

Indo-Portuguese History and Global Trends

Seventh Century Portuguese Legal Regime and Twenty First Century Global Trends:A Comparative Analysis

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Introduction:

There is a close resemblance between the Sixteenth-Seventeenth century problems faced by the Portuguese power in the Indian Ocean and the present day problems faced by US and allied powers post 11 September events ¹in the international field . Strangely there is some parallel between the measures that the Portuguese power adopted in order to keep its hold, and the measures adopted by US and its allies especially in the wake of Afghanistan and Iraq wars². It appears that History has repeated itself on the failure of international community to realize the importance of having binding international documents and authorities with moral and legal power. The world is still struggling within the tight jacket of National Sovereignty.³ The same blind race that was witnessed in the sixteenth and seventeenth centuries in the Indian Ocean is taking place today at a global basis, amidst criticism and counter criticism, with public opinion wavering as per events. There is even lack of proper criteria to enable the international community to objectively assess the political situation. The international law seems to be nascent at present to some extent, as it was when the Portuguese rounded the Cape of Good Hope. The present paper will concentrate on this dimension of international relations.

Indian Ocean in Sixteenth –Seventh Century:

¹ See for Terrorist attack on America’s World Trade Centre , Kapoor, S.K. *International Law and Human Rights* , Central Law Agency, Allahabad, 2002,pg. 957.

² Kapoor, S.K. *International Law and Human Rights* , Central Law Agency, Allahabad, 2002, refers to events in Afghanistan in pgs.953-955.

³ Bailey, Sydney, D., *The General Assembly of the United Nations*, Wiley Eastern Private Ltd., Publishers, New Delhi,1967, pg. 149,says “Nations treasure the concept of sovereignty as much as ever they did, yet nations never were, and are not now, wholly sovereign.” Also Friedman , Wolfgang, *The Changing Structure of International Law* ,An adaptation, Vakils , Feffer and Simons Private Ltd. , Bombay , 1964, discusses National Sovereignty in Our Time in pgs.30-38

The Sixteenth century changed the existing situation in the Indian Ocean on the wake of the rounding of the Cape of Good Hope by the Portuguese. The existing Arab trade stood threatened with the presence of the Portuguese in the Indian Ocean, thus giving rise to conflict. Conflict resolution strategies had not been enunciated then as they are today. The Portuguese on the other hand claimed the right to free trade in the East. The Portuguese felt that a threat lay to their trade from the Arabs as well as the pirates. Thus the positioning of the opposite powers and subsequent rearrangement of other powers aided with religious misunderstandings gave rise to stress and tensions in international relations. Mutual distrust led to local flare ups, which in turn led to greater conflicts. The Portuguese with their firepower, realized in the sixteenth century that they could control to some extent the trade on the spice route. So naturally all policies as well as the legal concepts and regime developed was to safeguard the defacto position acquired thus far through the barrel of the gunboats⁴. A very similar positioning is noticed in the twenty first century with a mention of a war between civilizations. However to a great extent the policy is to hold to economic and political power, which is threatened due to changing circumstances.

The Portuguese Sea Power⁵

There were favourable conditions in the Indian Ocean that helped the Portuguese to build their maritime power on their entry in the Indian Ocean. C. R. Boxer among other things mentions the following points as regards Portuguese Sea Trade:

- a) The Emperor of Egypt, Persia and Vijayanagar had no armed shipping in the Indian Ocean
- b) Wealthy entrepots of Ormuz and Mallaca did not possess Ocean going vessels.
- c) The Arabs, Gujerathis, and other Muslims who dominated the trade of the Indian Ocean had large ocean going vessels as well as small coastal ships, but even the largest were not provided with artillery and no iron was used in the hull construction.
- d) Portuguese took control of the strategic points in the spice trade routes. They controlled, Goa, Ormuz, Mallaca and these were supplemented by many other fortified coastal settlements and trading posts (feitorias) from Sofola in north-east Africa to Ternate in Moluccas.
- e) The domination of the seaborne trade of the Indian Ocean, first by the Arabs and later to a large extent by Muslims of Indian origin chiefly Gujeratis, was achieved in both cases quite peacefully.
- f) Many Asian rulers shared the conviction of Bahadur Shah, the King of Gujerat, that 'wars by sea are merchants' affairs, and of no concern to the prestige of Kings'⁶.

