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The state practice of India and the development of international law : selected areas

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Citation
Patel, B. N. (2015, May 21). *The state practice of India and the development of international law : selected areas*. Retrieved from https://hdl.handle.net/1887/33019

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Title: The state practice of India and the development of international law : selected areas
Issue Date: 2015-05-21

CHAPTER II
HISTORY OF INTERNATIONAL LAW IN PRE-1945 INDIA

2.1. Introduction

This chapter examines the history of international law between 1500 and 1945 and identifies those principles and practices that have disappeared after the independence of India or have become part of the regional system in one or other way. In other words, this historical analysis confines to the colonization period of India,[83] when the country was under the colonization of the European powers. One gets surprised with the reality of today's prevailing laws in India, as the English laws enjoy a persuasive authority as being an embodiment of written reason and impress its own character on a formally independent jurisprudence. This is largely similar to what Roman law prevailed in the medieval Europe. The English laws have also left lasting impressions on international law as practiced by India after independence. Between 1500 and 1945, international law in India grew up by degrees, completely marked by the absence of any attempt at codifying it, nourished however, by the writings and thoughts and practiced upon them by the Princely states.[84]

[83] The expression, India, shall mean British India, together with any territories of any native prince or chief under the suzerainty of Her Majesty – the queen of Great Britain. Under the Interpretation Act of 1889, India ceased to be a cultural or a mere geographic expression and acquired a clearly defined political meaning. The exact number of princely states differ from records to records. For example, while Sir Charles Tupper recorded 629 feudatory states in 1886, *The Imperial Gazetteer* listed 693 in 1907, and Edward Haynes speaks of "the 718 Princely States in India (*c.* 1912)," by 1920 the British authorities in Delhi could only count 587; ten years later the Butler Commission had pared the number down to 562. Within a year of independence, however, the new national government of India recorded a final figure of 584 states, including those that had acceded to Pakistan.http://princelystatesofindia.com/ accessed on 4 March 2011.

[84] Definition and meaning of princely state/native state has been subject to differences of opinion. For example, Sir William described native state as "a political community, occupying a territory in India of defined boundaries, and subject to a common and responsible ruler who has actually enjoyed and exercised, as belonging to him in his own right duly recognized by the supreme authority of the British Government, any of the functions and attributes of internal sovereignty. The indivisibility of sovereignty does not belong to the Indian system of sovereign states, … but the sovereignty of Native states is shared between the British Government and the Chiefs in varying degrees". Sir William Lee-Warner, *Native States of India*, (London: MacMillan and Co., 1910). According to Sir Charles L. Tupper, the native states were "autonomous states, enjoying various degrees of sovereignty,levying their own taxes, administering their own laws, and possessing territory which is, for purposes of internal administration, foreign territory, and has not been annexed to the dominions of the British Crown … [they], or their rulers, can be, and are, punished when the occasion requires, by fine, by the deprivation of salutes and other honors, by sequestration for a time, by the diminution of judicial authority, and, in extreme cases, by the deposition, or even execution, of the ruler and the annexation and incorporation of the states in the territories directly administered by British officers". Sir Charles L. Tupper, *Our Indian Protectorate*, (London: Longmans, Green, and Co., 1893), Government of India Act of 1935 defines "Indian State means any territory, not being part of British India, which His Majesty recognizes as being such a State, whether described as a State, an estate, a Jagir or otherwise." The demarcaction of princely and native staties is indeed a very difficult topic, however, it can be summed up that British India composed of and ruled directly by the representatives of the king-emperor and indirectly by the cabinet and parliament in London and another India composed of a group of states protected by the British government, with their own hereditary princes and chiefs who were sovereign rulers, except to the extent that their sovereignty had been abridged by treaty or agreement with the British Crown. The sovereignty of these states were divided into two – external sovereignty vested in the British government and internal sovereignty was distributed between the Paramount Power and the rulers.

2.2. Salient features or developments bearing the most important influence on the international law that evolved and practiced in India

First, there was a systematic collapse of international law traditions, which were observed as a matter of intercourse between princely states with the advent, and invasion of British (and to a limited extent French, Dutch and Portuguese) rule at all levels. In fact, one can observe that between 1600 and 1858, there were hardly any significant achievements noticed except preparation of some codes and digests. Since Hindu and Islamic laws have deeply penetrated into the political-socio-legal system of India, those codes and digests which were found to be not in consonance with the original Hindu or Islamic laws, have over the period, disappeared or were replaced during the colonization period.

Secondly, much like the ancient times, princely states[85] were convinced that interactions among them were necessary since they could not progress in isolation and much so cannot effectively counter the British influence. Various religious festivals and ceremonies, such as, *Aswamedha*, the *Rajasuya*, the *Vajapeya*, the *Punarabhisheka* and the *Aindra Mahabhiseka* sacrifices, which were practiced in ancient times now, were practiced in different versions. These ceremonies significantly enabled the interactions among the princely states and provided avenues for greater interactions between the executive authorities as well as normal people. These mechanisms enabled the princes and officials of princely states to discuss common problems and were also used to reach settlement on differences between them. With the independence of India, these practices have largely disappeared, but it remains interesting to see what have become the means of communication between these princely states in the post-independence Indian history and whether these traditions have any contributing effect on the relations between the Union of India[86] and these princely states.

Third, as far as self-determination, plebiscite and status of Indian princely states were concerned, these states prior to acceding to India (upon India receiving independence) did not seek the popular mandate of the people, as the princes often refused to recognize their people. As Chacko says the implied principle in all these refusals apparently was that the sovereigns of the Indian state alone had the need to exercise the legal rights of accession or secession from a political union.[87] The modern international law does not recognize such accession by the individual units of any nation to accede or secede from a nation state.

Fourth, the grounds on which paramountancy of the British Empire rested being natural factors of geography, politics, economics and history, social, religious and culture congruity, the method of automatic

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[85] In 1928-29, 235 of 562 Indian principalities came under the category of states proper while 327 were grouped together under the heading of "estates, Jaghirs and others", thus, it is impossible to identify the norms and rules of international law proclaimed and adopted by these states at individual level. M. Ramasamy (1940), "The Indian States in the Indian Federation – A juristic view," 3 *The University of Toronto Law Journal* 2, 301-322 (1940) at p. 302.

[86] Before the Islamic conquest, India never became a really centralized political entity but indulged in widespread decentralization. Inter-State relations in the pre-Islamic period resulted in clear-cut rules of warfare of a high humanitarian standard, in rules of neutrality, of treaty law, of customary law embodied in religious charters, in exchange of embassies of a temporary or semi- permanent character, etc. Early in this period, which finally culminated in the creation of the Mauryan and Gupta Empire, relations with ancient Greece and Rome were not infrequent. Alexander the Great left traces of his genius on Indian soil and exported cultural and material values from it to the West. The appearance of similar fundamental institutions of international law in various parts of the world shows that they are inherent in international society, irrespective of culture and tradition. The growth of these institutions in India came to a sudden end with the Islamic conquest, which converted the greater part of the Sub-continent into a highly centralized and autocratic State.

[87] C. J. Chacko, *India's Contribution to the Field of International Law Concepts*, (The Hague: *Recueil des C*ours, 1958(I) at p. 196.

succession that has taken place may be called natural secession in international law. As the instrument of accession binds entities with a certain measure of sovereign powers, these should be construed as instruments of international law. In so far as those instruments can function only on the sub-continent of India they have only a regional value, and hence may be called *regional international law.*

Fifth, a systematic reading of the ancient Indian literature like the *Srutis,*[88] the *Dharmashastras*[89] and the *Arthsastras*[90] show clear evidence of means and methods of international law as practiced by the princely states. These relations were regulated by certain customs and practices.

The history of foreign relations between princely states reveal the classical principles of international law which prevails in the modern world, namely, the rights of existence of self-preservation, of equality, of independence to territorial supremacy, of holding and requiring territory, of intercourse, and of good name and reputation.[91] Some of the rights, associated with the independence of a state were; power exclusively to control its own domestic affairs, power to admit or expel aliens, privileges and immunities of diplomatic envoys in other states and exclusive jurisdiction over crimes committed within its territory.[92] The duties were duty not to resort to war, to fulfill treaty obligations in good faith, the duty of non-intervention, not to perform act of sovereignty on the territory of another state, duty not to allow in its territory preparations which are prejudicial to the security of another state, duty not to intervene in the affairs of another state and not to foment civil strike in another states' territory. These rights and obligations exercised and fulfilled by the princely states originate from the religious scriptures of India and thus one could see that despite the European influence and the need for princely states to collectively defend their independence (or obtain one), these legal principles and norms were practiced and nourished by them.[93]

According to Oppenheim, international law is in its origin essentially a product of Christian civilization and began gradually to frown from the second half of the Middle Ages.[94] It has been widely observed that the claim of the European scholars that the credit of giving birth to international law as we know today, goes to the European countries is not correct.[95] The belief of the Western jurists, Oppenheim and others, that international law originated in Europe and is the creation of the Western Civilization is challenged by a study of the original

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88 *Srutis* cannon of Hindu sacred texts. It has no author and is considered as divine recording of the cosmic sounds of truth. It contains four famous Vedas – *Rig-Vedas* (Knowledge of Hymns of Prais), *Atharv-Vedas* (Knowledge of Magic Formulas), *Sama-Vedas* (Knowledge of Melodies), *Yajur-Vedas* (Knowledge of Sacrifical formulas).

89 *Dharmashastras* are the ancient law books of Hindus which formed the basis for the social and religious code of conduct in the past in areas where the Hindu rulers supported by their priestly supported implemented the Hindu dharma faithfully. These were the works of Manu, Apastamba, Vashistha, Gautama and Budhayana.

