India. Islam encourages trade among nations. More trade means more interdependence, and this leads to peaceful relations among States (A/Salam 2006: 67). According to Quran (60: 8), Muslims are encouraged to trade with non-Muslims unless and until they are peaceful and there is no threat to the Islamic faith. The terms of trade transactions should strictly follow *Sharia*. Usury should not be practised in any way. The State should maintain the qualities of the goods transacted. Therefore, "the market of the Islamic world is not an entirely free market, in spite of the volume of trade. It must live within the broader law of the Koran, which generally prohibits speculation and the unfair distribution of risk" (Glenn 2014: 194).

The European traders were supposed to pay customs duties, charges in port towns and the areas where they established factories (Ray 2014: 232). Restrictions were imposed on the foreigners from exporting saltpetre, gunpowder and lead from India. They could export only on the governor's permission. Saltpetre was an important commodity because it was an ingredient of gunpowder. Later on, the English exported saltpetre from Patna and Surat.

10. International Maritime Law

10.1 Seafaring in Medieval India

India's overseas trade flourished during the medieval period. Chinese ships touched South Indian ports to board pepper. Chinese Admiral Zing He continuously sent ships from 1405 to 1433 to the Malabar ports. Iranian and Arab ships halted in Malabar ports till the Portuguese arrival in 1498 which caused serious abruptions.

There were many ports in medieval India. In the 1630s, Balasore developed as a seaport and was an important manufacturing centre. Balasore also sent ships to England, Persia and Europe. Balasore was an important trading centre for the English till they occupied Bengal. Ships were also built and repaired there. The Mughals doubted the motives of the English and approximately around 1670, the customs

officers of the Mughals demanded to search the goods. The beneficiaries of the import of English goods were requested to give attestation.

There was a fear for seafaring in the Islamic world. Caliph Umar I preferred the believers should resort to deserts for military purposes over the sea because of the dangers involved in seafaring and naval warfare (Khadduri 1955: 112). Prophet Muhammad prescribed double compensation for those who died while fighting on the sea (*Ibid* 113). Due to this aspect of Islamic law, Indian historiography assumes that Mughal Empire was a continental power and hence, was not interested in sea-trade (Moosvi 2008: 243). It is true that they did not realise the importance of being a naval power (Sangar 1984: 35). But, as discussed in Section 9 of this chapter, the Mughals encouraged free trade and sea trade. Akbar conquered Gujarat in 1572 and thereby, commenced his Empire's sea trade. It helped in the export of goods from Agra. He owned two ships Salīmī and Ilāhī. The former was based on his son's name, and the latter meant God's kindness to him.

At that time, Portuguese were a threat to sea voyage and sea trade. In 1576, Mughal women headed by Akbar's aunt Gulbadan Begum went on Hajj in Salīmī. An official of Akbar, Bāyāzid Bayāt went for Hajj via Daman on a ship Muhammadī. The ship was asked to produce cartazes or pass by Portuguese. They demanded 10,000 Mahmūdīs in cash. Bāyāzid paid the amount on behalf of the passengers. The Portuguese Cartazes system was almost equivalent to blackmail for Indian shipping (Moosvi 2008: 247).

In the first half of the seventeenth-century, Mughal ships also made voyages to South East Asia. Surat was the main port of Mughals. Indo-Greek coins were discovered in Baruch which proves that there were trade relations with upper Indus basin. Cambay developed Gandhar and Gogha as its outer ports where large ships could anchor and deliver cargoes.

The interest of Mughals in sea trade and sea faring increased. Jahangir, Nur Jahan, Prince Khurram and Queen Mother owned ships which fared between Surat and the Red Sea ports (Chandra 2003: 228). In 1647, Prince Dara, Governor of Thatta bought ships from Portuguese through his agent. Satish Chandra (2003: 233) assumes that the fleet of ships owned by Aurangzeb were five in number. Ships were also owned by Princess Jahanara and carried trade with the help of English and Dutch.

Jahangir waged war on the Portuguese settlements because the ship, Rahimi, owned by the Queen Mother, was seized by the Portuguese in 1614. Prince Khurram, the Viceroy of Gujarat, owned ships which carried cloth and tobacco. They also transported gum lac to the ports of Persia.

Shah Jahan, enthusiastic in sea trade, sent two ships, Fath and Shahi, to Red Sea Ports. His enthusiasm was to the extent that he asked the merchants to load his ships first. Shah Jahan also tried to create a monopoly (Chandra 2003: 230). He entered into an agreement with Munnodas Dunda wherein the latter was granted the monopoly right to buy all the indigo grown in Mughal India. According to the agreement, he was supposed to pay rupees eleven lakhs at the end of three years or rupees two lakhs every year out of the profits he owned and rupees five lakhs as repayment of the loan he borrowed from the treasury. The English and the Dutch entered into an agreement wherein they negotiated to buy indigo at their own fixed price. It resulted in the failure of monopoly and redemption of contract.

The Europeans were afraid of attacking the Indian ships and intruding in Indian trading activities because of the possible action which could be taken by the Mughals (*Ibid* 279). Shah Jahan acted against the Portuguese in Hugli and Aurangzeb against English. Thus, the Indian rulers were protective until the times they wielded power. The English interfered with the trade when they seized some of the ships in 1622. They demanded monopoly over Red Sea.

Around 1650, Indian traders were able to create their niche in the Indian Ocean trade again due to the building of ships which were similar to European ships. The trade with the Persian Gulf and the Red Sea was revived. The European Companies continued their attempt to suppress private Indian merchants from carrying on trade with Europe. The European attitude was that Europe was mercantilist whereas Asia has seeds of Orientalism in it (*Ibid* 277). Spices and indigo were replaced by Bengal silk, chintz, calico and muslin. The Spanish mines in Peru and Mexico supplied gold and silver to India. Despite the competition from European companies, Indian traders continued with their trade (*Ibid* 277). Many traders settled in the port towns of Red Sea, Gulf, South-East Asia and East Africa. Hindu traders also settled in Iran, Tabriz, Mashed and Isphahan (*Ibid* 277). The notion that Indians were not mercantilist by nature is proved wrong because many traders were also

settled in Central Asia, South Russia and Moscow (*Ibid* 277). The traders celebrated their festivals and were also allowed to build temples in their settlements. Thus, it cannot be concluded that the Muslim States did not allow freedom of religion (*Ibid* 277).

The Motupalle pillar inscriptions (1244 and 1358 A.D.) assures refuge to foreign ships which wrecked off the coast. They were also exempted from the rule of forfeiture of goods (Sastri 1953: 143). Under Islamic international law, wrecked ships belonging to the enemy which did not have *aman* were prohibited from attack when they took resort in *dar al-Islam*. If the crew in the ship refused to take *aman*, they were not protected from molestation. If they wanted to enter into diplomatic relations, then they were allowed to meet the Imam and granted diplomatic privileges and immunities (Khadduri 1955: 116). In case the Imam did not get the required credentials with the crew, they were deprived of all the immunities and privileges. When applied in medieval India, refuge to wrecked ships was the discretion of the ruler.

10.2 Piracy in Medieval India

Piracy was rampant in medieval India. The jurisdiction to punish pirates was on the Kings who ruled the adjacent coastal area. Dahir ruled the Sind region in the eight century A.D. Hajjaj was the Viceroy of the Eastern region of the Caliphate. The King of Ceylon sent some Muslim merchants to Hajjaj. The pirates, off the coast of Sind, assaulted the merchants. Dahir requested Hajjaj to pay compensation to the orphaned daughters of the merchants. Hajjaj replied to Dahir that the pirates were beyond his jurisdiction and control; therefore, he could not punish them.

Indians carried profitable international trade since ancient times. It was disturbed by the piracy of the Europeans. The native traders suffered from irreparable loss (Sangar 1984: 39). Due to the thriving piracy in the Indian Ocean, the Indian traders entrusted their goods to the Dutch for shipment. The Dutch issued licences to Mughal ships and sent convoys (*Ibid* 38). The Dutch were the pirates of the Indian Ocean. Giving them the responsibility of shipment meant that the goods reached the destination safely (Rothermund 1988: 12). Initially, the English could not appease the Mughals diplomatically. Hence, they resorted to threat (Sarkar 1984: 24). In 1612, they captured some of the ships from Cochin and raided them. Some of the ships were

captured in Aden. The Europeans including the Dutch and the English committed the offence of piracy to gradually create a threat and consequent monopoly in the Indian Ocean trade which was famous for the freedom of the seas and freedom of trade.

The Portuguese did not like the diplomacy between the Mughals and the British. They made an unsuccessful attempt to conspire against the English by appeasing the Mughal Emperor. Therefore, they captured an Indian vessel near Surat carrying luxurious goods. They burnt the ship and took the 700 passengers travelling by ship to Goa. Many were enslaved. The ship had a license issued by the Portuguese themselves, and it was transporting goods under the aegis of Queen Mother (Sangar 1984: 39). This enraged Jahangir, and he issued orders to imprison the Portuguese in his territory and to confiscate their goods. Therefore, rivalry between Europeans also led to piracy in medieval India.

10.3 Debate on *Mare Liberum* and *Mare Clausum*

For the Portuguese, Hindus and Muslims were not believers of Christianity. Thereby, they did not have the right to property and ownership. Therefore, non-Christians were denied the right to *mare liberum*. Due to this denial, the Portuguese declared *mare clausum* in the Indian Ocean (Mathew 2014: 272). They exercised a monopoly over sea trade in the sixteenth century (Sangar 1984: 35). The Portuguese controlled sea trade and issued licenses or cartazes to the Ships. Ships without license were plundered.

Dutch lawyer, Grotius challenged *mare clausum* practised by the Portuguese and argued for *mare liberum*. Grotius followed the idea given by Francisco de Vitoria that non-Christian States cannot be exploited in the pretext of conversion to Christianity (Alexandrowicz 1954: 359). The Portuguese could not justify that they were propagating Christianity because they were accumulating enough wealth in this pretext (Clark 1934: 48; Mathew 2014: 273). Moreover, it was argued that the conquest of Portuguese cannot be justified as a title by conversion because there were Christians in the West Coast of India who were converted by St. Thomas long before the advent of the Portuguese (Alexandrowicz 1954: 361). Grotius urged that the Indians had their political organisation and hence, the Portuguese could not consider India to be *terra nullius* (*Ibid* 361). In his book *Mare liberum*, Grotius reflects the existence of independent States in India (Anand 1986: 56). Hindu rulers granted the

St. Thomas Christians privileges. The Christians in the West Coast sought the support of Portuguese on their arrival in the Malabar Coast.

Mare liberum is considered to be the foundation of the modern law of the sea because it propagates freedom of the seas (*Ibid* 7). Grotius' argument was influenced by the freedom of navigation existing in India since long time in Asia (*Ibid* 8). The Indian rulers supported freedom of the seas, and they broke the monopoly when this freedom was threatened. Sumatra controlled the sea route to China. To break this monopoly, Rajendra I of Chola Empire sent a naval expedition. The Chola Empire's inextricable link with the sea trade and the decline of the Empire led to the creation of free trade zones without any control of State (Rothermund 1988: 10). Individual merchants carried out the Indian Ocean free trade. They agreed with the small sea powers to pay customs to carry trade without any hindrance (*Ibid*).

Later, when the English trade was a competition to the Dutch, Grotius visited in a delegation sent to England. He represented the Dutch and denied the existence of freedom of the seas. As a reply to this, the English quoted *Mare Liberum* which stood for freedom of the seas (Anand 1986: 9). Gradually, Britain became the 'tyrant of the seas" (*Ibid* 11), thereby nullifying their own argument of freedom of the seas. In *Mare Liberum*, Grotius also emphasises that the freedom of the seas shall not be denied to non-Christians as the law is applied to all (*Ibid* 15). As a counter argument to *Mare Liberum*, John Selden argues for *Mare Clausum* in 1625 to establish the English claim over the English sea. The industrial revolution in the eighteenth and the beginning of the nineteenth century increased the demand for raw materials and markets for the European products, which gave an impetus to freedom of the seas. Grotius was eulogised as the father of international law due to his emphasis on freedom of the seas (*Ibid* 63). Freedom of the seas was used by the Europeans for navigation, but they misused the freedom to threaten and subjugate small States (*Ibid* 65).

11. International Environmental Law

Islam stands for harmony between nature and man (Das 2012: 9). According to Islamic law, the earth belongs to Allah, and hence, it requires proper management and consideration of future generations while using it. The ownership of land was held in trust. Thus, Islamic law reflects "the principle of trusteeship of earth resources" (Weeramantry 1997: 108). In this regard, the Islamic jurists proclaim that

"indispensable resources, such as pastures, woodlands, wildlife, certain minerals, and especially water cannot be privately owned in their natural state, nor can they be monopolised" (Hamed 2004: 711).

Medieval India is known for the Mughal architecture, gardens and orchards. A third of the land area comprised of forests. The economy of Mughal India thrived on forest produce (Habib 2010: 95). Gum-lac, honey, wax, silks, myrobalans were amongst the most useful products derived from forests. The medieval Indian State gained revenue from forest produce known as *ban-kar*. Mughals did not formulate laws for forest conservation which affected forests to an extent (Das 2012: 9). Deforestation was carried on to suppress rebels who took refuge in the forests (Habib 2010: 95). Deforestation was prevalent on the Doab and Katehr in the seventeenth century (*Ibid* 94). Elephants were used as beasts of burden and for war (*Ibid* 93). Hence, Mughals took effort to protect forests because elephants were captured from forests for military purpose (*Ibid* 95).

Keeping aside the efforts of Mughals, hunting and poaching were carried extensively which led to the extinction of many animals. For instance, rhinoceros existed in the area near Indus, Uttar Pradesh, and North-West Punjab. In the late sixteenth century, it became extinct from the Uttar Pradesh region (Habib 2010: 97). Similarly, cheetahs also became endangered. The number of cheetahs decreased further because they do not breed in captivity (*Ibid* 98).

In May 1578, a hunting expedition was arranged in the Salt Region. Many soldiers were ordered to capture animals and bring them in front of Akbar. After the capture, Akbar ordered to free all the animals and named the area as "Little Mecca". Akbar followed by Jahangir prohibited animal slaughter on specific days of a week. Jahangir was interested in environment and nature. He noted down the descriptions of living organisms (Gadgil 2009: 131). Thus, rulers in medieval India contributed in different ways to the protection of the environment.

Contributions were made to the biodiversity during the medieval period. Many fruits, crops were added to the large corpus of cultivation by Indian farmers which were brought by the Europeans (Habib 2010: 90). For instance, capsicum, maize, pineapple, tomato, tobacco, etc. The quality of many fruits was improved by grafting

under the aegis of the Mughals. Portuguese grafted Alfonso in the seventeenth century.

12. Conclusion

The quintessence of medieval India is the interaction of civilisations which gave birth to a syncretic civilisation. It exemplifies religious co-existence. There were violations of human rights due to caste discrimination, seclusion of women and indigenous peoples, and slavery. Some of these problems continue till date. The solutions to these problems can be found in the contemporary international human rights law calling for equality, gender rights, group rights and the abolition of any form of bonded labour and slavery. The multicivilisational approach to international law in medieval India is reflected in the law of diplomacy, international humanitarian law, international trade law, international environmental law, and international maritime law. The diplomatic rules reflected the Indo-Persian, Indo-Arab and Indo-European interactions. Thus, the interactions increased to an international level. Sometimes, the failure of diplomacy led to war. While waging war, the medieval Indian rulers followed the principles of international humanitarian law as espoused in the Islamic law. One of the main contributions made to the contemporary international law by India and Asia is the freedom of the seas which existed since ancient times. It caught the attention of the European international lawyers after interaction with India.

CHAPTER IV

INTERNATIONAL LAW IN COLONIAL INDIA

1. Introduction

Colonial India also witnessed the interaction of civilisations. India has been influenced by European culture, and the European culture has been influenced by India (Rai 1929: 195). The British claim that their culture was aloof from the influences of other cultures, but India left an indelible mark on the British culture. India "had a massive influence on British life, in commerce and trade, industry and politics, ideology and war, culture and the life of imagination" (Said 1993: 160). For the British, India was the largest settlement.[1] It is an imperialist assertion that there could be no India without the Empire (Mukherjee 2010: xxi).

During the colonial period, India was knit together with the world outside. But, India was considered as an uncivilised nation. Therefore, a plethora of instances in the period show clear violation of international law. From the conclusion of treaties, diplomacy, war, international trade, environment etc. the colonisers prioritised the extension of colonial period and their profit. Thus, international law of the times discriminated against non-Europeans and eased drain of wealth and resources. The present chapter aims at pointing out the impact of colonisation in the political, social, legal and religious spheres.

Section 2 of the chapter analyses the British rule and the impact of colonialism. Sections 3 and 4 enunciates the sources and subjects of international law in the colonial period. Section 5 deals with the conflict of sovereignties between the British East India Company and the British Crown. Section 6 is on international human rights law with reference to caste system, indigenous people, slavery, and gender rights. Section 7 discusses in detail the international law of diplomacy in the colonial period and its aims. Section 8 elucidates international humanitarian law in the colonial period. It includes the discourse on the concept of war in Europe and the role of Indian Army for the British. It also points out three major incidents wherein there was clear violation of IHL in the colonial era namely, the rule of Warren Hastings, the

[1] India was significant to maintain Britain's "Status" in the European balance of power (Mahajan 1982: 1).

first war of independence of 1857 and the freedom struggle movement. Section 9 mentions international trade law in the colonial period with emphasis on economic drain by the British East India Company followed by the rule of the Crown, the colonial monetary system and tariffs. Sections 10 and 11 deal with international maritime law and international environmental law respectively. Section 12 is a conclusion of the chapter.

2. British rule and the impact of colonialism

Colonialism is agreed to be a part of the history of international law by international law scholars. The contentious issue with this regard is the degree of impact of colonialism on international law (Craven 2012: 863). For scholars like Antony Anghie and China Miéville, colonialism plays a central role in the shaping of international law.

Colonialism means actual conquering of a territory whereas imperialism is wielding of power by a powerful country in such a manner that the policies in different parts of the world are formulated according to its visualisation (Anghie 2004: 272). The primary aim of imperialism was to earn profit (*Ibid* 141). The British followed "settler colonialism" in comparison to the "mercantile colonialism" of Portuguese. "Settler colonialism" aimed at spreading out the control of State and increasing the production of land (Craven 2012: 875).

Colonialism, initially, had different manifestations in India. The taking over of sovereignty while colonising was a gradual process amongst the British and the Europeans in general. After 1818, military conquests were rare, and there arose the need for more land to collect revenue for the company. The Europeans established protectorates through treaties. The external affairs were taken care of by the protector State. When the protected State was considered incapable of governing itself, the protector State took away its internal sovereignty too (Anghie 2004: 88).

Before 1858, the British created the "concept of indirect rule" to rule India (Fisher 1984: 394). Annexation of territory in India was not an easy task for the British. They could not declare the Indian territory *terra nullis* due to the existence of native rulers who ruled their native states since generations. Hence, the East India Company had to discover excuses like misrule, promise to provide military

protection, etc. which could help in annexation without rebellion. There were four pretexts on which the British annexed Indian Territory, viz. disrespect of British authority, the continuation of misrule by native rulers, to implement the doctrine of lapse and to satisfy monetary claims (Prasad 1964: 133-134). The British applied three means of annexation viz. "(i) military conquests, (ii) subsidiary treaty systems and (iii) the doctrine of lapse" (Choudhary 2009: 42).

The three principles of conquest adopted by the British are as follows as described by William Digby (2012: 77):

1. *Conquest by Trade*. Exploitation of India undisguisedly – 'naked and not ashamed' – 1700-83.
2. *Conquest by Deliberate Subjection.* India for England first and last – 1783-1833.
3. *Conquest by 'Pousta'*. A show of Fair Dealing accompanied with the maintenance, rigidly and uncompromisingly, of Indian National Inferiority – 1833.

By using these tactics within 15 years, the Company annexed approximately 100,000 square kilometres.

Lord Dalhousie applied the Doctrine of Lapse to further the East India Company's aim of colonisation. The doctrine put succinctly, meant that if an Indian ruler did not have successors, the native state would be annexed by the company. If the ruler adopted a son, then he would inherit the private property of the ruler and not the public property in the form of the native state. Under Hindu law, there is no such difference between the inheritance of public and private property in the case of an adopted son (Choudhary 2009: 47). Under the doctrine, adoption was also to be approved by the paramountcy (*Ibid* 45). The doctrine helped in avoiding bloodshed which would have resulted in the use of force to annex Indian Territory (*Ibid* 55). It was a policy to deceive Indian rulers so that they can annex the territory "legally".

Dalhousie divided the states into three classes viz. those Hindu sovereignties which were not subordinate to any paramount power, Hindu sovereignties which paid tribute to the British Empire, and Hindu chiefships created by *sanad* or authority of the British government (Gardener 1971: 238). Annexations of territories like Satara, Nagpur, Jhansi, Kolaba and Jalaun, Mandvi, Surat, were carried out under the doctrine of lapse. Nagpur was an important native state for the company because it had the capacity to generate revenue of ₤ 4 million (*Ibid* 238). The Treaties of 1803,

1817 and 1832 between the British and the rulers of Jhansi provided that on annexation of Jhansi by the British, it should provide for in perpetuity to the King and his family (Chapman 1986: 26). These treaties were breached by the British despite the advocacy of John Lang who represented Rani Lakshmibai before Dalhousie. Nana Sahib of Nagpur and Rani Lakshmibai of Jhansi were the ones who revolted against the Company in 1857. This was the result of the doctrine of lapse which was used by Dalhousie according to his whims and fancies without any uniform policy (Choudhary 2009: 53).

Another doctrine which governed the relation between the company and native rulers was that of subsidiary alliance wherein military service was provided by the company to the native state in lieu of revenue. It was introduced by Lord Wellesley. The rationale of the policy was to check the native rulers from forming confederacy which would harm the British security (Das 1949: 58).

The bureaucracy developed by the company aided in the expansion of the company's control. It was quite similar to modern bureaucracy with "a structured hierarchy and definite career patterns, free transferability, regular accounts and files regarding all administrative transactions, etc." (Rothermund 1988: 17). Robert Clive and Warren Hastings were a part of the bureaucracy who were dedicated to the Empire. They helped in the fast growth of the company from a trading company to a territorial power (*Ibid* 17). The secret behind the company's success was the "organisation and discipline" which lacked in the Indian generals.

The divide and rule policy adopted by the Company and continued by the Crown helped in the continuation of British rule in India. When the East India Company was granted the Dewani of Bengal, the right to collect revenue was vested in the Company. The administration of justice was incumbent on the Nawab. The British argued that the Muslim rule in India "endangered" the customs of Hindus and it was the duty of the British to restore the code of laws of Hindus (Seshan 2015: 156). Therefore, the aim of codification of Hindu laws meant that Hindus were "identified as separate" (*ibid*). During the 1857 war for independence, the soldiers wanted the Mughal Emperor to rule India. They attempted to challenge the British rule. This shows the Hindu-Muslim unity against their common enemy, the British. This was well understood by the British, and they aimed at dividing the unity. One

major step towards dividing the Hindu-Muslim unity was the partition of Bengal[2]. The hidden agenda behind the division of electorates according to sect or religion is elucidated by Mithi Mukherjee (2010: 206):

> This division was intended to pre-empt any possibility of now ever-proliferating communities from coming together to demand national independence from the British Empire. More 'freedom' meant deeper divisions between the communities and therefore more dependence on the British Empire to unite them; more freedom, in other words, necessitated a stronger empire. India's status as a colony, paradoxically enough, was presented as its only way to 'self-governance'. It was only as a colony that India could win 'freedom' for itself. It was as if the Indians could have their 'self-government' and the British their Empire at the same time. Such was the logic of British Empire in India.

The colonisers divided the colonised on the basis of race, sect, language, caste and religion to prevent combined retaliation. This division has repercussions in the present. Divide and rule policy was applied in most of the colonies.[3] The major result of the policy was a partition of 1947 which took away many lives. The seeds of partition were laid down by the Morley-Minto reforms[4]. The communal clashes now and then, in different parts of India are the reverberations of the colonial era.

Dadabhai Naoroji convinced his nationalist friends that wealth was drained to Europe (Said 1993: 245). Some scholars opine that colonialism exposed the colonised towards technology, nationalism and "liberal ideas" (*Ibid* 18). The Europeans also argue that the protest against imperialism by the colonised was due to the freedom supported by the European thought (*Ibid* 235). Thus, imperialism was a blessing in disguise. The Europeans complain that their contribution towards the colonised in bringing orderliness in their societies is not recognised by them. But, they do not take into account the number of slaves they exploited, and the people who suffered because of injustice, economic exploitation, and intrusion in their social sphere (*Ibid* 24). The violence to which the colonised were subjected is not brought to light. The European history reiterates about the "colonial experience" but does not mention that the colonised were kept away from the authority and administration (*Ibid* 28).

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[2] The partition of Bengal was carried out in the pretext of administrative difficulty despite the popular resentment against partition (Mahajan 1982: 27).

[3] One of the reasons for Rwanda genocide is attributed to the differences created by the colonisers between the Hutus and Tutsis.

[4] The Indian Councils Act of 1909 is popularly known as Morley-Minto Reforms. These reforms introduced separate electorate for Muslims. Muslims were assigned constituencies which were represented only by Muslims (Chandra 2009: 257-258). It disrupted the civilisational dialogue since time immemorial. The interaction of Hindus and Muslims as traders, rulers and residents of India was attacked by these reforms.

Indians saw gradually the transition of rule from Indian rulers to the British hands. The Indian institutions were replaced by the British institutions. Administration of justice is one of the primary duties of a State.[5] Colonisation took over this aspect from the Native State. Till 1790, native Judges played their role, but there was British control over the native legal system (Yule 2012: 148). In 1864, the appointment of Kazis by the government was abolished through Act XI. Due to the complaints received from Muslims, the appointment of Kazis by the government in consultation with the Muslims in concerned areas was reintroduced by virtue of Act XII of 1880 known as the Kazis Act. Pundit or law officer learned in Hindu laws advised the English Judges of the Supreme Court in Calcutta on the question of Hindu laws. The post was abolished after the establishment of High Courts under the Queen's Letters Patent of May 14, 1862. India's conquest was not possible with the military prowess of the British. Therefore, the concept of justice and the establishment of courts helped in the sustainability of the Empire in India for 200 years (Mukherjee 2010: xxxvi).

The injustice carried out by the British Governors was evident in the increasing poverty and starvation of millions of Indians (Shore 2012: 106). By the end of the nineteenth century, British rule was questioned by many intellectuals whereas few Indians influenced by the British believed that foreign rule is "the road to self-government" (Mahajan 1982: 2). In the initial days of the Indian National Congress, it looked upon the British rule as considering the welfare of the people of India. Bipin Chandra Pal and Aurobindo Ghose deviated from this view. They picturised the conflict between self-rule and foreign rule. With Mahatma Gandhi's entry into the politics, the views of the Congress changed as a whole. The Jallianwala Bagh Massacre was an impetus to the protests against the British Government. He called for the non-cooperation movement in 1921 asking everyone to quit British institutions and products. He advocated non-violent means of protest which was adopted by

[5] Europeans were allowed to establish courts in the colonies because non-Europeans were considered incapable of granting justice to the Europeans (Anghie 2004: 86). By virtue of some charters by the British rulers, courts were established in different parts of India. Initially, they tried the English, but gradually, their jurisdiction extended to the natives. By virtue of the Charter of 1623, a court was established in Surat. 1661 and 1683 charters provided for a court in Madras. The 1683 charter established admiralty courts in Madras and Bombay. The charters of 1670 and 1686 established court in Bombay. The 1774 Charter established the Supreme Court in Calcutta.

leaders worldwide for expediting the process of decolonisation. Other famous movements led by Gandhi were the Civil Disobedience Movement in 1930 and Quit India Movement in 1942. He said he realised that the British imperialism would prolong the "servitude" of India (Gandhi 1959: 114-119).

The greatest impact of colonisation is the imposing of European international law in the colonies. Four methods were applied to bring non-Europeans under the umbrella of international law viz. treaties, colonisation (through treaty of cession, annexation or conquest), fulfilment of parameters of civilisation (like Japan and China) and protectorate agreements (taking of control over many Asian and African countries was through protectorate agreements) (Anghie 2004: 67). There were different standards for the application of international law. First, it was Christianity, later it was the measuring rod of civilisation (Sinha 1967: 21). Colonisation was considered as a way to introduce European civilisation to the non-Europeans, and the Europeans saw colonies as a source of profit (Anghie 2004: 157-158). The civilising mission was used for imperial expansion (*Ibid* 96). India was considered to be a "society of warring communities", and hence, there was a need for foreign rule in India to spread the blessings of civilisation (Mukherjee 2010: xxi). They believed they could transform India. To rescue Indians, they enacted laws for reformation. Thus, the law became "an instrument through which it could wield its power and deploy its disciplinary efforts" (Nair 1996: 34).International law relating to "responsibility of States- expropriation of alien property and rules relating to compensation, protection of nationals in foreign countries" was formulated in a manner to protect the Europeans in colonies (Anand 1986: 26). We cannot undo the impact of colonialism as it percolated into all spheres of the colonised. International law cannot be entirely rejected as it is imperative for very human existence. But, we can criticise and reject those rules which aided colonialism and some of them which form an integral part of international law till date (Anghie 2004: 110).

3. Sources

Treaties constitute one of the most important sources of international law in colonial India. Initially, the treaties were between the political entities like the Mughal Empire and the European trading companies. These treaties permitted the European trading companies to carry out international trade in India. The significance of the European-

Asian treaties was that they "could hardly support the idea of an exclusively European-centred positive law of nations" (Alexandrowicz 1964: 60).

G.F. de Martens classifies the parties to treaties in India into six namely, the rulers of Mysore, Deccan, Oudh, Tanjore, Bengal and the Maratha confederation (*Ibid* 63). Treaties were entered for providing extradition. Extradition treaties were usually entered between the Princes and the East India Company (O'Higgins 1964: 105).

Prior to the colonial rule (as discussed in Chapters II and III), the native rulers granted concessions to the foreign traders in the form of capitulations. According to the capitulations, the foreign traders were permitted to administer justice using their native laws. This is exemplified by the rulers of West Coast of India who granted capitulations to the Muslim traders in the eighth century A.D. In the seventeenth century, the Europeans were granted capitulations which they misused by fledging their political and military powers (Alexandrowicz 1964: 65-66).

Apart from capitulations, discriminatory clauses were part of treaties. C.H. Alexandrowicz (1964: 71) describes the features of discriminatory clauses as follows:

> The discriminatory clause, apart from monopolising trade, extended to the expulsion of 'other' European nationals from the territory of the contracting ruler, the closure of frontiers, and harbours to foreigners, the prohibition of free navigation, the prohibition of accepting foreign military or technical assistance, the prohibition to build fortifications (which contained the element of an international servitude) and ultimately the prohibition of maintaining external relations with other European powers.

The result was that discriminatory clauses resulted in inequality between the parties because it put many restrictions on diplomacy and trade. It was a hindrance to free exercise of power by the political entities.

Sir John Simon recognised forty treaties between Britain and Indian Princely States (Chacko 1958: 187). The crux of these treaties was that the Princely States surrendered their sovereignty to the Crown at some point. The treaties between the Paramountcy and the Indian Princely States was according to international law of those times, but when these treaties came into effect, they became regional in nature (*Ibid* 188). Therefore, C.J. Chacko uses the term *regional international law* to address the international law of colonial times. Despite the inequality between two parties to a treaty, the so called "inferior" party also remains a sovereign State. This principle was

applied in *Statham* v. *Statham and H.H. the Gaekwar of Baroda* case before an English Court (*Ibid* 190).