Thus there were favourable historical conditions that helped the Portuguese to a certain extent to hold a defacto control of a section of the Indian Ocean i.e. mainly the Arabian Sea.⁷

⁴ Views of Governor William Hornby in a letter of 1780 stated that as the Portuguese had built their empire by use of force, whatever may have been their arguments, lost it also by force. See *Arquivo Portugues Oriental*, Ed., A.B. de Braganca Pereira, Bastora, Goa, 1936-40, Tomo IV, Vol. II, Part III, pg. 38.

⁵ Boxer, C.R., *The Portuguese Seaborne Empire, 1415-1852*, Pgs.44-45.

⁶ Boxer, C.R., *The Portuguese Seaborne Empire, 1415-1852*, pg.52

From the above, it can be inferred that unipolar system existed in the sixteenth century soon after the entry of the Portuguese, as far as a section of Indian Ocean was concerned. At least during the first fifty years Portuguese took control of the sea routes by taking hold of strategic positions all along the coast. As a result if one ignores the land control, we can have a model of Portuguese being unchallenged in the seas and an unipolar system developing in International field. The Portuguese lost this control on the entry of the Dutch⁸, the French and the English. The Portuguese behaviour was in clear lines when an unipolar political power controls the International scene and there is no higher neutral authority or a politico-legal document to control such activities. In such a situation, the power in control will evolve doctrines, strategies, and methods, to meet the problems and challenges it faces in the international scenario. The paramount principle to dominate its actions is the national interest⁹. The unipolar power tends to rationalize its behaviour by evolving jurisprudence to justify its actions. Thus the Portuguese powers justified a number of actions it took. Such measures when viewed from the angle of other countries are unfair and unjust. That is why, the events that were recorded with pride by Portuguese centric historians assuming that they were legal measures, were considered as plunder and piracy by Eastern scholars.¹⁰

The entry of the Dutch and other European powers changed the complexion, and diluted to a certain extent the Portuguese power. However the Western Powers did adjust through conflict and settlement to develop a regime, which was convenient to the West and unfavorable to the natives¹¹.

At the fag end of the twentieth-century the fall of USSR has led to the dominance of USA and allies in economic and political fields. Hence many international policies today are a reflection of what happened in the Indian Ocean earlier. In a very similar situation, the

⁷ M. N. Pearson in his essay "The Portuguese in the Indian Ocean: An Overview of the Sixteenth Century", in the book "The Portuguese, Indian Ocean and European Brigheads 1500-1800" edited by Pius Malekandathi, and Jamal Mohammed, Institute for Research in Social Science and Humanities of MESAR, 2001, pg. 64 says "obviously then the trade control system was only partially successful". Also he writes in pg. 53. "The Portuguese attempted monopoly was also very expensive to enforce: they spent vast sums on fleets and forts".

⁸ Subrahmanyam, Sanjay, *Improvising Empire*, Oxford University Press, 1990. Subrahmanyam gives an insight of the Dutch and Portuguese conflict in Pulicat in pgs, 188-215.

⁹ Friedman, Wolfgang, *The Changing Structure of International Law*, An adaptation, Vakils, Feffer and Simons Private Ltd., Bombay, 1964, writes: "A comparison of the position of the law with the practice of many states in recent times, makes the conclusion inescapable that principles of national policy and the assertion of what is regarded as the "national interest" have often prevailed over the rules of international law, pg. 157.

¹⁰ See, Nambiar, O.K., *Portuguese Pirates and Indian Seamen*, a book which gives a different views from those of Portuguese and Western historians about Portuguese activities in the Indian Ocean.