90 *Arthsasthra* is an ancient Indian treatise on statecraft, economic policy and military strategy which were prepared by Kautilya (Chanakya), a great Indian scholar belonging to Maurya Empire (350-283 BC).350-283 BC).

91 Ernst Waltraud, *India's Princely States: People, Princes and Colonialism*, (Abingdon: Routledge, 2007).

92 Nagendra Singh, "International Law in India: (II) Medieval India," 2 *Indian JIL* 65-82 (1962); V. S. Mani, "An Indian Perspective on the Evolution of International Law on the Threshold of the Third Millennium", 9 *Asian YbIL* 31-77 (2004).

93 J. Briggs (Transactions of the Royal Asiatic Society) underlines the importance of the correspondence as a historical document and praises the high qualities of the Marathas, particularly the religious tolerance of the Hindus – secular character and nature of inter-state relations.

94 L. Oppenheim, *International Law*, Vol. 1, 8th edition, p. 6, See also P. E. Corbett, *The Growth of World Law*, 1971, p.33.

95 Nagendra Singh, "India and International Law", in R. P. Anand (ed.) *Asian States and the Development of International Law* above at p. 25.

texts of the Ramayana (and of the Mahabharata).[96] It leads us nowhere to hold that modern international law is only three or four centuries old. Such an attitude is not only too legalistic, but is clearly disproved by the present practice which does take account of history.[97] In India too, one can find in the work of Kautilya in the 4th century B.C., elaborate rules for the conduct of diplomacy, as a means of avoiding conflicts, and the reception and treatment of diplomats.[98] A study of the Ramayana reveals that in the Ramayana period, relations of the sovereign rulers were based on the definite rules of international law and these rules were recognized by all sovereign rulers. It can be hardly disputed that these very principles are the foundation of modern international law.[99]

What one observes is that international law which "must be continuously developed by revision in content, expansion of scope and improvement of the means of securing compliance so that it is kept in accord with the changing needs of the international community"[100] was undergoing serious challenges as the European colonizers imposed their legal system on the princely states. If there been a fair and equitable trade, commerce, cultural and political relations between the princely states and the colonizers, the international law, which was practiced in these states, would have been richer and would have provided profound guidance to the current world community at large.

The current international law which is being practiced by India as an independent nation can be considered to be a product of changes that took place in the society as well as principles and practices, which are slowly disappearing from the state institutions and life and acquiring new meanings and shapes and influencing the new international law. In fact, independent India has greatly benefited by the practices of princely states, which themselves were, full-fledged states. By studying the practices of these princely states,[101] one is better equipped to understand the emergence of international law principles. It is remarkable that long before Hugo Grotius, the father of modern international law, Ashoka the Great[102] tried to give by his actions a concrete shape to those ideals and principles, whose defence and vindication has become the first concern of international law in current international affairs.[103]

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[96] S. S. Dhawan, *The Ramayana II International law in the Age of Ramayana*, National Herald Magazine, Sunday 21 January 1971, at p. 1.

[97] J. J. G. Syatauw, *Some Newly Established AsianStates and the Development of International Law*, (Leiden: Nijhoff, 1961) at p. 223.

[98] J. E. S. Fawcett, *The Law of Nations,* (London: Allen Lane the Penguin Press, 1968) at p. 16.

[99] S. Dhawan, *Ramayana II International law in the Age of Ramayana* above at p. 1.

[100] Edward Collins (ed.), *International Law in a Changing World*, (New York: Random House, 1970) at p. 424.

[101] Gradually starting from the late 18th century, the British rule brought India into the framework of a new empire and foreign relations of India were controlled and governed from London. The British Empire started depriving the princely states of their external sovereignty by various means and methods, therefore, one sees that, unlike pre-colonization period, their mutual relations did not call for a solution of legal problems on the basis of international law proper. However, the claim of external sovereignty was related to outside India, to be precise with European powers because non-European powers with whom these states had relations conducted their trade, commerce, cultural exchanges on the basis of principles and practices (customs) which were found to be mutually agreeable to the Indian and non-European states. Thus, an argument that the princely states could not be considered as state in sense of the current terminology because of alleged lack of external sovereignty must be refuted.

[102] Ashoka has been regarded as the Great Indian Emperor who ruled the Indian Subcontinent between 269 B.C. to 232 B.C. The spread of Buddhism in Asia and practice of secularism and non-violence in the Indian subcontinent is attributed during his reign.

[103] 1960 Seminar at the Delhi University which concerned itself with the possible contribution of Indian traditions to the development of international law, seminar failed to consider the point in time at which Indian traditions of interstate conduct were still capable of exercising a direct influence on our system of the

2.3. Geographical scope of inquiry

As mentioned above, India consisted of an amalgamation of princely states, the individual and collective inter-se relations is the fundamental and perhaps the only valid basis to understand the principles and practices of international law of pre-independent India. Just like the current reality wherein we find state as big as the Russian Federation and as small as Vatican, practicing international law in their relations, one finds that Indian states also ranged in size from few hundred acres to as large as France. Therefore, by juxtaposing their relations one can truly understand how the international law developed and was practiced by these states.[104]

2.4. Basis of international law

The princely states strictly observed that each state has a will that is completely independent and free from external influences. But through the process of auto-limitation, a state can restrict its powers and thereby limit its will. In short, the practice shows that they considered themselves not bound to follow international law because they were independent and sovereign but they can make themselves bound by rules of international law by restricting its powers. This auto-limitation theory is based upon a presumption that there exists a state will - in fact the will of the state is nothing but the will of the people who compose it. The princely states practices show that it was primarily the will of the ruler, which was, will of the state.

The period under examination also clearly shows that a consent was (and still is) a basis of inter-se relations between these states, i.e. international law. Thus, the modern international law which recognizes the importance and utility of consensus as a basis of obligation in international law, was the essential pre-condition of inter-se relations during this period. In fact, the theory of consent as the basis of obligation widely prevailed in princely states inter-state relations and was developed to promote their interests. Natural law, among other legal systems, had the greatest influence in their relations and practice of these states show that they considered the natural law to be of universal application.[105]

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law of nations. It must be recalled that these traditions came to an end with the collapse of the independent state system in India and further India at the end of 18th century and the beginning of the 19th century. The possibility of such influence simply vanished at a later date when the Indian subcontinent was either under the British administration or under the paramountcy of the Crown, and when the various states of Further India came either under British or Dutch rule or remained semi-independent only and ceased to act on their ancient traditions of inter-state conduct. The only point in time at which a direct influence of such traditions on our law of nations was possible was the period of the 16th, 17th and 18th centuries; at that time many of the sovereigns of India and Further India still enjoyed genuine independence and maintained treaty and diplomatic relations with the European agencies in the East Indies to which they tended to apply some of their own notions and usages of inter-state conduct. C. H. Alexandrowicz-Alexander, "Grotius and India" 3 *Indian Yearbook of International Affairs* (1954) at p. 303.

[104] According to Surjit Mansingh's *Historical Dictionary of India* "[a]t the time of India's independence from Britain in 1947, something between 562 and 600 (depending on definition) Princely States were scattered over two-fifths of the subcontinent. Their rulers were of similarly diverse lineage, traced back to mythological times as in the case of Mewar, to medieval Afghan incursions as in the case of Bhopal to the Maratha confederacy in the case of many West and Central Indian states, to the Sikh chieftains in Punjab, or to assertive vassals of the Mughal Emperor as in the case of Hyderabad.

[105] We largely believe that consent of states is must; the reason being states observe rules of international law because they have given their consent for it. However, this practice did not prevail among the princely states because they voluntarily agreed to observe the rules. In this regard, it can be said that all states are bound by international law, no matter whether they have given their consent or not. This was not true in pre-1945 era. H. A. Smith, *Great Britain and the Law of Nations*, vol.II (part I), (London: P. S. King, 1935), pp. 12-13.

Princely states observed norms of inter-state relations because they considered themselves as independent states and were recognized as such by other princely states.[106] The inter-state relations were largely governed by a body of rules of law – international law – to govern their conduct as members of that community. Furthermore, while the fact remains that princely states used to conduct and meet in general gatherings, the outcomes of these meetings are not perfectly documented and preserved exclusively.

2.5. Disappearance of British common law from international law practice in independent India

It has been observed that English common law was applied in many fields by the British Empire during their colonization of India. Upon independence, the Constitution of India did not alter that position but provided for the continued operation of law in force immediately preceding the commencement of the Constitution. Therefore, the analogy of the English common law, the municipal courts of India would apply the principles of international law through legislation, and the well-recognized principles of international customary law will be applied because they are supposed to form part of the law of the land. However, this continuity was short-lived because with the passage of time, several new laws came into being immediately after the independence and they clarified or codified some of the international customary law principles into national law. The judiciary of India also played an important role in holding or rejecting the applicability of English Common Law jurisprudence, *inter alia,* including then prevailing and practiced international law, into Indian laws.[107]

2.6. Sources of international law

The application of the doctrine of equity, justice and good conscience in India was marked with two characteristic features. Firstly, the application of personal laws to Hindus and Muslims was limited only to few matters, namely, inheritance, succession, marriage and other religious usages and institutions, while all other cases were to be decided according to the customs followed by the community to which the suitors belonged. Secondly, the practice followed by the British Crown's courts and the East India Company's Court greatly differed in this regard. The Crown's court applied personal law only to Hindus and Mohammedans and all other persons were adjudged by the English law which was *lex loci* in presidency towns.[108] On the other hand, the Company's courts in *Mofussils* decided the cases of persons other than Hindus and Mohammedans according to customs and usages followed by the community to which they belonged. The cumulative effect of such a dual application of the doctrine of equity, justice and good conscience was that it greatly helped the development of

[106] This is again a proof of what Brierly has to say, "the ultimate explanation of the binding force of all law is that man, whether he is single, individual or whether he is associated with other men in a State, is constrained in so far as he is reasonable being, to believe that order and not chaos is the governing principle of the world in which he has to live". Brierly, *The Law of Nations*, 6th edition, (1968), at p. 56. Not only this validation comes from the analysis observed by western authors but there is hardly any dispute exist among Indian authors with regards to the validity of the claim of the princely states as what one can consider an "independent nation state".