The existence of a treaty between the Portuguese and the Marathas was a contentious issue before the International Court of Justice in the *Right to Passage* case (ICJ Reports 1960). The Court accepted the existence of a treaty despite the fact that the Portuguese signed the treaty in 1779 and sent it for translation to the Peshwa who signed it after few months. It was further considered valid because parties to the treaty believed themselves to be bound by it resulting in the principle of *pacta sund servanda*. The Portuguese claimed right to passage and its sovereignty over some enclaves as transferred by the Marathas in 1783 and 1785 through *sanads*. The ICJ held that there was no such right over enclaves as the *sanads* provided for *jagir* or revenue tenure (Alexandrowicz 1967: 7).

The writings of jurists is considered a source of international law. The civilised-uncivilised dyad is reflected in the writings of the European international law of the colonial era. Most of the jurists justified colonisation and reflected their national aspirations. For them, non-Europeans did not have the right to be made part of the creation and implementation of international law. They were beyond the gamut of international law. As discussed in the sections on international law of diplomacy and international humanitarian law of the present chapter, the concepts of diplomacy and war were for the convenience of colonisation. These concepts clearly excluded the non-Europeans from their ambit.

4. Subjects

The subjects of international law during the colonial period in India were the political entities, the British East India Company (to the extent it exercised political power including collection of revenue, administration of justice and maintenance of Army), the Princely States, and the Government of India under the British Crown. Even after 1757, Battle of Plassey, the sovereignty of the territory around Delhi was with the Mughal Emperor. The East India Company had sovereignty over the territories annexed as a result of treaties with Indian rulers or conquest. There were territories under local Princes who had revolted against the Mughal Emperor. Hence, we can see there were three sets of rulers in India in the eighteenth century. R. Kemal's remarks on this situation are as follows:

> In the same way as the states of the Holy Roman Empire were treated (disregarding constitutional theory) as full members of the European international society, the Indian rulers, including the East India Company, established their independence and treated one another, as *internationally sovereign* and made alliances for war and peace.

The British East India Company derived its powers from the British Crown. In the history of Britain, the power of incorporation became a "prerogative of the Crown" in the late Tudor period (McLean 2003: 365). Incorporation was granted through letters patent or charter. A Company was considered as an artificial person. Thus, companies were established for overseas trade. These were the first transnational corporations. It was a means for raising revenue to the crown and a means of colonisation (*Ibid* 365). Apart from commerce, they entered into diplomatic relations, built forts and waged wars. First, they represented the Crown and exercised the "powers of imperium" (or sovereignty) (*Ibid* 366). Gradually, these commercial entities took the form of political entities.

After the victory in the Battle of Plassey of 1757, the British East India Company entered the political arena. In 1765, it obtained the Dewani of Bengal with the power to collect revenue. It gradually intruded into the administration of justice which was exercised by the Nawab of Bengal. The granting of *Dewani* (the right to collect revenue) and the other corresponding property rights were under the superiority of the Mughal ruler and other grantors of the rights in India. The British recognised the sovereignty of the Mughal ruler in 1772 when it became the *Diwan* of Bengal. Therefore, the sovereignty of the English East India Company was subject to that of the sovereignty of the Indian rulers who granted the British, rights in India (Kemal 2012: 108). The sovereignty of the Mughal ruler could not be overlooked because other allies of the Mughals respected them.

The trading companies, generally, prevented the application of European law of nations to the colonies and thereby applied different standards to rule them. Such requirement of different standards was because of the fact that the companies were exercising control over the colonies and the colonies were not ruled by the States where the companies were incorporated (McLean 2003: 371). The establishment of the trading companies brought transformation to the definition of State (Roukis 2004: 938) and many international lawyers argued for inclusion of transnational corporations as subjects of international law (McLean 2003: 371).

The British East India Company survived most difficult times, viz. "the English Civil War, the Glorious Revolution of 1688, the Thirty Years War, the War of the Spanish Succession, the Seven Years War, the American Revolution, the Napoleanic Wars, and the Crimean War, among many other conflicts between 1600 and 1858" (*Ibid*). The First War of Independence of 1857 led to the taking over of control over India by the British Crown.

In 1858, the English East India Company and its Board of Directors were replaced by the Secretary of State who was made the Member of Parliament.[6] This did not amount to the annexation of India as it was merely considered as supervision (Bhatia 1984/86: 144). India was not considered as a colony under the Interpretation Act. Upendra Baxi (2012: 756) has a different viewpoint on this. He mentions that some traits of State Succession can be seen in the Proclamation of 1858. It recognised the treaties entered by the East India Company with the Indian Native States. It had provisions for religious tolerance also. It also gave an assurance to respect the dignity and rights of the native princes. After 1858 proclamation, law and justice were derived from the monarch and not as an offshoot of natural law (Mukherjee 2010: 89). The treaties entered between the East India Company and the native rulers as well as the usages and customs determined the relationship between the British Raj and India (Qanungo 1967: 255).

"The symbolic significance of the Queen's proclamation and the royal durbars[7] lay in that it allowed the British Empire to overcome part of its foreignness by presenting the monarchy as a deterritorialized and denationalized institution that stood above Britain as a nation, and thus maintain the discourse of imperial justice that was so vital for its survival" (Mukherjee 2010: 79). "Ironically, the invention of the Raj fortified the impression of ahistoricity of the State, which took on the

[6] Drastic changes were not brought forth by the 1858 proclamation, but the Secretary of State replaced the Board of Directors and the Parliamentary Committee. A parliamentary under-secretary, a permanent under-secretary and the Council of India comprising of retired administrators, assisted the Secretary of State. In matters of the declaration of war, declaration of peace and conclusion of treaties, the Secretary of State was not required to take advice from the Council.

[7] Queen Victoria was to be declared as the Empress of India. This was presented in the form of Royal Titles Bill in the House of Commons as an omission in the Government of India Act 1858 by Benjamin Disraeli. He explained the rationale of the bill as a declaration of India as very important to Britain (Mahajan 2002: 37). In pursuance of the passing of the bill, a Royal Durbar was held in Delhi on 1 January 1877 wherein Queen Victoria was declared as the Empress of India. A great Assembly was held in Delhi. There was a continuous showcase of British imperialism through royal durbars in 1877, 1903 and 1911.

performances and rituals of a transcendent and traditional government that cherry-picked its allegories and authority from Mughal, Hindu, British and Roman History" (Cohn 1983 as quoted in Legg 2009: 243). The State did not touch many practices which were an integral part of India so that the British could rule for longer.[8] Hence, the British tried to gain legitimacy by borrowing traits of authority from the Indian past.

There was a difference between other colonies and India. The indigenous populations of the colonies of North America and the Caribbean "were quickly subjugated or simply massacred by earlier conquistadors, required few of the innovations that were necessary in a country like India, which appeared to have recognisable institutions and codes which were binding and had the force of law" (Nair 1996: 19). They studied the scriptures and books which were the basis of these institutions.[9] Thereby the British created an image that they followed the rule of law. Due to this, an alien legal tradition was imposed (Zartner 2014: 170) on India.[10] They passed many legislations through the legislature. While formulating such laws, there was a tussle "between imperialist strategy and nationalist ideology" (Mahajan 1982: 146). Most of the freedoms (freedom of speech, freedom of association etc.) underwent strict surveillance of the British Raj through laws like the Press Act 1910, the Prevention of Seditious Meetings Act, 1911, etc. The moderates in the legislature demanded the Government of India to provide public facilities like education, healthcare facilities, etc. The British were against providing education because they believed education to be detrimental to the Empire in India (*Ibid* 238-239). The members of the Indian legislature did not always agree with the British proposals. The Indian members of the legislature put forth many arguments against the motions introduced by the British. These were based on strong evidence, facts, and figures. It was difficult for the British to defend them (*Ibid* 278).

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8 As will be discussed in the section on human rights, the caste system was an evil which was not changed by the British despite the gross violation of human rights.

9 These texts were in Sanskrit or Persian. Thus, history of the orientalists took into account *Dharmasastras*, *Srutis* and *Smritis*. These texts did not describe the customs of forest tribes, scheduled castes and other diverse communities (Nair 1996: 20-21). In the late eighteenth century, the East India Company required Orientalists or Indologists to study their colonies in the East. The purpose of the study was to strengthen their colonial rule. The oriental studies and Indology was a matter of research in many European universities. Some scholars who wrote a plethora of treatises on India never visited India exemplified by Max Müller (Thapar 1968: 319).

10 Since legal tradition determines the acceptance of international law and its internalisation (Zartner 2014: 3), the Common law system as adopted in India during the colonial rule determines how international law is internalised. Similar to Britain, India also follows dualism.

The Princely States in India entered into treaty relations with the East India Company and were relatively independent in comparison to the rule of the Crown (Das 1949: 58). After 1858 proclamation, the Indian states had links with the Government of India which was the paramount power as far as the Indian states were concerned (*Ibid* 57). The Princely States did not have an independent international status (Chacko 1958: 183). The agreements signed, later on, reflect that the Native States of India were considered as "'quasi' subject of imperial international law" because of the 'paramountcy' that comes into picture. The Native States were again proved to be subjects of international law when they entered into the instruments of accession with India. The Princely States were vassals as they had internal sovereignty, but their external sovereignty was surrendered to the British (Alexandrowicz 1954: 395). The very existence of the Indian Princely States depended on their allegiance to the British, but vice versa, it was not true. The British exercised power to intrude in the internal affairs of the Princely States (Das 1949: 60). Intervention in the affairs of the Indian Native States was easy for the British due to the awareness of the "internal conditions" (Rothermund 1988: 15).

By the end of the nineteenth century, British India was divided into eight provinces under governors. There were 550 Princely States under native rulers who recognised the British sovereignty. The Government of India Act, 1919 envisaged a kind of federalism wherein the Princely States and other States had the power to govern themselves in matters of local concern (Das 1949: 65). In 1926, the Governor General of India wrote to the Nizam of Hyderabad that the Crown is the supreme power in India and the Princely States are subject to that power (*Ibid* 66). The Government of India Act, 1935 did not change the protectorate status of the Princely States whereas the Act clarified that India was treated as a colony (Mukherjee 2010: 204). The Congress Party in 1938 passed a resolution in the Haripura session that it supports *poorna swaraj* wherein the Princely States are an integral part of India.

5. Conflict of Sovereignties[11]

Recognition doctrine was used to "dispense, deny, create or partially grant" sovereignty[12] to the non-Europeans (Anghie 2004: 100). Europeans asserted the right

[11] Sovereignties are of different types. Stephen Legg (2014: 97) enlists different types of sovereignties as "*representational* (diplomacy); *governmental* (administration); *theoretical* (political philosophy); political (anti-colonialism); *territorial* (political geography); and *contractual* (international law)".

to trade and whichever nation went against their freedom was excluded from the scope of international law and was considered uncivilised (Anand 1986: 24). It was not recognised. For the Europeans, the non-Europeans have to gain sovereignty gradually (Anghie 2004: 103). Thus, to progress, they were supposed to look forward to Europe. This is described as the waiting period for the non-Europeans by Dipesh Chakrabarty (2000: 9) before they are recognised in the political arena.

The Battle of Plassey was the turning point of the advent of British in India. The changes brought forth by the Battle were very fast (Digby 2012: 81). Nawab Alivardi Khan of Bengal managed to maintain peace with the British. His successor, Siraj-ud Daulah opposed the fortification of Calcutta by the British. When the dispute over fortification could not be settled amicably, then Battle of Plassey was fought. Robert Clive bribed the Nawab's Commander-in-chief and won the battle. The commander-in-chief was declared as the new Nawab. Since the power of Mughal over Bengal had declined a long time back, the Mughal ruler offered the English East India Company power to collect revenue and civil jurisdiction of Bengal. He planned to vest the military powers and criminal jurisdiction to the Nawab. Clive opined that the British Crown should be given the revenue collecting power. In the first instance, the offer was not accepted by Clive on the advice of William Pitt. Pitt opined that the revenue would enrich the King and the Company should take the offer. In 1765, Clive became the Governor of Bengal, and he accepted the offer. The revenue earned from Bengal filled the coffers of private individuals and did not reach the Crown. It was invested to expand the company's trade. It also helped the British to aggrandise Indian territory. The company emphasised that it did not have the political power and they were collecting revenue and exercising civil jurisdiction on behalf of the Mughal ruler. The company minted coins on his behalf. The Company was also granted powers to enter into treaties with foreign governments (Kemal 2012: 105). Gradually, the Company controlled the Nawab of Bengal and the Nawab of Carnatic (*Ibid* 105).

[12] As seen in Chapters II, III and IV, the concept of sovereignty is largely understood in modern times as confined to the State and the Princely States. “Sovereignty, power and authority are almost always seen as statist, the people being merely reactive” (Deo 2014: 128).

The post of *Vakil-ul-Mutlaq*[13] was initially held by the Nizam. It was transferred to the Marathas. The Marathas were uneasy with the recognition of Nawab of Bengal by the East India Company. Therefore, Warren Hastings wanted the Marathas to be replaced by the Company as *Vakil-ul-Mutlaq*. The Marathas were defeated, and the office of *Vakil-ul-Mutlaq* was incumbent on the East India Company.

After gaining so much power by the Company, Warren Hastings was brought to trial. The trial is an important event in the history of international law because it questioned the sovereignty of the East India Company. Warren Hastings was the Governor-General of India from 1772 to 1785. The House of Commons moved impeachment proceedings against him for "high crimes and misdemeanours"[14] (Mukherjee 2010: 5). The proceedings against Warren Hastings before the House of Lords began in 1788. Edmund Burke was arguing against Warren Hastings in his trial. Burke applied natural law and argued that the oppression of the colonised is not justified (*Ibid* 2). The irony of the trial is that a conservative like Burke was arguing for the colonised. One of the aspects of the trial is to check the increasing power of the Company and to affirm its allegiance to the home government in Britain. In the aftermath of the trial of Hastings, the British "sought to reword the ideas of Empire, governance, rule and supremacy" (*Ibid* 7). It discussed the rights of the natives under a colonial rule, the restrictions while waging war (amounting to international humanitarian law) and natural law. The conflict between common law and natural law in the trial was evident. Burke justified his arguments by employing the natural law principles and thereby establishing the right of natives (*Ibid* 26).

The sovereignty of the East India Company and that of the Crown was not clear in the case of India despite the passing of Regulating Acts in 1773, 1784 and 1793. The Acts do not clarify the sovereignty over Indians. R. Kemal (2012: 107)

[13] The term has an Arabic origin. Vakil means advocate or agent. *Vakil-ul-Mutlaq* is mandatory paramountcy. The post can be equated to that held by Bairum Khan during the reign of Akbar. Hence, we can say in legal terms a *de facto* ruler.

[14] "The charges against Hastings included "corruption, use of political power for extorting bribes from native rulers of India, abuse of judicial authority, despotism, and arbitrary rule. Hastings was being tried specifically for illegally occupying territory in India by launching aggressive, offensive and criminal wars against native rulers, treaty violations, and for open violence against native rulers and the peoples of India."

describes the period as that of uncertainty with regard to the question of India.[15] Due to doubt on sovereignty, the British began administering the British in India by English laws and natives of India by native laws (Ilbert 2012: 142). Many law offices were undertaken by the British (Yule 2012: 145).

The sovereignty of the British Crown in India was clarified and asserted by the Act of Parliament in 1813. Gradually, the Mughal Emperor's sovereignty diminished in the eyes of the British. The interference in the exercise of powers of the Mughal Emperor increased to such an extent that the gifts offered to the Mughal Emperor by the Indian Princes went through the residents of British in the Mughal Court. Perturbed by such intrusions, the Mughal Emperor wrote to the Directors of the East India Company for rectification. Furthermore, he sent Raja Ram Mohan Roy as his envoy to the King of England. The Company finally acceded to the fact that it derived its powers from the Mughal Emperor. Later on, in 1835 Indian coins were minted with the impression of British King on them. After the 1857 first war of independence, Bahadur Shah was deported to Rangoon in Burma after he was held guilty of felony. The Court exercised jurisdiction over the trial of the Emperor on the ground that he was a pensioner of the British Government.

The major source of income of the company was from revenue collection[16] and unfair trade practices[17]. The East India Company wielded a lot of power and compared to its initial days it acted as a parallel State. The British government wanted to check the expanding power of East India Company in India. The government required the wealth amassed from India. Therefore, it enacted the Regulating Act of 1773.[18] It established the Supreme Court in Calcutta[19] with the two-fold power to

[15] The British sovereignty over India remained uncertain due to many reasons. India was not a colony of the British. It was not conquered by the British *stricto sensu*. The British-Indian relation was purely contractual which necessitated the maintenance of Indian identity (Kemal 2012: 114).

[16] The Company collected revenue after it obtained the Dewani of Bengal as a consequence of its victory in the Battle of Buxar in 1764. It looted the peasants. The area under its jurisdiction was affected by famine.

[17] The company had a monopoly over trade. It fixed prices of the goods directly purchased from the cultivators and sold at an exorbitant price in Europe.

[18] The rival British East India Companies merged in 1709. It loaned three million pounds (the company's capital) to the Crown and traded on borrowed funds. Sometimes, for the benefit of the State capital was unpredictably withdrawn. To prevent this situation, in 1772, the Company applied for a loan of one million pounds. Therefore, the Regulating Act of 1773 was enacted to increase the control of British Government on India (McLean 2003: 369).

[19] It had jurisdiction over Bengal, Bihar and Orissa. It had the power to prosecute the officials of the Company if they went against the laws of England. In the Cossijurah case, the Supreme Court asserted its power of judicial review of the decisions taken by the Governor General in Council. A

check the administrative powers of the Company and to formulate laws in the fields not covered by the government (Mukherjee 2010: xviii).

The Supreme Court and the East India Company had power struggle. The reason behind the tussle is succinctly put in the following words by Eric Stokes (1959: 35) it had "less to do with their conflicting claims over-representation of 'native' subjects in relation to English law"…"and more with the legitimacy and limits of the power of the colonial State." The Company was considered as responsible for mal-administration which led to 1857 conflict. Therefore, the sovereignty over Indian territory was taken over by the Crown.

6. International Human Rights Law

International Human Rights Law (IHRL) is considered Eurocentric because it is without any multicivilisational tinge. The genesis of human rights is associated with the Empire and its discourse. David Kennedy (2006: 133) critiques the genesis of human rights discourse in the following words:

> Human rights, given its origins, its spokesmen, its preoccupations, has often been a vocabulary of the centre against the periphery, a vehicle for empire rather than an antidote to empire.

First, the English East India Company through its army conquered the vast territory of India, and after the Proclamation of 1858 a direct control was exercised by the English Crown. The company used the "language of profit" whereas the Crown used the language "of order, proper governance and humanitarianism" (Anghie 2004: 69). Therefore, the Crown prescribed rules in the name of humanitarianism to curb some practices in India which they thought they could change without affecting their rule.

William Bentinck, the Governor-General of India, applied utilitarianism to rule India. He brought some changes in the Indian society. For instance, the law on abolition of Sati. The main concern of the British rulers in India was not the differentiation between the right and wrong but whether such distinctions will affect their rule in the colony (Said 1993: 185). They were hesitant to meddle with Indian

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positive aspect of the Supreme Court was that it stood for the natural rights of life and property of the natives of India.

laws in the eighteenth and the nineteenth century (Liddle and Joshi 1985: WS73). The proclamation of 1858 clarified this position.

In describing the Asian economic system, Marx opined that the British colonisation of India was helping India in bringing a "real social revolution" (Said 1978: 153). Edward Said (1978: 154) urges us to recollect the loss incurred by Asia because of the colonial rule. Marx reached such a conclusion based on the writings on Orientalism. As pointed out earlier, the advantages of colonialism are counted in the form of infrastructural development (like railways). The loss of human lives due to inhumane policies of the government is not paid heed.[20]

Natural calamities cause deaths at all times. During the colonial era, the indifference of the rulers and neglect of the people led to further deaths and maximised their sufferings (Habib 2010: 126). In the last decade of the nineteenth century, about a million died of plague and nineteen million out of starvation (quoting the Lancet [June 1901] Digby 2012: 101).

Legislations like Act of 1870 which declared female infanticide as an offence shows the intrusion of colonial State in private spheres of families and practices which were called customs and traditions. The colonial State wanted to preserve its monopoly to take lives of its citizens and passed legislations if it was curbed (Nair 1996: 88). The Indian nationalist movement opposed changes in the domestic sphere because they believed it was an uncolonised arena and would remain unaffected by colonisation (*Ibid* 42). However, changes in the economy by colonisation had repercussions on the social life, "nature of the family and in gender relations" (*Ibid* 49).

The Indians themselves took a step towards human rights. The Motilal Nehru Committee Report, 1928 aimed at political rights as well as social, economic and cultural human rights (Singhvi 1985: 348). This took forward the debate on the inclusion of fundamental rights in the Indian Constitution. It was further emphasised by the Sapru Committee (Conciliation Committee formed under the All Parties Conference, 1944). The proposals (Constitutional Proposals of the Sapru Committee

[20] Many human rights violations took place under the colonial era like the Black Hole of Calcutta in 1756, firing of people at Jallianwala Bagh.

Bombay 1945 as quoted in Singhvi 1985: 349) recommends fundamental rights as an important part of the Indian Constitution as "assurances and guarantees to the minorities but also for prescribing a standard of conduct for the legislatures, governments, and the courts".

Human rights were included in the Indian Constitution as a result of long debates. The Constitution of India Bill 1895 mentioned individual freedoms and the right to education to be provided by the State. Annie Besant's Commonwealth of India Bill 1925 also included rights like education, access to public roads and public institutions. Thus, the freedom fighters envisaged social rights apart from the civil and political rights (Sankaran 2011: 70). This bifurcation was clear in Motilal Nehru Report in 1928 on draft constitution bill and Karachi Session of the Congress in 1931. Mahatma Gandhi opines that the treatment meted out to Dalits and women in India is a reflection of “our own weakness, indecision, narrowness, and helplessness (Gandhi 1927).

6.1 Caste System

An intermingling of politics and caste began in the early twentieth century after the first census (Mukherjee 2010: 103). There are two contradictory opinions amongst scholars as to the genesis of caste. The first opinion states that caste existed since time immemorial in India and the other says that caste was created by the British by introducing census. Caste is considered a European construct because the origin of the word caste comes from the British word *casta* (Samarendra 2011: 51). Caste is equated to Varna or Jati by different scholars. Padmanabh Samarendra (2011: 52) argues that caste is neither jati nor varna “though it masquerades as one or the other or both at the same time”. Caste began as a part of the census. It was included in the 1865 census of the North West province and continued till 1931 census.

The writings of British Officials like William Jones and Henry Colebrook was based on their study of Hindu Sanskrit texts and not on the social setup (*Ibid* 54). The British realised after the empirical approach in the census that the social setup was different from the descriptions in texts. They attempted to base their study on anthropological and ethnographic tools. The census of India was conducted in 1881. The British aimed at "maintaining uniformity in the classification of castes" (*Ibid*). For such uniformity, the practical study was necessary. For this purpose, the

Government of Bengal selected H.H. Risley in 1885. In the study on caste, the British could not escape completely from the Sanskrit texts. The census commissioner of the 1891 census linked caste to racism. According to him, it was created as an attempt of the Aryans to keep away the dark complexioned Dravidian race (*Ibid* 55). Risley became the Census Commissioner in 1901; he also supported the racial theory of caste and the Aryan-Dravidian dichotomy. The census reports prepared by the British did not have uniformity in classifying castes as some castes were always classified as "other castes" (*Ibid* 57). Since they could not continue with the classification of castes, they stopped the inclusion of caste in the census in 1931.

Keeping aside the argument on the genesis of caste, the discrimination against Dalits continued in colonial India too.[21] The army stopped recruiting Dalits. They were all discharged from service between 1864 and 1884 and recruitment was confined to martial classes or races (Farwell 1989: 179). The British also ostracised Dalits due to the practice of discrimination existing in India then. Thus, it is again proved that the political entities never changed the cruel social practices. The politics of those times relied on the powerful in the society. Thus, they gave preference to upper castes so that they can establish themselves in the Indian territory without confronting any rebellion. Jyotirao Phule, B.R. Ambedkar and Mahatma Gandhi fought against caste discrimination in all spheres.

Jyotirao Phule played a crucial role in the emancipation of Dalits. He established schools because he believed that the rationalist outlook in Western education could help in improving the situation of Dalits (Guha 2010: 76). He interpreted the Brahmins as a medium of exploitation of peasants and labourers. In his writings, he opines that the real representatives of Indian society have had been the cultivating castes (*Ibid* 77). He also expresses the vicious circle of poverty in which the peasant is entrapped. The peasant is indebted to the unscrupulous money lender, confront the corruption of bureaucrats, deprived of education, entangled in cumbersome suits and also, exploitation by Brahmins. Hence, he advocated for the

[21] With regard to the popular comprehension of violence, Gyanendra Pandey (2014: 14) points out that, "The violence in question is to be found not only in the physical and sexual abuse, rape and flogging of lower caste and class servants and workers; and not only in riots and police violence against blacks and Dalits. It may be traced, too, in the upper caste desertion of neighbourhoods, clubs, schools, public transport and sometimes even jobs into which the lower castes have been allowed entry."

teaching and empowerment of peasants so that they could escape the irreparable poverty (*Ibid* 86).

B.R. Ambedkar in *Annihilation of Caste* (1945: 38) distinguishes division of labour from the caste system that in the latter, there is "a hierarchy in which the division of labourers are graded one above the other...". He established the Depressed Classes Federation in 1930, later known as All-India Scheduled Caste Federation. He stood for the emancipation of Dalits from discrimination and lead a life of equality. His efforts in drafting the Constitution of India earned him the title of *Father of Indian Constitution*. His vision helps us today to fight for social justice.

Mahatma Gandhi strongly opposed the discrimination against Dalits. He called them *Harijans*. Gandhi wanted dalits to be accommodated into the fourth caste of Shudras (Keane 2007: 284). The separate electorates for the depressed classes as suggested by the Macdonald Award was a point of divergence between Gandhi's and Ambedkar's views on the caste system. His understanding of caste system was different from that of Ambedkar. Ambedkar wanted the annihilation of caste system itself whereas Gandhi wanted to abolish the practice of untouchability (*Ibid* 284). Gandhi was against separate electorates for the depressed classes because it would divide Hinduism. He commenced fast unto death to stop implementing Ramsay MacDonald's Communal Award. On the 21st day of Gandhi's fast, Ambedkar approached him and signed the Poona Pact of 1932. Thus, for assurance to include the Dalits in education and employment, reservations were granted. Gandhi's approach towards the issue of discrimination and caste system is criticised by many Ambedkarites due to the signing of Poona Pact. Gopal Guru (2017: 96) argues that such understanding of Gandhi by Ambekarites should change. He writes, "Ambedkar and Gandhi were both committed to overcome (the) reality (of untouchability) to achieve their conceptions of the ideal, which converged on the unity of the equal worth of every human being" (*Ibid*). Ambedkar saw "affirmative energies", "the tradition of association and affirmation" ("an integral part of Buddhism") and truthfulness in Gandhi (*Ibid* 97-98). Ambedkar converted to Buddhism in later years.

Ambedkar was the Chairman of the Drafting Committee of the Constituent Assembly of India and played a pivotal role in inclusion of reservation system in the Constitution of India. Article 17 of the Indian Constitution bans untouchability.

Reservations are provided for in the Lok Sabha, State Assemblies, educational institutions and government jobs for the Scheduled Castes (SC), Scheduled Tribes (ST) and Other Backward Classes (OBC).

6.2 Indigenous Peoples

Modern international law during its genesis did not recognise indigenous peoples as its subjects. The treaties which were entered with them were not regarded as international treaties. The opinion of States has changed with this regard today. But, indigenous peoples are not considered as "distinct nations". The laws assume that they are "disadvantaged racial minority" or "ethnic group" and their advancement depends on assimilating them in the "mainstream of society" (Kymlicka 1995: 22). The British policies in colonial India on the indigenous peoples attempted to assimilate them into the mainstream society.

Verrier Elwin, an English priest, wrote on tribals in India with specific reference to the Gond tribes. He pointed out that the nationalist movement did not take into account the plight of the tribals (Guha 1996: 2375). After the 1937 elections, Congress governments took notice of the welfare of tribals. Most of the discussions revolved around women and caste, tribals were neglected (*Ibid* 2376). The Mandala Gond women had more freedom than Hindu caste women did because they had autonomy in the household and right to divorce and remarry (*Ibid* 2377).

The civilisational scale did not even consider the indigenous people within its purview. In contrast to the indigenous peoples, the Western civilisation and Hindu caste system had overt "oppression of women, social hierarchy, the spirit of competitiveness, aggression, and sexual repression" (*Ibid* 2377). A V Thakkar established Bhil Seva Mandal to serve the tribal population. He was based in Gujarat. Elwin had a protectionist attitude, as he did not want Indian aboriginals to meet the destiny as that of others in Africa and Australia. He opined that the policies framed by Thakkar were kind of interventionist (*Ibid* 2381). G. S. Ghurye, a Sociologist, researched on Bhils. He thought that rather than using the term aboriginals, backward Hindus is a better term because there are many tribes which migrated from different places and also those which mingled with Hindus and follow Hindu practices (*Ibid* 2385). Ghurye's term can be called homogenisation of Indian society. All sections of society which do not come under the purview of Christianity and Islam cannot be

brought under the umbrella of Hinduism. The legislations of the colonial period brought them under Hinduism.

Indigenous population in Assam was most affected in the colonial era. In the region of Assam, the British used direct or indirect force to recruit labour in tea plantations (Austin 2014: 318). In the pretext of conservation of forests by the British government, the shifting cultivation practised by the tribal people was affected badly (Habib 2010: 135). They cultivated after clearing a forest for few years. When the fertility of the soil decreased, they shifted to another area, and the process continued. Due to restrictions on forest clearance by the government, they could not cut the forests and had to stick to the previously cleared land. They could not afford to till the land with the help of oxen. Hence, the forest legislations of the British government adversely affected the livelihood of the indigenous people.

6.3 Slavery

Scholars have classified slaves in colonial India as agrestic and domestic (Chatterjee 1999: 3). Slaves were considered as symbols of power and dignity (*Ibid* 19). In the 1820s, many slaves of Nizams were impoverished. The British East India Company did not provide a stipend to the heirs of slaves thereby leaving them poorer than their predecessors (*Ibid* 131). After the establishment of English Courts, the English Judges decided the inheritance rights of slaves. There were different inheritance laws under different schools of Islamic law. The English judges were supposed to choose amongst them in various cases, which came before them. In this process of selection, "the English judges and officials in the first half of the nineteenth century may have impeded processes of emancipation and incorporation of the slave-born at one extreme while leaving the larger panoply of masters' authority over slaves intact at another" (*Ibid* 153).