¹¹ Panikkar questions whether what if barbarism in London or Paris whether it turns to civilized conduct in Peking. Panikkar, K.M., *Asia and Western Dominance*, The Other Press, Kuala Lumpur, 1993., pg. 35.

world today even though controlled by some international regime and institutions, has not come out of the tight jacket of Sovereignty coupled with National interests, which permits a country unilateral action, provided it has the power to carry out the measures. This was clearly noticed in the Iraq war when US managed to take action partly and conveniently outside and within the UN regime, purely led by its national interests or international welfare as defined from its national point of view.

Lacuna in International Regime

It is to be noted that the Portuguese assumed that there was a lacuna as regards International Regime as far as the Indian Ocean was concerned. Portugal did not apply to the Indian Ocean, the laws of nations as was known among the European countries. Neither did the other countries apply those principles with respect to the local inhabitants. So in the absence of any legal regime in International law of that nature, the Portuguese tried to carve their own legal system. To their luck they were able to enforce it by means of gunboat¹² diplomacy. They based the Legal System on pillars like Concept of Discovery, Navigation, Peace treaties, System of Cartazes, Assumed Titles by their Kings, Quasi-Possession of the Seas, etc. Often they used circular arguments to support each of them. But the real postulate on which the system was based, was the defacto control exercised by the Portuguese.

One can compare the lacuna in International regime then and today. When the Portuguese entered the Indian Ocean one noticed lacuna in international regime to deal with the new challenges made by discovery and navigation. However today an improved system of International Law prevails, which is developing in leaps and bounds. Yet when it came to the question of Afghan war and more clearly in Iraq war, there appeared to be lacuna in International Law. Such lacuna may continue for some time, till more bidding documents on the whole International community with fully developed institutions evolve. Perhaps it is time to look forward to a more independent UN or A World Constitution or World Constitutionalism, or a similar binding document¹³, based on the experiences of the Portuguese.

Concept of Discovery: ¹⁴

The Portuguese evolved the concept of Discovery to build up the legal regime of their choice for the sixteenth century international relations. They claimed that certain rights flowed to them because of Discovery. They claimed possession to the sea or quasi

¹² Panikkar relates an incident of Vasco de Gama in ordering to set fire to a ship> He writes in conclusion “The following incident quoted in *Lendas da India* is a typical of the policy of terrorism and piracy that he introduced in the Indian Waters”. Panikkar, K.M., *Asia and Western Dominance*, The Other Press, Kuala Lumpur, 1993, pg.35.

¹³ See D’Souza, Carmo, A World Constitution, and Peoples’ Debate
<http://www.goacom.com/community/ismilda/constitution.html>
http://www.goacom.com/community/ismilda/peoples_debate.html
<http://www.civitatis.org/const1.htm>

¹⁴ D’Souza, Carmo, *Legal System in Goa, Vol II, Laws and Legal Trends (1510-1969)*, Publisher Agnelo D’Souza, 1995, pgs. 8-9

possession on the basis of discovery. The Portuguese described the Indian Ocean as Mare Nostrum i. e. Our Sea. Once they rationalized that Discovery gave them the rights that became the corner stone for their Seaborne Empire. They used it as foundation to claim other rights.. The following points may be noted about discovery:

1. The Portuguese claimed to have discovered many places in the East.¹⁵
2. Discovery had a tremendous impact on the Portuguese psyche, on its history and social and cultural life
3. The concept of discovery if granted at all was Eurocentred if one assesses the situation today and surely meaningless from the Eastern viewpoint.
4. The Portuguese were so concerned about protecting their right to discovery that they clamoured for Papal Bulls.
5. The Portuguese Kings requested their captains to carry on the process of Discovery¹⁶.
6. As part of the process of discovery they put stone pillars whenever they came across a new land.¹⁷
7. The Portuguese believed that the process of discovery resulted in service to the King as well as gave rise to right of property.¹⁸
8. It is interesting to note that as late as 1870, President Grant of USA in arbitration proceedings, as far as the Bolame dispute between England and Portugal was concerned, conceded to the Portuguese the right on the basis of Discovery¹⁹
9. The Portuguese held the Concept of Discovery dearly even in the twentieth century by appeal to it in their Fundamental Legislations like the Constitutions.²⁰