[107] S. K. Agrawala, "Law of Nations as Interpreted and Applied by Indian Courts and Legislatures", 2 *Indian JIL* 4 431-78 (1962) at p. 433.

[108] Trade and Port Cities established by Britishers in India and was the main focus of the British Empire Rule and contained the Western style business districts and amenities. These towns were typically having fort in the centre and followed the pattern of colonial cities. Kolkatta (former Calcutta), Mumbai (former Bombay), Chennai (former Madras) were among the major towns.

different branches of law in India through judicial activism.[109] This doctrine, which is obviously more applicable in private international law than public international law is unique to the Indian sub-continent and still remains valid.

Although treaty law developed in India, the *Farman* (a royal decree) enjoyed a status of treaty in India. For example, the Moghul Emperor in 1615, on the pleadings of Sir Thomas Roe, issued a *Farman* granting certain facilities to Englishmen. By issuing the *Farman*, the Emperor allowed the Englishmen to live according to their own religion and laws and to settle disputes among themselves by their president. A treaty is normally, negotiated and executed by two or more parties in modern international relations, but the Indian history shows that Indian princes practiced a unilateral approach to treaties, in the sense, that the Emperor would set the terms and conditions, without the traders having rights to negotiate the terms. Of course, as the trade progressed, this unilateral practice slowly disappeared and took shape of bilateral negotiations, reflecting the current practice of treaty laws.

The *Shrutis*, the *Smritis*,[110] the *Dharmashastras*, the *Arthashastras*, the *Puranas*[111] and the rest, establish that the states of ancient Indian states had inter-state or international relations and were carried on according to well-established customs, usages and principles of life based on the *Advaita* system of philosophy.[112] These sources of international law continued to guide the relations of princely states.[113]

State treaties as regional international law

The domain of operation of the treaties, considered here, was the sub-continent of India, and concerned directly only by the British government, the British Indian government and the Indian states. The conclusion of these treaties was a procedure recognized by and observed under the generally accepted rules of international law governing international instruments. But the moment they came into effect, their scope became regional in character. Oppenheim pointed out that the "diversities between states may render necessary developments and adjustments on the basis of a regional community of interests, provided of course that the creation of such regional or particular international law principles is not derogatory to or subversive of the more universally acknowledged and widely observed principles of universal or general international law".[114] As a result one wonders if paramountcy, although yet undefined in law and perhaps undefinable as well, may not be brought as a

[109] Judicial activism has led to instances of encroachment upon the jurisdiction of legislature in post-independence India. For example, the Supreme Court of India came under considerable criticism for encroaching into the domain of legislature in the wake of its judgment in the *Vishaka v. State of Rajasthan*. The Court invoked the text of the Convention for the Elimination of all Forms of Discrimination Against Women (CEDAW) and framed guidelines to establish redressal mechanisms to tackle problems of sexual harassment at work places.

[110] *Smirits* are specific body of Hindu religious scripture and is considered to be a codified component of Hindu customary law. While *Shrutis* are primary in the source of authority, the *Smritis* – written are the secondary in source of authority.

[111] *Puranas* are the important Hindu religious texts, consisting of narratives of the history of the universe from creation to destruction, genealogies of kings, heroes, sages, and demigods, and descriptions of Hindu cosmology, philosophy and geography.

[112] According to Bandopadhya these customs, usages and principles of life were compendiously called the *Desh Dharma*. Bandopadhyay, *International Law and Customs in Ancient India*, (Calcutta: Calcutta University Press, 1920) at p. 16.

[113] *The authority of Sruti is primary, while that of the Smriti is secondary. Sruti literally means what is heard, and Smriti means what is remembered. This shows the distinction between hard-law and soft-laws in the ancient India.*

[114] See Oppenheim *above.*

principle into the realm of regional international law. One might venture a definition of paramountcy as an implicit right enshrined in a treaty designed to preserve and secure the territorial integrity and welfare of a suzerain power in relation to his contiguous vassals. Otherwise, in view of the experience of the Indian states prior to 1947, one must unavoidably conclude that paramountacy was an unwarranted display of *Real Politik* against a group of helpless entities. These treaties, sanads, etc. can be referred as "inter-state" law.[115] This term may be applied to any series of rules whereby full or quasi-political entities enter into contractual obligations towards one another, being forced hereto by the pressure of unavoidable regional interests. This has ceased to exist since independence and does not prevail anymore.

One reason for non-acceptance of treaty law of the Western powers is founded on the conception that its interpretation as the recognition of quality of lawgivers is assumed by the Western powers. It might even mean endorsement of some treaties, which are in contradiction with the newly independent states' conception of international law and which run counter to their fundamental interests.[116]

It can be seen that India, like many developing countries, resisted accepting the validity of customary international rule of law, so well recognized by the European powers, which permitted the latter the right of acquisition of non-Christian territory by discovery and occupation. It insisted that that part of international law that gave expression to the pattern of domination be no longer recognized. The theory of *terra nullius*, according to which the territories not in possession of a Christian prince were subject to acquisition by Papal grant or by discovery and occupation, was not palatable to India. [117]

Terra nullius, a Latin expression, means, land belonging to none – a territory which has never been subject to the sovereignty of any State or over which any prior sovereign has expressly or implicitly relinquished sovereignty. As the Permanent Court of International Justice clarified in the *Legal Status of Eastern Greenland case*, "the expression '*terra nullius*' was a legal term of art employed in connection with 'occupation' as one of the accepted legal methods of acquiring sovereignty over territory. 'Occupation' being legally an original means of peacefully acquiring sovereignty over territory otherwise than by cession or succession, it was a cardinal condition of a valid 'occupation' that the territory should be ter*ra nullius* – a territory belonging to no-one – at the time of the act alleged to constitute the 'occupation'.[118] The ICJ in the *Minquiers and Ecrehos* case did not however simply disregard the ancient titles, and decide on a basis of more recent display of sovereignty. It did not assimilate the islands to *terra nullius*, but examined evidence of possession as confirmatory of title.[119] In ancient India, the source of native title was the traditional connection to or occupation of the land, that the nature and content of native title was determined by the character of the connection or occupation under traditional laws or customs and that could not be extinguished by governmental powers which happened during the colonial period.

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115 K. M. Panikkar, *Asia and Western Dominance*, (London, 1970) at p. 24.

116 N. R. G. Martens, *The Act of Berlin of 1885*, 2nd Series (2000) at p. 19.

117 B. Prakash Sinha, "Perspective of the Newly Independent States and Binding Quality of International Law," In January *ICLQ* 121-35 (1965) at p. 125; W. S. Armour Esq., "*Customs of Warfare in Ancient India*", Papers read before the Grotius Society in the Year 1922, 71-88 (Cambridge University Press, 1922).

118 *Legal Status of Eastern Greenland*, P. C. I. J. Series A/B, No. 53, pp. 44. 63.

119 *The Minquiers and Ecrehos* case, Judgment, I. C. J. Reports, 1953, pp. 56-57.

2.6.1. Sources of international law in pre-1945

Lack of literature disables learning about how the princely states treated customary rules of international law into the domestic setting and what were their approaches in case the customary rules of international law conflicted with existing domestic law. We do not find any treaties like the Treaty of Danzig which provides for the direct rights to individuals under a treaty in pre-1945 era. Treaties were one of the most important sources of inter-state relations. We find enormous references to various treaties concluded between princely states and other states and British India or other nations.[120] However, the determination and interpretation of treaty provisions rested with the kings and not with judiciary, *per se*. We find ample examples of such customs in the pre-1945 era. With independence, all the treaties, which the princely states concluded, either were abrogated or eclipsed as they became part of independent India and independent India acquired all rights and obligations flowing from these treaties. Unlike pre-1945, the judiciary established under the Constitution of India came to determine and interpret the rights and obligations of India vis-à-vis other nations. Thus, the combined role of judiciary, executive and legislature in pre-1945 got bifurcated since the adoption of the Indian constitution.

Treaties were negotiated and the states confirmed to be bound by the obligations flowing from those treaties. In independent India, the treaties were negotiated by the executive and ratified by the Union Cabinet, except few cases, which found ratification of the Parliament, and judiciary acquired independent role in interpreting the obligations of the Indian state. Thus, the earlier customs which were widely followed among the princely states disappeared with the independence of India. In other words, an institution of treaty negotiation, execution and interpretation of pre-1945 and post-1945 was markedly different.[121] Unlike post-1945 era, wherein we see law-making treaties and treaty contracts, we find that pre-1945 era had only treaty contracts which were entered into by two or more princely states of India and other foreign states such as Britain, Portugal, Holland, and France.

Did all ingredients of elements of custom such as long duration, uniformity and consistency, generality of practice, *opinio juris et necesitatis* exist in pre-1945 India? One can find that the motives of fairness, convenience or morality were more prevalent in inter-state relations pre-1945 which differs from an essential element of *opinio juris et necessitatis* which underlines customary law. These elements have disappeared as India has, like any other nations, underlined the importance of *opinio juris et necessitatis*. Customary rules of international law in pre-1945 developed as a result of diplomatic relations between princely states and British India and treaties between princely states, while the current customary international law also developed as a result of practice of international entities and state laws, decisions of state courts and state military or administrative practices. There was no inter-state organization like what we have in the current world in form of the UN.