The rivalry between the French, the Dutch, the Portuguese and the British in India is well-known. The strength of the European rivals of the British depended on the number of slaves. Therefore, to check this strength, the British formulated policies regulating slave trade. The Proclamation of English East India Company of July 1789 "forbade Europeans from transferring slaves away from India, arranged for the pilots of such boats to be prosecuted, and offered rewards for information on such transactions" (*Ibid* 180). It prohibited the export of slaves by sea. The Parliament Act

of 1807, legislation against slavery was interpreted by the Governor-General in Council as applicable to the import or "removal of slaves by land" (*Ibid* 183). Regulation X of 1811 was an attempt by the Company to prevent the import of slaves from foreign countries. Clause 5 of this Regulation, made it compulsory for the vessels of other European companies except the British vessels to execute a bond worth Rs. 5000 with the company for unloading cargoes. These legislations by the company were to lessen the strength of other European powers. This is evident from the fact that the records of the Maritime Department mention that in the 1830s the East India Company's ships imported slaves from Africa to India. This shows the difference in standards for the British in India against other European powers. To justify the British position, in 1773, the East India Company published *Hidaya* and *Sirajziya* to prove the public in England that slavery was allowed by the laws in India (*Ibid* 184). In 1860, the Indian penal code prohibited holding and trading of slaves. The non-official records of the early twentieth-century show "that the older patterns of circulation of women and children between various 'domestic' sites continued under the aegis of an expanding rentier aristocracy" (*Ibid* 232).

In 1926, the Slavery Convention was signed by Britain in Geneva under the aegis of the League of Nations. The rationale behind the treaty was the civilising mission prevalent in the nineteenth century (Allain 2008: 6). Article 9 of the Convention empowered the metropolitan States to determine which part of their territory was exempt from the application of the Convention. It is also called the 'colonial clause'. Forced labour was prevalent in India, and the negotiators tried to protect their interests. Colonial India signed the treaty on 18 June 1927.

6.4 Gender Rights

Dianne Otto (2006: 320) traces female subjectivities in international human rights instruments into three viz. the wife and mother who is protected by the head of the household, woman who is equal to man as created by the masculine standard and victim who is created by the coloniser who bears the burden of civilising mission that liberates her from the barbarian men. This is relevant in the context of colonial India wherein the British passed legislations like the Sati Act, Age of Consent Act etc. which manifested the White man's burden to uplift the women in India who according to them were suffering in the past.

The British envisioned a scale of civilisation for women. According to Janaki Nair (1996: 31):

> The colonial State had to perform a delicate balancing act, poised between its aspirations as a paramount power and the respect for Indian "tradition" that was first elaborated by Hastings once British rule was more secure, one of the major planks of cultural legitimation for its continued economic and political domination of India rested on the introduction of a scale of civilisation that hierarchised the position of women in various societies. In any such scale, the women of England easily constituted the top while those of India lagged far behind.

Thus, in the scale of the civilisation of the English world, India was in the lower rung, and Indian women were classified in the lower rung amongst the women in different States. The English judges, Indian liberals and reformers favoured Sastras over the customs. Patriarchy was embedded in the Sastras. Customs were more gender neutral (*Ibid* 34). Practices like matrilineal institutions in Kerala, Devadasi system, etc. were condemned as "un-Hindu practices" (*Ibid* 37).

In the nineteenth century, the status of women was considered correlative to that of the progress of a nation. India was not considered as advanced because of the low status of women. Thus, the Indian woman was projected as similar to the English woman of Victorian age who was capable of managing a home (Chaudhuri 1999: 114).

The bad treatment meted out to Indian women by the Indian men was a reason given by the colonisers to prolong their colonial rule (Liddle and Joshi 1985: WS 75, Kapur 2009: 393). The British did not want to change the social setup drastically so that they could prolong their rule. To achieve this purpose, they sought Indian supporters and one of the ways to gain alliance "was to support and buttress Indian patriarchies, rather than rescue women from them" (Nair 1996: 42). They showed the superiority of their civilisation by enacting laws for the emancipation of women. All the laws they enacted had serious flaws and also, the hidden agenda to continue with colonisation. However, there was the difference in laws between each community and caste. To homogenise this, Warren Hastings issued a ruling according to which all Hindus be bound by the laws of the Brahmins.[22] This put restrictions on lower caste

[22] Various attempts were made by the British to homogenise the laws for easy administration and better understanding. The Act of Settlement of 1781 materialised Hastings idea that Hindu and Muslim laws should deal with matters relating to marriage, succession, caste and all religious

women who earlier had the liberty of divorce, widow remarriage, etc. (Liddle and Joshi 1985: WS 73). The law on restitution of conjugal rights subjected women to the clutches of patriarchy (*Ibid*).

The British colonialists with the support of "male nationalist élite" brought many communities under the umbrella term "Hindu" (Menon 2012: 24). This was continued by the personal laws of Hindus formulated in independent India. The broader purpose of uniformity suppressed many communities which had favourable practices for women. For instance, matriliny in Kerala and Khasi community were turned upside down.

Reforms relating to social evils like Sati which violated the rights of women are narrated in simple terms. Such reforms are also described as blessings of colonialism. There are many vicissitudes to this aspect of social reforms. It is contended by many scholars that the reforms were propagated by men especially belonging to the upper castes and the reform movements were confined to specific regions and castes (Chaudhuri 1999: 118). Strong support of "Indian intelligentsia" to enact laws was inevitable for the British (Sen 2001: 24). In this regard, William Bentinck is given credit for the abolition of Sati, but the elimination of the practice was not possible without the continued participation of Raja Rammohan Roy (Guha 2010: 28). He emphasised that Sati was not supported as a duty by the Hindu religious scriptures.

Arvind Sharma (1988: 13) has done a comprehensive study on Sati. He divides the perceptions of Sati in colonial India into three phases:

> It aroused a wide gamut of reactions ranging from admiration to outright condemnation and abolition. Over the long history of Indo-Western contact, the emphasis shifted. In what has been called the first period–from 4th century B.C. to 1757–the Western reaction was a mix of admiration and criticism. In what has been called the second period–the 1757-1857 period - the reactions of condemnation and prohibition manifested themselves with vigour leading to the abolition of sati in 1829. In what has been called the third period–the post-1857 period–two opposite trends appeared. On the one hand, an approach of broad-based condemnation was developed which used sati as a justification for the perpetuation of British Raj in India. On the

usages and institutions. In 1777 the Supreme Court appointed *Pandits* and *Maulvis* for assisting the judges in dealing with Hindu and Muslim laws respectively. The Cornwallis Code of 1793 appointed *Pandits* and *Maulvis* in District Courts, Provincial Courts and Sadr Dewani Adalat. The appointment of *Pandit* and *Maulvis* ended in 1864 because by then the colonisers were well acquainted with Indian legal system.

other hand, a streak of admiration also reappeared. In this period scholarly investigation into the origin of sati also made considerable headway.

While measuring in the scale of civilisation, the colonisers highlighted one of the practices and projected them as representing the whole society (Nair 1996: 51). Sati was one such custom, and the British pointed out the need to reform it. The British enacted protective laws for women with vested interests. They "had an interest both in maintaining women's subordination and in liberalising it, the former to show that India was not yet fit for self-rule, the latter to confirm Britain's superiority in relations between the sexes" (Liddle and Joshi 1985: WS 73).

Jyotirao Phule advocated widow remarriage. Some of the traditions were granted further support by colonial laws. For instance, the *Karewa* custom of Punjab wherein the widows could remarry. The intention of the laws was to prevent the widows from alienating their property (Nair 1996: 43). There was a restriction on widow remarriage in upper caste. The Hindu Widow Remarriage Act of 1856 did not provide expected results (*Ibid* 62). Ishwar Chandra Vidyasagar conducted widow remarriage with his money and ended up in debt. Widows wanted education and economic independence over remarriage (*Ibid* 63). These needs were not fulfilled, but the focus remained on remarriage.

Widows belonging to lower castes used to remarry. This aspect was hidden by the Widow Remarriage Act which gave the right to upper caste widows. “The process of homogenising the law on the basis of Brahminical tradition resulted in the displacement of the plurality of customary laws, with very serious consequences for the lower castes and tribals” (*Ibid* 66). This kind of “homogenisation and construction of a monolithic image and practice of Indian womanhood persists to this day” (Chaudhuri 1999: 118).

The Age of Consent Act marked the age of girls as 12 years. It prescribed punishment[23] for the consummation of marriage but did not prohibit marriage. In the 1880s and 1890s participation of women in the debates on the age of consent were nil (Nair 1996: 75). When All India Women's Conference was formed in 1927, it followed the debate on child marriage and actively participated in it. In 1927, Har Bilas Sarda introduced a bill in the legislative assembly. She proposed raising the age

[23] Upto ten years imprisonment or transportation for life.

of consent for boys and girls to 18 and 14 respectively. This proposal, later on, became the Child Marriage Restraint Act of 1929.

Colonialism affected the occupations of women drastically (Moosvi 2008: 158). Due to colonialism and the competition from foreign goods, spinning was eliminated. It created new jobs in plantations, mines and factories and required migration from one place to another and hence, women were not able to shift. Therefore, in the national movement spinning wheel was considered as a symbol in support of women (*Ibid*).

In 1919, the ILO adopted the Maternity Protection Convention for the benefit of women workers. The Government of India considered the introduction of maternity benefit legislation to be pre-mature for India because women workers in India continued working even after few hours of delivery. It also cited the pretext of underdeveloped healthcare facilities in India. Since the Government of India did not support the maternity benefit legislation, therefore it was left to the provinces to enact the same.

The labour laws enacted in the nineteenth century were gender neutral and thus, neglected the women employed in various sectors like plantation (Nair 1996: 101). In 1929, a legislation banned the employment of women in underground mines. The Act excluded from its purview, coal and salt mines which were to reduce women employment gradually. The ban was lifted during the Second World War.

The women's movement in colonial India attributed the suppression of women to imperialism and customs "resulting from wars, invasions and imperialism" (Liddle and Joshi 1985: WS75). The All India Women's Conference established in 1927 worked towards freedom from foreign rule and patriarchy.

Women's delegation in India met Montagu, the Secretary of State in 1917 demanding voting rights. The British did not accept the demands because the number of men educated were very less and they estimated the number of women to be lesser. Women in Britain gained voting rights in 1928 and granting of female suffrage to women in India was not possible for them (*Ibid* WS74). The British played the role of protection of women through various legislations, but their liberalisation did not include encouragement of women representatives and female suffrage (*Ibid* WS74).

Finally, the diad of the struggle of women's organisations against patriarchy and foreign rule were gifted with universal adult suffrage in the Indian Constitution. Gandhi's Civil Disobedience Movement in 1931 mobilised the support of women.[24] When the leaders of the movement were arrested, women carried forward the struggle.

In the colonial period there was violation of gender rights with regard to women as well as LGBT community. Ratna Kapur (2009: 385) uses the term "sexual subaltern" because there are many identities which are not covered under the term LGBT. "Heteronormativity" is the term used for resumption that only heterosexuality is normal and homosexuality is abnormal (Menon 2012: 95). Heteronormativity was not a part of ancient Indian tradition as discussed in Chapter II. Due to the influence of colonialism, homophobia was spread to India. This is evident from the inclusion of Section 377 in the Indian Penal Code, 1860 (Vanita 2004: 121). Section 377 of the IPC was included to implement the civilising mission (Kapur 2009: 387). The illegality has been attached to homosexuality in India since the codification of the Indian Penal Code.

The term tolerance was used by the colonialists in the contexts of natives. They considered the natives as intolerant. Later, it was used for promoting religious tolerance. Ratna Kapur (2009: 390) correctly points out that tolerance should not be confined to religion but other aspects like gender.

The repercussions of Section 377 of the Indian Penal Code have been negative on the people of India (Misra 2009: 21). Many same-sex weddings take place in India, and there are reported cases of suicides by same-sex couples (Vanita 2009: 47). In the judgment given by the Delhi High Court in *NAZ Foundation* v. *Government of NCT*, the court held that Section 377 was unconstitutional. The judgment was overruled by the Supreme Court upholding the constitutionality of the Section. Queer groups and NGOs have mobilised public support towards LGBT minority and continue to do so.

[24] It is an undisputed fact that women participated in the Indian national movement and the national leaders encouraged the inclusion of women in the movement. The difference of opinion amongst scholars is over the extent of political participation of women. Indian women participated in many movements against imperialism, suppression of workers and peasants, etc. (Chaudhuri 1999: 123).

Article 16 of the Universal Declaration of Human Rights ensures the right to marry and have a family.[25] Article 26 of the International Covenant on Civil and Political Rights prohibits discrimination on the basis of sexual orientation.[26] LGBT people are discriminated and denied basic human rights in most of the countries of the world. Such violation affects their mental and physical health (Marks 2006: 33).

7. International Law of Diplomacy

The European international law scholars debated on various aspects of the law of diplomacy. Some scholars referred to India in their discussions. The development of the law of diplomacy can be attributed to their writings and ideas. Zouche classified temporary and permanent embassies. For Grotius, permanent embassies were not necessary. Gentili wrote a treatise on diplomacy in 1585 titled *De Legationibus Libri Tres*. His contribution to the law of diplomacy is "in the field of diplomatic immunities" (Alexandrowicz 1967: 187). He discussed diplomatic relations between European nations and European and Islamic nations. He did not discuss India or other nations of his times which practised active diplomacy. In comparison to Gentili, Bynkershoek discussed the diplomacy practised by the French and the Dutch East India companies. He observed that respect given to the envoys in the East Indies was according to the importance of the rulers who sent them (*Ibid* 188). For Vattel, unequal treaties and dependency of a State did not prevent a State from establishing diplomatic relations with other States. He also discussed diplomacy of East India Companies. He mentions that it was incumbent on the envoys to respect the laws of the receiving State, but they were not under the jurisdiction of the judiciary of the receiving State. Martens supported the right of the sovereign to delegate the right to send envoys in the context of East India Companies.

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[25] Article 16 of the UDHR provides: "(1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.
(2) Marriage shall be entered into only with the free and full consent of the intending spouses.
(3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State."

[26] Article 26 of the ICCPR states: "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

The British Government in India had considerable liberty in entering into diplomatic relations with other countries. They had diplomatic relations with Burma, Persia, Afghanistan, Tibet, etc. This was due to reasons like the long distance between Britain and India, the authority in India took its decisions which were not altered every time by the authorities in London and finally, the policies were formulated and implemented by the authorities in Calcutta. But, the ultimate authority lied in the hands of power-holders in London (Mahajan 2002: 31).

All defence proposals from the British Government in India was sent to the joint committee of the India Office and War Office. The proposals thereafter were sent to the Prime Minister for a final decision. After 1902, they were sent for final approval of the Committee of Imperial Defence. Thus, the decisions were finalised by the authorities in London. The expenditure for diplomacy and defence of India was meted out of revenue from India by the British (*Ibid* 32).

There are two aspects of diplomacy in modern India. The first is the diplomatic relations between the British, French, other traders and the rulers of India.[27] Diplomacy between the native States was also prominent. The second aspect deals with the diplomatic relations in the colonial era between the British Raj (as representing India) and other States. Customary principles of international law in colonial India developed due to the diplomatic ties established between the British and the princely States and between the princely States. Initially, diplomacy was conducted by the Europeans to establish commercial relations. Europeans believed in granting of privileges and immunities to diplomats. The embassy of Tipu Sultan sent to France in 1787 was granted privileges. In 1712, the local ruler requested the English East India Company in Madras to stop the Burmese Ambassador from leaving for Bengal. Officials of the company refused because such a step was against the privileges granted under the law of nations (Alexandrowicz 1967: 223). Deviations from the law of nations was visible now and then, but flouting of international laws was manifest after 1858 when the Crown took over the rule from the East India Company.

[27] For instance there was treaty relations between the French and the Sultan of Mysore. The French assisted the Sultan till his downfall in 1799.

A major difference was manifest in the pre-colonial and colonial laws of diplomacy. The rationale of the law of diplomacy in the Mughal era was based on the principle of reciprocity as discussed in the previous chapter. The British rule in India took the foundation of "the new rationality of anarchical-binarism, which reached its zenith with the invention of 'race' understood as coterminous with the nation" (Datta-Ray 2015: 165). Diplomacy was always contemplated with a threat of war, and it transformed to "diplomacy as battle" during the rule of the English East India Company (*Ibid* 166). The negotiations entered by the British were backed by force (*Ibid* 172). Diplomacy in colonial India was militarised because it aimed at conquering the 'other' (*Ibid* 170). The British aimed at colonisation and diplomatic tools were adopted to conquer the native rulers and to seize their sovereignty.[28]

Some of the tactics of the annexation of territory held by native rulers were in the disguise of diplomacy. One of the policies was 'subsidiary system' wherein the government of the East India Company would provide a defence to the native state by allotting a contingent of its army to the native State. The power left to the native States differed from State to State. The English East India Company watched the internal administration even though according to the terms of the treaty it was not granted such power. Gradually, the Company took over the administration of the State under the pretext of "misrule or failure of succession" (Sastri 1953: 150). Thus, there was intervention by the government of the Company in the pretext of diplomacy and treaties. Initially, the Company extended inter-State relations with the native States according to diplomatic practices and international law. Gradually, the Native States were reduced to vassals and protectorates (*Ibid* 151).

Since the advent of the Europeans in India, the European envoys aimed at entering into treaties with the native rulers through negotiations (Alexandrowicz 1967: 185). Gradually, these negotiations changed into coercion with outright rejection of international law. The British government asserted that international law did not apply to the native rulers. This is clear from the Gazette of India published in 1891 (Sastri 1953: 151) which states as follows:

[28] They created some rules like Doctrine of Lapse which forced the native rulers to surrender their territory ultimately to the British. The initial process of treaty making in this doctrine was diplomatic, but later it adopted the garb of conquest.

> The principles of International Law have no bearing upon the relations between the Government of India, as representing the Queen-Empress on the one hand and the Native States under the suzerainty of Her Majesty on the other. The paramount supremacy of the former presupposes and implies the subordination of the latter.

Diplomacy was gradually taken over by the British from the hands of the Mughals. They cut off the relations between Marathas and Mughals, prevented Sikhs and Jats from contact with Delhi so that they don't ascend the throne (Panikkar 1968). They also appeased the Rajputs from showing allegiance to the Mughals.

7.1 Diplomacy as a Tool to Protect the Frontiers of the Empire

India was the most important colony of British Empire. India played a major role in determining the foreign policy of Britain. Napoleon considered India as an important part of Britain even though only Orissa, Bengal and Bihar were conquered by then. He tried to weaken the British control over India. Considering this as a threat Britain sent diplomatic missions to Punjab, Muscat, Sind, Persia and Afghanistan (Mahajan 2002: 6). French controlled Pondicherry. But the French were considered as a threat by the English because of their ambitious annexation in South Asia (*Ibid* 11). Britain considered Russia as a threat as the latter was presumed to conquer India given a chance. Hence, the British tried to protect the routes to India by preventing Russia from expanding south towards the Persian Gulf. Hence, the British tried protecting the Ottoman Empire (*Ibid* 49). The administration of British Empire which took care of the foreign policy as the government of India, the India Office, Foreign Office and the War Office all were vigilant about the steps taken by Russia (*Ibid* 14). Construction of railways in Central Asia by Russia was a threat to India. The Russian-British rivalry in Central Asia in the nineteenth century is christened 'the Great Game'.

Gladstone, the British Prime Minister, also followed the principle of protectionism. He believed in protecting the imperial possession out of which India was the most significant (*Ibid* 59). The relationship between Britain and France was disturbed after Britain occupied Egypt in 1882 under the aegis of Gladstone (*Ibid* 63). The purpose of conquest was to protect the route to India which was in danger according to the War Office, India Office and the Admiralty. The Pamirs Delimitation Agreement, 1895 between Britain and Russia drew lines between the Russian territory in Central Asia and Britain in such a manner that there was no continuity of the Russian territory with the British territory in India.

Britain maintained diplomatic relations to prevent aggression from powerful States and to protect India. From 1902-1907, Germany was wielding great power in Europe. Due to fear of Germany, Britain preferred maintaining peaceful relation with Russia and France (*Ibid* 166). The diplomatic office at Tehran was under the control of India Office. Britain maintained diplomatic relations with Persia because of the Russian threat to India and Persia was on the way to India.

From 1886 to 1892, Robert Gascoyne Cecil was the Prime Minister of Britain. He dealt with the foreign affairs portfolio. The British tried to appease Russia through diplomacy so that the Indian Empire can be protected. They also tried to make Germany an ally. But, Bismarck was sceptical about the alliance. War against Russia was finally avoided. The establishment of diplomatic ties between Burma and France became one of the reasons for Britain to annex Burma (*Ibid* 86). British thus, not only wanted to protect the Indian Empire but also the neighbouring regions.

7.2 Embassies in Colonial India

The residency system in India exemplified indirect rule, and it was applied to other parts of the British Empire in Southeast Asia and Africa (Fisher 1984: 422). The East India Company appointed Residents[29] in each court who dealt with the diplomatic communications (Datta-Ray 2015: 189). The residents were appointed on the basis of treaties between the company and the native rulers. The trend began after the Battle of Buxar in 1764. A resident was appointed in the Nawab of Bengal, Mir Jafar's Court through a treaty signed in 1763. Some rulers considered the East India Company to be equally sovereign to them or inferior to them. Hence, they demanded control over the residents in their courts (Fisher 1984: 401). Hence, there was the role of diplomacy in the appointment of residents initially. Later, the residency system was turned into an indirect rule.

In the sixteenth century, permanent embassies were established in Europe. At the end of the eighteenth century, permanent embassies were established in India (Alexandrowicz 1967: 202). In 1793, the Company began signing treaties with different courts to appoint Residents. About 55 states agreed to the treaty. Due to the widespread network of residency system, the British government realised the need to

[29] The term ‘resident' was used for an envoy because he resided in the receiving State. The nomenclature continued to be used until the end of the eighteenth century.

control the residents (Fisher 1984: 417). Therefore, the Governor General in Calcutta controlled the major residencies leaving others to the Presidencies of Bombay and Madras. There was inter-communication between the residents in different courts. *Dak* or a special postal system was established for communication amongst the residents.

In the beginning of Euro-Indian relations, there are instances in which European men were envoys of the Indian rulers (Alexandrowicz 1967: 203-204). John Morrison was an officer in the English East India Company. He first worked as the commander in chief of the Mughal army. He was despatched as an ambassador by the Mughal Emperor to King George III. Jodhpur and Jaipur had British dewans or chief ministers twenty years before 1947 (Rudolph and Rudolph 1966: 140). Similarly, the European powers sent Brahmins as envoys to Indian courts. They were believed to carry their duties in a better manner compared to the European envoys. Thus, a multicivilisational approach to diplomacy can be seen here wherein Europeans acted for Indian rulers, and the Indians represented the Europeans in Indian courts. Even though such representation was due to cultural barriers but at the same time, this exchange bridged the cultural gaps.

In 1830, the Mughal Emperor sent Raja Rammohan Roy to England as his diplomat for increasing his allowances. Roy stayed in London from 1831 to 1833. He met the King of England and the officials of the East India Company. He appeased the British government to increase the allowances of the Mughal Emperor by £30,000 a year.

In the later nineteenth century, Russia desired direct communication with India by the establishment of a consulate (Mahajan 2002: 126). The government of India was suspicious of Russia sending its secret agents in India. The reason given for the rejection of consulate was the lack of trade between India and Russia. In 1890, Nikolai Alexandrovich Romanov (heir of the Russian Empire) visited India. The Governor of Bombay welcomed him. To appease Russia, a consulate was established in Bombay in 1900. The Government of India did not support the move and watched each move of Russia (*Ibid* 126).

Some rulers were reluctant to encourage the entry of foreigners in the territory. Major James Rennel, an official of the English East India Company, acquired

information on the borders of Ahom territory in Assam. He could not go into detail because the ruler did not grant him permission to enter the territory ruled by him (Goswami 2012: 12).

At the end of the eighteenth century, permanent embassies were established among the Indian rulers and the English East India Company. Therefore, the foreign office in India was improvised by Lord Curzon with assistance provided by the "archivists, docketeers, typists, stenographers, printers and binders" (Ruthnaswamy 1954: 24). By the beginning of the twentieth century, the foreign office had turned into an established government department with permanent head called Under-Secretary, heads of divisions namely, Assistant Secretaries and heads of sections called Principals. Clerks, typists and other personnel were appointed in the office. The Under-Secretary was transferred only as Ambassador to a first class embassy. He played a pivotal role in the formation of foreign policy. A well-experienced person was selected for the post.

7.3 Diplomacy between the British and the Princely States

Many rulers during the 1857 war of independence supported the British government and helped in the suppression of war. The Sindhia of Gwalior was firm in allegiance to the British. Despite his army joining the war, the Holkar of Indore was loyal to the British government. The Rajput rulers, the ruler of Kashmir, Sikh chiefs of Punjab supported the British. Nepal ruler sent his military to help British suppress the uprising in Oudh. Most of the native rulers joined the British side. Bhupen Qanungo (1967: 254) cites the following reasons for such an alliance:

> The Native rulers generally did not join the Mutiny, either because they were able to guess from the first to which side ultimate victory would go, or they were aware of their military impotence, or were too jealous or hateful of each other to combine against the Paramount Power, or they listened to the timely persuasions of able ministers and British agents at their capitals.

In the Queen's Proclamation of 1858, the monarch extends a hand of friendship and cordial diplomatic relationship with the native rulers. The second paragraph of the proclamation states, "we desire no extension of Our present territorial Possessions". The British changed their policy of annexation after 1857. The British "ceased to augment British territory at the cost of the Native States" (*Ibid* 256). The ruler of princely State of Dhar was allowed to adopt an heir namely, Bala Sahib. The ruler

died of cholera, and the ruler's relatives were suspected to support the 1857 war. A troop of the princely State was against the British. The EIC government withdrew the succession of Bala Sahib and annexed the territory of Dhar. In June 1858, the Home Government approved the succession of Bala Sahib and gave the territory back to the Prince. The reason cited was that the government cannot expect a weak State to control its rebelling army when the powerful Princely States in India, as well as the British Government itself, was not able to control the rebel armies (*Ibid* 256). The rulers of Patiala, Jhind and Nabha submitted a request to the Government of India in February 1858 for approval of the adoption of heirs. The three rulers had supported the British by supplying arms, ammunitions and food during the 1857 war. Following the practices of the pre-1858 government (based on the doctrine of lapse), the Government of India rejected their petition. The Home Government was disappointed with the decision because of the support provided by these rulers in the 1857 war. Hence, it insisted the Government of India accept their request. This instance shows the change in policies of the Home government towards the native rulers, especially towards those who supported the government during 1857 war. On November 3, 1859, Lord Canning conducted a durbar in Kanpur wherein he granted the right to adopt to various native rulers like the rulers of Rewa, Charkhari, etc. who were on the British side in 1857. With regard to the change in the policy of the British government, Qanungo (1967: 261) makes following observation:

> The Home Government agreed with the Government of India that, not expansion, but consolidation and development of the area already under British rule, should be the object of British territorial policy in India; and that to promote this object the relation between the Paramount Power and the Native States should be based on friendly goodwill.

The British government's policy was to protect the territory it possessed. For continuation of the colonial rule, it adopted diplomacy with the native States. At the same time, the native rulers also wanted to protect their territories not only for themselves but also for the next generations to come. They took approval of the British government for adoption of heirs thus showing allegiance to the paramountcy of the British. Thus, the rulers wanted to protect their hold over territories, and the sufferings of people due to colonisation was not a concern at all. The "legal effect of Canning's adoption *sanads* was to emphasize the power of the Government of India in matters relating to life and death of every Native State" (*Ibid* 264). Lord Canning,

while granting permission of adoption, clarified that "disloyalty and misgovernment" will not be tolerated and these will lead to the annexation of the Native States (*Ibid* 265). There are instances when the Princes were dethroned on the pretext of disloyalty or misrule[30]. The native States did not have the power to directly contact the British government in Calcutta, but they could communicate only through the residents in their respective courts (Das 1949: 62). Even if two Native States had common interests they could not club them together and approach the British government, they had to consult separately (*Ibid*). In the international scenario, they were non-entities once they recognised the Paramount Power (Westlake as quoted in Das 1949: 62).

7.4 Conduct of Diplomacy

One of the senior residents of the English in Indian Courts, states that two pathways to be a part of English diplomacy in India were commerce and medicine (Fisher 1984: 414). Indian rulers considered the allopathic medicine as a high form of cure for many diseases. Many native rulers welcomed surgeons. A similar reference is made in chapter III with regard to Shah Jahan.

The diplomatic practices of Indian rulers was quite different from that of the Europeans. The Maratha diplomacy, till the eighteenth century, was largely influenced by “Kautilyan tradition” (Alexandrowicz 1967: 191). Foreign ambassadors were given equal treatment with native envoys “as a matter of customary law” (*Ibid* 217).

The British considered the gifts given by Indian rulers as bribery (Datta-Ray 2015: 185). The Regulating Act, 1773 prohibited the East India Company officials from accepting land, money and jewels from Indians. Warren Hastings wanted the gifts to be of English style. Nawab of Awadh, Asaf ud-Daula’s portrait was drawn by an English painter. The Nawab did not like the fact that the English were imposing their style of gifts. Therefore, Asaf ud-Daula left Hastings astonished by gifting horses, elephants and robes. Not allowing native rulers to follow their style of diplomacy was “surveillance to an unprecedented scale” (*Ibid* 187).

[30] Maharaja of Nabha was dethroned on the pretext of misgovernance in his State.

The British tried to win Indian rulers' minds by giving those titles like Nawab and Maharaj. This was a continuity of Mughal diplomacy. The British believed such conferring of titles would give legitimacy to their ruler (McLeod 1994: 238). Such conferment with the new nomenclature of titles increased after the 1857 war of independence. Amongst the titles so conferred, *Star of India*, introduced by Lord Canning was considered as the supreme in the hierarchy of titles. Usually, the titles were given to men except in two cases wherein it was conferred to women rulers.[31] In the decision to grant honours, the residents played a crucial role. They recommended the names of the native rulers which was sieved through various stages of adding up and subtracting from the list. The rationale behind earning honours on the part of Indian Princes was to keep the honour or *izzat* of their royal family (*Ibid* 241). In the later period, the British expected the Indian Princes to suppress India's freedom struggle, but they did not budge (*Ibid* 247).

In the later colonial period, Mahatma Gandhi's ideas of *dharma* influenced the practice of diplomacy. He often quoted the *Mahabharata*. He relied upon *Bhagvad Gita* and understood the means to preserve the world. Therefore, he avoided the violence which is described in *Mahabharata* (Dattaa-Ray 2015: 201). Gandhi classified violence into two categories viz. "aggressive violence and resistance". Gandhi's resistance towards the British rule was reciprocated with "sympathy" and did not impose "modernity" further (*Ibid* 202-203). He used the process of *satyagraha* to get his demands fulfilled from the British. Gandhi used passive resistance i.e. not cooperating with the ruler (Ishay 2004: 42).

7.5 The Institution of Espionage

Indian rulers did not abjure from appointing *Akbar Nawis*, but the Company's aim was to keep a check and have access to the diplomatic communications of native rulers through the appointment of residents (Datta-Ray 2015: 190). Initially, the residents acted as diplomats "than as agents exercising indirect rule" (Fisher 1984: 401). The government ordered the residents to keep a distance from the local affairs of their receiving State but their diplomatic strategies aimed at making the native ruler dependent on the Company and to facilitate the use of the State's resources for the benefit of the Company (*Ibid* 420).

[31] Maharani of Dhar and Rani of Gangpur were given the honours.

Each Resident under the East India Company appointed an intelligence service and intelligence office. In 1795, a Poona Court did not support the appointment of a Resident. The locals knew about the intelligence network under the Resident. The East India Company insisted on the appointment because rejection by one ruler would lead to rejection by other native rulers (Datta-Ray 2015: 183). Intelligence was the backbone of British diplomacy because they used "diplomacy-as-battle" (*Ibid* 181).