It is to be noted that the Portuguese were jealously protective of their discoveries and desired to safeguard it against others on the basis of prior discovery. Thus as far as their claim to discovery was based it was established through physical might, as well as by a suitable legal regime developed unilaterally by the Portuguese Sovereign. In the existing situation in those days, one could hardly expect the Portuguese to comprehend the difficulties of the opposite powers. International justice and Equity were not even

¹⁵ *The Portuguese claimed to have discovered a number of territories and islands, unknown or vaguely spoken in Europe. See for example Arquivo Portugues Oriental, Ed., A.B. de Braganca Pereira, Bastora, Goa, 1936–40., Tomo I, Vol. I, Part. I, Doc.13, p.296; also Arquivo Portugues Oriental, Ed., A.B. de Braganca Pereira, Bastora, Goa, 1936–40, Tomo I, Vol. III, Part III, Doc.98, Pp.164-167, this text of 1721 refers to Portuguese as discoverers of Eastern Coast of Africa. Almeida, de, Fortunato, Historia de Portugal, Tomo IV, pp 94-96, ed, 1926, refers to Australia as discovered by the Portuguese; and pp.109-110 refers to discovery of Tibet.*

¹⁶ *In Arquivo Portugues Oriental, Ed., A.B. de Braganca Pereira, Bastora, Goa, 1936–40. APO-BP, Tomo IV, Vol. I, p. Part. I, p.256, regiment given to Diogo Lopez Sequeira on 13 February 1508, required him to try to discover all lands of St. Lawrence and to erect stone pillars.*

¹⁷ Livermore, H. V. *A New History of Portugal*, Cambridge University Press (1969) pg. 129, during the Voyages. the ships carried stone pillars surmounted by a cross and the arms of Portugal, to be erected as markers, evidence of priority and beacons.

¹⁸ Regiment given to D. Francisco de Almeida on 5 March 15015, referred to many places in India that were yet to be discovered. It says that the process of discovery results in great service to the King as well as it gives rise to the right of property.

¹⁹ Livermore, H.V., *A New History of Portugal*, Cambridge, 1969, pg.303.

²⁰ See Art. 133, Constitutional Law no. 2.048 of 11 July 1951. It stated that it was an organic essence of the Portuguese Nation to fulfill its historic functions of colonialising the lands of its discoveries.

propounded then especially between Eastern and Western Jurisprudence. In fact all matters were viewed through a prism of national interests. It is to a certain extent unfair to judge the Portuguese on issues that were beyond sixteenth century comprehension. However the evolution of suitable concepts to further their national policy, are like stone pillars left by History for the twenty first century globalizing world.

The mistakes committed by the Portuguese, which is evident to present day historians, is not always visible to the powers that are positioned in similar circumstances. They did not certainly strike Portuguese historians or even western historians in euphoria of discovery. However those experiences are a lesson for the modern world on how to build an international regime. Just like the Portuguese pursued various concepts to justify the measures adopted then, so too super powers today tend to build concepts favourable to them in keeping with their national interests. The arguments used by USA for the Iraq war are being questioned today in various quarters.

Regime Based On Peace Treaties

The Portuguese clamoured for their rights based on Peace Treaties. As there was agreement and consent it was accepted to be just and equitable, as per the jurisprudence of the times. The Portuguese made it a point to sign a number of treaties with a number of rulers in the East. They meticulously executed them. The following points may be noted about the peace treaties:

1. Often Portugal's gunboat diplomacy in enforcing their control on sea by arms was the force behind the acceptance of peace treaties.
2. In peace treaties with princely States, Portugal forbade trade with certain Arab powers. Failure to obey this condition amounted to break of the peace treaty, consequently legitimizing Portugal's interference with such trade and justifying application of punitive measures.
3. Frequently one of the clauses that appear in the Peace treaties was that friends of friendly powers with the Portuguese were to be considered as friends and friends of inimical powers were to be considered as enemies. This clause magnified the content of a peace treaty in very general and sweeping terms.
4. Peace treaties were signed for perpetuity, thus implying a perpetual right of interference with the local trade in case of violation of the clauses of the treaty.
5. It is to be noted that the regime meticulously built by the Portuguese with the aid of Peace treaties collapsed in course of time, especially with the Portuguese losing power in the Indian Ocean.²¹
6. The Peace treaties sometimes offered incentives as the local ruler was entitled for the issue of certain number of free Cartazes.²²

²¹ Views of Governor William Hornby in a letter of 1780 stated that as the Portuguese had built their empire by use of force, whatever may have been their arguments, lost it also by force. See *Arquivo Portugues Oriental*, Ed., A.B. de Braganca Pereira, Bastora, Goa, 1936-40, Tomo IV, Vol. II, Part III, pg. 38.

²² Souza, de, T.R., *Medieval Goa*, p. 34, mentions treaty with Bijapur for issue of six duty free cartazes. See similar examples in *Arquivo Portugues Oriental*, Ed., A.B. de Braganca Pereira, Bastora, Goa, 1936-40, Tomo I, Vol. III, PII, p.232, clause 9 of peace treaty dated 23. 3. 1716, also p.103 of the same book.

One may criticize today the regime built on peace treaties, on the ground that the clauses were coercive considering the existing situation then, casting a cloud on free agreement. Analyzing from an Eastern point of view, the clauses were applied to the then existing trade and hence can be said to be unfair. The process under peace treaties aided with the political power went beyond cut throat competition. The princely States were forced to accept the peace treaties as it was very difficult to carry on sea trade against the threat of force by the Portuguese. It is to be noted that unfair systems last as long as buoyed by the power of the firearms.

In the twenty-first century, we notice that many multilateral trade agreements have unfair clauses that are upsetting the existing trade system. The weak countries are forced to discard the available practices and opt for the newer systems. The clauses once accepted sabotage the countries economy. In such circumstances the coercive clauses have to be tested on some kind of philosophers stone. If one concludes that the Peace treaties by the Portuguese were unfair a fortiori some of the unfair clauses in multilateral treaties²³, dumped on the economically weak world. A super international document like the World Constitution is needed to balance the injustices arising out of multilateral treaties.

Another important point to be noted is that the regime built on peace treaties collapsed with the collapse of Portuguese power structures. The same could be the result today with some of the treaties. Hence there is a need to build strong international institutions with a world constitutionalism²⁴ culture. A regime built on peace treaty is on a weak foundation as noticed today where countries withdraw from their past commitments. Also there could be a possibility of inconsistencies arising out of the various multilateral treaties, which will need a super document to harmonize them. Besides the law should be binding on all groups in the world functioning within national frame or otherwise.

Promulgation of Laws

As soon as the Portuguese stepped into the process of discovery, it is to their credit that at least they promulgated laws convenient to their own national interests with a view of protecting their maritime trade. This regime was evolved on the new experiences in the fifteenth, sixteenth and seventeenth centuries. The following points may be noted about this regime.

1. King Manuel proclaimed Ordenacoes Indianas in 1520²⁵. This was a code to protect the maritime trade.
2. From time to time various legal provisions were proclaimed to secure the rights to maritime trade for the King as well as to control navigation and trade.

²³ As every man is the best judge of his own interests, so every nation is presumed to be the best judge of its own interests. Thus one can consider a multilateral treaty on trade to be fair on the countries that accept it. Is that really so? There have been criticisms about multilateral agreements. So it becomes necessary to have other criteria, external to the treaty to judge the fairness of the document.

²⁴ World Constitutionalism, can be said to be a kind of a value system based on principles that are needed for effective survival of mankind as global community.

²⁵ The law for Indian Ocean was called Ordinacions of India, promulgated in 1520 to safeguard Portuguese Commerce, Trade and Navigation. See, D'Souza, Carmo, Legal System in Goa, Vol II, pgs.95-96.