It is observed that courts in pre-1945 made decisions based upon considerations of fair dealing and good faith, which may be independent of or even contrary to the law. Inter-state comity was another source of development of inter-state law in pre-1945. In pre-1945, a number of matters of the governments of respective states were resolved on the advice of their legal advisors. These advices are also, therefore, sometimes treated as

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120 See above Nagendra Singh, *India and International Law in Ancient India* and V. S. Mani, *Evolution of International Law*.

121 Monroe Leigh, and Merritt Blakslee, *National Treaty Law and Practice: France, Germany, India, Switzerland, Thailand and United Kingdom*, (Washington D.C.: American Society of International Law, 1995).

source of international law currently. However, in pre-1945, it was one of the most dominant sources of inter-state law. [122]

Equity and justice and fairness in pre-1945

The Courts emphasized that decisions must be just and equitable. In pre-1945, the principle of equity as applied to a particular case, situation or circumstances would usually turn out to mean in effect the view of a decision maker or a consensus of decisions makers as to what is reasonable and just in the particular case, situation or circumstances. The rulers' principal objectives were to build a more equitable and just society. It is also seen that the rulers resorted to formulations which couched in the language of equity which helped to produce agreements and in this sense equity was an important tool of inter-state legislations.

2.6.2. Sources of international law in ancient India and their influence on Independent India

Dharma in ancient India was not solely the deliberate creation of lawgivers and legislatures but largely social custom and practices observed under fear of divine sanctions. The sources of ancient Indian laws were Revelations (*Sruti*, the Vedas), the tradition (*Smritis* or Dharmshastra) and the practice of those who knew the Vedas or customs (Acahar), as mentioned earlier. Custom was an important source. Customs were considered as a mixture of inter-caste practices. One of the critiques is in the case of the ancient states of India there is but little that is available in the nature of acts or statutes, or opinions and decisions of judicial forums.

Indian history is proof of respect for the stranger, for we were strangers in the land of another country. Princely states' population believed in internationalism. The princely states continued the practices of following strictly the treaties entered into by them with other states and conferred privileges and immunities upon diplomatic envoys. Although princely states lived in far small city-states than we know now today, their mutual relations were regulated and governed by some definite inter-state rules and principles. Princely states followed definite laws of war and peace. Arbitration was the most preferred means of resolving disputes that finds mention in the Indian Constitution. While in Europe, there were Greeks, in Asia; it was India, which showed to the world how sovereign states could live in mutual cooperation with each other like a single community.[123]

The writers and jurists of princely states developed Law of Nature in accordance with the values and conventions of their age. According to them, if there was a conflict between positive law and natural law, the latter would prevail. Despite some criticisms, it must be admitted that natural law emphasized the importance of purpose behind law. It stressed that law was not the body of meaningless rules or principles to be enforced by the courts. In fact, law existed to achieve definite objectives.[124] It is therefore concluded that India, having deep rooted Natural Law traditions, embraced and developed human rights law, system of punishment of war crimes,

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[122] It remains to be examined whether judicial mechanisms or equivalent of arbitral tribunals contributed as source of international law in pre-1945.

[123] *Jus natural* means, the sum of those principles which ought to control human conduct, because founded in the very nature of man as rational and social being. See Fawcett, *supra note 11* at p. 26. The law of nature is the expression of what is just against what is merely expedient at a particular time and place; it is what is reasonable against what is arbitrary; what is natural against what is convenient and what is for the social good against the personal will. Thus natural law was based on the rational and reasonable needs of man's nature.

[124] Natural law could be adapted to the changing times and circumstances although its fundamental principles remain unchangeable.

due to the influence of Natural Law. Thus, the idealist character of Natural Law has greatly influenced the pre-independence international law among the princely states.

The Indian civilization and state practice demonstrates heavy emphasis on the rule of morality. In fact, the Indian legal literature has combined and explained rule of law and rule of morality as one.[125] Thus, the Western philosophy which is captured in Oppenheim's definition shows that a rule of morality is a rule which applies to conscience only and cannot be enforced by external powers, whereas, the Indian traditions and practice read and practice both together. Regardless of periodization, the Indian policy-makers and rulers have given considerable weight on moral arguments. While the Western nations will appeal to precedents, to treaties and to opinion of specialists, Indian writers would appeal to the general feeling of moral rightousness, as these are based on the long civilization history of India. It is, however, slowly disappearing in the post-independence foreign policy which is at times devoid of moral righteousness. The Indian policy-makers and rulers, earlier and today too, to an extent, give sufficient expression to moral principles in the legal form. India, in its international law and foreign policy and practice, has accepted and practiced the relationship between morality and international law.

It was indeed an important landmark in the history of Islam when religion came to be separated from the conduct of the state at least in respect of external relations and this fundamental principle obtained full recognition in 1535 AD when a treaty was signed by Sulayman of the Ottoman Empire with King Francis I of France. Thus, the modern character of international law separated from religious attachments dates back to this period.[126]

In Islam, it is believed that the law bound individuals rather than territorial groups. Thus, Muslims wherever they went were under the jurisdiction of the Islamic state, as jurisdiction in Islam was based upon the personal rather than the territorial principle. This approach was bound to conflict with the development of inter-state law in so far as every state has a territory and exercises jurisdiction over its nationals and the concept of the latter, has primarily been territorial. However, as the Islamic law also bound the ruler of an Islamic political unit, who was more often than not a monarch, and movement beyond the territories of a state without the monarch in command was rare, this lacuna need not be exaggerated, particularly in an age when jurisdiction could be personal also. This legal principle, which has been in existence since the Islamic civilization comes into conflict with present principles of international law. India is the second largest Muslim country in the world and Indian Muslims do follow this principle. Thus, as far as India and Indian Muslims are concerned, one can discern two approaches to international jurisdiction.

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[125] Oppenheim suggests that "a rule is a rule of morality if by common consent of the community, it applies to conscience and to conscience only; whereas, on the other hand, a rule of law if by common consent of the community it will eventually be enforced by external power. L. Oppenheim, *International Law*, vol. 1, 8th edition at p. 8.

126 The very first article of this treaty stipulated that a "valid and sure peace would be established between the two states and reciprocal rights conceded to the subjects of each nation in the territory of the other. This acceptance of the principle of peaceful relations between Islam and Christendom has been often described as a revolutionary departure from the classical principle of permanent war or jihad. This treaty has, therefore, been regarded as the stepping stone for general recognition of nations of different faiths and this attitude of Islam gradually applied to mediaeval India also.

2.7. Concepts of international law

2.7.1. Sovereignty

The king, not only in the ancient times but also during the pre-1945 period, was regarded as the personification of the sovereignty of the people, and that he acted on the powers delegated to him by his subjects. Under current modern international law, the king or the sovereign ruler is one element of the whole sovereignty, especially looking at the examples of monarchy in the Netherlands and the Scandinavian countries. The practice of surrendering external sovereignty, e.g. foreign and defence, was practiced by kings of several Indian states, to British, against protection from British for internal disruption and aggression. It can be also seen that the Indian States were considered to be outside the legal jurisdiction of the Paramount Power in respect of the enforcement of international conventions.[127] Nevertheless sovereignty in this unique form continued to exist in pre-1945 India. It shall be noted that the practices and attitude of princely states and even ancient states towards international law to employ the modern terminology, constituted a community-oriented consensus towards the fulfillment of international obligations instead of sovereignty-oriented consent. As India was constituted of hundreds of princely states, the community approach of these princely states toward the British authorities continued to exist. [128]

Sovereignty in princely states had different meaning in the 18th and 19th centuries of India than now. The 18th and 19th century India had active acceptance of double allegiance (a symbol which does not necessarily fit with the modern allegiance of only one state to which a person citizen despite the acceptance of dual nationality in many cases)**.** In native states of India, there existed double allegiance of the subjects of native states. The native rulers themselves were the subjects of the Indian government. The natives of protected states owe not only allegiance to them, but also certain duties, ill defined, to the protecting state. This was typical of the Indian subcontinent and these practices and notion of sovereignty have disappeared and do not hold validity in the modern state of India.

2.7.2. Recognition and Reciprocity

Reciprocity is the basis of current modern international law - no government can expect its legal claims to be honored unless it demonstrates a corresponding willingness to honor similar claims as its foreign counterparts. The pre-1945 Indian history shows that the reciprocity was expected by native / princely states vis-à-vis the British government and the East India Company, but the latter did not demonstrate the willingness to honor these expectations as they were in more powerful position than the former. However, with the advent of modern international law after the Second World War, the inequality in reciprocity faded away.

In ancient and also during princely states existence, kings exercised full territorial sovereignty over their own lands but in addition, there are instances in which they exercised limited sovereignty over others – protectorates, spheres of influence and leased territories. In ancient India, recognition came in various ways: when a state having achieved independence was invited to participate in great inter-state assemblage like *Asvamegha*, *Vajapeya*, or *Rajasuya*. An invited state thus received an inter-state recognition. The rulers

[127] Lanka Sundaram, "The International Status of India", Read before the *Grotius Society*, 26 March 1931, vol. 17, 35-54 (1931) at p. 50.

[128] It is in this light, one should see the India's leadership of NAM which projected a challenge to the sovereignty oriented consent, deeply rooted in the western countries, to the fulfillment of obligations instead of community oriented consensus, found in NAM nations. Thus, what the pre-1945 shows is that along with consent, consensus should also be recognized as a basis of obligation in international law.

assembled there, by agreeing to take their seats alongside that power, gave virtual recognition to its independence. Here an invitation meant recognition. In the case of inferior or part-sovereign states, consent of the overlord meant recognition.