During the times of Warren Hastings, an agent was appointed to the Mughal Court to indicate the recognition of the Mughal ruler. For Hastings, the real aim of the appointment was to obtain information from the court (Kemal 2012: 110). The East India Company collected reports from all news writers in different courts. East India Company tried to convert Indo-Mughals in its service to modernity, but they turned out to be ‘hybrids' who had opposite views too (Datta-Ray 2015: 188). Hence, they reported what was suitable for them. There was an element of untrustworthiness against Indians since the times of first English diplomatic envoy in India (*Ibid* 188). During the period of conflict of sovereignties between the Company and the Crown, King George III despatched an envoy namely Commodore Linday to the Mughal Court without consultation of the Company (Kemal 2012: 107). Indo-Mughals did realise at some point that Residents were appointed by EIC just to get rid of them and their power shortly (Datta-Ray 2015: 189).

The British could not establish their rule without the help of native middle-men. *Munshis* were proficient in English and Persian who helped the Empire to spread its tentacles of colonialism and imperialism. Establishment of strong intelligence service and the support of native middle-men assisted in the sustenance of British Empire.

8. International Humanitarian Law

“In our world, war is called competition and police action, violence has taken a lawful, humane, civilised form, nesting everywhere and nowhere, linked to any number of ends but not to a supreme end.” (Douzinas 2006: 54). The principles of international humanitarian law have tried to minimise the atrocities of war, but war keeps lingering in international relations.

The modern international humanitarian law originated in Europe to exclude the colonised. The colonisers opined that the uncivilised people were not eligible to be protected by international humanitarian law because of their incapacity to comprehend IHL and to restrain from warfare (Mégret 2006: 289). Historically, laws of war were "instruments of forced socialization of non-Western nations into the international community, one whereby non-Western peoples have been called to wage war on the West's terms, by adopting Western military mores" (*Ibid* 308). IHL shed itself of its "racial overtones" after the Second World War. Before the war, it was "a project of Western ideological expansion" (*Ibid* 268).

In 1876, King Leopold II of Belgium organised a conference in Brussels which was the beginning of the Scramble for Africa. In the same year, International Committee for the Relief of Military Wounded was formed. Hague Convention was held in 1899, twenty years after the complete colonisation of Africa by Europe. Henry Dunant was aggrieved by the Battle of Solferino. Hague Conferences took into account Franco-Prussian war. These instances prove the Eurocentric past of modern IHL (*Ibid* 270). The *travaux préparatories* of the 1899 Conference shows that the delegates had a tacit understanding that absence from the conference meant exclusion as far as the non-Europeans were concerned (*Ibid* 285). Due to their non-participation, it was assumed by the colonialists that reciprocity cannot be expected from them (*Ibid* 294). The Declaration of 1899 prohibited "expanding bullets on the ground". The British refused to sign it because they considered it necessary to control Asian and African tribes (*Ibid* 271). The exclusion of savages and uncivilised from the purview of IHL was reflected in the formulation of IHL (*Ibid* 284). Even if they were brought under the purview of some aspects of IHL, it was clarified that such inclusion does not mean they had changed to civilised (*Ibid* 282). Later on, many barriers were crossed for the 'other' to be brought under the ambit of IHL:

> If the non-participation of certain 'territories' in international humanitarian treaties, an 'anthropology of difference' and an insistence on reciprocity were the three pillars of exclusion of 'savage' peoples, then the effective challenging of these three is what in due course brought all under the protection of the laws of war.

Modern IHL was largely influenced by Henry Dunant and Francis Lieber. Henry Dunant envisaged a convention and an organisation to deal with the IHL aspects. The Convention took the shape of Geneva Convention of 1864, and the

Organisation took the form of the International Committee of the Red Cross. Dunant "in his early years, was himself a colonialist and a colonizer" (*Ibid* 272). He was a businessman who had prospects in Algeria. He made a fortune by exploiting mines, forests, and mills in Algeria.

Frédéric Mégret (2006: 274) attributes the genesis of IHL to the contradictions of colonialism:

> It was in the nature of colonialism as a historical venture, furthermore, to be deeply split between racism and universalism, greed and disinterestedness, exploitation and humanitarianism. The right way to understand the exclusion of non-European peoples from the laws of war, therefore, is not simply as an outgrowth of colonialism: rather it is a consequence of colonialism's contradictions and inner tensions.

In the colonial period, the rules of warfare were clearly laid down which prescribed the treatment of prisoners of war, distinguished between combatants and civilians, etc. due to the development of instruments on IHL (Singh 1984: 250). But, the colonisers applied the principles of IHL while waging war among themselves. International law did not consider the colonised as its subjects and hence, IHL was not applied while conquering them or waging a war against them. Invasion of a country was usually a reaction to war whereas conquering a country which was uncivilised or barbarian according to Europeans was a "punitive expedition" (Anand 1986: 26).

The Crown granted power to maintain to the East India Company. The army was used by the Company to conquer Indian Territory from 1757 to 1818. Indian Princes followed the rules of warfare while fighting with the colonisers. These principles were peculiar to the Indian civilisation (Patel 2012: 514). After 1700, the English resorted to arms rather than diplomatic means as in the initial period of their commercial relations with India (Krishna 1987: 140).

IHL has excluded from its purview one set of people or the other. It differentiates between combatants and non-combatants. Combatants are a belligerent State's army. Due to the complexity and asymmetry of war in the present era, many entities are still not brought under the purview of IHL. For instance, the private contractors in war. Modern IHL needs to keep pace with the developments which are beyond the nation-State system.

8.1 Doctrine of War in Europe

The doctrine of war as envisaged by the colonisers is based on the opinion of scholars in Europe in the modern times. Coming to the practical aspect of the war in the colonies, the colonisers flouted the rules on the pretext of civilisation. The doctrine of just war was for the first time discussed in the writings of Augustine. A war was justified if it was waged due to a "wrong suffered" (Nawaz 1964: 84). Thomas Aquinas enumerates the conditions to wage a just war viz. it should be waged by the Prince or legitimate authority, it should have a just cause and the parties to the war must have a right intention (Preiser 2012: 883). Vitoria had a different point of view; for him, propagation of religion and aggrandisement of Empire were not just causes to wage war (Nawaz 1964: 85). For Alberico Gentili war was just for belligerents (*Ibid* 86). Hugo Grotius also agreed that war should be waged on the basis of just causes and it could be just for both parties to the war (*Ibid* 86). David Kennedy (2006: 144) opines that the doctrine of just war fomented wars "by de-legitimising the enemy and justifying the cause". In the nineteenth and initial twentieth centuries, international law was governed by the formula "might is right". This was the zenith of colonisation, and international law was primarily Eurocentric (Nawaz 1964: 87). The bifurcation of just and unjust wars was not applied. Also, the applicability of the natural law to statecraft was doubted by the nation States (Kennedy 2006: 144).

Hugo Grotius did not express dissent against preventive war. Perhaps, he was in favour of waging a preventive war even in the absence of a just cause (Duchhardt 2012: 636). The preventive war led to intervention in the affairs of another State. After the Congress of Vienna of 1815, intervention in the affairs of other States (especially debtor States) was considered necessary to protect European interests (*Ibid* 660).

The silence of the nineteenth century was broken by the formulation of the modern law of war in the twentieth century by an emphasis on institutions. War was regulated by institutions (Kennedy 2006: 144). The disappointing aspect in the recent past is “What began as an institutional effort to monopolize force became a constitutional regime to legitimate justifications for warfare” (*Ibid* 145).

8.2 Indian Army under the British

The Indian rulers did not finance their army well. Being a trading company, the military expenditure approved was very less. Hence, the company concentrated on developing a well-disciplined and regularly paid infantry which was a strong force against the Indian cavalry (Rothermund 1988: 18). Natives outnumbered the Europeans in British Army in India between 1793 to 1830 (Malcolm 2012: 193). Europeans were recruited in cavalry wherein there was a requirement of fewer soldiers and the risk was also less in comparison to infantry (*Ibid* 194). The period of service of Europeans was ten to fifteen years whereas that of native Indians extended to twenty years or more (*Ibid* 197). Here also we can see discrimination between the European soldiers and Indian soldiers in the British Army. After the 1857 war of independence, the ratio of British personnel in the army was increased. It was 1:2 in Bengal Army and 1:3 in Bombay and Madras armies.

The recruitment of military personnel from Britain was more than the appointment of civil servants[32] (Fisher 1984: 408). In the nineteenth century, the Indian army was one of the largest in the world. A large part of revenue was consumed by wars. Hence, there was no reinvestment in India rather the revenue was used to sustain the army (Datta-Ray 2015: 168). British invested in the army to keep it ready for war due to insecurity the Empire faced (*Ibid* 169).

An integral part of Indian Army during the period of colonisation was that of non-combatants comprising of traders, servants, artisans, soldiers' families, etc. which accompanied the army to war (Farwell 1989: 35). There were religious instructors for separate regiments viz. Granthis for Sikhs, Maulvis for Muslims and Pandits for Hindus (*Ibid* 36). There were military hospitals also. Extra emoluments were granted to the soldiers in case they had to fight beyond British territory. The extra emoluments were ceased once the said territory was annexed by the British. About 4500 British and Indian troops fought the first Afghan war (1839-42). British waged war against Sikh in 1845-46 and 1848-49. Kitchener opined that Indian Army was not formed to fight against the Indians but to protect from Russian and Afghan invasion from the North-West frontier, the instruction, organisation and operation of Indian army were

[32]. The reason behind such appointments is that military officials were to be paid less than the civil servants. These officials did the job of civil officials.

to remain same whether be it war or peace, the secondary purpose of the army was to maintain internal security. The training of troops was to aim at protecting the North-West Frontier (*Ibid* 216).

In Madras, British law was applicable and hence, in 1642 first battalion of East India Company's army was established (Lawford 1978: 24). This unit was continued in the form of the Madras European Battalion, the Madras Fusiliers and finally, the Royal Dublin Fusiliers.

The British used Indian troops for the World Wars to fight on her behalf.[33] Too much expenditure on the military was incurred during the British rule. During the First World War, in 1913-1914, 3065 lakhs of rupees was spent on the military. The Brussels Conference report (1920: 100) terms it as unproductive extraordinary expenditure. After the First World War, the expenses shot up to 8738 lakhs rupees in 1920-21. About 53,000 Indian soldiers died fighting the war and many were injured (Garton 2014: 155). Due to racism, the British were concerned whether Indian troops can be despatched to fight Europeans. Therefore, they were sent to Africa and Middle East (*Ibid* 160).

Indians supported Britain in the hope that India will be granted independence (Gerwarth and Manela 2014: 10). Mahatma Gandhi also encouraged Indians to stand with Britain in the First World War. Since the British did not meet the demands of Indians after the war, it triggered nationalism[34] (Garton 2014: 154). Indian troops helped the British and her allies win the Second World War also. The victory does not highlight the loss suffered by Indians. After the fall of Singapore, one hundred and thirty thousand soldiers of the British, Australian and Indian troops were captivated as prisoners of war. This number was forty times that of casualties.

8.3 Violations of IHL

8.3.1 The Rule of Warren Hastings

The indictment against Hastings was that of unjust war against the Rohillas. An instance of so-called punitive action by Hastings in association with the Nawab of

[33] Manpower supplied by India for the First World War was approximately 1.4 million men upto December 1919.

[34] The Montagu-Chelmsford Reforms of 1918 granted limited self-government but did not granted the expected self-determination. The Rowlatt Act of 1919 granted vast police powers to suppress terrorism.

Awadh was the First Rohilla[35] the war in 1773-1774. The alliance between the Nawab and Hastings was to achieve political aims of the Nawab. Hastings justified his actions by stating that the Rohillas were a threat to the British Empire.

Even though Warren Hastings encouraged the recognition of native laws, he argued in his trial that the natives were in "perpetual conflict" with the State. Hence, he waged war against the native rulers as a punitive action because of their rebellious attitude. He justified the use of force as inevitable for the very existence of the colonial State (Mukherjee 2010: 17-18). He emphasised on the extra-legal nature of war.

Ironically, Edmund Burke who was arguing against Hastings pointed out that war cannot be waged against the native rulers as a punishment because the Mughals and the Hindu rulers had their legal systems "far more advanced than those in England and Europe" (*Ibid* 20). There was no permanent "rebellious population" (*Ibid* 19). Burke argued that the instances of rebellion in India were provoked by the policies of Hastings and the East India Company (*Ibid* 27). The peasant uprisings in Rangpur and Dinajpur were due to the exploitative nature of revenue extraction. Thus, according to Burke, the rebellions were for "the preservation of life and property", therefore, "they were just, legal, and legitimate" (*Ibid* 28).[36] He understood that the sustenance of Empire depends on the prevention of rebellion with appeasement policies. Nevertheless, in the narration of colonial history, the archive of land relations focussed on revenue and peasant rebellion was interpreted as crime (law and order) (Pandey 2014: 4).

8.3.2 First War of Independence

There were many causes which led to the 1857 war of independence. The main cause of the war was the domination of a large number of Indian soldiers by the British officers, and they realised that they had numerical strength over their superiors (Said

[35] Rohillas were the Afghan highlanders who resided in Rohilkhand.

[36] Thinkers like James Mill believed that the English East India Company had absolute power over the natives and hence, they could punish the natives in the way it deemed fir (Mukherjee 2010: 61). The difference between Burke and his contemporary international lawyers was that Burke advocated the right of the natives to resist. Here Burke had a political motive to achieve. The trial was to control the untrammelled power of the Company in India. It had to show that the British Parliament has power over India and India is a part of the British Empire. While achieving his political motive, by arguing in the case against Hastings, he upheld naturalism over positivism in international law. This needs to be appreciated.

1993: 177). Edward Said (*Ibid*) points out that the 1857 war was a symbol of nationalism for Indians but according to Edward Thompson in *The Other Side of the Medal* written in 1925 described that the war clearly demarcated the opposition between Indians and British.

The reason for the 1857 war is attributed to the use of greased cartridges comprising of cow's and pig's fat. The 1857 war commenced from Meerut. Those who refused to use the cartridges were awarded a sentence of ten years of rigorous imprisonment and paraded in front of other soldiers. The other soldiers mutinied, set free the prisoners and marched to Delhi wherein other regiments also joined them (Farwell 1989: 40).

The impact of 1857 war was pervasive. It affected many policies of the British towards India. The British attitude towards Indians was of suspicion. On this pretext, the British annexed some of the native States. The annexation of State of Dhar was done on "charge of rebellion in 1857" (Qanungo 1967: 251). Delhi was annexed and Bahadur Shah, the Mughal ruler, was tried and transported for life for the offence of treason against the British government. The British had no right to try the Mughal (*Ibid* 254). The estimated death of Indians is said to be about a lakh but Amresh Misra (2007) estimates death of ten million between 1857 and 1867.

8.3.3 Indian Freedom Struggle

Indian resistance against colonialism led to the suppression of voice raised against the British. They did not follow any principle of international humanitarian law while killing 307 and injuring 1200 people in Jallianwala Bagh Massacre in Punjab. The Jallianwala Bagh had a single entrance which was closed by the British and then, the gathering was fired. Many were killed in the shooting whereas many others jumped into the well to save themselves, ultimately succumbing to death. The protesters included women, children and aged. They were civilians who were unarmed and had the sole intention of resisting the oppressive British rule. They had gathered to protest against the Rowlatt Act. It was a draconian law which empowered the British to arrest without warrant, imprison without a trial, conduct a special trial without a jury. The in-charge of the attack, General Dyer, was not punished for the atrocity. It was a clear violation of international humanitarian laws which were very well framed by then. It was an attack on the civilians, killing of aged, women and children, the protesters

were peaceful and unarmed, they did not pose any threat to the British. General Dyer assumed a situation of threat from the gathering and fired the protesters.[37]

After the Jallainwala Bagh Massacre, Gandhi condemned the attack and stressed the need for non-violence despite the atrocities committed by the British. Gandhi emphasised the significance of passive resistance and opined that it is a soul-force which is more powerful than the resort to arms (Quoted from Hind Swaraj, Guha 2010: 154). Body-force leads to resort to arms. Thus, he highlighted the importance of non-violence in modern times. Gandhi further says (The Hindu: 13 August 1920):

> I think that the ancients of India, after centuries of experience, have found out that the true thing for any human being on earth is not justice based on violence but justice based on the sacrifice of self, justice based on *yajna* and *kurbane*.

Guha (2010:159) opines that the use of Sanskrit and Urdu word denotes the urgency of Hindu-Muslim unity. Gandhi also opines that India should hail non-violence and if it does not do so, then it is a doomed country (Amrita Bazaar Patrika, 15 August 1925).

9. International Trade Law

For the Europeans, the Orient was not only an area of trade but was "culturally, intellectually, spiritually outside Europe and European civilisation" (Said 1978: 71). Most of the treaties entered with non-Europeans had a provision of the right to trade (Anghie 2004: 72). The provisions granting rights were accepted by the Europeans, but they did not concede to the obligations arising out of treaties with the non-Europeans (*Ibid* 80). Since trade was the primary aim of the Europeans, the governance of colonies was encouraged to the extent trade was allowed to be conducted or not (*Ibid* 252).

Colonisation commenced with the help of trading companies. Tripartite powers were granted to the trading companies. They wielded power to carry trade,

[37] Even though a direct application of IHL cannot be made in this case because IHL is applied in armed conflicts. Since there is a nexus between humanitarian laws and human rights we cannot overlook the application of IHL here. In the words of Judge Nagendra Singh (1982: 86), "humanitarian laws are all based on the concept of human rights projected to cover the vital field of armed conflicts, and it is in this special sphere that the future of the world hinges."

enter into peace treaties and declare war and to mint money (*Ibid* 68). Brijen K. Gupta (1962: 32) opines that there was "an uneasy alliance" between the English East India Company and Indian traders, bankers, rich people to increase their profits. They allowed the portals of colonisation to open. Traders were powerful enough to influence the foreign policies of State. In this case, the connection between Indian traders with Europe is evident. Initially, the traders were interested in foreign trade. Gradually, their trade was suppressed by the Europeans to such an extent that it affected not only the traders but also the artisans, weavers, etc. who were the foundation of the products manufactured in India.

Colonialism spread capitalism to its colonies according to Marx (Austin 2014: 301). The economic fabric of the self-sufficient villages was destroyed by capitalism. Nehru opines that "colonial laissez-faire had retarded Indian development" (*Ibid* 336). It was an obstacle to the industrialisation of the colonies. Manufactured goods were supplied by the West and raw materials for those products were exported from the colonies (*Ibid* 302). Artisans and weavers were impoverished because they could not compete with the large-scale, low-cost products of Britain. In the seventeenth century, Indian exports to England were perceived as a threat to the industry of England. Therefore, in 1700, the British Parliament put absolute restrictions on import of dyed and printed cloth from Asia (Robins 2002: 82). This led to deindustrialisation of India. It led to the destruction of Indian handicrafts and textile industry (Dutt 1904: 162). Thus, India became a raw material exporting country from a manufacturing country (Habib 2006: 31).

Bengal was exploited to a large extent. The revenue earned from Bengal was indirectly invested in the industries in England which played a pivotal role in the advent of industrial revolution there (Rothermund 1988: 18). India was looted in many ways by the British. The prosperity of England is attributed to the plunder of India (Digby 2012: 83). In the era of Company's rule itself, Robert Clive transferred £2.5 million into the Company after the conquest of Bengal (Tharoor 2016: 5). Moreover, in the beginning of the Crown's rule, the exports from India exceeded far more than the imports (Dutt 1904: 343). India was a source of coins to the British (Digby 2012: 80). Coins were the basis of issuing notes. Money was imperative to England to establish its superiority in Europe itself. The spinning industry of England

depended on the supply from Bengal and Carnatic (*Ibid* 81). Being a major chunk of Empire, British priority was to protect India. Therefore, they protected the routes and at the same time, maintained diplomatic relations with Europe (Mahajan 2002: 32).

Dadabhai Naoroji argues that the excessive drainage of wealth to Britain led to the incessant poverty of Indians in his book *Poverty and Un-British Rule in India*, published in 1906. "The debates in the legislature confirmed the feeling in India that in economic matters Britain had never dealt fairly with India and had used her political power to keep India in a state of economic subjection" (Mahajan 1982: 236).

British were not concerned with the food grains. They encouraged the planting of cash crops. Their aim was profit. Tea cultivation and research on tea plantation reached its zenith during the era of Lord William Bentinck. He annexed Coorg, Cachar and Mysore keeping in view the areas fertile for tea plantation. In Assam, while expanding tea cultivation, coal and oil were also discovered. Diplomacy was applied to obtain tea from nearby regions. Profit was envisaged in the tea trade. British wanted to annex Assam for tea plantation (Gupta 2012: 306). British relations with China were not good, and hence, there was a need to explore new sources of tea production. Sir Joseph Banks researched on areas wherein tea could be planted in India. Amiable relation with Sikkim, Nepal, Bhutan was significant with regard to this. Lord Amherst was sent to China to improve diplomatic relations but in vain. Sir Joseph Banks' research was carried on by Gardner, the British Resident of Nepal and others in Kashmir, Ladakh, and Rangpur. This was done under the guidance of Warren Hastings. During the end of his tenure, tea was obtained from Nepal. He was succeeded by Lord Amherst who was acquainted with the north-eastern region. Northern Assam attached to the Chinese region was discovered to be good for tea plantation. Major R. Bruce gifted a Snuff Box to the Singpho Chief in Jorhat because he gave two tea plants to the latter. He also signed a treaty with Bruce to provide tea plants in future. He is known for the discovery of tea plants in Assam. The First Burmese War and the consequent Treaty of Yandabo[38] clarified that the Burmese cannot interfere in Assam any more. The political chaos in Assam after the war and insecurity of Burmese interference again in Assam prevented the East India Company

[38] Entered in 1826, Article II o the treaty states: "His Majesty, the King of Ava, renounces all claims upon, and will abstain from all future interference with the principality of Assam and its dependencies, and also the contiguous petty states of Cachar and Jyntea."

from reinstating the Ahom ruler. Thus, the East India Company became the de facto ruler of Assam (Goswami 2012: 20-21).

Many officials of the European companies traded with some of the parts of India. Largely, Army officials traded with Assam and procured large fortune. Mir Kasim, the Nawab of Bengal, complained to the Governor of Bengal that a loss of about 40,000 rupees was incurred because of the private trade with Assam, Karaibari and Rangamati. To check this rampant corruption by the officials, Robert Clive was appointed as the Governor of Bengal for a second term (*Ibid* 12). He created a Society of Trade for the officials in Assam to trade in tobacco, betel nut and salt. Since the first two items were produced in Assam, the trade in salt was the only lucrative product. Realising the increasing profit in salt, the Court of Directors, later, abolished the monopoly of the Society. The trade with Assam gained further importance when the British thought it was a route to Tibet.[39]

9.1 East India Company and Indian Trade

There was no interference by the Parliament in the affairs of the company until the Battle of Plassey of 1757 when it decided that some control should be exercised over the company (Farwell 1989: 17). The Charter of 1813 led to the loss of monopoly over the Eastern trade of the East India Company (Tripathi 1987: 183). A few limitations were imposed on the company. The impact was due to the industrial revolution. The external trade was affected by the prohibitive tariffs, shipping had to confront ruthless competition which led to its destruction, land was allured by the Permanent Settlement, credit system was contained by the European banks that were against the interests of Indians, revenue obtained was spent on procuring investments, the plundered money was taken to England and rural people did not get any returns (*Ibid*). A license system was introduced with limiting the number of Europeans who could reside, buy land and invest in India. There was opposition to this system by significant chambers of commerce like the Glasgow Chamber of Commerce, the Manchester Chamber of Commerce, etc. which demanded freedom of investment (*Ibid* 196). Mass exploitation commenced with the Charter of 1813 and was continued by the Charter of 1833 which established laissez-faire. This was a massive blow to the

[39] Tibet imported more and was a source of gold. Gold was inevitable for the British to trade with China.

village economy of India (*Ibid* 197). The 1857 freedom struggle was interpreted as an admonition to the intrusion by British in "agrarian systems of property, taxation and markets" (Austin 2014: 325).

The establishment of railways was for better accessibility to markets for British goods. "The Government of India owned 25,125 miles of trunk lines in India out of which it managed approximately 6,800 miles. The balance 18,325 miles were leased to companies. These companies operated on commercial principles. Public welfare could not be their aim" (Mahajan 1982: 219). It is argued by some scholars that railways, ports and after 1918 motor roads which would have been costly for the decolonised nations were established by the colonisers (Austin 2014: 329). These scholars advocate the legacy of colonialism as infrastructure, but the exploitation of the colonised and the creation of a vicious circle of poverty which they could not escape for generations is immeasurable.

The positive aspect of railways which was highlighted by the British was the supply of food grains to unreachable lands. The price of food grains increased in the areas wherein they were supplied. The poor could not afford despite the availability. The high prices led to the starvation of millions, and they succumbed to death (Habib 2010: 121). The suffering of people was evident in 1860-69 in Uttar Pradesh. Food grains were exported in large amounts which led to the famines of 1895-96 and 1899-1900 affecting millions. The famine occurred because of the brutal policies of the colonisers. The establishment of railways encouraged cultivation of commercial crops like cotton, jute, etc. by decreasing the production of food grains because the railways facilitated transportation to ports for further exports (*Ibid* 121). The deaths caused by famines in India was about 5.55 million in 1876-8 and 5.15 million lives in 1896-7 (Austin 2014: 331).

In the nineteenth century, Bombay was the fastest growing industrial city in the world and the industrial epicenter of India (Nile 2011: 3, 5). Religious pluralism existed in Bombay in the nineteenth century also (*Ibid* 11). Such pluralism was eased by Act XX of 1863, by virtue of which the colonial government was not allowed to interfere in the matters of religious institutions.

The British pretended to establish the rule of law in India. The aim behind establishing the rule of law in the colonies was to expand commerce, but it could not unite the colonised society because it's very political and social integrity was put at stake by the commerce (Furnivall as quoted in Anghie 2004: 193).

The economic and labour laws were formulated by the demand of the Indian economy:

> The mixture of administrative orders and legal regulations that constituted the totality of colonial governance were impelled by the needs of the colonial economy: revenue extraction required the introduction of a property in land; the exigencies of recruiting and rendering the labour force on plantations, mines and factories stable and permanent required the introduction of rudimentary labour laws (Nair 1996: 39).

In reality, India was de-industrialised. It became a supplier of raw material from that of the manufacturer of textiles. Property rights were granted to the *Zamindars* that legitimised their feudal powers. This affected the rights of tenants (Nair 1996: 49).

The spinning industry in India employed women in large numbers. Their employment was affected due to the industrial revolution in England and consequent export of yarn from India (*Ibid* 97). Due to the demand for mechanised labour, the employment of men was encouraged. Furthermore, Indian members of the legislature opined that the Factories Act, 1911 was enacted to hinder the growth of the cotton industry in India. The rationale provided was labour protection.

9.2 Trade and Tariffs

Just after the 1858 Proclamation, the import duties on foreign goods was double that of British goods in India. Due to the "financial burden" after 1857, differential tariffs were abolished (Dutt 1904: 401). Benjamin Disraeli believed that possession of India was important for other countries to reduce their trade tariffs (Mahajan 2002: 35). Britain used the colonial rule in its favour (Habib 2006: 35). The Indian members of the legislature were dissatisfied with the tariff policies of the British Raj because India was overburdened with many manufactured goods (Mahajan 1982: 206). The government decided to increase the duties on tobacco, liquor, silver and petroleum products. Duties on liquor and tobacco were welcomed by Indian members because this would discourage consumption but the duty hike on silver and petroleum

products was criticised. Silver duty hike was discouraged because it would affect the exports to silver-using countries. Increase in duty on petroleum products would affect the poor. The finance member did not consider the argument of Indian legislative members. On the request of British tobacco manufacturers, the import duty on tobacco was further reduced by the Secretary of State. This was again severely opposed by the Indian members of the legislature (*Ibid* 207). In 1911, a resolution was recommended by Dadabhoy in the legislature to cut off excise duty on cotton. The reason stated was "in view of depression in the cotton industry, absence of direct competition between Lancashire and Bombay, non-protective nature of tariff duty, rise in the price of cloth for consumers, unpopularity of the tax and the feeling of injustice it caused, this duty should be abolished" (*Ibid* 208-209). The Indian members were against the increase in excise duty on cotton. During the First World War, the contribution from India was demanded to meet the war expenses. In this pretext, the cotton tariff duty was hiked because salt tax and income tax were already high.

9.3 Monetary System

Even though currency and money are used interchangeably today, the term money has many connotations (Helleiner 2003: 20):

> Money is a notoriously difficult term to define precisely. Economists usually define money according to the functions it performs. Three are cited most frequently: a medium of exchange, a store of value, and a unit of account. Scholars from other disciplines have found this approach limiting. While modern money usually performs all three of these roles, historical forms of money have sometimes assumed only one or two of these functions. Money's functions are also often not just economic but also political (e.g., an instrument of power), social (e.g., facilitating various social relationships), and cultural (e.g., transmitting or reflecting cultural values).

These are the functional explanations of money. Apart from these typological forms, money is classified into three types (*Ibid* 20-21). First is “commodity money” “which refers to an object whose monetary value is similar to the value of the material from which it is made". Non-perishable items like cowry shells, gold and silver were used in this manner. Second, comes "nominal money" which means "an abstract money of account an indicates a value that has no correspondence to a physical currency in circulation". The third type is "fiduciary money" which has a particular value not

connected to the material from which it is made. Fiduciary money is used in most part of the world today. It has various forms like coins, notes and bank deposits.

Fiduciary money in the form of notes was introduced in India in 1861. Currency Boards were established according to 1844 Act which possessed note monopolies in the British colonies. Such monopoly ensured "an automatic macroeconomic adjustment mechanism" (*Ibid* 174). Currency notes introduced in India by the British had the European symbol of Britannia on them (Hewitt 2005: 100). Imperialism was asserted in many ways as this was one of the ways to show the supremacy of the colonisers. In 1857, the Bank of Bengal introduced notes with Britannia sitting in between females representing justice and commerce. An Indian woman is shown kneeling and offering her fruits. This manifests "the chauvinist images on colonial notes" and "hierarchy of ruler and ruled" (*Ibid* 105).

Notes were not completely European because to prolong their rule the British had to print Indian symbols and language on them. A mixture of Indian and European symbols was represented in the notes (*Ibid* 102). Indian scripts were also introduced on the notes. Bank notes of Asiatic Bank of Madras had *Fortuna* riding a tiger on it.

After the Proclamation and taking over of power from the East India company, the Bank of England published notes for India. Britannia was replaced by Queen Victoria in the notes. After coinage had been introduced in India by the Bank of England, Queen Victoria was depicted on them. The native merchants protested against the introduction of currency by the British as they had local currency system followed for a long time (*Ibid* 110). Later, Governor-Generals' images were also printed on the notes. Royal Arms were illustrated on notes printed by the Chartered Bank of India. Perkins Bacon, a printing company, printed currency notes for India. To control counterfeit notes, many security features were introduced by the British (*Ibid* 102).

The Central Bank of India was established in 1935, not for economic development "but in order to create a new conservatively managed monetary authority that would be independent of the rising power of Indian nationalists" (Helleiner 2003: 175). Another aim of creating the bank was to maintain the international gold standard (*Ibid* 199).

10. International Maritime Law

After the 1858 Proclamation, the British "began to disclose imperial ambitions towards neighbouring States" (Anand 1983: 124). The British strategically acquired Singapore. Thereby, their imports and exports shot up at an unprecedented rate. Due to the power exercised by the British over India, they could take any product from India to Europe without investing capital (*Ibid* 125). The Indian overseas trade could be handled by the British due to its naval power (Habib 2006: 126). The British power in India was beneficial to other Europeans also. The Europeans realised that British Empire in India and the strength of British Navy in the Indian Ocean was beneficial to them (Anand 1983: 126). The British naval power gave an impetus to freedom of the seas (*Ibid* 129). It was a tacit understanding between the Europeans that they would exploit the new world together and hence, freedom of the seas was a necessity.

The principles of laws of the sea in the eighteenth and nineteenth century developed not because of juristic opinion but to cater the needs of the States (*Ibid* 152). Grotius suggested delimitation of the sea. He supported control of some part of sea adjacent to the land under the control of the State (*Ibid* 137). The Europeans demarcated territorial waters to protect the coastal States from naval wars. International law scholars had different demarcation for territorial wars. Bynkershoek suggested the cannon shot rule. It means that the territorial waters will be demarcated by the point at which a projectile lands when shot from a canon. In the eighteenth century, the territorial waters included three nautical miles. USA and Britain followed the three nautical miles criterion. There was no common demarcation because States claimed more miles according to their interests. A final decision on demarcation was not reached even at the Hague Conference on Codification of 1930.[40] A similar uncertainty lingered in the case of the contiguous zone which was demanded for the protection of customs zone and to take sanitary measures. Another issue which came before the States was the right of innocent passage. States allowed innocent passage to merchant ships but excluded war ships. The Freedom of the High Seas was recognised.

[40] The Hague Convention was an important step towards delimitation taken under the auspices of the League of Nations. Some States supported the declaration of contiguous zone and exclusive economic zone whereas others did not want any demarcation beyond the territorial waters (Rao 1983: 178).

Piracy was an instance in which the States could curb the freedom (*Ibid* 151). In colonial India, piracy was conducted by the ships owned by the European companies to curb competition and establish monopoly of trade. The Europeans did not use the term piracy for the conduct of a privateer or commander of a private commercial ship. Perhaps, privateers were authorised to seize cargoes of other ships, impose naval blockades etc. They were authorised for "armed commercial ventures" by letters patent marque from the King or Admiralty" (McLean 2003: 367). For instance, the charter granted by Charles II in 1661 empowered the British East India Company to confiscate rivals' goods and ships (Roukis 2004: 943). The nomenclature of piracy was applied to other ships and pirates were considered unlawful and criminals. This differentiation between the commercial ships and other ships is a reflection of the "modern public/private divide" (McLean 2003: 367). In this regard, when other ships attacked the British, it was known as piracy. Therefore, Robert Clive controlled piracy agains the British in Severndroog and Vijayadroog.

In colonial India, the limit of territorial waters was considered as three nautical miles (Rao 1983: 51). In the decision given by the Bombay High Court in *Reg.* v. *Kastya Rama* (Bombay High Court Law Reports 1871: Volume VIII as cited in Rao 1983: 52) it was held that offences committed within three nautical miles of territorial waters were punishable under the Indian Penal Code. The Privy Council in the *Secretary of State for India in Council* v. *Sri Raja Chelikani Rama Rao and Others* (43 L.R. Ind. App. 192) held that the islands within the limits of three nautical miles near the mouth of the Godavari river are within the territory of the Indian Empire and constitutes "British territory" (Rao 1983: 54).

Due to the increasing maritime activities in colonial India, there arose a need to establish courts to try maritime offences and deal with maritime questions. Hence, based on the Colonial Courts of Admiralty Act of 1890 passed in the British Parliament, The Colonial Courts of Admiralty (India) Act of 1891 was enacted by the Indian legislature. The High Courts of Bombay, Madras and Calcutta were declared as the Admiralty Courts.

Other important colonial laws dealing with maritime questions are the Admiralty Offences (Colonial) Act of 1849, the Indian Registration of Ships Act of

1841, the Indian Ports Act of 1908, the Indian Merchant Shipping Act of 1923, the Merchant Seamen (Litigation) Act of 1946.

11. International Environmental Law

The impact of colonialism on the environment is inexplicable. The repercussions of colonialism can be found till date. Irfan Habib (2010: 113) describes the effect in following words:

> British colonialism controlled Indian resources for its purposes and in the process created food scarcity, let diseases rage, promoted a progressive degeneration of the soil, generated a crisis in the pastoral sector, turned forests into commercialised timber reserves and decimated wildlife.

Colonialism affected the environment in India because of the mass plunder of natural resources of the country. During the construction of railways in India, forests were cut at a massive scale (*Ibid* 132). For laying 13,639 kilometres of railway track by 1879 an estimated 3.4 million trees were cut, and about 2 million were cut for replacing the sleepers. In the beginning, firewood was used as fuel for trains before the introduction of coal. Gradually, the government realised the need for afforestation for a further supply of timber for the railways (*Ibid* 132-133). This led to a series of enactment on forests.

Indian Forest Act was first enacted in the year 1865 just after the establishment of Forest Department. The aim of the Act was to procure timber for railways (Guha 1983: 1940). The forest was protected under the Act only when it was owned by the government. The Act lacked in provisions for fire protection, fencing, etc.

The Indian Forest Act, 1878 superseded the 1865 Act. It could be interpreted in different ways because of which villagers in the Himalayas could procure forest produce free of cost, tribals in Chattisgarh could buy it on a subsidised rate, and those of Midnapore had to pay (*Ibid* 1942). The British also created an indigenous ruling class for liaison between the tribal and the British (*Ibid* 1942). The very structure of indigenous society and their self-sufficient economy was disturbed by colonialism. They can be emancipated from current plight by giving them due space in the

international laws formulated for them. Since the previous two legislations did not include Madras Presidency, special legislation was passed for the same in 1882.

The aforementioned Forest Acts divided the forests into two categories under the British government. The first category was reserved forests wherein the timber could be procured for the purposes of government or agencies approved by the government. Private rights were not granted in reserved forests. Even if private rights were granted many regulations were imposed on the same. A lot of revenue was gained by the government even from the firewood which poor women collected from forests (Habib 2010: 134). The second category of forests was protected forests. Some private rights were granted in these forests like timber collection, grazing of cattle, etc. It was expected to be transformed to reserved category. The forests which were not under these two categories were gradually included in them.

The British government projected as if the forests were for conservation. But they granted extensive area of forests to the European planters in Assam and North Bengal at Rs. 6 to 12 per hectare. In 1910 such land extended to 2,280 square kilometres (*Ibid* 133).

The paradoxical feature of the environmental laws formulated during the colonial period was that the exploiters were the creators of law. Indian Forest Act enacted in 1927 is one such example. The Bengal Regulation VI of 1819 conferred the sovereignty over water resources on the government. Earlier the water resources were considered as common property. The Shore Nuisance (Bombay and Kolaba) Act of 1853 and the Oriental Gas Company Act of 1857 prohibited water pollution. The Merchant Shipping Act of 1858 prevented the pollution of the sea by an oil spill. The Bengal Smoke Nuisance Acts 1905 and 1912 dealt with air pollution.

Poaching and hunting of animals were a common feature in colonial India. The extinction of cheetah in India is the result of extensive hunting carried by the British hunters who used guns (*Ibid* 98). Use of guns and rifles for hunting made the killing of elephants easy (*Ibid* 137). In the 1860s a British planter killed about 400 elephants in the Nilgiris.

Pollution led to many diseases and occupational hazards. Tuberculosis was a common disease in the towns due to industrial pollution. Many industries like coal

mining were owned by the Europeans which were required for operation of the railways. British capital was used to establish jute mills in West Bengal. During the colonial era "the most unhygienic and stressful conditions of work prevailed" (*Ibid* 124). The British owners aimed at earning a maximum profit and did not control occupational hazards. They were not bothered about the labourers.

Mahatma Gandhi stood for protection for the environment. He was against the excessive use of technology due to the damage it causes to the environment (Bhattacharya 2011: 55). Thus, we can see the rejection of "wholesale industrialization" by Gandhi (Guha 2009: 114). He was against the mechanisation of agriculture. He promoted the use of organic fertilisers to prevent soil depletion (*Ibid* 115). The following statement of Mahatma Gandhi which is quoted worldwide (quoted in *Ibid* 117) can be set as a motto for inter-generational equity:

> The World has enough for everybody's need, but not enough for everybody's greed.

The use of non-violent techniques in environmental movements is well known. Thus, the influence of Mahatma in such movements cannot be overlooked. The Chipko movement of 1973 and the recent Narmada Bachao Andolan used Gandhian tactics to put forward their demands (*Ibid* 111-112).

12. Conclusion

"A conquered nation is like a man with cancer; he can think of nothing else" are the words of George Bernard Shaw. India during colonisation could not think of anything else but to get rid of colonisation. The repercussions of colonisation are so many that even today it cannot be forgotten that India was conquered and exploited. Name any sphere, international laws were violated by the colonisers. Diplomatic relations were a farce, international humanitarian laws were outrightly violated in many instances, international trade laws eased exploitation and unjust enrichment of Britain, international maritime laws violated freedom of the seas. The concern shown for enacting of environmental legislations had vested interest of exploitation of natural resources without any restrictions. Thus, the British rule, did not follow international law while ruling India.

CHAPTER V

COLONIAL INDIA AND INTERNATIONAL ORGANISATIONS

1. Introduction

Clive Archer (2001: 5) recognises that there were rules governing inter-State relations in India and China since ancient times, but they did not create an international organisation. The creation of international organisations is traced to the nineteenth century. The primary reason stated for the genesis is traced to the 1648 Treaty of Westphalia and creation of the nation-State system (Archer 2001: 4). The period between 1648 and 1800 witnessed diplomatic relations. It was also a spectator of 67 prominent wars. Therefore, efforts to form international organisations were not realised in that period. However, the craving of States for co-existence and thereby, the requirement of institutions that solve their problems gave an impetus to the creation of international organisations in the nineteenth century (Claude 1964: 17). A compelling reason behind the European States' efforts for peace through treaties and an attempt to organise their relations was the outreach of Europe throughout the world in the form of colonisation and imperialism (Archer 2001: 7). The aim was furthered by envisaging a global community. One of the means by which a "global community" is created today is through international organisations (Iriye 2002: 9). The basis of international organisations is *internationalism* (*Ibid* 9)[1]. It is the consciousness of a State to move beyond national interests.

The pioneer inter-governmental organisations ranged from those on women, technology, postal service to medical, humanitarian aid, etc.[2] The League of Nations was an international organisation dealing with pervasive topics affecting human life. It had an inextricable link to International Labour Organisation, Health Organisation,

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[1] It does not mean that internationalism did not exist before the modern era. It existed in ancient India and medieval India also. Therefore, the political entities moved beyond their national interests and possessed a global consciousness which persuaded them to enter into treaties, trade, diplomatic exchanges, etc. Internationalism in the post-Westphalian era led to the formation of international organisations.

[2] Commerce was the triggering point for the proliferation of international organisations. Health was another concern. The international organisations included International Telegraphic Bureau (1868), General Postal Union (1874), the International Bureau of Weights and Measures (1875), the International Union for the Publication of Customs Tariffs (1890), the Metric Union, International Health offices in Vienna, Paris, and Havana.

Economic and Financial Organisation and others. The establishment of League of Nations posed a challenge to the positivist ideas that State was the only subject of international law. It also led to questioning the concept of sovereignty by international lawyers (Anghie 2004: 125). In 1929, the League of Nations published a *Handbook of International Organisations*. By then, the number of international organisations counted to 478.

The liberal theory of international relations is the basis of the creation of international organisations. The scourge of world wars acted as an impetus to the formation of international organisations with wider ambit and membership. The League of Nations was established after the First World War and the United Nations after the Second World War.

The pioneer international organisations included only the European States. For instance, the Central Commission for the Navigation of the Rhine formed as result of the Congress of Vienna in 1815. It was a creation of Europe with European members. Gradually, the non-European States were included in the membership of international organisations. Eurocentrism was challenged by the formation of alternative organisations. The Soviet Union and the colonised nations together formed Comintern or Communist International in 1919 challenging imperialism. M.N. Roy was a member of the executive committee of Comintern. The meeting in Baku in September 1920 was a significant step with regard to the organisation.

Colonial India also participated in international institutions. A representative of India signed the Berne Convention in 1874 by virtue of which India became a member of the Universal Postal Union in 1876. In 1890, India[3] was represented by a delegate at the Conference of the International Union for the Publication of Tariff Customs. British India signed International Wireless Telegraph Convention in 1912. India had a separate vote at the International Radio Telegraph Conference in 1912. Colonial India was party to 150 multilateral treaties (LNTS 124; UNTS 26) and 44 bilateral treaties (LNTS 32; UNTS 12). Certain international agreements were signed separately for British India even though she was a colony of Great Britain (Lissitzyn 1968: 72).

[3] India hereafter means colonial India.

There were three prominent international women's organisations in the post-First World War era viz. the International Alliance of Women, the International Council of Women and the Women's International League for Peace and Freedom. The Women's International League for Peace and Freedom organised a meeting of women during the First World War whereas most of the other inter-governmental organisations were not functional. After 1919 non-European members joined these organisations. India acceded to the International Alliance of Women for promoting universal suffrage (Iriye 2002: 29-30).

India was a member of Peace Pact of Paris of 1928. She also signed 1928 General Act for the Pacific Settlement of International Disputes. When World War II was approaching, India did not fulfil her obligations under the Act. When World War II commenced, India ruled out of the optional clause of the Statute of the PCIJ. She stated the ground of changed circumstances. India was a party to the International Silver Agreement, 1933. Britain was not a party to the Agreement. India was mentioned after Great Britain in trilateral treaties and alone in bilateral agreements. After World War II, India could exercise more control over its foreign policy. India was an original member of the United Nations. She also signed the Chicago Conference on International Civil Aviation in 1945. In May 1945, India accepted the Chicago Interim Agreement on International Civil Aviation and the Chicago Air Services Transit Agreement. India entered into a bilateral Air Services Agreement with the United States of America in 1946. After the partition of India, Pakistan became the new member of the United Nations.

The present chapter deals with the participation of colonial India in international organisations. Section 2 of the chapter analyses the anomalous position of colonial India. Section 3 examines the anomalous position of Princely States. Section 4 discusses the financial contributions to the international organisations with focus on colonial India. Section 5 elucidates different aspects of colonial India's membership in the League of Nations. It debates the problems, issues and positive aspects of the membership. Section 6 deals with the colonial India and International Labour Organisation. Section 7 is on colonial India's membership in the Health Organisation. Section 8 scrutinises the participation of colonial India in the Bretton Woods negotiations. Section 9 illuminates colonial India's participation in the United

Nations. Section 10 highlights the aspects of non-aligned movement. Section 11 is a conclusion of the chapter.

2. Anomalous Position of Colonial India

The internal and external affairs of colonial India was dealt with by the British. The right to declare war for colonial India rested in the Crown. Colonial India did not maintain diplomatic relations by herself. The India Office in London dealt with the external affairs of India. It formulated her foreign policy. The Government of India had a Foreign Department, but it did not deal with the matters of external relations with other States or issues in the League of Nations. Therefore, the Secretary of State and the India Office in London were in an advantageous position. The government in India did not deal with the external affairs nor with the representation in international organisations. It was confined to territorial disputes and Indian States (Verma 1968: 83).

India was not a self-governing territory, neither internally nor externally due to the power exercised by Britain (Lissitzyn 1968: 66). India being a member of the League was considered a part of the British Empire (Verma 1968: 23-24). India meant British India according to Section 18(5) of the Interpretation Act, 1889 (Sundaram 1930: 452).[4] Moreover, the Government of India (implies Governor-General in Council) was not accountable to the people of India (*Ibid* 452-453). Since, the Interpretation Act does not mention India as a colony, therefore, its personality was maintained as separate from that of Britain. Consequently, India became a member of international organisations (Kemal 2012: 122).

Colonial India was represented in various international organisations. During the formation of the League of Nations, India was represented in the international organisation by the British with a vested interest to increase its "voting strength"[5] (Anand 2010: 7). It also included other Dominions as members. Thus, the total vote counted to six (Great Britain, India, Australia, New Zealand, Canada, and South Africa) and they were quite in number to increase the strength of the British Empire (Ram and Sharma 1932: 142). Prominent personalities like Govind Ballabh Pant,

[4] Section 18(5) of the Interpretation Act of 1889 defines India as follows:
"British India, together with any territories of any native prince or chief under the suzerainty of His Majesty."

[5] Till 1929, India was represented by the officials appointed by the British.

Bhagwan Das and others criticised India's membership in the League as beneficial to the British. British denied this allegation by pointing out Article 5 of the Covenant which mentions the voting procedure of the League demanding unanimous votes with few exceptions in the Assembly and the Council (Verma 1968: 24).[6] The British reply was not satisfactory as the appointment of committees, and in the matters of procedure, the British wielded much power by the voting strength it had in the Assembly. It also had an impact on the membership in the Council (*Ibid* 24-25). The representatives were criticised as being part of the British system. J.S. Gupta (1926: 384 as quoted in Verma 1968: 61) criticised the delegation severely, "it must consist of members who were poles asunder from each other and who might not belong to such divergent species as the autocratic Indian Prince, bureaucratic Government official and an irresponsible Indian, all three of them owing allegiance not to the Indian nation but to an alien bureaucracy".

Indian delegates were treated equally[7] (Verma 1968: 50). India was granted equal rights with other members. "She was the only non-self-governing member of the League" (*Ibid* 20). India's membership was accepted without any conditions whereas States like Finland, Albania, Latvia and Lithuania had problems while seeking membership in the League. The admission of members to the League was the discretion of the States which met at the Paris Conference. For them, India was a major political entity which lent a helping hand to them during the First World War. Hence, she became a member of the League of Nations. It is pertinent to note that

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6 Article 5 of the Covenant of the League of Nations states:
Except where otherwise expressly provided in this Covenant or by the terms of the present Treaty, decisions at any meeting of the Assembly or of the Council shall require the agreement of all the Members of the League represented at the meeting.
All matters of procedure at meetings of the Assembly or of the Council, including the appointment of Committees to investigate particular matters, shall be regulated by the Assembly or by the Council and may be decided by a majority of the Members of the League represented at the meeting.
The first meeting of the Assembly and the first meeting of the Council shall be summoned by the President of the United States of America.

7 They were equal as representatives of the League of Nations. Technically, they were not equal to other members because other representatives served the interests of their peoples but the Indian delegates were elected by the British and not by the Indians. This issue clamoured in the Indian Legislature so that the ultimate authority lies with the Indian people (Verma 1968: 57-58). The demands were further raised for representation in the Genoa Conference in 1922. Resolutions were passed to this effect by P.C. Sethna and H.S. Gour in Council of State and Legislative Assembly respectively. The British argued that in other States, the executive selects the delegation and in India's case that cannot be done by the Legislature. Indians did not budge with their demands. The British never agreed to grant the power of selecting delegations to the Indian legislature.

India was given membership in the League but India's participation in the First World War was a result of British rule in India (*Ibid* 29).

Even though India participated in many international conferences but the representatives were selected by the British (Anand 2010: 12). The question of the authority to select Indian delegates to international organisations was a tough one. The issue revolved around the superiority of the Secretary of State or the Government of India. The appointments were to be made, as decided in 1920, in "prior consultation and agreement" between the Government of India and the Secretary of State (Sundaram 1930: 462). The India Office despatched the appointment letter. The name of the authority was not mentioned so that an impression that superiority of Secretary of State existed. The instructions were issued by the India Office on the information given by the Government of India. When necessary, they were given by the Secretary of State in consultation with the Government of India. During the conferences, a separate meeting was held amongst the British Commonwealth delegates in which issues were discussed and frank opinions were considered.

After the conference, reports were sent to the Secretary of State, and a copy was despatched to the Government of India. The delegates were supposed to submit reports to these authorities. This decision was made in 1920. Thus, control was attempted to be imposed on India's representation in the international forums during the colonial era. Although important selections were made by the above authorities, the representatives of workers and employers to the International Labour Conferences were selected by the Government of India. Therefore, the reports on International Labour Conferences were submitted to the Government of India and copies were sent to the Secretary of State. The treaties signed by India were ratified by the "an instrument of ratification signed by the King on the advice of the British Cabinet" (Verma 1968: 30). In the matters of less gravity, the Secretary of State for India did the ratification.

Indian delegates put forth their arguments and successfully procured the required changes in the drafts of the conferences. At the Washington Labour Conference, 1919, India suggested sixty hours of work in the Hours of Work Convention because of her industrial needs and the recommendation was accepted. India's interests were secured in the Convention on the Weekly Rest Day of 1921,

Barcelona Transit Convention of 1921, Geneva Convention on Import and Export Prohibitions and Restrictions of 1927. Sometimes, the arguments formulated by the British were reformulated according to the opinion of India (Sundaram 1930: 459). India's position on reform of the Governing Body of the International Labour Office was later supported by the British delegation. There were contradictory opinions between India and Britain in some issues wherein India stuck to her position. When the question of disinfection of Indian wool came up, India and Britain took contradictory viewpoints in the International Labour Conferences of 1921 and 1924. In the Genoa Maritime Conference of 1920, India demanded special treatment for Indian seamen in British ships. The British were adamant in firing the Indian seamen in British ships. The Indian delegates did not budge, and the Secretary of State also supported the decision. The freedom of expression for India was not untrammelled. It was under the British control. Latin American countries tried to take a joint stand, the British also emulated this and made similar decisions for the Empire as a whole (Verma 1968: 115-116). All the important political matters "affecting the Empire as a whole" were left to the British Government (Sundaram 1930: 461). It is laudable that whatever autonomy the Indian delegates obtained, they utilised it for the benefit of India and her interests.

Later, some autonomy was granted to India. As far as the international obligations were concerned the matters concerning bilateral relations with a foreign power were dealt with by the British government. In the matters which affected India only, discretion was given to her. Treaties like the Locarno treaty had a provision that the issues affecting India and other Dominions were to be decided on their consent. The Imperial Conferences of 1923 and 1926 made it obligatory on the Empire to let the dominions and India decide whether to sign treaties or not.

D.H. Miller (1928 as quoted in Verma 1968: 20) termed India’s membership in the League as “an anomaly among anomalies”. V. Shiva Ram and Brij Mohan Sharma (1932: 139) opine, “India is a political curiosity inside the League.” India’s situation in the period between 1919 to 1947 is described as an “anomalous situation” by T.T Poulose (1970).

Unlike the League of Nations, wherein India was given a separate voting right, the same principle did not apply to the International Air Navigation Conventions. So,

the problem arose as to how the voting will be determined since Great Britain and its dominions were considered as a unit (Keith 1935: 13). The convention left this position vague.

3. Anomalous Position of Princely States

India had broadly two components in the colonial period viz. the territories governed by the British administration and the 562 Princely States. The Governor-General dealt with the relationship between these two components. The Princely States did not have the power to enter into foreign relations with the external powers. The Princely States of India were like vassal states under the control of Britain (Anand 2010: 11). "At the Paris Peace Conference and in the Covenant of the League of Nations, India was recognised to be of composite and corporate character" (Verma 1968: 240). Therefore, India was represented by one Prince in the League Assembly's annual sessions. First, they were part of the Indian delegations to the Imperial Conferences and the Paris Peace Conference. The Princes played a crucial role in supporting the British in the First World War and hence, were made representatives of India in international forums. They were included in the delegations so that they will convey the international obligations to the Chamber of Princes and the Government of India did not have to persuade them separately. An Indian Prince was appointed as a cultural diplomat in the League.

The signature of the Maharaja of Bikaner in the Treaty of Versailles shows the cooperation between the Government of India and the Princely States in external matters. This step brought both political entities closer (*Ibid* 310). The inclusion of Indian Princes projected India as one political unit (Ram and Sharma 1932: 143), and the Indian nationalists utilised this to propose a federalist structure of independent India (Verma 1968: 246). The representation of India by a Prince was also an “anomaly” according to D.N. Verma (1968: 244). The Covenant of the League did not have provision for representation of different political units as one.

The problem with such representation was that the Prince could not express on behalf of his fraternity and he was sent as a part of British India (Sundaram 1930: 464). Whenever the Government of India accepted some international obligations, it had to appease the Indian Princely States to follow similar obligations. Since problems would arise with negotiations, the Covenant of the League of Nations and

other conferences had provisions to exclude territories from its purview (*Ibid* 465). When the British realised that some obligations can never be expected to be followed by the Princely States, they excluded those territories.

In many instances, the Princes signed the conventions and later, after the discussions in the Chamber of Princes, they refused to fulfil international obligations. They claimed autonomy in internal administration. The Government of India issued a circular on January 21, 1926, asking the Princely States to follow international obligations under the League of Nations as deems fit in their internal administration (Verma 1968: 251). The Princely States maintained the position that the Government of India should not interfere in their administration. The adamance of Princely States led the Government of India to exclude them from the application of many important treaties like the Hague Opium Convention, the Slavery Convention, Convention regarding Suppression of Traffic in Women and Children, etc. Similarly, the Princely States were exempted from the operation of obligations arising out of International Labour Conferences. N.M. Joshi opposed this non-compliance by the Princely States. He was restricted from raising this question in the Legislative Assembly. The anomalous position of the Princely States was analysed by the Government of India. It was reluctant to compel them to comply with International Labour Conferences' obligations because Princes were not part of the delegations sent to the International Labour Conferences and such demand would be interpreted as an intrusion in internal administration. The Government of India was in a dilemma because it could either ask for an amendment to the Treaty of Versailles or stop ratification of treaties after that. Finally, it suggested that the treaties shall be ratified for British India or will not be ratified at all. India's attitude was criticised severely (*Ibid* 264). The vulnerability of labour in the Princely States arose due to lack of labour legislations. The Government of India Act, 1935 altered the relations between the Government of India and the Princely States. The Rulers of Princely States had to sign an instrument of accession. They could specify in the instruments as to the matters on which the Government of India could enter into international treaties on behalf of the Princely States. They were also empowered to opt out of international labour conventions. The Princely States were termed as "international orphans" (Proceedings of the International Labour Conference 1944: 288).

4. Financial Contributions to the International Organisations

The League of Nations constantly faced financial problems due to the failure of many members to do financial contributions on time (Ram and Sharma 1932: 200). India paid her contributions on time and insisted other members to be prompt (Verma 1968: 123). India paid far beyond her capacity. India's contribution was highest in the 1920s and 1930s.

The contribution was not recognised as India did not have much representation in these organisations (Krishnamurty 2011: 53, Verma 1968: 134-138). Indians opined that "as in other oriental countries, that the League did not carry out much work of value for Eastern countries, and that its tendency was to strengthen European interests at the expense of those of other continents and races" (Verma 1968: 129). India emphasised that it was imperative for the League of Nations to consider the issues of Asian countries to become truly a world organisation.

India suggested control over League's expenses, improvement of budget procedure (*Ibid* 119). India's suggestions for the betterment of League's finances led to Foster-Eysinga Report. The demand for "economising" League's expenditure was met after the untiring efforts of Indian delegates in 1920 and 1921 (Sundaram 1930: 461).

The Central Legislature of India was empowered to check the budget of the Indian delegations to international organisations, contribution to the League, etc. (Verma 1968: 42). The members of the Legislative Assembly in 1928 questioned as to the proportion of India's contribution to the international organisations and the disproportionate number of Indian representatives in them.

In the Ninth Assembly of the League of Nations, the question of budget was discussed in detail. The Secretary-General strongly opined that some States feel the burden of contribution to the League and India is one of them (Bulletin of International News 1928: 21). Lord Lytton mentioned in his speech in the Assembly that opinion of Indians was that the expenditure of the League was not beneficial to her. With regard to International Labour Organisation, a contradictory view was expressed by Sir Atul Chatterjee in the International Labour Conference, 1927. According to him, ILO had paid attention to the industrial problems in India. Also, the

Conference and ILO has influenced labour legislations and formation of trade unions in India profoundly. He said, “The International Labour Organisation stands as a living proof to the hundreds of millions of workers in the East of the immense value of cordial co-operation between the State, the employers and the workers, and of the outstanding advantages to be gained by progressive and constitutional development in measures promoting social welfare and international harmony” (*Ibid* 22). Due to the active role of Indian delegates in the ILO and their firm opinions, they could secure a better position for India whereas in the League of Nations they could not overcome Eurocentrism. India's financial burden was not recognised in the League, and she was not given required attention.

Just after the Second World War in 1945, India was the third largest contributor to international organisations after the USA and the UK. Since the contribution was to be equitable, a UN scale was developed which took into consideration “the capacity of different countries to pay, per capita national incomes, war damage and changes in economic strength over time” (Krishnamurty 2001: 54).

5. Colonial India and the League of Nations

5.1 Colonial India’s membership in the League of Nations

The idea of the League of Nations came from Immanuel Kant’s essay *Perpetual Peace* (Ram and Sharma 1932: 28). Woodrow Wilson, influenced by the essay supported the League of Nations (Simma *et al* 2012: 2). After the first world war, the victors and several international non-governmental organisations concerned with health, prevention of war and propagation of peace came together to create the League of Nations at the Paris Conference in 1919 (Archer 2001: 3). They envisaged the organisation based on the Hague Conferences of 1899 and 1907. They were positive in creating the League because of existing public international organisations. The "peacetime co-operation between European states" and the co-operation during the war gave hope for the creation of the League (*Ibid* 3).

Before the establishment of the League of Nations, Imperial Conferences were conducted which were known as colonial conferences in the beginning. In 1887, the First Colonial Conference was convened in London with the participation of the Heads of the self-governing colonies. The main occasion was the Jubilee celebration of Queen Victoria. India was not a participant, but the Secretary of State for India

attended the inaugural meeting. The Second Colonial Conference was held in 1897 with the participation of the self-governing countries and the representatives of Great Britain. India was not present in the conference. In 1902, the Third Colonial Conference was held wherein preferential tariff in the jurisdiction of the Empire was discussed. Hence, the representation of India was inevitable, and therefore, an invitation was sent to the Government of India. A representative of India Office attended the conference. It was an "ad-hoc representation at the imperial conference" (Verma 1968: 2). In the Fourth Colonial Conference conducted in 1907, the representative of the Secretary of State for India attended. The Fifth Colonial Conference was held in 1911. Lord Crewe, the Secretary of State for India participated in one of its meetings and discussed the issue of Indian immigrants to the Dominion. The conferences were called imperial conferences later. Issues of India were discussed in the conferences through the participation of India Office.

India's demand for participation in the imperial conferences was given impetus by the support provided by India to Britain in the First World War (*Ibid* 3). The support changed the attitude of the British public and also, the Dominions towards India. On 22 September 1915, Mian Muhammad Shafi put forth a resolution in the Legislative Council demanding an invitation to India for participation in the Imperial Conferences in future. The Governor-General of India, Lord Hardinge assured consideration. The War Cabinet decided in January 1917 to include India in the forthcoming conference.[8] In March 1917, the War Cabinet began its meetings. India was represented by James Meston, S.P. Sinha and the Maharaja of Bikaner. A decision for the permanent participation of India in the conferences was decided. A resolution was passed for the Dominions and India conferring "a right to an adequate voice in foreign policy and foreign relations" (*Ibid* 6). India was not mentioned in the original text, but S.P. Sinha insisted on an amendment to include India. India's claim on enemies of the First World War amounted to Rupees eighty lakhs. This claim made the representation of India inevitable in the Paris Peace Conference. India was represented at the Paris Peace Conference by E.S. Montagu, the Secretary of State for

[8] The Imperial War Conference of 1917 “passed a resolution which defined the self-governing Dominions “as autonomous nations of an Imperial Commonwealth,” and India “as an important portion of the same,” and claimed for the Dominions and India an adequate voice in the regulation of the foreign policy and foreign relations of the Empire” (Sundaram 1930: 454).