2.8. International Law Making through Treaties

Treaty was an agreement concluded between two kings and they would exercise treaty-making powers on behalf of their states. It is evident that the kings and princes in ancient and pre-1945 India were regarded as the personification of the sovereignty of people. So when in ancient India a king entered into some sort of transaction with another king, it was really a case of two states, and not that of two individuals, entering into an understanding or intercourse. In such a case there was no room for doubt that the king concerned was representing the people (in whom alone resided true sovereignty) and his state. This doctrine has lapsed with the coming into being of independent India. In fact, the transactions, which took place between the kings prior to independence and post-independence evidence this doctrine and must be accorded legal weight. Thus, the principles and norms, which were followed by these principalities and constitute a body of conduct among these principalities ought to be considered as rules of international law or inter-state relations of ancient India. Although modern India can claim out of virtue and ideals, the fact remains that there was no equality among states in ancient and later on 1500-1945 India. States were divided into superior, inferior and equal according to the degrees of power and happiness possessed by the inhabitants. States wished to become all-powerful, states hankered after the attainment of higher status by adding to the qualities of happiness and power. Rulers performed sacrifices like *Asvamedha, Rajasuya,* and *Vajapeya* to further these ideals.

2.9. Select areas of international law

2.9.1. Principles and Practices of Criminal law

An examination of criminal law system reveals that several principles and practices of the British era have ceased to exist since independence. Prior to the Warren Hastings reforms,[129] in the area of substantive criminal law, the British tended to exercise much bigger scope of jurisdiction than the current international law recognizes. For example, not only the dacoits but family members of the dacoits were also made slaves and whole villages were fined, all under the pretext of stringent measures which were felt necessary to eradicate the evils of dacoity. The British Empire applied English laws in criminal matters for the circumstances, which were totally different, than those of the English. Similarly, the harshness of English law was a reality in India but the redeeming features of English law and procedure were nowhere to be found.[130]

2.9.2. Religion and international law

Prior to independence, *Koran* and *Shastra* were consulted in deciding the disputes among the Muslims and Hindus. With the independence, reforms have been taking place gradually and although *Koran* and *Shastra* based rules and norms determine the cases such as inheritance, marriage, caste and other religious usages,

[129] Waren Hastings was the first Governor-General of India from 1773 to 1785. He carried out major social, economic, administrative and political reforms

[130] It is not surprising therefore that several nations, including India and China, among others, refute the exercise of international criminal law by international institutions such as the International Criminal Court for regions and realities which are far away from the physical locations of these institutions.

uniform civil code has been entering gradually in the legal system of India. The *Koran* and *Shastra* were consulted because the judges were Englishmen and they did not have knowledge of personal laws of Muslims and Hindus. Moreover, local traditions and customs of these two dominant communities were required to be preserved from English onslaught.

Dharma is the core and foci of Hindu philosophical thought and political theory. It is no wonder therefore that Hindu law began with duties (*Dharma*) rather than with rights as in the Western countries. In his study of Kingship and Community in Early India, Drekmeier shows that "in Hindu political speculations, duty occupies the central position and European thought belongs to conceptions of natural rights and freedoms – we are justified in saying that civil obligations rather than civil rights formed the basis of the relation of state and subject."[131] These philosophical pronouncements underpinned the international law practice for the period prior to independence. However, the post-independence and much of today's international law norms observed by India focuses on rights first instead of duties.

International law in ancient India and pre-1945 may be defined as the body of customary rules or ethical principles based on the philosophy of the *Advaita*[132] which regulated the relations of Indian states in their intercourse with one another. The above definition implies the following five pre-requisites, viz: (1) the existence of sovereign independent states, based on the supremacy and universality of law which was the expression of the philosophy of *Advaita,* (2) the sanctity of treaties, (3) the existence of sanction, (4) the inevitability of intercourses among such states, and (5) the need for regulating such intercourse.[133]

2.9.3. Diplomacy

There are variations with regards to the pronounced principles and practices of diplomatic law and practices in pre-independence India. It is observed that not all princely states were able to station ambassadors in all other princely states on a permanent basis, the reasons for this significant departure from the fundamentals of the *Arthsastra* differs from one princely state to another state. Instead of permanent stationing, these princely states used *ad hoc* or temporary approaches. This had immediate short and long term implications for the princely states since the lack of permanent stationing disabled them from using these ambassadorial services also in spying, sabotaging and securing defections from the enemy's army. This tradition and use of ambassadors for spying has been substituted by the stationing of attachés in various diplomatic missions of the nation states. These spying agents in form of defence attachés or any other post give direct feedback to home state through the ambassador or directly.[134] Hindu rulers of princely states had conferred numerous privileges on the Christians and Muslims raising them to a position of considerable importance. This is one of the most distinct contributions of India to the principles of international law and to respect the secular and democratic character of international

[131] A. K. Pavithran, "International Law in Ancient India", 5 *The Eastern Journal of International Law*, 220-42 (1973) at p. 230.

[132] *Advaita* are the most influential and dominant sub-school of the Vedas – School of Hindu philosophy.

[133] It should be noted that inter-state rules and principles had religious sanctions rather than legal sanctions as understood in the West.

[134] It is quite interesting in this regard to note that sending spies and using them for securing all possible information from a foreign state was "not considered wrong morally, politically or legally". The current international law does not approve this practice anymore, although operations by spies in foreign nations continue unabated.

law.[135] In this regard, it is remarkable that European ambassadors (whether royal or East India company envoys) who visited the courts of East Indian Sovereigns in the 16th, 17th, 18th centuries found everywhere the same pattern of diplomatic ceremonial and etiquette which reflected diplomatic usages described in the classical literature.[136]

2.9.4. Human rights

Is the Indian intervention into neighboring regions, unilateral use of force on human rights grounds, a part of India's rich civilization contribution to the protection and promotion of human rights? In other words, deep-rooted civilization values will come to motivate modern civil state institutions to revisit the current civilization system.[137] With regards to the Bangladesh War of 1971, the realization of the need to evolve norms and principles of international law to cover such situations began to emerge. Pre-independent India was full of social problems and evils; some of them were *sati* (wife setting herself ablaze on her dead husband's pyre), caste system, and untouchability, among other problems. To eradicate these problems, various social reform movements were launched which also attained measurable success. These social reform movements used to reinterpret the sacred texts of the Hindus and appealed to the conscience of people. Thus, the social problems and reforms have made great contribution to modern international human rights law.[138]

The independence movements and corresponding nationalism accelerated the social change. With the progress of the political struggle, the enthusiasm for social reform waned considerably with the result that it was deliberately disassociated from the political movement. While we observe that the current wave of nationalism may be seen as widely utilized for self-determination or independence from unwanted domination of a foreign state or otherwise, a unique contribution of the Indian nationalism has contributed to the social change and social transformation. By contributing in these areas, the nationalism movement also achieved independence from the British colonization. These processes and mechanisms are unique to the Indian Sub-continent. With India achieving independence, these movements have clearly oriented themselves to resist the undue domination of Western influence towards the social changes.

The progress of the struggle for independence provided equal opportunity to women. The Indian National Congress provided a common platform for men and women to play their role. This exposure

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[135] According to three well known Malayali deeds the Head of the Christian Community ranked as a hereditary prince (Utayavar) equal to the Utayavars of Mysore and Coorg (Malabar) C. H. Alexandrowicz-Alexander, "Grotius and India" 3 *Indian Yearbook of International Affairs* (1954) at p. 361.

[136] European Ambassadors often complained about restrictions imposed on their freedom of movement by the receiving courts, which gave the impression of detention but were in principle measures directed against espionage about which Kautilya had so much to say. It is not found whether, during the British colonization period, there had been also envoys or ambassadors from other nations and what were their roles and responsibilities. Alexandrowicz, *supra note* 13 at p. 310.

[137] As Frank and Rodely observe, "international law, as a branch of behavioral science as well as normative philosophy may treat this event as the harbinger of new law that will henceforth, increasingly govern inter-state relations. Perhaps *India*'s example by its success has already entered into the nations' conscious expectations of future conduct." Thomas M. Frank and Nigel Rodley, "After Bangladesh: The Law of Humanitarian Intervention by Military Force", 67 *American JIL* 2 (1973) at p. 303.

[138] To promote and protect rights of women across the world, UN have established various machineries. Similarly, during the pre-1945 period, several institutions were established in India to achieve the respectful and proud place of women in the society. Institutions and organizations like the Servants of India Society, Ramakrishna Mission and Vishwabharati have done great deal of works for the spread of education and culture among women to achieve the same ideals which are now found in international instruments, already in the context of India, much prior to the adoption of these instruments at global level.

empowered women to develop their own individualities and crusade for equal rights. The social reform movement lost its exclusive male basis and orientation and women themselves founded an exclusively female association, the All India Women's Conference, in 1926.[139] They crusaded for various rights of women and advocated equality. Thus, the issues and problems unique to the Indian Sub-continent's multiculturalism were addressed by equally unique means and mechanisms. Obviously, the same problems were not found in monoculture societies of the West and the Islamic world. If these means and mechanisms had not contributed to the typical problems, the universal aims of universal human rights instruments would have been difficult to achieve. In other words, the modern universal human rights instruments would have been devoid of universal or a truly multicultural input. If the Indian problems and solutions would not have existed, then modern international law would not have been able to claim universal approach neither would it have been able to appeal to the entire human society.