India, the Maharaja of Bikaner and S.P. Sinha, Parliamentary Under-Secretary of State for India.

India participated in the Paris Conference, 1919. In 1919, India signed the Treaty of Versailles and other accompanying peace treaties. India's membership in the League was dependent on the signing of Treaty of Versailles. India became an original member of the League of Nations.[9] There were 29 original members of the League Covenant. The Covenant of the League contains 26 articles providing for aims of the League, its membership and settlement of international disputes. The Preamble to the Covenant states as follows:

> The High Contracting Parties,
>
> In order to promote international co-operation and to achieve international peace and security
>
> by the acceptance of obligations not to resort to war,
>
> by the prescription of open, just and honourable relations between nations,
>
> by the firm establishment of the understandings of international law as the actual rule of conduct among Governments,
>
> and by the maintenance of justice and a scrupulous respect for all treaty obligations in the dealings of organised peoples with one another,
>
> Agree to this Covenant of the League of Nations.

India's membership in the League of Nations was met with opposition from the French, but the British asserted India's right to membership (Verma 1968: 14-15). The US President, Woodrow Wilson[10] supported the inclusion of "colonies enjoying full powers of self-government" (*Ibid* 15). He also reminded the participants of the conference as to the valuable contribution of India in the First World War. When the issue of India's membership in the Senate came up, Senator Norris pointed out the atrocities committed by the British in the Jallianwala Bagh Massacre.[11] He showed the hypocrisy of the British who asserted in Paris Conference that India was governed democratically. Finally, the Senate of the USA did not accept the Covenant of the League. Article 1 of the Charter of the League of Nations had provisions for

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[9] India was a participant in the Paris Conference wherein the Covenant of the League was drafted. It listed the original members. Original members were included according to Article I, paragraph I of the Covenant that states, "the original members of the League shall be those of Signatories which are named in the Annex to the Covenant".

[10] Woodrow Wilson was one of the masterminds behind the League of Nations, but, the USA never joined the League.

[11] The negotiations at Versailles were conducted as an epilogue to Jallianwala Bagh Massacre and the *Satyagraha* of Mahatma Gandhi (Anghie 2004: 139).

membership to any self-governing State, Dominion or Colony.[12] The Same question arose as to the membership of the Council as in the earlier draft only States could be members. The draft was amended later to include members of the League on the insistence of Robert Cecil.

The European interests were discussed vastly in the League due to more representation from Europe. It was known as a European organisation (Ram and Sharma 1932: 93, Legg 2014: 97). "Oriental conditions and interests were in this way accorded a condescending and somewhat contemptuous tolerance, and then forgotten, while attention was concentrated on Western problems" (Verma 1968: 84). India opposed Eurocentrism in the League. The League of Nations aimed at maintaining status quo. The status quo was not acceptable to the Indians who were struggling for freedom (*Ibid* 273). For them, the League was a manifestation of imperialism.

The Council of the League of Nations was an arena of the great powers. It did not have representation from Africa, Australia, North America and South America. Ram and Sharma (1932: 193) staunchly criticise the composition of the League Council by stating that "Although the chief aim of the League is to inspire confidence in all the nations of the world and to treat them as equals, still in the composition of its organisations there is clearly inequality prevailing." India and China deserved to be permanent members of the Council due to their large population[13] (Ram and Sharma 1932: 166). But India under the British rule could never aspire to secure a seat in the Council (Verma 1968: 89).

The other two wings of the League were the Secretariat and the Permanent Court of International Justice. In the Secretariat, there were very few employees from India (about half a dozen) (Ram and Sharma 1932: 167). A representation was sent to the League of Nations in 1926 on the appointment of Indians in the League of

[12] Article 1 of the League of Nations provides: "Any fully self-governing State, Dominion or Colony not named in the Annex may become a member of the League if its admission is agreed to by two-thirds of the Assembly, provided that it shall give effective guarantees of its sincere attention to observe its international obligations."

[13]. They proposed "reshuffling" of the council. In their words, "Some of the seats on the Council should be assigned on a territorial basis. For example, Europe, and Asia should each get three seats, America two, Africa two, and Australia one. After that, some seats should be distributed on population basis, and India and China, being the countries with the largest populations in the world, should each get a permanent seat. Seats may be assigned on the basis of the principal forms of civilisation, such as Anglo-Saxon, Teutonic, Slev, Latin, Chinese, Japanese, Hindu, and Mohammedan etc. There should be a number of non-permanent seats open to election as at present" (Ram and Sharma 1932: 208).

Nations. One of the earliest appointments of Indians made to the League of Nations Secretariat was that of P.P. Pillai. Election of an Indian as the Judge of the PCIJ was again a difficult task. Candidates like Amir Ali, Sultan Ahmad contested for elections of the judicature but in vain. "It is, however, much to be regretted that neither the Hindu nor the Moslem system of jurisprudence and civilisation has been represented on the Court so far, though it was originally intended that all the principal systems of jurisprudence and civilisations should be represented on the bench of the Court" (*Ibid* 57).

The British accepted the optional clause[14] of the Statute of the PCIJ in 1929 after a long contemplation. The exceptions given by India to the optional clause in effect nullified compliance with it (Verma 1968: 95). Due to such exceptions, India could not settle disputes (for instance, with the problem of Indian emigrants in South Africa) with the other imperial dominions and left them to the Privy Council.

India contributed a lot financially in the international organisations in the 1920s and 1930s. When it came to representation according to contribution, Indians were represented less in number the international organisations. This was an issue which was raised in the League and the ILO. With regard to representation and discussion of issues on non-European countries, the League was very much Eurocentric.

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[14] The Indian delegation led by Mr Habibullah signed the optional clause on 19 September 1929. He made the following statement (Indian Delegation Report 1929):
"On behalf of the Government of India and subject to ratification, I accept as compulsory *ipso facto* and without special Convention, on condition of reciprocity, the jurisdiction of the Court in conformity with Article 36, para 2, of the Statute of the Court, for a period of 10 years and thereafter until such time as notice may be given to terminate the acceptance, over all disputes arising after the ratification of the present declaration with regard to situation or facts subsequent to the said ratification, other than –
Disputes in regard to which the parties to dispute have agreed or shall agree to have recourse to some other methods of peaceful settlement; and
disputes with the Government of any other Member of the League which is a Member of the British Commonwealth of Nations, all of which disputes shall be settled in such a manner as the parties have agreed or shall agree; and
disputes with regard to questions which by international law fall exclusively within the jurisdiction of India.
And subject to the condition that the Government of India reserve the right to require that proceedings in the Court shall be suspended in respect of any dispute which has been submitted to and is under consideration by the Council of the League of Nations, provided that notice to suspend is given within 10 days of the notification of the initiation of the proceedings in the Court, and provided also that such suspension shall be limited to a period of 12 months or such longer period as may be agreed to by the parties to the dispute or determined by decision of all the Members of the Council other than the parties to the dispute."

The Eurocentric nature of the League was reflected in the mandate system which kept all members of the League under the control of great powers. The Mandate System was formulated to promote self-government among the colonies and to make them a part of "international system as sovereign, independent nation-States" (Anghie 2004: 116). It changed the language of civilised and uncivilised to that of "backwards and advanced" (*Ibid* 189). Ram and Sharma (1932: 192) rightly predicted that the mandate system of the League could become a "bone of contention" between States as they were former colonies of the defeated States of the First World War.

The Indian public opinion mobilised against the mandate system if the League because instead of granting self-determination, the League created the mandate system to maintain status quo (Verma 1968: 274).[15] The discontent amongst Indians was due to the issue of Tanganyika. It was a mandate territory under the British. Indians residing in the area faced discrimination because of the policies formulated by the British administrators. The Indian public opinion was directed against the British policies, and the Government of India highlighted it to the Permanent Mandate Commission. India could not move the PCIJ because of the exceptions made in the optional clause (*Ibid* 98).

5.2 Problems Faced by the Indian Delegation

The English, who were part of the Indian delegation to the League, sometimes took decisions for India and her interests. For instance, William Meyer strongly supported reduction of India's expenses in the League of Nations. It was proved in many cases when the interests of Britain and India clashed the British served the former. Sometimes, due to lack of instructions and delay in instructions from the India Office, the Indian delegates had to face difficulties in the conferences they represented (*Ibid* 52).

The number of delegates sent on behalf of India was less in number in comparison to any other member of the League. They could maintain professional contact whereas other members sent many delegates who entered into unofficial diplomacy.

[15] The European powers dominated the League, and they were the colonisers who did not wish to grant self-determination. "The League of Nations is not a super State which could dictate to the States Members anything that is likely to affect the *international* administration" (Ram and Sharma 1932: 140). It could put a condition before the members that all the colonies and their dependencies should be given the right of self-governance (*Ibid* 190).

Due to the suggestion given by the delegates who went to Geneva, three substitute delegates were appointed to represent India in the seventh Assembly of the League of Nations.

India did not have a permanent representative in Geneva. Many nations had permanent representatives, but the Government was reluctant to incur expenditure. The absence of a permanent representative in Geneva led to a setback to Indian interests in many issues (Verma 1968: 56). The members of Indian legislature demanded the appointment of Indian head in the delegations sent on behalf of India. The British rejected it in the pretext that an Indian could not "appreciate the guiding principles of His majesty's Government" (*Ibid* 68). Indian legislators demanded an Indian head to get rid of the allegation against Indians that they are reiterating the British views in the international forums. The British possessed the feeling of racial superiority. It never justified their conscience that the head of the delegation could be an Indian leader (*Ibid* 70). Due to the untiring efforts of the Indian legislators like P.C. Sethna, the demand was met by the British when Mohammad Habibullah was appointed as the head of the Indian delegation to the Tenth Assembly of the League of Nations. The uniqueness of the report submitted by this delegation was that it made some recommendations to elevate the position of India in the League. One of the recommendations was on India's candidature in the Council elections. The recommendations were not materialised due to the disagreement of the government. After that, an Indian headed the delegation.

The next issue raised by the Indian legislators was the appointment of Indian delegates to other international conferences of technical nature (*Ibid* 77-78). In 1937, India succeeded in her demands as Indians led the delegation thereafter.

Another problem faced by the delegates was inexperience because every time new representatives were appointed for representation. They were never part of committees of the League due to their lack of experience. Demand was raised for continuity in the appointments which was met in 1930. Such reappointments helped in the election of Aga Khan as Vice-President of the Assembly, Denys Bray became a part of many sub-committees and H. Mehta was appointed as General Rapporteur of the Fourth Committee. The Indian legislators through debates and negotiations with the British solved almost all the issues stated above.

5.3 Issues Discussed in the League on India

The League of Nations analysed a plethora of problems. Some discussions concerned India and her interests. A special report submitted in the Assembly was on the claim of India to be represented in the Governing Body of the International Labour Office. The representation in the Governing Body was emphasised in one of the sessions of the Assembly in July-August 1920.

The issue of disarmament was debated in detail in the League. The representatives of India in the League did not support disarmament because of the general notion that it would mean putting India's security at stake. The British opinion was that the tribes of Afghanistan were dangerous in the frontiers and were waiting to attack without following any principles of international humanitarian law. The British exaggerated the power of these tribes, and the actual threat was assessed from Russia (Verma 1968: 103). Moreover, under the British rule, Indian opinion in the League reflected that of the British. The British could not pull out the army deployed in India because it was an important factor to suppress the freedom struggle in India (*Ibid* 105).

The clamour caused by the issue of opium trade world over caught the attention of the League. Opium became a menace in many parts of the world. Opium wars were fought between India and China. An action against opium trade became imperative. In this regard, the US government organised two conferences on opium traffic in Shanghai (1909) and Hague (1912). India ratified the Hague Convention in 1920 but did not comply with it. Indian opium was sold even after the ratification.

Article XXIII of the League Covenant empowered the League to deal with the traffic of opium and other narcotic drugs. In the first Assembly of the League in 1920, it appointed an advisory committee to deal with the opium trade. An Indian representative was a member of the committee. The work of the committee was based on international conventions like the Hague Convention of 1912. The League with the intention of controlling domestic consumption of opium introduced a League standard. The Council of the League appointed A.C. Chatterjee as a Member of the Permanent Central Opium Board. The League of Nations' work on controlling opium and narcotics traffic helped India to an extent (Asirvatham 1946: 61).

Indian delegates to the League in 1921 and 1922 cited the medical and scientific use of opium in India and hence, did not support the ban of opium totally. The Geneva Conferences, under the aegis of the League, in 1924 and 1925 also dealt with the opium issue. US and China opposed the Government of India's policy as the sale of opium was rampant in these States. They blamed India for the production of opium. India opined that an agreement should be reached between the opium-producing countries.

Opium was vastly used in India. The use of opium in India was severely criticised by medical experts. Use of opium in India was to such an extent that women who worked in industries drugged their babies with opium to prevent the babies from crying. The Government of India's policies on opium were criticised as inadequate. Since the Government earned a lot of revenue from Opium trade (national as well as international), it did not want to restrict its use (Ram and Sharma 1932: 150). It appointed a Royal Opium Commission. The Commission submitted a report in 1895. It was known to be a farce because it stated that Indians used opium for medicinal purposes and the Government's policy was based on it (Verma 1968: 216).

The Government of India's opium policy was criticised by Mahatma Gandhi and the Indian National Congress. Due to the pressure from international and national spheres, the consumption of opium in India was reduced drastically despite the fact that it was a blow to India's revenue (Ram and Sharma 1932: 153). In March 1926, a resolution was passed by the Indian Legislature to stop the export of opium for any other purpose except medicinal and scientific reasons. The Government of India tried to control domestic consumption with the enactment of Opium Act.

Further conventions on opium and other narcotic drugs entered in the League era were the Geneva Convention of 1925, the Geneva Agreement on Opium Smoking of 1925, the Drugs Limitation Convention of 1931, the Bangkok Agreement on Opium Smoking of 1931, and the Convention for the Suppression of the Illicit Traffic in Dangerous Drugs of 1936. India also participated in these conventions (Ginneken 2006: 105).

These conventions were a result of deliberations in the League on use of other narcotic drugs. Smuggling of narcotic drugs like cocaine in India led the Indian delegates to request the League in 1926 to check the widespread problem of narcotic

drugs. Due to the pressing need for a solution, a conference (Conference on Limitation on the Manufacture of Narcotic Drugs) was convened under the League through a resolution passed in 1930 in the Assembly. The outcome of the conference was a convention in 1931 based on the Geneva Convention of 1925. India signed the convention. The convention was an unprecedented step towards regulation of an industry under "international co-operation" and "that manufacture in its economic aspect has been wholly subordinated to higher humanitarian and moral aims" (Ram and Sharma 1932: 121).

The League also discussed issues concerning women and children. One of the important Conventions on women and children signed by India under the aegis of the League of Nations are the Convention for the Suppression of Traffic in Women and Children of 1922. The Indian Penal Code declared trafficking as an offence and prescribed punishment for the same. The laws were inadequate, and amendments were brought to the IPC to provide more protection to women below 18 years of age. The provincial governments also passed legislations to curb trafficking like the Madras Suppression of Immoral Traffic Act of 1930. These steps were taken to bring national laws in consonance with international laws.

Child health, infant mortality and child welfare caught attention of the League. The Government of India cited that the conditions in India were not amicable to introduce legislations of child welfare. In 1928, a report was submitted to the Fifth Committee stating that the age of marriage was gradually rising and child marriages were decreasing in number (Verma 1968: 187). Some legislations on children were passed like Madras Juvenile Offenders Act, amended in 1930. Laws were passed in provinces raising the age of marriage. The International Convention for the Suppression of the Circulation of and Traffic in Obscene Publications was signed in 1923. In India, obscene literature, advertisements were prevalent at that time. India ratified this convention in 1924. To implement this international convention, India made amendments to the Indian Penal Code and Criminal Procedure Code.

In one of the sessions of the Assembly in 1922, the issue of slavery was discussed. After that, the Secretariat formed a Temporary Committee on Slavery. Slavery Convention was signed under the auspices of the League in 1926. India was ready to sign the treaty provided she could make some reservations with the exclusion

of territories practising some forms of slavery and those on which the Government of India did not have direct control. Another motive behind such a reservation was that the Government wanted to maintain good relations with the Princely States. In pursuance of signing the treaty, the Government released all slaves from the Hukawng Valley in Burma.

With regard to the issue of statelessness a Special Protocol Concerning Statelessness was formulated under the aegis of the League. On 28th September 1932, India as a separate member of League of Nations signed the Special Protocol. Article 1 of the Protocol provided the following international obligation on the signatories:

> If a person, after entering a foreign country, loses his nationality without acquiring another nationality, the State whose nationality he last possessed is bound to admit him, at the request of the State in whose territory he is:
>
> (i) If he is permanently indigent either as a result of an incurable disease or for any other reason; or
> (ii) If he has been sentenced, in the State where he is, to not less than one month's imprisonment and has either served his sentence or obtained total or partial remission thereof.
>
> In the first case, the State whose nationality such person last possessed may refuse to receive him if it undertakes to meet the cost of relief in the country where he is as from the thirtieth day from the date on which the request was made. In the second case, the cost of sending him back shall be borne by the country making the request.

Under the aegis of the Council of the League of Nations, International Financial Conference was held in Brussels in 1920. It was an important step towards international cooperation and pioneered the discussion on monetary affairs (Sayers 1976: 153). The conference was convened to discuss the financial crisis and ponder over solutions for the same.[16] Committees were categorised into four to report in the conference viz. public finance, international trade, currency and exchange, and international credits. There were 86 members in the conference. The representatives were not chosen because of their connection to a nation-State but due to their expertise. They had enough freedom to express as per their belief and experience. 39 countries were represented in the conference (Federal Reserve Bulletin 1920: 40). India was one of the participants. India was represented by Sir Marshall Frederick

[16] The resolution passed by the Council in February 1920 states "The League of Nations shall convene an international conference with a view to studying the financial crisis and looking for the means of remedying and of mitigating the dangerous consequences arising from it."

Reid, the former member of the Council of the Secretary of State for India, H.P. Howard, former finance secretary to the Government of India and Sir Fazilbhoy Currimbhoy, representative of the Bombay Business Community.

5.6 Positive Aspects of India's Membership

"The League can be considered an apparatus, through the way in which it attempted to re-territorialise the imperial world into an international order, but this also involved deterritorialising and de-scaling imperial sovereignty" (Legg 2009: 243). In the words of J.G. Starke (1964: 209) the League of Nations was a significant step in the evolution of international law:

> The League of Nations Covenant, that is to say, Part I of the Treaty of Versailles, 1919, reflected a new theory of the scope and purpose of the international organisation. This was the conception of an international institution, with universal or almost universal membership of the states of the world and devoted to the fulfilment of most general aims in the interests of the international community, namely the promotion of international cooperation, the preservation of international peace and security, the fostering of open, just, and honourable relations between nations, the firm establishment of International Law as the actual rules of conduct between States, and the maintenance of justice and a scrupulous respect for all treaty obligations.

The greatest flaw of the League was that it could not prevent the Second World War. States like Japan, Germany, Italy and the Soviet Union were dissatisfied with the outcome of the 1919 treaty. The USA was not a member of the League. Hitler withdrew the membership of Germany in 1933. Despite these drawbacks, the League was not a failure as it laid foundations for the United Nations. Kewal Singh (1985: 52) states the importance of the League in institutionalising international relations, "By its commitment to the principles of justice to all peoples and nationalities and their right to live on equal terms of liberty and safety with one another whether they be strong or weak, the League marked the first effort to democratize the international relations."

The positive aspect of India's membership in the League of Nations was that she "got an opportunity to develop her international personality" (Verma 1968: ix). It helped her "for the creation of a special international status" (Sundaram 1930: 452). After the membership in the League, Indian diplomacy began to be shaped (Verma 1968: 35). Indian Political Department members were sent as British Ministers to Afghanistan and Nepal. Consular Officers from India were despatched to many parts

of the world like Kashgar, Persia, Muscat, Jeddah, etc. In 1927, India was empowered to enter into commercial treaties directly without the backing of the British government.

"The debate over Indian rights at the League was but one indication of how newly defined international political space in the 1920s threatened domestic governments' ability to control their domestic political governance and discourse" (Gorman 2012: 140). The membership also appeased the national leaders who were demanding independence in an unprecedented manner (Verma 1968: 25). They understood that the British wanted to show the outside world that Britain was supporting India. The membership gave an impetus for "constitutional development" of India (*Ibid* 35-36). Montagu by providing the rationale that India was a member of the League, put forth the Government of India Bill before the House of Commons. The British also tried to disprove the allegations that strengthening her voting power was the motive behind including India in the League. Therefore, granting some autonomy to India to govern herself was imperative (*Ibid* 41). The Government of India Act of 1919 kept out of the Indian legislature's purview to discuss matters on the League of Nations.[17] The first resolution on an international treaty was put forward by Sir Atul Chatterjee in the Legislative Council and by Thomas Holland in the Legislative Assembly to frame laws in consonance with the Washington Conference, 1919 fixing the hours of work. Thus, the Indian Legislature attained the status of "competent authority" to decide on such matters (*Ibid* 43).

One of the advantages of membership of the League was that the Indian legislature moved beyond national issues and discussed international issues (*Ibid* 78). Some of the inter-imperial problems were raised in the League of Nations by India. For instance, the issue of Indians residing in the mandated territories was raised by Maharaja of Nawanagar. Srinivas Sastri criticised the treatment of Indians in the mandated territories in strong words before the Assembly of the League (Gorman 2012: 126). These issues were discussed in international fora by the Indian delegates until a decision was made to restrict such speeches in the Imperial Conference of 1923. In the 1930s there was a debate in the League of Nations to decide a scale

[17] Article 8(i) of the rules under the 1919 Act states that "no question shall be asked regarding any matter affecting the relations of His Majesty's Government or the Governor-General in Council with any foreign power."

wherein national and international matters would be demarcated. This issue came up during the discussions on trafficking in women and children. The British said that the League could deal only with international matters whereas the League denied such bifurcation (Legg 2009: 234). The Government of India was more "contemptuous" of the League of Nations and did not want to share intricacies of the Empire (*Ibid* 244).

Membership in the League led to India's presence in the non- League conferences also. India was represented in Washington Conference on Naval Armaments of 1921, the Genoa Economic Conference of 1922, the London Reparations Conference of 1924, London Naval Conference and World Economic Conference, 1927. India participated in the Washington Conference of 1921. India participated because matters concerning India and Dominions were supposed to be decided with their consent. India was represented by Srinivas Sastri and signed the Washington treaties on February 6, 1922.

India's membership in the League of Nations made her a part of the Permanent Court of International Justice, the International Labour Organisation, the International Committee of Intellectual Co-operation[18], the Advisory Committee on Opium and Drugs, the International Institute of Agriculture, the Health Committee, etc. Ram and Sharma (1932: 179) saw India's membership in the League as a significant step towards disarmament and world peace. They also opined that disarmament could be achieved only by mobilising public opinion against the use of armament (Ram and Sharma 1932: 199).

A civilisation can be preserved not only with the curbing of war but also with human cooperation through international organisations (Iriye 2002: 38). India's membership in the League was significant from a multicivilisational perspective. The interaction with other States led to further civilisational exchanges and also brought India's culture to the front through her delegates. They upheld the values which Indian civilisation stands for and spread them in international forums. Ram and Sharma (1932: 177-178) opine:

[18] Jagdish Chandra Bose and Radha Krishnan were the members of Intellectual Committee of Intellectual Cooperation. The aims of the committee were to develop "the interchange of knowledge and ideas among peoples and improving the conditions of intellectual work" (Ram and Singh 1932: 130).

> Through the League, India can teach to the West whatever is precious in her culture, and she can also learn from the West what it can teach her, particularly in the field of science. It is really through intellectual co-operation that nations come to respect each other, avoid war and enjoy peace which is the highest goal of human existence. India should be failing in her duty if she did not contribute her proper share in building a peaceful world. It is not too much to say that East without West is incomplete, and the *vice versa*.

India's hostile attitude towards the League of Nations changed after the establishment of the branch of International Labour Organisation in India. The former leader of the Indian National Congress, C. V. Raghavachariar appealed to Indians to take the issue of economic and political self-determination to the League of Nations. Gradually, Indian hostility turned to amity towards the League. When Germany and Italy left the League, India was perturbed as to the functions of the League. She wanted to withdraw from the League. Many leaders suggested that such a step would compromise future membership (Verma 1968: 301). An innovative idea was suggested by few scholars in India to create a League of Peoples to replace the League of Nations. "These people imagined that in the League of Peoples only civilised idea would dominate and countries would be represented by a delegation based upon their population ratio" (*Ibid* 302). The whole idea of internationalism suffered a setback with the declaration of the Second World War.

6. Colonial India and the International Labour Organisation

At the beginning of the twentieth century, the idea of ILO emanated due to two reasons (Rodgers 2011: 46). First, there was unrestricted capitalism, violation of human rights and exploitation of labour. The need for an institution arose for regulating these problems. Secondly, an organisation which would fulfil the demands of the workers was the need of the times. The demand for ILO rose because the workers contributed in the First World War, wanted their leaders to keep their promises made to them during the war. The Paris Peace Conference, 1919 was the right arena for discussion.

Some private unions were the predecessors of international organisations. Finally, the International Association for the Legal Protection of Labour was transformed to International Labour Organisation in 1919. The Commission appointed in the Paris Peace Conference, 1919 enunciated the following nine

principles while recommending the establishment of the ILO (Ram and Sharma 1932: 61):

1. Labour is not to be considered as only an article of commerce.
2. The employers, as well as the employed, have the right of association for all lawful purposes.
3. Workers should be paid such wages as are adequate and reasonable to enable them to lead a comfortable life.
4. To adopt a forty-eight-hour working week whenever it has not yet been adopted.
5. At least 24 hours continual rest should be given to the workers, which should include Sunday as far as possible.
6. Children should not be employed for work, and young persons should be employed as to have sufficient time left for their education and physical development.
7. Men and women workers should get equal wages for works of equal value.
8. Each country should lay down a standard of conditions of labour with due regard to the equitable economic treatment of all workers.
9. Provision should be made for inspection to see that regulations and laws for the protection and welfare of workers are being enforced. Women also should take part in this inspection.

Two organs of the ILO were established viz. the International Labour Office and International Labour Conference. Ram and Sharma (1932: 175) opine that "the International Labour Conference is the proper machinery through which our delegates can ventilate the grievances of the workers and create world opinion in favour of necessary reforms". Practically, International Labour Conference was a forum which was utilised by Indian delegates to point out to the world the plight of the workers.

India occupied a unique position in the ILO as it was the only nation to be not independent and yet be a member (Gavin 1967: 75). India had to face the debates on membership in the ILO similar to the prolonged discussions in the League of Nations. India had to fight for membership in the League of Nations. India was admitted as a member of the ILO after much confrontation. She had to debate harder for membership of the Governing Body of the ILO. One of the main criteria for being a part of the Governing Body was that the State should be of industrial importance. This was to be decided by the Council of the League of Nations. The Organising Committee of the Washington Labour Conference, 1919 recommended eight countries of industrial importance as the USA, Great Britain, France, Germany, Italy, Japan, Switzerland and Spain. Objections were raised by India, Sweden, Poland and Canada. India contended that India's capacity to pay to the international organisations was assessed high, but when it came to representation, she was given least

importance. The Council accepted the recommended names. India contended firmly and thereby a committee was formed comprising of four members of the Governing Body to define the term "industrial importance" and "to fix the criteria for the selection of the eight states" (Verma 1968: 156). The Council heard the contenders. Poland argued that India's membership in the Governing Body would mean more representation to the British. India's advocate was Lord Chelmsford who argued that India had a huge population, twenty million industrial workers. Moreover, he pointed out that the demand of peculiar situation of labour called for India to be a part of the Governing Body. Final contestants to the post were India and Sweden. Lord Balfour justified India as the deserving aspirant. Finally, the Council decided the eight States of industrial importance as Germany, Belgium, Canada, France, Great Britain, India, Italy and Japan. India's membership in the Governing Body raised her international status (*Ibid* 159). She could also highlight many industrial problems.

The uniqueness of ILO is that not only the representatives of States but also those of workers and employers participate in the proceedings and discussions of the organisation (Bhattacharya *et al.* 2011: 44). Out of the delegates who represented India in the ILO, one was Indian (Sundaram 1930: 457). "Indian national delegates have used the rostrum of the International Labour Conference as a place for the expression of national aspirations" (*Ibid* 458). They did not try to appease the British rulers. India voted contradictory to Britain in 46 instances between 1919 and 1936 at the International Labour Conferences. During the first conference of ILO in Washington in 1919, NM Joshi was sent as the representative of workers in India by the British Government. He opposed the government's position in the travaux preparatory of the Convention 5 on fixing the minimum age for admission of children in industrial employment. In 1927, Sir Atul Chatterjee was elected unanimously as the President of the International Labour Conference. In 1932, he was elected the Chairman of the Governing Body.

V.V. Giri participated in the International Labour Conference of 1927 (Proceedings of the International Labour Conference, 1927: 97) as the Workers' delegate. He spoke not only for India but also for other colonised countries which denied representation to the coloured:

> Ungrateful though it may sound to many, I have to draw the attention of this Conference to the fact that, perhaps from causes outside its control, the International Labour Office has not devoted that time, energy and attention which it was to be hoped it would devote to the investigation and amelioration of conditions in those countries which are known as special countries, in mandated territories and in countries like India, where the Government is foreign and where the interests of rulers and ruled are at variance and where the workers are not well organised. I make this reference, not in a spirit of fault-finding, but to remind you and to remind the Office that there is much work to be done and that, if it is not accomplished, the international character and prestige of this Organisation is jeopardised.

Amongst the Indian representatives, P.P. Pillai, N.M. Joshi and Rajani Kanta Das created their niche. While working in the League of Nations, P.P. Pillai was sent to India in 1925 to open a League office in India. He had discussions with Jinnah and Nehru. They did not find the idea feasible. However, he proposed the establishment of an ILO office in India. An ILO office was set up in India, and in 1928, Pillai was appointed as the head. He published papers and promoted ILO in India (Krishnamurty 2011: 56). Rajani Kanta Das joined the ILO in 1925. He was recommended to prepare a report on the labour conditions in Asiatic countries by N.M. Joshi at the Seventh Session of the International Labour Conference. His report was very critical of the labour conditions in India under the British rule. The government did not consider the report as official. He used the material to publish articles. The writings brought to light, problems of labour in India with particular emphasis on child labour and the conditions of women labour. He stood for compulsory primary education and social legislation to combat the problem of child labour. He recommended changes in the labour conditions of women, providing technical education to women, improvement in their status, curb child marriage (*Ibid* 58). While analysing the problems of labour in India under the British rule, Das highlighted various social problems and aspects related to labour.