The Indian joint family system, which is unique to India, has contributed to the modern international business, trade, human rights, humanitarian law and many other branches of international law, as one could observe that practices and customs originated and maintained by the joint family indirectly and directly contributed to the growth of, and reflection in the modern international trade practices. It is to be noted that the joint family system and principles have found inner reflections in the overall Indian legal and judicial system and jurisprudence, which is in tandem with and not necessarily in conflict with modern international law, and jurisprudence centric to the nuclear family.

2.9.5. Cooperation among princely states - a metaphor of functioning of international organizations in the post-1945 era

Nation states, after the Second World War, have established several international and regional organizations to address issues of common concern and find solutions. In ancient and pre-1945 India, as mentioned earlier, various religious ceremonies and sacrifices accelerated the process of such intercourse and strengthened people's conviction that greater and closer intercourse, and not isolationism, could alone offer dividends in the long run.[140] These mechanisms were *ad hoc*, unlike the concepts of administrative secretariats which are found in international organisations. By performing these ceremonies on a particular day, the kings and states ensured some form of presence of other kings and state representatives and provided a platform to discuss issues of common concerns and interests on these occasions. Thus, ceremonies were actually (annual) conferences of general bodies to meet and discuss the progress and chalk out future course of action. When the kings met together, they exchanged words of sympathy and fellow feeling. Thus, these occasions served to strengthen inter-state amity and ensure cooperation among states.

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[139] Established in 1926, All India Women's Conference, focused on Indian women's educational improvement but, slowly, it started addressing social and economic concerns of women and certain prohibitive practices like child marriages, purdah system. The organization became influential and started addressing legislative reforms too. AIWC played an important role in the Indian independence movement by involving, training, organizing girls and women to become volunteer and contribute to the call of independence.

[140] A concept of IO was thought as back as during Kautilya period, although a step which was akin neither in Europe nor in Asia prior to the 20th century. But confederations of states appeared in the *India*n sub-continent in the 18th century, to mention only the Maratha state, an association of rulers under the supreme government of the Peshwa at Poona. Moreover, the Moghul Empire at the stage of its decentralization in the 18th century became a composite entity similar to the Holy Roman Empire. Alexandrowicz *supra note* 13 at p. 309.

2.9.6. War and peace

Princely states followed Kautilya's advice that, for self-preservation any mode of war[141] is quite justified, including peace treaty (Sandhi), *Mantra Yudha,*[142] a war of intrigues (Cold War), *Kutayudha* and uses of barbarous tribes.[143] The modern international law imposes limitations and prohibition as far as means and methods of warfare are concerned. However, the element of righteousness is unique, found in Indian history of warfare[144] and one, although disappeared in modern international law, which begs to be re-examined, especially, when nations resort to non-prohibited means but still having no regard for righteousness of those deployed means and methods.

Indian philosophers such as Kautilya, Kamandaka and Manu, all were primarily against war from a moral and economic point of view, but turning to it as a last resort was not dismissed as an option. In fact, the Manu *Smriti* suggests that the kings should aspire for victories more glorious than those of war and victories achieved by battles were not spoken of highly by the wise. It is due to this strong influence of the scriptures one would find that unnecessary and aggressive wars were rare in ancient India. The conception of war as an engine for destroying the barbarian, which prevailed in ancient Greece and Rome is seen to operate in India also.[145] In ancient India, it was a practice to declare a war if and when it became unavoidable and that too after exploring all options to seek the peace, including negotiations.[146] The practice has been also found in the West, however, not so consistently. The case of Paraguay and Bolivia declaring war in 1933, when actual war broke out in 1932, is a case in point. The declaration, as mentioned earlier, was crucial to India, as the declaration would pave the way to the enemy to be prepared for war.[147]

The Indian custom of giving notice before engaging in battle[148] has disappeared in the modern rules of warfare.[149] Similarly, the kings were not resorting to war for territorial aggrandizement unless they were forced

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[141] For the princely states, war meant a series of acts of hostility, and not merely a condition.

[142] Yudha implies the employment of organised forces and implements of destruction.

[143] Alekzandrowicz *above* at p. 32.

[144] Warfare in Indian scripture is defined as the affair that two parties who have inimical relations undertake by means of arms to satisfy their rival interests. S. V. Visvanatha, *International Law in Ancient India*, Longmans, Green & Co, 1925, p.109

[145] The Mahabharata says, "War was invented by Indra for destroying the Dasyus, and weapons and armours were created for the same end. Hence merit is acquired by the destruction of the Dasyus. Udyog Parva, 29, 30 and 31.

[146] The Mahabharata: Santi: Rajadharma: 68.26 states that the war should be waged only if all other expedients of bringing about peace have failed.

[147] This practice has ceased to exist especially in modern international law. The wars in Iran and Iraq, Afghanistan, former Yugoslavia are all cases in reference.

[148] The beauty of Indian customs was that initially the envoys would be dispatched with the messages and if the opposite party denies, then a day, keeping in view the climatic conditions and auspicious day will be announced for battle. The climatic conditions were to be as neutral as possible to allow the warring parties to prove their strength in the battle field and in accordance with ideas of chivalry of soldiers, however, this custom is now been completely disregarded because adversary will attack on the enemy when the climatic conditions are in favor of the invading party only. This gives favor to invader in winning a battle instead of proving his strength. Secondly, the *India*n history hardly enables us to read that an attack could take place on an auspicious day, in fact, the auspicious days were deliberately kept out of the battle days to rejoice the culture and tradition. India kept this custom intact when it was engaged in wars with Pakistan in 1947, 1965 and 1971 as well as with China. However, the modern international relations are witness of attacks on "days of celebration" regardless of auspicious nature, the US invasion of Iraq, NATO invasion in former Yugoslavia are proof to this deplorable custom. Former declarations of war were not uncommon – a custom which is completely taken over by "surprise attack" war strategies employed by all nations alike, including *India*. Economic blockade – a modern term, was very much employed in the ancient India. It was considered

and that too after great deliberations and on weighty issues. While war was taken as a last resort, once invoked, the kings would pursue all out efforts to achieve victory at all costs, and death and never dishonor was the fundamental principle.

Prior to 1500 and even during 1500-1945, the rules of warfare observed by Indian kings and princely states were unique to the Indian civilization and have made significant contribution to the modern international humanitarian law.[150] These rules of warfare sources are genuine evidence of ancient chivalry and priestly influence and preaching. This is typical of Indian civilization. There were strong religious sanctions for the observance of these rules, with penalties for breaches in this world and the next (reincarnation). In this regard, it is extremely important to note that once the war began and warring parties engaged in warfare, it was hardly expected that the war would remain inconclusive. This was partly because as per the scriptures, such as Agni Purana and Mahabharata, it was expected that warriors would remain on battlefield and never desert and turn back from battle. The consequences of fleeing away from battle were loss of wealth, infamy and reproach. One could observe that these principles remained heavily influential in the wars which took place between various princely states during the pre-1945 period. For example, those who left comrades in war would face isolation from the society including denial of private rights in family life.

As far as the rights to armed intervention either unilaterally or collectively in the modern days are concerned, one can find good reflections of similar reasons for intervention in the 1500-1945 India.[151] The modern concept of international law is essentially based on one uniform set of rules which, for example, would

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to be better to secure the impoverishment of the foe, to lay an embargo on his merchandise and starve him into submission.

149 *Temperamenta Belli*: Rules for warriors: (1) it is odious for Kshatriyas to make away with those who cannot defend themselves; (2) the ordered conduct of battle; (3) rules against fighting those taken at a disadvantage in the actual combat; (4) Necessity for notice and prohibitions against striking one that is unprepared; (5) prohibition similar to Do not strike below the belt; (6) Rule against fighting one engaged in battle with another; (7) rules against attacking a retreating enemy; (8) rules against slaying one who has asked for quarter; (9) the general rule of sparing refugees and suppliants; (10) differentiation between combatant and non-combatant portions of the army recognized; (11) distinction between non-combatants in general and the fighting forces recognized; (12) prohibition against slaying animals employed in battle; (13) prohibitions against slaying those [suffering] from any natural, physical or mental incapacity whether due to permanent or accidental causes; (14) rules against killing anyone with special qualifications; (15) whole classes exempted from slaughter; (16) prohibitions against slaying certain classes with special sanctity attached; (17) places of special sanctity to be avoided; (18) care of the wounded; (19) night slaughter infamous and horrible; (20) Honour to a fallen foe; (21) pension for widows of slain soldiers; (22) Punishment of deserters; (23) Not to turn one's back in battle.

150 Warfare was classified according to the weapons with which it was conducted, however, this classification seemed to have lost meaning during the princely states warfare days. As per the religious scripture, the weapons were like daivika, asura, manusha. However, one does not find references to these particular classes of weapons in pre-1945 history. For example, chanting of slokas or mantras fall under daivika type of weapons which has found no real use. However, asura which means employment of mechanical instruments have been resorted.