A significant step was taken to stop forced or compulsory labour in the form of a Convention, Convention Concerning Forced or Compulsory Labour of 1930. In India, legislation called the Criminal Tribes Act was enacted in 1924. It tried to discipline the criminal tribes by employing them compulsorily in certain sectors. The provincial governments implemented the Act successfully employing 31000 tribesmen (Verma 1968: 203). There was no exception about criminal tribes. Therefore, the Government of India decided not to ratify the Forced Labour Convention. After that, furore against the Government's stand in the Indian

Legislature forced the government to ratify the Convention. It exempted the Criminal Tribes Act from amendment. It also directed the provincial governments to check forced labour.

The Treaty of Versailles under Articles 405 and 408 provided for the ratification of treaties (by members' legislatures) formulated under the aegis of the International Labour Organisation.[19] Under the aegis of the ILO, 28 conventions were

[19] Article 405 of the Treaty of Versailles states:
"When the Conference has decided on the adoption of proposals with regard to an item on the agenda, it will rest with the Conference to determine whether these proposals should take the form: (a) of a recommendation to be submitted to the Members for consideration with a view to effect being given to it by national legislation, or (b) of a draft international convention for ratification by the Members.
In either case, a majority of two-thirds of the votes cast by the Delegates present shall be necessary for the final vote for the adoption of the recommendation or draft convention, as the case may be, by the Conference.
In framing any recommendation or draft convention of general application the Conference shall have due regard to those countries in which climatic conditions, the imperfect development of industrial organisation or other special circumstances make the industrial conditions substantially different and shall suggest the modifications, if any, which it considers may be required to meet the case of such countries.
A copy of the recommendation or draft convention shall be authenticated by the signature of the President of the Conference and the Director and shall be deposited with the Secretary-General of the League of Nations. The Secretary-General will communicate a certified copy of the recommendation or draft convention to each of the members.
Each of the Members undertake that it will, within the period of one year at most from the closing of the Conference, or if it is impossible owing to exceptional circumstances to do so within the period of one year, then at the earliest practicable moment and in no case later than eighteen months from the closing of the session of the conference, bring the recommendation or draft convention before the authority or authorities within whose competence the matter lies, for the enactment or other action.
In the case of a recommendation, the Members will inform the Secretary-General of the action taken.
In the case of a draft convention, the Member will, if it obtains the consent of the authority or authorities within whose competence the matter lies, communicate the formal ratification of the convention to the Secretary-General and will take such action as may be necessary to make effective the provisions of such convention.
If on a recommendation no legislative or other action is taken to make a recommendation useful, or if the draft convention fails to obtain the consent of the authority or authorities within whose competence the matter lies, no further obligation shall rest upon the Member.
In the case of a federal State, the power of which to enter into conventions on labour matters is subjected to limitations, it shall be in the discretion of that Government to treat a draft convention to which such limitations apply as a recommendation only, and the provisions of this Article with respect to recommendations shall apply in such case.
The above Article shall be interpreted by the following principle:
In no case shall any Member be asked or required, as a result of the adoption of any recommendation or draft convention by the Conference, to lessen the protection afforded by its existing legislation to the workers concerned."
Article 408 of the Treaty of Versailles provides:
"Each of the Members agrees to make an annual report to the International Labour Office on the measures which it has taken to give effect to the provisions of conventions to which it is a party. These reports shall be made in such form and shall contain such particulars as the Governing Body may request. The Director shall lay a summary of these reports before the next meeting of the Conference."

formulated in the first decade of its establishment. India ratified many conventions before her independence. Hours of Work (Industry) Convention, 1919, Unemployment Convention, 1919, Night Work (Women) Convention, 1919, and Night Work of Young Persons (Industry) Convention were ratified on 14.07.1921. Right of Association (Agriculture) Convention, 1921, and Weekly Rest (Industry) Convention, 1921 were ratified on 11.05.1923. Minimum Age (Trimmers and Stokers) Convention, 1921, was ratified on 22.11.1922 and Medical Examination of Young Persons (Sea) Convention, 1921 was ratified on 20.11.1922. Workmen's Compensation (Occupational Diseases) Convention, 1925 and Equality of Treatment (Accident Compensation) Convention, 1925 were ratified on 30.09.1927. Inspection of Emigrants Convention, 1926 was ratified on 14.01.1928. Seamen's Articles of Agreement Convention, 1926 was ratified on 31.10.1932. Marking of Weight (Packages Transported by Vessels) Convention, 1929 was ratified on 07.09.1931. Night Work (Women) Convention, 1934 was ratified 25.03.1938.

Many of the Conventions formulated under the aegis of the ILO are influenced by the discussions and debates by Indian representatives and many laws formulated in India are influenced by the ILO conventions. Thus, it is here again proved that international organisations are influenced by States and vice-versa (Bhattacharya *et al* 2011: 44).

Formation of industrial organisations in India was a repercussion of her membership in the ILO (Verma 1968: 150). For instance, the All India Trade Union Congress (AITUC) was formed in 1920. The first president of the organisation was Lala Lajpat Rai. The rationale behind the organisation was to choose a deserving representative of the workers to the ILO rather than giving the power of nomination to the Government of India. Similarly, the employers questioned their representation in the ILO. Consequently, the Federation of Indian Chamber of Commerce was established in 1927.

The Indian representatives to the ILO argued against colonisation. The Indian representatives like Lala Lajpat Rai linked the importance of self-determination to the welfare of workers. Discussions in the ILO on decolonisation began after an impetus was given by the freedom struggle led by Mahatma Gandhi. Workers' representatives at the International Labour Conferences like S.C. Joshi, Chaman Lal, Fulay and

employers' delegates like Amritlal Ojha, Walchand Hirachand spoke for the right to self-determination of Indians. They unveiled the reality of the British rule in India. Decolonisation was supported by ILO after the second world war (Rodgers 2011: 46).

It is pertinent to note that there were better labour standards in comparison to international standards in some private firms in India. In the 1920s and 1930s Tata Iron and Steel Company followed better labour standards as compared to the national and international labour standards of those times (Ratnam 2000: 475).

Earlier also there were labour legislations, but they favoured the interests of employers rather than that of labour (Verma 1968: 164). As a consequence of membership in the ILO, colonial India enacted several labour legislations viz. Indian Factories (Amendment) Act of 1922, Workmen's Compensation Act of 1923, etc. The Indian Mines (Amendment) Act of 1935 proscribed employment of children below 15 years of age in mines. The legislations limited the hours of work of labour, provided dispute settlement mechanisms in an industrial dispute, compensation for an accident during work, etc. With untiring efforts of the Indian members of the legislature, indentured labour was abolished (Mahajan 1982: 270). The result of all this was that the Government of India could not neglect the issues concerning labour. NM Joshi (as quoted in Verma 1968: 165), who represented India in International Labour Conferences, opines that the "International Labour Organisation has done, to my mind a great amount of good to the working class of this country. The factory legislation and labour legislation of this country are not sufficiently advanced. But I must admit that whatever advance we have recently made in the sphere of legislation is to a great extent due to the International Labour Organisation."

7. Colonial India and the Health Organisation

The Assembly of the League created the Health Committee on June 22, 1921, with the objective of establishing an Epidemiological Information Service. The Permanent Health Organisation was formed in 1923. It comprised of three organs viz. an Advisory Council formed by the Office International d'Hygiene Publique, A Health Committee and a Secretariat. The aims of the organisation are enunciated as "(i) to assist those individuals who are carrying on researches into the causes of epidemics, (ii) to collect and disseminate all useful information regarding health and sanitation,

and (iii) to render active help in combating the outbreak of epidemics in any part of the world" (Rama and Sharma 1932: 111).

Due to the rise of epidemic diseases in India, the leaders in India demanded the Health Committee to pay attention to the health issues in India and Asia. They opined that the health related problems of West were given too much emphasis by the Committee. In 1924, an Eastern Intelligence Centre (later known as Singapore Epidemiological Bureau) was opened in Singapore because it was a Port to ships and with ships came diseases (Verma 1968: 208). On the outbreak of an epidemic, it would inform all the port authorities. It assessed the situation in the East and published a weekly bulletin on health conditions. India and Japan successfully demanded the League to finance the Singapore Bureau as it did not have a regular financial support.

India was represented in various official posts of the Health Organisation by personalities like Col. J.D. Graham and C.P. Ramaswamy Aiyar. The organisation had a medical and sanitary officers' exchange programme which was helpful to India. In 1928, the Far Eastern Association of Tropical Medicine organised its seventh congress in India on invitation from the government of India. The Congress discussed various issues like sanitation, rural health, diseases like small-pox, etc. It was the first time that the League's activity was organised in India (*Ibid* 213). In pursuance to the Congress, League's Malaria Commission visited India in 1929. Malaria was rampant in India (Rama and Sharma 1932: 157). It did a comprehensive study and submitted a report to the Health Committee. Indians appreciated the Commission's visit, and thereby the attitude of Indians towards the League changed.

8. Colonial India and the Bretton Woods Institutions

Forty-four nations participated in the United Nations Bretton Woods Monetary and Financial Conference. More than half of the participant countries were poorer, and it was based on one country one vote. The consequent Articles of Agreement established International Monetary Fund (IMF) and International Bank for Reconstruction and Development (IBRD). The rationale behind the formation of

Bretton Woods institutions was to confront situations like the Great Depression of the 1930s and to ease laissez-faire in international trade[20] (Dubey 1985: 173).

Eric Helleiner (2015: 31) points out the general assumptions about the Bretton Woods institutions that the negotiations to create the institutions were an Anglo-American affair and international development issues were ignored in the discussions. As a result, the role of developing countries in the Bretton Woods negotiations is neglected. Even though IMF and IBRD are advocates of neo-liberal policies now, but the "Bretton Woods architects outlined a much more ambitious template for international development that included the creation of the IBRD and support for

[20] Article 1 of the Articles of Agreement of the IMF states the purposes of the institution as follows:

(i) To promote international monetary cooperation through a permanent institution which provides the machinery for consultation and collaboration on international monetary problems.

(ii) To facilitate the expansion and balanced growth of international trade, and to contribute thereby to the promotion and maintenance of high levels of employment and real income and the development of the productive resources of all members as primary objectives of economic policy.

(iii) To promote exchange stability, to maintain orderly exchange arrangement among members, and to avoid competitive exchange depreciation.

(iv) To assist in the establishment of a multilateral system of payments in respect of current transactions between members and in the elimination of foreign exchange restrictions which hamper the growth of world trade.

(v) To give confidence to members by making the general resources of the Fund temporarily available to them under adequate safeguards, thus providing them with an opportunity to correct maladjustments in their balance of payments without resorting to measures destructive of national or international prosperity.

(vi) In accordance with the above, to shorten the duration and lessen the degree of disequilibrium in the international balances of payments of members.

The World Bank has following purposes as stated in its Articles of Agreement:

(i) To assist in the reconstruction and development of territories of members by facilitating the investment of capital for productive purposes, including the restoration of economies destroyed or disrepute by war, the reconversion of productive facilities to peacetime needs and the encouragement of the development of productive facilities and resources in less developed countries.

(ii) To promote private foreign investment by means of guarantees or participations in loans and other investments made by private investors; and when private capital is not available on reasonable terms, to supplement private investment by providing, on suitable conditions, finance for productive purposes out of its own capital, funds raised by it and its other resources.

(iii) To promote the long-range balanced growth of international trade and the maintenance of equilibrium in balances of payments by encouraging international investment for the development of the productive resources of members, thereby assisting in raising productivity, the standard of living and conditions of labour in their territories.

(iv) To arrange the loans made or guaranteed by it in relation to international loans through other channels so that the more useful and urgent projects, large and small alike, will be dealt with first.

(v) To conduct its operations with due regard to the effect of international investment on business conditions in the territories of members and, in the immediate postwar years, to assist in bringing about a smooth transition from a wartime to a peacetime economy.

policy space to enable poorer countries to pursue state-led development strategies" (Helleiner 2015(b): 39).

The North-South dialogue and differences in the formation of Bretton Woods Institutions is not highlighted by the historians (Helleiner 2015(a): 1). The usual discourse on Bretton Woods history is that the leading officials in the negotiations, Harry Dexter White and John Maynard Keynes were not bothered about the welfare of poor nations[21] (*Ibid* 2). White, while proposing IMF, envisaged the fulfilment of aims in the Atlantic Charter. In envisaging IBRD, he emphasised on the movement of capital from rich to poor countries. He also advocated Roosevelt's plan to promote the development of Latin American States. Keynes believed that since countries like Brazil, China, etc. do not have much idea about international finance, the USA and Great Britain should formulate a blueprint of the international economic program and later invite other countries. The USA did not support this idea and invited other 43 countries to the Bretton Woods Conference.

Hans J. Morgenthau (1945:182) opined that the conference was a significant step towards peace and prosperity of the world. He took into account the poor countries and their development thereafter (*Ibid* 190):

> Nothing would be more menacing to have than to have the less developed countries, comprising more than half the population of the world, ranged in an economic battle against the less populous but industrially more advanced nations of the west. The Bretton Woods approach is based on the realization that it is to the economic and political advantage of countries such as India and China, and also of countries such as England and the United States that the industrialization and betterment of living conditions in the former be achieved with the aid and encouragement of the latter.

The history focusses on the "failed efforts of Indian officials to request that India's "sterling balances"- that had accumulated during the war in London as frozen funds- be liquidated multilaterally by the new IMF" (Helleiner 2015: 32). While emphasising on the failure India's crucial role "in advocating the prioritisation of international development issues in plans for the post-war international financial order" is neglected (*Ibid*).

The Indian public opinion was that India should play an active role in the Bretton Woods negotiations (*Ibid* 33). Views were invited from the General Policy

[21] Benn Steil (2013: 117) opines that Keynes was concerned with the economy of Britain but was not concerned with that of India and other parts of the British Empire.

Committee of the Reconstruction Committee of the Council comprising of representatives from the Government of India, provincial governments and eminent personalities. The first Indian Governor of the Reserve Bank of India, Chintaman Deshmukh suggested that India should demand more policy space to be granted to the poorer countries, "to adjust exchange rates to insulate their domestic economies from sudden balance of payments problems caused by changes in agricultural prices" (*Ibid* 33). He reminded the delegates to keep in mind the standard of living of Indians while evaluating any proposed scheme in the negotiations.

Sixteen governments of the inner circle met at the Atlantic City in June 1944 to formulate the agenda for the Bretton Woods conference. Raisman, Gregory and Deshmukh represented India in the meeting. They succeeded in amending the proposed purposes of the IMF. RBI's senior economist, J.V. Joshi, proposed the following amendments which were well taken (*Ibid* 36):

> To facilitate the expansion and balanced growth of international trade, *to assist in the fuller utilisation of the resources of economically underdeveloped countries* and to contribute thereby to the maintenance in the world as a whole of a high level of employment and real income, which must be a primary objective of economic policy.

At the Bretton Woods, India was represented by Sir Jeremy Raisman and the representatives were chosen by him. The representatives of India were divided equally between British and Indian officials due to the British rule. Chetty and Shroff opposed India's representative head to be a British. Later, Raisman gave them the opportunity to express themselves well and hence; they accepted the support he provided (Helleiner 2015: 36). India primarily dealt with her quota, voting power and sterling balance at the Bretton Woods (*Ibid* 36). At the time of Bretton Woods negotiations, India was frequently questioning Britain as to how it will repay her war debts (Steil 2013: 182). This aspect was a cause of disagreement between India and Britain throughout the conference. The Indian representatives argued with Keynes over the issue.

India's negotiating power increased due to the war debt Britain owed. India demanded "that the fund provides some means of turning Britain's huge sterling debt to India into dollars. At nearly $12 billion, Britain's Indian debt alone was 50 percent greater than the entire proposed fund capitalization" (*Ibid* 218). Egypt also raised a similar issue over the devaluation of the pound. The USA did not want to give war

supplies to Britain for free as the latter was trying to pay its debts with it. Hence, the USA supported the withdrawal of British troops from India in the negotiations[22] (*Ibid* 278).

India's aim along with France, Russia, China was to increase their borrowing capacity while reducing their debts. They could not oppose the plans formulated by the USA because of the gold reserves it possessed to materialise the scheme (Steil 2013: 229).

Like all other participant countries, India actively participated in the discussion on national quotas which determined the borrowing capacity of a State, voting power and significance of a State in the "global economic hierarchy" (*Ibid*). Britain tried to increase its voting strength by demanding more quotas for the countries which were part of the Empire. The USA decided to check this demand. India competed with China in this matter. India, China, New Zealand protested at the draft fund quota list, but they had to accept it. Finally, the Indian representative, Sir Jeremy Raisman accepted the quota list. About the Bank, delegates demanded less quota because more quota means more lending capacity (*Ibid* 230).

The Indian representatives proposed the inclusion of words "to assist in the fuller utilisation of the resources of economically underdeveloped countries" in the mandate of the IMF (Helleiner 2014: 250-254). The term *underdeveloped* was a contribution made to the economic institutions by India. US, Brazil, Netherlands and South Africa dissented with this amendment because this might lead to confusion with the aim of development envisaged in the Articles of Agreement of the IBRD. They amended the mandate article. Chetty emphasised on the inclusion of the term "economically backward countries" (Helleiner 2015(b): 36). He also criticised the past institutions of Eurocentrism. Therefore, he expected the Bretton Woods institutions to take note of the plight of the economically backward countries like India.

India tried to give separate and independent opinions from Britain in the conference. For instance, there was a debate on silver as the monetary base. A representative of India expressed in a Press Conference that India had no interest in

[22] Maintenance of British troops in India would cost Britain, $500 million per year.

monetisation of silver. This was denied by Britain. The representatives of India were inquisitive about India's interests in the conference. An Indian official asked for an explanation when the discussion on "gold convertible currency" and "gold convertible exchange" came up in the Fund Commission meeting (Steil 2013: 216). Bernstein, the US representative, explained that a definition of the term was difficult and cumbersome to derive at, but in a pragmatic sense, it would mean United States dollar.

Anghie (2004: 191) draws a lineage between the Mandate System and Bretton Woods Institutions. IMF and World Bank are more pervasive in comparison to Mandate System as they have penetrated into the third world in the name of development. The differences between developed and developing were the language used in the Bretton Woods Institutions to balance interests of the third world (*Ibid* 204). The developed-developing dichotomy is evident from the Final Act of the Bretton Woods Conference. It states that "only *economic considerations* shall be relevant to its decisions" (Ganguli 1953: 55). The Bretton Woods Institutions were linked to the UN (Priestley 1987: 49-50). The aim of the UN and that of the institutions match according to the preamble to the UN which states:

> To promote social progress, and better standards of life in larger freedom [and to that end],
>
> To employ international machinery for the promotion of the economic and social advancement of all peoples.

Many demands of the South were not fulfilled in the Conference, but it was "the first substantial North-South multilateral dialogue on international economic reform" (Helleiner 2015(a): 8). A plethora of "innovative ideas about long-term development finance, short-term balance of payments support, capital controls, commodity price stabilization, and international debt restructuring mechanisms" were discussed in the conference (*Ibid* 16). This particular aspect of history wherein development of the third world nations was discussed has been forgotten today and needs to be revived for better financial institutions (*Ibid*).

9. Colonial India and the United Nations

It is a heated debate whether UN is a legacy of the League of Nations. Some scholars contest the legacy, and others accept the same. Rikhi Jaipal (1987: 8) draws

similarities between these international organisations, at the same time by pointing out the differences:

> Whereas the League was Europe-oriented and accepted the colonial situation, the UN provided for decolonisation and has now become virtually a universal organization. Both the League and the UN were conceived by American Statesmen and inspired by American idealism that was moderated in practice by European realism.

The creation of UN cannot be attributed to one person or one nation. It was a combined effort. Roosevelt propagated the idea of UN and persuaded allies. Winston Churchill wanted to entrust peacekeeping function to regional organisations. He supported the creation of a Council of Europe and a Council of Asia (Simma *et al* 2012: 11). Stalin focussed on preservation of the independent great power position of the Soviet Union. A memorandum was signed by 200 prominent members of American legal profession. Efforts of British international lawyers like Lauterpatcht, Hurst, McNair, Brierly and others contributed to the creation of the U.N.

The discontinuity thesis that UN is not a continuation of the League of Nations is criticised. The genesis of the UN began at the very moment collapse of the League became evident (*Ibid* 2). These international organisations existed simultaneously from October 1945 to April 1946. Therefore, it is argued that succession was not intended. The UN charter does not mention succession from the League of Nations. Due to the dual membership, it was decided to wind up the League of Nations and its property was transferred to the UN. In the last session of the League, Viscount Robert Cecil, the British diplomat made a famous statement, "The League is dead. Long Live the United Nations" (*Ibid* 22). The major difference lies at the beginning of the instruments of these organisations. The United Nations mentions peoples in the Charter whereas the Covenant of the League of Nations refers to nations. Thus, the Charter attempts to go beyond the nation-State system. The positive aspect of the Charter is that it provided support for the decolonisation of many colonised nations at its commencement (Isaiah 1985: 94).

The discussions on the establishment of the UN was preceded by the Inter-Allied Declaration of June 1941, the Atlantic Charter of August 1941 and the 26-nation Declaration by the United Nations of January 1942. On an analysis of Roosevelt's Quarantine Speech, it is clear that the US before joining the Second Word War had post-war plans (Simma *et al* 2012: 3). There is a link between the Second

World War and the UN. The formation of the UN was negotiated while the Second World War was going on. The allies of the Second World War met in 1943 in Moscow and envisaged the establishment of an international organisation. Later, they gathered in Tehran in December 1943. The original foundation was laid down at the 45 days long diplomatic preparatory conference held in Dumbarton Oaks in 1944. The States also conducted Yalta Conference in February 1945 wherein "a final compromise formula concretising some of the controversial issues (like the voting procedures at the Security Council) was evolved" (Singh 1995: 34). The thrust of peace and security was assumed by the Great Powers at the Yalta conference which later became the permanent members of the Security Council (the USA, the USSR, the UK, France and China)[23]. In the name of collective security and self-defence, the big three (the USA, the UK and the USSR) created escape clauses in the guise of Article 51 of the UN Charter (Isaiah 1985: 90). They finalised the Charter in 1945 at San Francisco. The sponsoring powers (Great Britain, China, Soviet Union, and the USA) convened the meeting. Fifty States participated in the meeting. India was present during the formation of the UN "not as an independent actor but more as a witness to the proceedings, variably serving as an additional (proxy) vote/voice for the British" (Saksena 1995: 2). India's membership in the UN "was to serve solely British imperial interests in those days" (Murthy 1993: 42). "India's role during the initial months of the United Nations was an unfair legacy inherited by independent India" (Sarangi 2004: 79). However, we cannot draw a conclusion that India in her initial years in the UN served only British interests. She raised her voice against injustices, like racism. Though her position was not independent due to the colonial rule, India did try to contradict British opinions and supported decolonisation. India supported decolonisation even when it was under the interim government lead by Jawaharlal Nehru (Josh 1985: 279). In September 1946, he called back the military comprising of Indian soldiers from Indonesia which was under Dutch colonisation.

When the question of veto in the Security Council was opposed by Australia, India had to fight Australia because she was under the British rule (Saksena 1995: 2). The Indian delegation was headed by Ramaswami Mudaliar on 26 June 1945 when

[23] "Yalta Agreement of February 1945, arrived at between the heads of the governments of the Soviet Union, the United Kingdom and the United States, it was laid down that all decisions in the Council on questions of Procedure should be taken by a majority of any seven votes, and that decisions on other questions should be taken by a like majority, with the added requirement of unanimity of the permanent members" (Misra 1985: 114).

the participatory nations signed the draft of the UN Charter, the Statute of the ICJ and the Preparatory Commission[24] of the UN. The Indian representative during the drafting of the Charter pointed out that power which leads the world to war needs to be checked. He stated, "the wit of man has yet to devise a method whereby a powerful and unscrupulous nation can be prevented from plunging the world into war" (Khan 1985: 7). He opposed the veto system in the Security Council (Rajan 1973: 448). He strongly supported the US recommendation to empower ECOSOC to conduct international conferences (Report of the Indian Delegation to the Preparatory Commission 1946: 5). His proposal to add the agenda on refugees in Committee 3 was successfully accepted.[25] He was elected the Chairman of Committee 3. Due to his insistence, the Economic and Social Council was included as the principal organ of the UN. His grandiloquence and leadership skills earned him the position of the first President of ECOSOC (Saksena 1995: 2).

India was represented by Mrs Vijayalakshmi Pandit at the first session of the General Assembly in October 1946. India was under the interim government. She made a remarkable point in the Assembly. She stated that she considered "imperialism, political, economic and social as being inconsistent with the principles and purposes of the U.N. Charter" (Rao 1952: 246). Such statement in the international organisation was significant because India was demanding independence from Britain. Her words reflected the vision of Jawaharlal Nehru (quoted in Khan 1985: 9):

> Towards the United Nations Organisation, India's attitude is wholehearted cooperation and unreserved adherence in both spirit and letter to the Charter governing it – to that end India will participate fully in its varied activities and endeavour and assume that role in its councils to which her geographical position, population and contribution towards peaceful progress entitle her – in particular, the Indian Delegation will make it clear that India stands for the independence of all colonial and dependent peoples and their full right to self-determination.

She further mentioned

[24] The preparatory commission created eight technical committees. Committee 1 dealt with the General Assembly, Committee 2 on Security Council, Committee 3 on Economic and Social, Committee 4 dealt with Trusteeship, Committee 5 was on legal questions, Committee 6 on Administrative and Budgetary Matters, Committee 7 on the League of Nations and Committee 8 discussed General Questions.

[25] Later, it was decided that due to political considerations, the issue of refugees was to be dealt with by the General Assembly. The matter was not abandoned entirely by the Economic and Social Committee (Report of the Indian Delegation to the Preparatory Commission 1946: 10).

> We move, in spite of difficulties, towards a closer cooperation and the building of a world commonwealth. Let us do this with more deliberation and speed. The peoples of the world are well aware of our sentiments and look with expectation to their fulfilment. Let us recognise that human emotions and the needs of the world will not wait for an indefinite period. To this end let us direct our energies, and reminding ourselves that in our unity of purpose and action alone lies the hope of the world, let us march on.

She argued against imperialism and stressed on the need for decolonisation of all the colonised nations of the world. She emphasised on India's support in the international organisation to achieve its aim of world peace and prosperity. Later, India fulfilled the promise made in the United Nations by playing a crucial role against imperialism and colonialism as a leader of the third world.

India raised her voice against apartheid in the UN in 1946 pointing out the racism against the 3,00,000 Indian diaspora in South Africa and also, the maltreatment of Africans by the White (Ali 1985: 236). Consequently, the UN General Assembly passed a resolution that such practices were against the principles of the UN Charter. It also recommended a meeting of the governments of South Africa and India to resolve the issue. She referred the matter under Articles 10 and 14 of the United Nations Charter[26] and presented her argument as follows (as quoted in Berkes and Bedi 1958: 11):

> The issue we have brought before you is by no means a narrow or local one, nor can we accept any contention that a gross and continuing outrage of this kind against the fundamental principles of the Charter can be claimed by anyone, and least of all by a Member State, to be a matter of no concern to this Assembly of the world's people.

Article 4 of the UN Charter welcomes all peace-loving States of the world to be a part of the organisation.[27] There were six applicants who wished to be part of the

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[26] Article 10 of the UN Charter States:
"The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and except as provided in Article 12, may make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matters."
Article 14 reads as follows:
"Subject to the provisions of Article 12, the General Assembly may recommend measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations, including situations resulting from a violation of the provisions of the present Charter setting forth the Purposes and Principles of the United Nations."

[27] Article 4 of the UN Charter states as follows:
"1. Membership in the United Nations is open to all other peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations.

UN in 1946. India supported six of them viz. Siam, Albania, Eire, Outer Mongolia and Transjordan. The sixth State was Portugal. India did not support Portugal due to its "ruthless colonial policy in Goa and other places in Indian territory itself" (Rao 1952: 247). Thus, India stood against the colonial powers.

India was in favour of maintaining the trusteeship territories under the aegis of the UN Trusteeship Council. India introduced a resolution in the U.N. for not acceding South West Africa in the Union of South Africa. It suggested that South West Africa was to be placed under the trusteeship system. The resolution was adopted on December 14, 1946.

After partition, India inherited as the original member of the UN (Fifield 1952: 450). India contested elections for the post of non-permanent membership in the Security Council in 1946 and 1947 but in vain.

After learning from the mistakes of the League, the UN emphasised on "preventive diplomacy" thereby including Chapter VI in the Charter on pacific settlement of disputes (Singh 1995: 37). Many disputes are settled today by the use of pacific settlement of disputes. Despite such provision, armed conflicts exist even today.

As we have seen in the section on the League of Nations, the permanent membership in the League Council was not satisfactory to the members, and many scholars criticised the composition of the council. They also suggested changes. The League did not change the granting of permanent membership to some powerful States. This legacy of permanent membership of the League Council is left in the Security Council wherein the permanent five make the most important decisions on international peace and security.

The use of nuclear weapon in Japan led the UNGA to pass its first resolution on 24th January 1946 "calling for disarmament specifically for the elimination of nuclear weapons as well as other weapons of mass destruction and the assurance that atomic energy would be used only for peaceful purposes" (Subrahmanyam 1995: 60). Even though this was the first resolution of the UNGA, the issue of procurement of

2. The admission of any such state to membership in the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council."

nuclear weapons still lingers international institutions. The recent case filed by the Marshall Islands against the nuclear powers (including India) in the ICJ does not make the position of the World Court or the international organisations clear. It is high time, a clear stand on disarmament is taken seriously by the States at least by self-retrospection.

Berkes and Bedi (1958: 33) assess the importance of the UN after a decade of its formation. They argue that for India it has been a significant forum to raise its voice for the suppressed and as a means of negotiations:

> In any case, and whatever else the United Nations might stand for or against, it is viewed by India primarily as an incomparable vehicle of communication. It becomes an instrument through which the needs and wants of a heretofore voiceless world can seek remedies – remedies that require international cooperation but that, through the United Nations, are more likely to avoid the price of economic and political subordination to any given Great Power or group of Great Powers. Beyond that, it is an instrument of negotiation, and that of the reconciliation of interests using negotiation; negotiation in the more informal sense, not with legal trappings and procedural booby traps, but just negotiation.

India's initial foreign policy in the UN was largely influenced by the Non-Aligned Movement Propagated by Jawaharlal Nehru. Nehru said in a radio broadcast on 8 September 1946 (as quoted in Josh 1985: 277):

> We propose, as far as possible to keep away from the power politics of groups, aligned against one another, which have led in the past to world wars and which may again lead to disasters on an even vaster scale. We believe that peace and freedom are indivisible and the denial of freedom anywhere must endanger freedom elsewhere…

The speech given by Nehru sets the following "objectives and principles" which are similar to the aims set out in the UN Charter (Murthy 1993: 28):

> (a) The pursuit of peace, not through alignment with any major power or group of powers, but through an independent approach to each controversial or disputed issue; (b) the liberation of subject peoples; (c) the maintenance of freedom, both national and individual; (d) the elimination of racial discrimination, and (e) the elimination of want, disease and ignorance which affect the greater part of the world's population.

In 1946, Nehru announced the beginning of Non Aligned movement by declaring "to stay away from military alliances and to work for friendship and cooperation with all nations with a view to achieve the ideal of a "world commonwealth"" (Singh 1985: 80-81). It began with 25 members in Belgrade.

Nehru's envisaged "an effective UN as the essential instrument for its implementation" (Saksena 1995: 8).

10. Conclusion

The anomalous position of India in the international arena and the anomalous position of Indian Princely States as part of India being represented in the international forums raises the question of legitimacy of international law in the colonial period. Due to the power wielded by Britain and her vested interests gave India a separate seat in the League of Nations. The Indian delegates who represented India became cultural ambassadors and gave a multicivilisational aspect to the international forums. Their role was not easy. The Indian delegates in the international organisations had to struggle at each and every level. At the national level, they had to struggle for freedom and at the international level, there was struggle to be a part of international organisations. The struggle did not end at the membership of these organisations, but they continued. India struggled to be heard because she was viewed as a mouthpiece of the British and included to increase the Empire's voting strength. India raised her voice against many issues of significance till date. A revisit to the history of colonial India in the international organisations is a history of struggles and courage shown by the Indian delegates who spoke for India and the third world within whatever autonomy they were provided under the colonial rule.

CHAPTER VI

SUMMARY AND CONCLUSIONS

Interdisciplinarity has become a norm in the study of international law today. Due to the application of interdisciplinary tools of research, the history of international law has emerged as a separate discipline in recent years. There is a *turn to history* witnessed by works on the history of international law by scholars like Martii Koskenniemi, Anthony Anghie, Emmanuelle Jouannet and others. An attempt has also been made to compile a global history of international law by Bardo Fassbender and Anne Peters in the form of *The Oxford Handbook of the History of International Law*.

Anachronism and Eurocentrism are two major problems in writing the histoy of international law. Anachronism is ingrained in law because it considers the past, and the present of the discipline. The history of international law cannot escape anachronism because repercussions of the past can be understood only through contemporary concepts. Despite the differences of the principles of international law in the past and contemporary international law, there is a family resemblance between both.

International law is deemed to be the creation of Europe. Due to the colonial epoch, Eurocentrism dominates international law. The concepts of international law formulated by Europeans are used to narrate the history of international law of the non-European world. The nation-State system, the ideas of State and sovereignty define the contours of the narratives. These concepts are the creation of positivism which is a language of Eurocentrism. The spatial and temporal boundaries created by the Europeans largely confine the history of international law to Europe. Usually, the genesis of international law is traced to the Treaty of Westphalia of 1648. The very existence of non-Europeans is recognised from the colonial encounter. The history of non-Europeans before colonisation is erased from the pages of history.

Many alternative perspectives have tried to challenge Eurocentrism in the history of international law. James Thuo Gathii classifies the exponents of alternative perspectives to contributionists and critical theorists. The contributionists include the

proponents of intercivilisational/transcivilisational, multicultural, pluralist, third world approaches to international law and post-colonialist perspectives of international law. Their commonality of argument is that other civilisations, cultures and legal systems have contributed to international law. Whereas the critical theorists have a critical view of the contemporary international law, they view colonialism as a major factor in the shaping of international law.

The present study narrates the history of international law from a multicivilisational perspective which is an alternative perspective challenging Eurocentrism in the discipline. The multicivilisational perspective refutes the *clash of civilisations* thesis proposed by Samuel Huntington. But civilisations have never clashed with each other because each civilisation is a porous entity without strict boundaries. Civilisations borrow from each other. The need of the times is to remind ourselves of the porous nature of civilisations and the necessity of dialogue between them. The multicivilisational perspective of international law culls out some of the values of civilisations which can strengthen international law. It considers, in this regard, basic values of civilisation. In the present study the opinions of Indian scholars have been used to identify the values of Indian civilisation seen as spirituality, syncretic culture, cosmopolitanism, and *dharma* (emphasis on obligations over rights), etc. The multicivilisational perspective is an alternative perspective of international law which is an imperative of the times.

International Law in Ancient India

The inter-State relations in ancient India were governed by the principles of international law.[1] Many factors contributed to the development of international law in ancient India like the development of political entities, increasing international relations, the concept of *Vasudeva kutumbakam* (world as a family), the aim of aggrandisement by rulers to become *chakravarti* or world ruler etc. The political entities in ancient India were the primary subjects of international law which had similar characteristics to the modern State. The major legal texts (including *Manusmriti*) attributed seven elements to the ancient Indian State viz. King, minister, treasury, armed forces, allies, village communities, and forts. The modern State has

[1] These principles have family resemblance to the principles of modern international law and hence, the term international law is used to describe these principles.

four prerequisites viz. the government, a permanent population, defined territory and capacity to enter into relations with other States. Comparing the ancient Indian State to the modern State, the King and ministers were the government, forts demarcated the territory, a permanent population was there in the shape of village communities and the external relations existed with allies. International law in ancient India did not have separate sources but the principles of international law were part of juristic writings like *Smritis, puranas* and epics, customs, treaties called *sandhis*.

International law in ancient India was based on *dharma*. *Dharma* has various interpretations. In the present study, it is interpreted as rule of law. It means States should fulfil their international obligations being the primary subjects of international law. *Dharma* has many aspects of human rights. Many exceptions to *dharma* were included by the powerful sections of the Indian society like caste system, oppression of women, ostracism of indigenous population, slavery etc. Social practices in ancient India cannot be generalised because there were some progressive practices also. There are instances wherein women were more learned than men. Moreover, with regard to LGBT rights, *Kamasutra* written by Vatsyayana supports gays, lesbians and bisexuality. The problem of discrimination in Indian society is manifest even today with caste and patriarchy playing a dominant role thereby violating human rights of various sections of the society. At present, international human rights law is including communal rights apart from individual rights and therefore, the assurance of human rights to these sections in India can be gained through a multicivilisational interpretation and compliance with IHRL.

The Eurocentric history of international law traces the genesis of law of diplomacy to the seventeenth century Europe. But the political entities in ancient India considered allies as a prerequisite of State and diplomacy as a means to maintain international relations. For Kautilya, diplomatic relations and its rules moved around the *mandala* system wherein the inter-State relations were carved into concentric circles. Diplomacy was encouraged between weak States and strong States so that war did not lead to irreparable loss for weak States. Diplomacy aimed at providing recognition of States, to trigger trade relations, for religious propagation, maintain peaceful relations, and to prevent war. In fact, the external relations of a State were determined by the act of a diplomat. Thus, diplomats had multifarious

functions ranging from conclusion of treaties, transmission of messages, protection of interests of the citizens of his State. A diplomat was supposed to give any information pertaining to the receiving State. Therefore, the ancient Indian texts compared diplomats to open spies. Due to these diverse functions, very high qualifications were demanded of a diplomat like vast knowledge (in fact, polymathic), good character, noble lineage, memoriousness, cleverness, honesty, eloquence etc. Similar to modern international law, there existed personal inviolability of a diplomat. Unlike in modern times, the diplomatic missions in ancient India were temporary and diplomats were despatched by a State on specific missions. Diplomatic missions were terminated on the fulfilment or failure of mission, death of the sovereign of sending or receiving State and declaration of war.

War was not a constant phenomenon in ancient India as described by some scholars. Yet, wars were waged for self-defence, maintenance of balance of power, aggrandisement of territory, to fulfil personal vengeance of rulers, humanitarian intervention etc. Similar to modern international law, war was supposed to be waged as a last resort after failure of peaceful means of settlement of disputes. When war was inevitable, it was to be waged following the principles of international humanitarian law. Hence, the classification of *dharma yuddha* and *kūta yudhha* were made. *Dharma yuddha* was the war fought in compliance with IHL principles whereas *kūta yudhha* was based on deceit and stratagem. The IHL in ancient India made clear differentiation between combatants and non-combatants which is a part of modern IHL and also, customary international law. The narrow definition of combatants, helped in minimising the atrocities of war. Rules were formulated for protection of environment during war. This aspect is still under development and far away from implementation in modern international law. It needs to be implemented for protection of environment and inter-generational equity. Other significant rule with regard to war in ancient India provided for humane treatment to the prisoners of war. It also prohibited use of poisonous and hyper-destructive weapons. This aspect has been inculcated in the dissenting opinion given by Judge Weeramantry in the *Legality of Nuclear Weapons* case.

Due to the dominant European discourse of the history of international trade law, the aspects of international trade law in ancient India were neglected.

International trade in ancient India was lucrative because the balance of trade was in favour of India. The traders and merchant associations in ancient India wielded tremendous power to influence the external relations of a State. They favoured prosperity and profit and therefore, influenced the State in concluding peace with other States. Thus, international trade led to development of finance and monetary system in ancient India. State had control over international trade with bureaucratic officers like *Astunomoi* and *Panyādhyaksa*. Customs and tolls were levied on foreign goods. State encouraged foreign trade. Therefore, traders, especially foreign traders were granted privileges. International trade law in ancient India was largely dealt with by customs and usages.

International trade gave an impetus to sea trade and thereby, some principles of international maritime law evolved. The basis of international maritime law in ancient India was the freedom of the seas. The ancient Indian State had control over navigation but the jurisdiction of State did not extend over Seas as such. There was no strict delimitation of seas. But, ships were considered as the territory of the State because the ships hoisted the flags of their States just similar to the United Nations Law of the Sea Convention, 1982 which upholds similar provision. Wrecked and weather beaten ships were supposed to be granted refuge similar to Article 98 of the UNCLOS, 1982 which makes it incumbent on ships to grant refuge to other ships in distress. Under modern international law, to prevent oil spills and protect environment, it is not obligatory on a coastal State to grant refuge to ships in distress. Identical to the universal crime of piracy under UNCLOS, piracy in ancient India was a crime. Pirate ships were either destroyed or seized by the ancient Indian State. Pirates were not left scot-free. They were severely punished.

Even though international environmental law is a very recent discipline, its spirit informed the practice of State and societies in ancient India. The personification of nature and the recognition of power of nature was a feature of ancient Indian civilisation. Conservation of flora and fauna, and water resources was focussed by rulers like Ashoka. Moreover, prevention of pollution and prohibition of deforestation were also upheld. Hunting, poaching, and sacrifice of animals existed in ancient India but with the advent of Buddhism and Jainism these practices were criticised and abstained to some extent.

International Law in Medieval India

The principles of international law in India developed further in the medieval period with the interaction of existing Indian civilisation with the Islamic civilisation. The interaction of these civilisations gave birth to a syncretic culture with coexistence of diversity in them. The coexistence of these civilisations was not only at a political level but also at a social level. Even though the sources of international law for the Muslim rulers was derived from *Siyar* or Islamic international law and the Hindu political entities followed the concept of *dharma* derived from different texts, they had a pragmatic approach in the interactions between them.

The major sources of international law for the Islamic rulers was Quran. Other important sources were *sunna*, *ra'y*, *ijma* and *qiyas*. *Siyar* or Islamic international law, an integral part of *Sharia* was followed by the Muslim rulers. Islamic law is largely jurist's law with varied interpretations offered. At present, an extremist interpretation of Islamic international law is leading to fundamentalism and xenophobia. It needs to be recollected that the interaction of Islamic and non-Islamic States gave birth to treaties as a source recognised by Quran itself. Quran emphasises on fulfilment of treaty obligations. Even though the treaties in medieval India were not law-making but were contractual in nature, they reflected the principles of international law. Treaties aimed at political settlements, war alliances, propagation and protection of Islam, conclusion of peace, trade relations etc. Treaties were entered by States. The only subject of Islamic international law is the Islamic State ruled by Caliph. The jurisdiction of the Islamic State extends to individual believers of Islam. Therefore, theoretically, Islamic international law does not recognise any other political entity (Sahli and Ouazzani 2012: 401). When the Islamic rulers conquered far away lands, they did pay tribute to the Caliph. But with the increasing power of these new rulers, inter-State relations with non-Muslims was also recognised.

International law of the medieval epoch in India got enhanced with the interaction of civilisations. To the contrary, there was not much change in the social setup. The State tried to maintain status quo. The caste system which existed for a long time before the advent of Islam, also percolated the section which followed Islam. Thus, caste system is seen amongst people who follow Islam as well as Christianity even today. Sufis and the advocates of Bhakti movement tried on their

part to bring social change but they could not transform the social system. With regard to the status of women, Islamic law was progressive to the extent that it prohibited female infanticide, provided property rights etc. Yet, these rights did not uplift their status much because they had to face seclusion. On the other hand, Hindu women were not allowed to remarry on the demise of their husbands. The system of *sati* or self-immolation of widows also increased at an unprecedented scale. In the medieval period, few women, namely, Razia Sultan, Noor jahan and others broke social stigmas and wielded much power in the political arena. Women in the lower echelons of society worked in agricultural fields, textile industry etc. besides their household chores. At religious level, women like Meera, Andal and others actively participated in the Bhakti movement. Indigenous peoples in the medieval era were again secluded and not considered in the policies formulated by the State. Concerning gender, the Muslim rulers appointed transgenders as guards in their harems. At times, they also appointed transgender as diplomats because of their privilege of personal inviolability and trustworthiness.

Diplomatic missions were despatched by the medieval Indian rulers for commercial purposes, propagation of religion, enter into alliance to fight war, to protect territorial integrity, conclude peace etc. The Islamic rulers conducted diplomacy with non-Muslim rulers in medieval India which again shows the syncretic culture of the times. A permanent foreign office did not exist but ministers in charge took care of foreign affairs. For instance, the minister of ceremonies held the portfolio of foreign affairs in Delhi Sultanate as well as in Mughal Empire. Many European ambassadors were despatched to India which shows that the Indian rulers demanded equality in diplomacy. Thus, the Europeans realised that India cannot be colonised easily and it was not a *terra nullius*. After many attempts, the European ambassadors succeeded in obtaining *firmans* to establish factories and govern their natives by the European laws. The medieval Indian rulers demanded high qualifications of a diplomat viz. proficiency in languages like Persian and Arabic (since they were deployed in the middle East), high status, education, intelligence. Saints and transgender were appointed in many instances as ambassadors because they automatically possessed the privilege of personal inviolability. Otherwise, envoys had the privilege of safe conduct or *aman*, personal inviolability even in war camps, tax

exemption etc. Apart from diplomacy, espionage was also practised on a large scale by medieval Indian rulers to deal with the external affairs of State.

On failure of diplomacy, the medieval Indian rulers waged war. War was fought under the compliance of principles of international humanitarian law. War in Islamic international law is known as *Jihad*. It is of many types and have different meanings. The war waged in the name of Allah was considered to be authentic under the Islamic law. The present extremist interpretation of *Jihad* propagates fundamentalism. In the history of Islamic international law, the connotations of *Jihad* changed according to time. The interaction of Islamic and non-Islamic States in medieval India sets one example wherein war was not a permanent feature but was waged as a last resort. Similar to modern international law, there was clear differentiation of combatants and non-combatants. Non-combatants were spared from attack. They included women, children, aged, disabled etc. Abu Bakr al-Siddiq, an Islamic jurist, prohibited unwanton destruction of environment during war. Use of poisoned weapons was strictly prohibited by Islamic jurists. Usually, wars ended with peace treaties.

International trade in the medieval period increased to a large extent. Export of textiles and raw materials increased by the arrival of Europeans and the establishment of their factories in different parts of India. Free trade was the norm in India but the Europeans gradually introduced monopolies. International trade brought technology to India. The use of silver and gold coins became rampant. The European traders were imposed customs duties and charges on factories. They were provided with privileges of trying their natives by the European laws. Similarly, many Indian traders settled in foreign lands like Central Asia, South Russia and Moscow wherein they were not restricted from following their religion and laws. This shows how international trade has been and can be truly multicivilisational.

International trade was largely carried out through seas in the medieval period as compared to the ancient times. The medieval Indian State was not a naval power but it encouraged sea trade. The Mughal rulers owned ships and actively participated in sea trade. The ship building industry in India was also well developed in the epoch which gave an impetus to sea trade. Increasing sea trade led to the development of principles of international maritime law comparable to the modern international law.

Wrecked ships which took refuge in the coastal States were prohibited from attack under the Islamic international law. This aspect is also mentioned in the Motupalle pillar inscriptions. Increasing sea trade also led to increase in piracy. European traders also committed piracy. Usually, the pirates were punished by the rulers of the coastal States. The advent of Europeans in India and other States in Asia gave birth to the heated debate on *mare liberum* and *mare clausum*. The Asian tradition of freedom of the seas was reflected in the participation of Asian States in UNCLOS negotiations and finally, was reflected in the provisions of the Convention.

Protection of environment was not a direct concern of the medieval Indian State but the Islamic law they followed provides that the earth belongs to Allah and it is incumbent on humans to take care of it. This reflects, in modern parlance, the principle of trusteeship. The medieval rulers were attracted by the beauty of nature and hence, gardens and orchards were part of their architecture. Yet, with regard to fauna, the massive hunting and poaching led to extinction of many animals in the medieval era. A contribution of the medieval era is that the increase in interaction of different civilisations with the Indian civilisation led to the enhancement of biodiversity by addition of fruits and crops from different parts of the world.

International Law in Colonial India

The colonial period is a significant epoch in the history of India because the colonial rule has vast repercussions in the political, social, cultural, economic and legal fields. In the medieval period, the Europeans had to take permission for trade through diplomatic links with the Indian rulers. Thus, the Indian political entities were recognised by the European rulers and also, the inter-State relations were according to international law. Interaction of European civilisation with Indian civilisation was the prominent feature of the medieval period. Amongst the Europeans who came to India, the British succeeded in gaining political power after their victory in the Battle of Plassey in 1757. The attitude of the British towards the Indian political entities started changing with the political power. The East India Company framed policies like the subsidiary alliance, the doctrine of lapse etc. to further annex Indian territory. Thus, the Company created a parallel State in India. The British Crown realised that the expansion of political power of the Company was to be controlled. The conflict of sovereignties between the British Crown and the East India Company and the 1857

war of independence led the British Crown to proclaim its paramountcy over India. Thus, India came under the colonial rule of Britain.

The colonial rulers did not comply with international law to govern the relations with India. Since, India was not considered as a civilised State, it was considered beyond the cognisance of international law. The Princely States of India were treated as vassals or protectorates with power only to deal with the internal affairs. The power to determine external affairs rested with the British Government in India. The administration of justice was taken over by the courts established by the British. Culturally, the interactions between Hindus and Muslims gave birth to an eclectic culture. This unity between Hindus and Muslims was not conducive to the colonial rule and hence, the colonisers tried to divide them through various means like the partition of Bengal. The communalism bred by the British in the colonial period is seen in the Indian society even today.

Like the pre-colonial rulers, the British did not intrude in all the social practices in India. Caste system was one such practice which was not meddled with. Some scholars contend that the caste divide was widened by the British rule. The untiring efforts of B.R. Ambedkar, Jyotirao Phule and others led to breaking of many social barriers of the lower castes and gave birth to positive discrimination incorporated in the Indian constitution. We can see that caste system and its consequent effects could not be abolished from the Indian society totally with various reported incidents of discrimination now and then. In such cases, the role of international human rights law arises. Amongst the other social practices, patriarchy was given a different shape by the colonial rulers who viewed Indian women as victims of barbaric practices like *Sati*, child marriage etc. and therefore, supposed to bear the brunt of the civilising mission. On the pretext of upliftment of Indian women from such practices, the British justified extension of colonial rule. These practices were not uniformly practised throughout India and amongst all castes. Yet, the British created a stereotyped narrative of Indian women. To the contrary, the unemployment of women due to trade policies, lack of labour laws was never a concern of the British. They were concerned about appeasing the upper caste of the Indian society to prolong the British rule. In addition, the oppression of indigenous peoples continued in the colonial period. They were exploited as labour in British tea plantations especially in Assam. Similarly, slavery also continued in colonial India. Some laws

were passed to control slavery, but these legislations targeted control of slavery practised by other Europeans (the Dutch, the French and the Portuguese) in India. Whereas the British continued practising forced labour despite signing the Slavery Convention of 1926. With regard to the LGBT rights, heteronormativity and homophobia was imposed by the British by enacting the Indian Penal Code with Section 377 criminalising homosexuality. The provision is still a part of the IPC despite the continuous legal efforts of the LGBT community to decriminalise homosexuality. This shows the social impact of colonial rule.

Diplomacy was used as a tool for coercion, annexation, protection of the Empire and other vested interests of the British. In the diplomatic ties of Britain with other States like Russia, France etc. the protection of Indian Empire played a crucial role. Permanent embassies were established by the East India Company. It also established a foreign office which was further improvised as a government department during the rule of the Crown. The appointment of residents by the British in the courts of the Princely States in the garb of diplomacy was in fact strengthening the indirect rule through espionage. Due to the cultural gap with India, the colonial government sometimes appointed Indians as their diplomats to the Indian Princely States, vice-versa the Indian Princely States also appointed the British dewans. Hence, the British tried to appease the Princely States for continuing their rule. The paradox in the diplomatic ties between the Crown and the Princely States is seen when the 1858 proclamation and the 1891 Gazette are compared. Due to the cooperation of some Princely States to suppress the 1857 war of independence, the Crown extended diplomatic relations with the Princely States. Gradually, the supremacy of the British Crown was established. The paramountcy of the British Crown and the nullification of international laws in the relation between the Crown and the Indian Princely States was stated in the 1891 Gazette of India. Thus, diplomacy was just a means to continue the British rule in India without due regard to the laws of diplomacy.

Modern international Humanitarian law developed in Europe in the nineteenth century through conventions and the efforts of Henry Dunant and Francis Lieber. For the Europeans, IHL was to be followed in wars with the civilised because the uncivilised did not have the knowledge of the laws of war. Hence, by application of the civilised uncivilised dichotomy, the non-Europeans were excluded from the

purview of IHL. In addition, the concepts of just and unjust wars were not followed by the colonisers during wars with the non-Europeans. The soldiers who fought for the British belonged to India. They were not treated equally with the European soldiers. The exclusion of Indian from the purview of IHL and the discrimination against native soldiers led to continuous violation of IHL during the colonial rule. The first instance wherein the violation was noted is in the trial of Warren Hastings wherein the paradox is that Edmund Burke supported the cause of the natives and Warren Hastings justified the wars he waged against the native rulers. In the first war of independence fought by Indians in 1857 to protest against the policies of the British, the Indian soldiers were treated as rebels and the war was treated as a mutiny. Hence, by violating IHL, the British suppressed the soldiers and other rulers who fought against the British. Despite the peaceful protests, the concept of *satyagraha* and non-violence propagated by Mahatma Gandhi during the Indian freedom struggle, gross violation of IHL was carried out by the British in the Jallianwala Bagh massacre. Children, aged, women also participated peacefully in the protest in the Jallianwala Bagh against the draconian law enacted by the British in the form of Rowlatt Act.

The tariffs and trade laws formulated by the British for India eased the maximisation of revenue extraction, import of British manufactured products to India, and export of best Indian products to Britain. These policies hampered the international trade carried out by Indians since the pre-colonial period. India was viewed as a market wherein the British can gain maximum profit. They planted cash crops by replacing food crops to maximise exports and profit. The establishment of the railways was to procure raw materials and supply finished products to the ports for export. International trade led to procurement of Indian labourers by the British. They were exploited to an inexplicable extent. Even though, through the efforts of the ILO many domestic labour laws were passed in colonial India but they were not beneficial to the Indian labour due to inherent flaws. The monetary system developed by the British in India abolished the local currency systems followed by the native traders. The establishment of the Central Bank in 1935 aimed at keeping away the Indian nationalists from the monetary system and also to maintain the gold standard. The tariff policies of the Government of India further hindered the balance of payments because it gave an impetus to the import of manufactured goods from

Britain and export of raw materials like cotton. Thus, the trade laws formulated by the British with regard to international trade from India was to ease the maximisation of profits.

The link between international trade law and international maritime law is discussed earlier. The link continued in the colonial period also. The issue of delimitation of the seas was discussed widely by the States at international level without a unanimous outcome. Colonial India followed three nautical miles rule as demarcation of territorial sea. The freedom of high seas was upheld. Piracy was opined to be a crime to be punished severely. The increasing maritime activities also led to enactment of domestic laws dealing with maritime issues.

The environment was affected to an inexplicable extent by the colonisers. They aimed at maximising the use of natural resources for their use. The environment laws formulated in the colonial era had no restrictions for government use. The government was the largest exploiter and the creator of laws to ease further exploitation of natural resources. Despite the discrepancies in the colonial rule in India, Britain projected a good image of itself in the international organisations. Britain made India a separate member of international organisations.

Colonial India and International Organisations

The seed of international organisations was sown in the Treaty of Westphalia, 1648 but it was realised in the nineteenth century. The impetus on the proliferation of international organisations was given by internationalism and emphasis on liberal theory of international relations. Colonial India also became part of many international organisations. The League of Nations was the first pervasive international organisation of which India became an original member. Colonial India's position in the League of Nations and other international organisations is called an "anomalous position" by scholars. She did not have the right to enter into diplomatic relations, right to declare war and right to choose representatives to international organisations. The reports of participation in the international forums were also submitted to the Secretary of State. These aspects show India's subservience to the colonisers. Despite the subservience, colonial India was a member of international organisations like other nation-States and Dominions of Great Britain with separate voting power and representation. India's inclusion in the international

organisations is criticised as Britain's move to increase her voting strength. India's membership was emphasised by the great powers to pay gratitude to her support during the First World War. Even though her position was anomalous and her representatives dependent on the orders of the British, the Indian delegates tried their best to raise voice whenever India's interests were put at stake.

The anomalous position was not confined to India but also at the internal level with the Princely States. The League Covenant did not have provisions for representation from different political entities. Yet, Indian Princes were sent as a part of the Indian delegation. The British were obliged to send them due to their support in the First World War. They acted as cultural ambassadors. They could also convey the discussions in the international forums to the Chamber of Princes and thereby, ease the fulfilment of international obligations. When the question of international obligations by the Princely States arose, it was viewed as an intrusion in the internal administration by the Princes. Therefore, the Government of India Act, 1935 altered the autonomy of Princely States. They had to mention as to the treaties into which the Government of India could accede on their behalf.

India's financial contribution in the international organisations was far beyond her capacity. Despite the heavy financial burden she bore she was not granted proportional representation in these organisations. This issue was raised by the Indian legislators and delegation to the International Organisations, but it was not paid much attention.

The League of Nations was an outcome of the alliance of the victors of the First World War. A prologue to the League was the set of imperial conferences. India was not an active part of these conferences until her contribution and support in the First World War. Thereafter, she was included in the Paris Peace Conference, 1919. She was also a part of the Treaty of Versailles. Thus, she became an original member of the League of Nations.

Eurocentrism was manifest in the League of Nations because the majority of issues discussed were confined to Europe, and representation was largely from Europe. India raised her voice against such discrimination. She did not like the fact that the League gave priority to status quo over decolonisation. India also opposed the

unequal composition of the League Council and the mandate system. Indians staying in the mandate territory were discriminated.

India confronted many problems in the League of Nations. The representation of India was less compared to other members. She also did not have a permanent representative in Geneva. Moreover, her delegation was headed by a British. Due to the untiring efforts of the Indian legislators, finally, an Indian head of the delegation was appointed to represent India in the tenth Assembly of the League. The Indian delegates could not play their part well due to lack of experience and delay in instructions from the India Office. Later, the representation was increased to an extent and continuity of representation was also maintained. The achievements of the Indian delegation to the international organisations were not easy. There was a long struggle by Indian legislations, leaders of the freedom movement and the Indians who were part of the delegation. They were supported by the British as far as the Empire's interests were not affected. In other instances, they had to struggle to be represented and raise their voices to be heard.

Some issues discussed in the League were on India. When the issue of disarmament was discussed, the Indian delegates did not accept the terms. The delegates reflected the British opinion that the frontiers were threatened by the Afghan tribes. In reality, Britain wanted to protect the Indian Territory from Russia because India was the most important part of British Empire. When the issue of opium trade was discussed in the League, the source of the menace of opium was pointed out as India. Within India, opium was used vastly. It was exported from India to various parts of the world. The Government of India did not intend to alter the policies on opium because of the huge revenue from the opium trade. Criticism in the League, opposition from States like the USA and China, and pressure from Indian legislators and national movement leaders in India, led the Government of India to reduce opium production and confine it to medical and scientific purposes. India ratified the Suppression of Traffic in Women and Children of 1922 and amended the IPC to bring uniformity between national law and international law. India signed the Slavery Convention with reservation as to the Princely States. She also signed the Special Protocol Concerning Statelessness in 1932. A significant step on monetary affairs was taken under the League in the International Financial Conference of 1920 held in Brussels.

Despite many flaws of the League of Nations, its importance lies in the fact that it helped India in developing her international personality and status. Her diplomatic relations were improved. Many international issues having repercussions on India were discussed in the Indian legislature. The most important aspect from the point of view of this study is that the Indian delegates represented Indian civilisation in the international forums and highlighted the values India stands for. It led to civilisational exchanges in whatever small ways it could in that era.

Amongst the international organisations, colonial India played a crucial and prominent role in the International Labour Organisation. India had to struggle to be included in the ILO and furthermore, in the Governing Body of the ILO (as she had to be included as a country of industrial importance). The Indian delegates did not always agree with the British delegates in the ILO. They took decisions in favour of India's interests and stood for the welfare of her labour. Such representatives were P.P. Pillai, Rajani Kanta Das, N.M. Joshi, V. V. Giri and others. ILO conventions influenced law making in India and the discussions in the Indian legislature were reflected in the arguments of the Indian delegation to ILO. Thus, the interface between domestic law to international law was affirmed. The ILO was also dominated by European powers, but Indian representatives raised the issue of decolonisation there also without fear. They could raise the issue because of the peculiar character of the ILO wherein the representatives of workers were also sent.

India benefited from the Health Organisation (the predecessor of World Health Organisation under the League of Nations) after demanding attention. Under the auspices of the Health Organisation, the Eastern Intelligence Centre was inaugurated in 1924 at Singapore. It helped in collecting and disseminating information on epidemics in Asia. The prior information helped in controlling epidemics. India was paid further attention by the Health Organisation when the Malaria Commission visited India and submitted a report on the disease. There were many health issues in India which required medical help. The outreach of the Health Organisation was limited.

Colonial India also participated in the Bretton Woods negotiations. India did give her opinions in many instances during the negotiations playing an active role in upholding development. The negotiations reflected the North-South dialogue. The

Indian delegates demanded more policy space. They pointed out the debt Britain owed to India. The negotiations have a positive aspect that it was a forum wherein the developing countries could negotiate with the developed world, the new agenda of development.

The United Nations is argued to be a continuation of the League of Nations. There are arguments in support and in contradiction to the continuity thesis. The major difference is in the preamble of these institutions. The League of Nations Covenant addresses the *High Contacting Parties* whereas the United Nations Charter is given by the people. India became an original member of the United Nations. She was under colonial rule in her initial years of membership. Yet, she played a crucial role in the negotiations to create the UN as well as in the organs of the UN. She strongly supported decolonisation. She opposed apartheid. The initial years of India in the UN reflected the leadership of Jawaharlal Nehru and his idea of Non-Alignment.

The importance of reminding the struggle of the delegates in the international organisations is necessary for the fulfilment of the aims of these organisations. The UN aims at disarmament. Yet, States are busy procuring arms, ammunitions and most hazardous nuclear weapons. A truly international law can be realised if armed conflicts are eradicated totally. For this arms race needs to be curbed. History reminds us that it is not easy to stand for peace and prosperity, State interests pose different challenges. Despite the challenges faced by the forefathers of these institutions, they fought against injustice and envisaged a better future.

This thesis is an attempt to compile the history of international law in pre-independent India from a multicivilisational perspective to increase the legitimacy of international law. It tries to challenge the Eurocentric history of international law by narrating an alternate history of international law. In this effort, it has focussed on the Indian civilisational perspective. Alternate histories from different civilisational perspectives can help create a truly global history which challenges the dominant Eurocentric history.

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