151 Interventions were not outdated but practiced even during the 1500-1945 for various reasons – these reasons are also considered valid in the modern international law (1) Intervention on the strength of an implicit previous understanding (2) Intervention in self-defence i.e. ward off imminent danger to the invading power (3) Intervention on the ground of humanity (4) Intervention to prevent continued misrules in a state (5) Intervention in order to preserve the balance of power (6) Intervention by one or more powers at the request of one of the parties to a civil war (7) It must not be understood that ancient Hindu jurists ruled out all possibilities of war. On the contrary they felt that war was inevitable in dynamic and ever expanding human society…there is, however, one condition that: he (Kshatriya) must fight war according to just principles of war. Indian history allows us to conclude that Indian rulers were fully aware of unjust battle or unrighteous warfare. And their differentiation of a righteous war from an unrighteous war strikingly resembles the Grotian concept of a just and unjust battle. Hiralal Chatterjee, supra note 43 at p. 4.

govern all belligerents in a war. We have such a concept at present, i.e. the Geneva conventions of 1949, which have a universal application irrespective of considerations of different civilizations or opposing political ideologies of different states. This could not be said of medieval India, which became a battleground of two civilizations, each having its own laws to govern inter-state conduct. Independent India has witnessed disappearance of many principles and practices, which were found in the Hindu scriptures and princely states functioning.[152]

The Regulating Act of 1773 made provision for the appointment of a Governor-General and a council of four and centralized the administration of India. Regarding the right to commence war or negotiate peace, the following provisions were made in the act: normally the subordinate presidencies could commence war or negotiate peace only with the consent of the Governor-General, but they could do so without the consent of the Governor-General when there was very urgent necessity provided they received orders directly from the Court of Directors of the British East India Company.

2.9.7. Trade, commerce and economy

Rural economy and the self-sufficiency of the village communities, which were disintegrated during the British rules, are typical of the Indian sub-continent. The principle of international commercial, trade and business run contrary to the objective of self-sufficiency, according to David Smith and Ricardo and the Keynesian and the economic principles of world economic integration and interdependence they advocated. During the British rule, a slow but steady emergence of tax regime to meet the needs of the British colonial administration consolidated.

However, this process also witnessed the rural credit and the emergence of the moneylender or micro-financers. This is a unique economic system applicable in India, which finds resonance in the current international financial and fiscal policies and principles. The new versions having new means and mechanisms of financing have emerged but the principle and effective working system can be traced back to the Indian rural economy prior to independence. The British colonization led to the breaking down of the economic and social fabric of Indian self-sufficient village communities and the transformation of the whole pre-capitalist feudal economy of India into a capitalist economy. In other words, the rural economy of India was not powerful enough to withstand the forces of global capitalism which shows weakness of rural financial system and machineries of India and more so, inability of the financial institutions to withstand, is unique of Indian economy. The temples played a rather important role in development of foreign trade in the 15th, 16th and 17th centuries. For example, the Kaikkolas (a merchant community in South) being closely associated with the temples were often induced to

152For example, return of dead body of a defeated king to his home country was also practiced. For example, we have the classic example of the return of the dead body of Biswas Rao by Ahmad Shah Abdali after the battle of Panipat of 1761 AD, though according to the Durrani tradition the body should have been taken to the conqueror's country. In context of this example, it may be worthwhile mentioning that in some cases even where the law of the overpowering state which was in a position to enforce it, was more liberal than the law of the victim state, it could happen that as a matter of reprisal the state in a position to enforce its liberal law renounced it in favour of the law of the victim state in order to retaliate. This appeared to be the position arising out of the perpetual wards waged by the kings of Bahmani with the kings of Vijayanagar, both being mediaeval states of South India. This practice has disappeared from modern international law. Nagendra Singh, "International Law in India: (II) Medieval India", 2 *Indian* JIL 65-82 (1962) at p. 71. It has been the general custom in the Decccan to spare the lives of prisoners of war and not to shed the blood of an enemy's unarmed subjects. This is a regional principle but over a period appears to have disappeared.

work within the temple precincts. In fact the association of artisans and merchants with temples can be considered as important tradition for the development of temples in Vijaynagar times.[153]

Even when all obstacles to cooperation were overcome under the pressure of the growing volume of trade, there remained the traditional reluctance of East Indian rulers to conclude treaties, which has its roots in ancient traditions of Hindu polity. This shows preference for informal – less legalistic relations which disappeared but with post colonization it has resurfaced again. It is easier to obtain a unilateral grant than to receive any concessions by treaty, which is considered a limitation to the sovereignty of the conceding ruler. This shows the East versus West approach to international law.

2.10. Administration of Justice and international law

India's history till 1947 suggests that there was no clear separation between the executive and judiciary. The judiciary was under the control of the executive. Kings and princes were the lawmakers as well as law interpreters. Due to these historical reasons, the question of judicial independence did not arise in pre-independence India.[154] Thus, the foreign relations between Indian states and the questions with regards to the settlement of disputes between these kingdoms or princely states were settled by the executive only.

Various attempts were made by Great Britain during the colonization period to address difficulties and disputes arising between princely states and between princely states and individuals. However, none of these attempts provided a long-term solution, which could be accepted by the rulers and population at large. For example, the 1781 Act of Settlement had various difficulties and defects such as (1) the jurisdiction of the court over the Indian habitants was vague, (2) the jurisdiction of the court over the actions of the government was not clear, (3) the procedures were considered to be oppressive and harsh, (4) the European British subject would use to their advantage the jurisdiction of the Supreme Court, while the Indian habitants in distant parts of Bengal, Bihar, and Orissa could not avail themselves of the jurisdiction of the Supreme Court. The European British subjects could choose to sue the Indian habitants either in the *Adalats* or in the Supreme Court.

During the Cornwallis reformation process, attempts were made to ensure that all subjects get free and impartial justice. However, these reforms attracted floods of cases against other princely states and British institutions and individuals. These led to inordinate delays. Furthermore, Cornwallis entertained a notion that Indians were not worthy of trust. Probably, his experience in the field of administration of criminal justice led him to this belief.[155] Not only in terms of refining the substance of law and bringing more clarity and expedition in the settlement of disputes, British rulers also attempted to combine functions of all organs into one. However, Lord Hastings reversed the process established by Cornwallis and brought about the reunion of magisterial and revenue functions in the same person. Another important development of the British era (late 18th and 19th century) was that the Indian legal system was faced with confusion, contradictions, and difference. The three Supreme Courts established by British were expected to administer English law as it suited the situation. The

153 http://www.*India*netzone.com/2/coins_princely_states_*India*.htm accessed on 26 December 2010.

154 In early days the administration of justice in the settlements of the East India Company was not of a high order. There was no separation between the executive and the judiciary. The judiciary was under the control of the executive. The judges were not law-experts. The company gave lesser importance to the judicial independence, fair justice and rule of law.

155 It was unfortunate that Cornwallis did not appreciate the fact that corruption was not confined to the Indian and even the English servants were equally, if not, more corrupt. It has been observed that the American and the British subjects were excluded from the jurisdiction of the Indian judges. The reform introduced by Bentick was a great step forward in Indianisation of administration of justice.

interpretation of suitability could vary from court to court and from judge to judge. Therefore, even the principles of English law administered by the three Supreme Courts were not uniform.

It is not surprising because the Privy Council that administered justice to people was separated from it by thousands of miles. They were away from the people and their life, from their customs and traditions. In such circumstances what is surprising is that the administration of justice at the highest level had so few blemishes. The Privy Council tried to inject principle of equity and common law into the realms of the Hindu law and the Mohammedan law. Quite often the decisions of the Privy Council were not in conformity with the accepted customs of the people. Another criticism is that it was too true to the ancient texts of personal laws and thus was responsible for the stagnation of personal laws of the people of India.

The judiciary established in Bombay, Calcutta and Madras contributed to the confusion and uncertainty in the fair and equitable implementation of rule of law, having profound implications for independent India.[156] The Indian judges did not enjoy equal status with the English judges during the British East India Company rule – a principle which has been abolished in 1947 since the independence.[157] What can be unheard in the modern international law was practiced by the British courts during the late 18th and through the 19th century. For example, the Admiralty Court had jurisdiction to determine all cases, mercantile and maritime in nature, all cases of trespasses, injuries and wrongs, committed on the high seas.[158] In Madras, the British East India Company

156 Bombay: The judiciary system of 1668-1684 consisted of the Court of Deputy Governor in Council (an appellate body). Under the Reforms of 1672, a court having jurisdiction in all civil, criminal, probate, and testamentary matters were established. These courts had jurisdiction over all subjects belonging to the state as well as non-state people. During the British domination, the Britishers themselves were very jealous of the independence of judiciary, especially during Dr St John's presiding over of the Admiralty Court. During this period the British East India Company became very hesitant to appoint professional lawyers as judges. The judges had no professional training. It may be mentioned that the British East India Company did not favor the application of the parliamentary acts. It preferred application of the laws of company or the laws of the crown. They preferred application of martial law, civil law and the customs of merchants instead of Acts of Parliament and common law. Rama Jois, *Legal and Constitutional History of India above* at p. 8.

157 They were not counted for the purpose of the quorum of the Court fixed at 3 (there were 5 English and 4 Indian judges, who were called Black Judges) In the record of each day's proceedings, the name of each English judge was specifically mentioned but the Indian judges were collectively described as black justices. The *Indian judges* played more or less a subsidiary role similar to that of assessors. However, with the independence of India, this system disappeared. Unlike the island of Bombay the settlement at madras was not under the sovereignty of the East India Company. The company acquired a plot of land from the local raja in 1639. Under the jurisdiction of the madras settlement, there was a white town within the fort and a black town in the village. This system applied to the citizens of various princely states. It is perhaps incorrect to generalize and state as a matter of truth, however, during the English regime, there was no systematic trial or production of any evidence in some courts such as in Madras. For example, a case in which an accused was a local person was tried for an alleged offence in accordance with the English law. He was sentenced to death on the basis of insufficient evidence. This became an accepted practice or norm several courts. This has now disappeared. The method of trials was ad hoc from case to case. In case of serious offence and particularly when Indian was victim of an offence, the matter would be referred to the Raja. In brief, the system which prevailed was vague, crude and unsystematic. Rama Jois, *Legal and Constitutional History of India* at p. 11. At times, the governor and council would also postpone the trial of cases involving serious cases of crimes as they were aware of their lack of knowledge. Therefore, a story of hesitation and delay continued.

158 It had to decide cases according to the rules of equity and good conscience and the laws and customs of the law merchant. Although all the states are free to use the high seas and although the queen Elizabeth of England to the Spanish ambassador in 1580 emphasized about the freedom of the high seas and that no state can claim over them, the British East India Company significantly differed because the admiralty court tried to exercise jurisdiction over the high seas too. At present freedom of the high seas is a universally recognized principle and all the states subscribe to this view. Under the ITLOS, Article 279 imposes obligation upon state parties to settle dispute by peaceful means and they may agree to settle a dispute concerning the

established the Corporation mainly for the purpose of municipal administration, however, it began to exercise judicial jurisdiction as a Court.[159] This shows that various mechanisms and various *ad hoc* institutions were established to resolve the disputes which invariably involved individuals and institutions of various princely states of India, which although under the suzerainty or colonization of British East India Company, enjoyed independence to a significant extent and were considered state proper, as we know international law today. Thus, the norms and mechanisms for dispute settlement have disappeared with the independence of India.

The Supreme Court, which was established in Calcutta in 1774, had various jurisdictions, which involved national and international private and public law and norms. It had original jurisdiction, equity jurisdiction, admiralty jurisdiction probate and ecclesiastical jurisdiction and jurisdiction to supervise. With the establishment of the Supreme Court of Calcutta, for the first time the principle of separation of the judiciary from the executive established in India. This was a major legal milestone in the Indian civilization as till this time, the executive and judiciary were one and there was no separation of powers between the two. The judges till this time were non-professional men, not conversant with the English laws under which they were administering justice. One could draw a conclusion, therefore, that with the advent of British colonization, the system of administration of justice as practiced between princely states by the king, collapsed and was largely taken over by the non-professional men. These non-professional and non-conversant men in law could hardly be expected to know international law much less the British or Indian laws. This is one of the main reasons why there was a silent collapse of international law during the British era as it was practiced before between the princely states.

Challenges to Indian Practice of International Law: While the civilization like India was undergoing administration of justice by these non-professional men, Western Europe was seeing the emergence of great international lawyers like Grotius, Bynkershoek, and Vattel among others. The philosophy and regime of international law promulgated by these Western international lawyers dominated the international scenario as there was no adequate counterforce or strong resistance from the Indian Sub-continent. This conclusion is true because before the advent of the British, there was a robust practice and administration of justice as we understood ancient international law of India and therefore, there was a counterforce in Asia, but this Indian counterforce collapsed and so the collapse or the withdrawal of the great ancient international law traditions during the British time in India.

2.11. Private international law

The questions which arose out of the merger of princely states mostly relate to the execution of *ex parte* decrees of the British Indian courts in the courts of the merged states and *vice versa*. What Lord Selborne had laid down

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interpretation or application of the convention by any peaceful means of their choice and also provides for procedure where no settlement has been reached by the parties and also stipulate provisions relating to obligation to exchange views and conciliation. These provisions apply mutatis *mutandi* to the cases involving high seas. However, during the British East India company time, at least in some regions, there were clear rules and sources to decide on the high seas cases. Now a days, there are trained or knowledgeable judges appointed under the Indian Judiciary system to deal with the maritime cases, however, earlier a civil lawyer was to preside over the courts (called Judge-Advocate) and he was considered proper because in those days maritime transactions were regulated by international customary law known as the Law Merchant. Thus, a civil lawyer was to decide the cases in accordance with the law merchant.

[159] It should be noted that the mayor's court used jurisdiction over European population as well as Indian people including religious matters. Incidents such as the case of conversion of a Hindu Woman (in 1730), the Oath in Bombay, Madras clearly evidence of this jurisdictional practice of the mayor's court.

in the well-known case of *Sardar Gudayal Singh v. Raja Faridkote* has become the accepted principle of international law. He observed, "in personal action…a decree pronounced in absence by a foreign court, to the jurisdiction of which the defendant has not in any way submitted himself, is by international law an absolute nullity."[160] And it must be regarded as such by the courts of any nation except in the country of the form by which it was pronounced.

Independence of India raised several issues with regards to partition, transfer of property, assets, liability, etc. With regards to the execution of decree, it was observed that the execution of a decree of the court of one country could be directed not only against property in one dominion but also against the property in another. The principle applies not only for the purpose of passing the decree but also for its enactment. Though this interpretation is not in accord with the ordinary rules of international law, it had become somewhat necessary to meet the new situation. This practice, especially restricted to India and Pakistan, does not find acceptance in international law but could be very useful, should such circumstances arise again in future.

When an Englishman died leaving some property in India without leaving any legal representative, the practice followed was that the Governor and Council of the Presidency towns sold the property by public auction. The sale proceeds were deposited for the benefit of the legal representatives of the deceased in England. As the courts established in India had no royal authority, this practice of the Company would lead to litigation in England. Often the Company had to pay damages as a result of the orders of the English courts. The Company very much desired to avoid such complications. The Company requested and was given by the Crown a grant of such powers as conducive to the punishing of vice, administration of justice and a better governing of effects of settlements abroad. This principle has disappeared as the current jurisprudence recognizes a limited right of recognition of foreign decrees in India.[161]

2.12. State Responsibility

In ancient and pre-1945 India, defiance of universally respected rules or precepts, whether of warfare, or of peace, or any other kind, was likely to lead to social ostracism and / or religious condemnation. These principles and practices are important in modern international law. In modern international law, when a state defies universally accepted rule or principle (*erga omnes* obligations) that state faces various kind of sanctions including, as a last resort, use of force against the wrongdoing / non-complying state. In ancient India, most states were Hindu states and in the Hindu States – concept of *Dharma* became one with concept of religion to a Hindu ruler. Hence, by observing social ostracism or religious condemnation, complying states were compelling the non-compliant states to comply with the rules, the rules which were found in *Smritis, Shrutis* and *Dharmasashtras* and *Arthsashtra* as well. In other words, these were the means to condemn non-compliance and induce compliance. Social ostracism and religious condemnation are typical of practices of ancient Hindu state and the ones which have disappeared from the modern international law rule books but are still practiced in different variant at domestic level. These practices that were universal in nature in the ancient times are limited to the Indian sub-continent only.[162]

Although India is largely composed of Hindu population, the secularization of the royal function was a phenomenon, which revealed itself in the domain of internal and external affairs – shows separation of influence

[160] S. K. Agrawala, *Law of Nations as Interpreted and Applied by Indian Courts and Legislature above* at p. 451.
[161] Rama Jois, *Legal and Constitutional History of India*, above at p. 16.
[162] Hiralal Chatterjee, *International Law and Inter-State Relations in Ancient India*, *above* at p. 6.

of religion on governance. While the sovereign ensured internal public order within his realm with the ultimate help of sanctions – *Danda*, external relations were at the mercy of anarchy. Indian rulers followed an objective, which was to propose a minimum of principles, which could diminish the threat of anarchy. These principles were at first of a political nature but they were outcome of the past experience, derived from the period before the foundation of the centralized Mauryan Empire and they stimulated the gradual establishment of a code of usage and customary rules which was similar to our law of nations in its early stages. This code, based on the Kautilyan and post-Kautilyan tradition, was in principle secular and allowed the sovereigns in India and further India to maintain regular relations *inter se* and later with Islamic rulers, as well as with the European agencies, which first appeared in the east in the beginning of the 16th century.

2.13. Concluding remarks

One could conclude that, unlike many other states of Asia and the former Soviet Union and their attitude towards international law which challenged some of the fundamental tenets of modern international law, India and princely states of India never challenged prevailing international law in the same strength as these states did. Rules and institutions, established and practiced in India, China, Egypt, Assyria, in ancient times, have enormous and lasting impacts on international law. According to Anand these earlier systems of China, India, Egypt, Islam or even Greece, were confined to their own civilizations, were not universal, and in any case "have left no trace of continuity of history."[163] This remark is challenged for its inability to grasp and establish the impacts of these civilizations on the current modern international law in various ways. Independent India considered herself bound by the pre-existing treaties, at any rate those relating to extradition, boundary problems and debts, as valid instruments of international law.[164]

The basic tenets which guided the practice of international law suggests that there was a clear difference between two philosophies as espoused by the actors and institutions in their conduct – a philosophy based on the original Hindu concepts of world law and politics and a mixed philosophy containing the Hindu and British concepts. This chapter shows how these differences were observed markedly in the subjects concerning rights and duties relating to independence, equality among princely kingdoms, intervention, jurisdiction, diplomacy and alliance and treaties. The concept of *Swarajya* (i.e. independence), which means that the kings and princes wanted to manage their internal and external affairs on their own without outside control, has undergone a significant change, since the introduction of the British rule. Before advent of the British rule, the kings and princes retained freedom to adopt whatever mode of government they wanted, power to exercise supreme authority over their citizens at home and outside and over aliens within their territories, liberty to determine the external relations between them, power to declare war and peace and conclude treaties without any outside intervention. These features of independence and governance were embodied as international law practiced in ancient India.

It has been observed that during the colonization period, the British and Indian judges adopted English concepts of public and private international law, which has continued to a great extent even since independence of India. The Constitution of India has adopted common law principles and old legal tradition in many ways; this

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[163] R. P. Anand, *Development of Modern International Law and India*, (New Delhi: Indian Society of International Law, 2006) at p. 1.

[164] M. K. Nawaz, *International Law in the Contemporary Practice of India: Some Perspectives*, (Durham, NC: World Rule of Law Booklet Series 275-90, 1963) at p. 281.

is legacy of the British rule. The Indian Constitution adopted the British Cabinet Rule and gave the President more executive powers and gave the powers to the Cabinet to negotiate and conclude treaties.