3. Various captains and judges were set up at various places in the State of India to adjudicate violations of this legal regime and they were provided with suitable regiments.
4. It is to be noted that the legal regime was unilateral and hence did not cater to the interests of the opposite parties.
5. Lack of justice (Falta de justica) was often the complaint against the officials which sabotaged the legal regime .

It is interesting that the Portuguese tried to control the seas by a legal regime. The Ordenacoes were proclaimed and punishments prescribed for its violations. Though it was unilateral , a legal regime to some extent justified to their own way of thinking the measures adopted under the law. It is to be noted that a legal regime imposed by a foreign power can be questioned. Its authority lies merely on the force, and it stands while the force last. However the external regime may be tolerated if there is some element of justice. If this element is lacking the adjudicatory process becomes a farce. It is interesting to note that in modern democratic governance, external imposition gives a bad label.

Legal Order Under Papal Authority.

The Portuguese when they found it convenient for their national interests harped on the Papal authority to build a legal order. The following points may be noted about the policy of appealing to papal authority in order to strengthen their rights.

1. The Portuguese thought of the world as Christian Commonwealth and the purpose of Portugal in entering Asia , was to unite the Indies and the world in a spiritual empire .²⁶
2. The Portuguese made it a point to keep the Popes well informed about their discoveries as well as impress him about them .²⁷
3. The Portuguese clamoured and obtained Papal Bulls and Grants in their favour. ²⁸
4. The Portuguese were consistently holding to the Papal Bulls as being irrevocable , unconditional and were holding them even against the Papal authorities in the tussle of Padroado²⁹ V Propoganda Fidei.
5. The Portuguese claimed their rights to discovery , navigation etc. on the basis of papal Bulls and Grants made in their favour.

²⁶ Edwardes , Michael , Asia in the European Age , (1961),p.99. See D'Souza Carmo ,LegalVol. II ,pgs. 18-19

²⁷ “ In 1505, Manuel sent an embassy of obedience to Rome to announce the discoveries and to give publicity to Portugal’s conquests in India.” Lach, F., Donald, Asia in the Making of Europe, Vol. I, The Century of Discovery, The University of Chicago Press, Chicago and London , 1965,pg.112 .

²⁸ Some of the Bulls were Dum Diversas of 18 June 1452, Romanus Pontifex of 8 January 1455, Inter Caetera dated 13 March 1456 of Pope Calixtus III, Bull of Pope Alexander VI of 4 May 1493, dividing the world into two parts.

²⁹ “ By a series of papal bulls issued in the fifteenth and sixteenth centuries the Portuguese crown was entrusted with what came to be called padroado” Lach, F., Donald, Asia in the Making of Europe, Vol. I, The Century of Discovery, The University of Chicago Press, Chicago and London , 1965,pg., 230 .

It is to the credit of the Portuguese that they attempted to appeal to an international authority though acknowledged only in their part of the world. It is to be noted that the Portuguese were not ready to accept the authority of the successive Popes when they touched their earlier grants conferred on them, whenever it was not convenient to their interests. For instance they were not ready to concede some of the rights granted to them earlier when the Propaganda Fidei was established. So in such circumstances in absence of established International Institutions and Law, a country is selective while seeking recognition as well as abiding by the authoritative decisions of international institutions. Similar approach was noticed in the twenty-first century when USA approached UN as well as took action outside the UN regime in the Iraq war. There was a close similarity between the two processes though separated by: (1) centuries and (2) better evolved International Law.

System based on Cartazes.

Though Cartazes had earlier origins, the Portuguese, introduced it in their own style evolving it to suit their conveniences. M. Pearson referring to this system in his essay *Portuguese in Indian Ocean : An Overview of the Sixteenth Century*³⁰, puts the following propositions:

1. All ships trading in the Indian Ocean were meant to take a pass or cartaz.
2. The cartaz specified where the ship was sailing to, and specified what people, armaments, and goods were not to be carried,
3. Trade with the Red Sea, considered to be a hostile Muslim area was discouraged or stopped.
4. Turks were not allowed to trade in the Indian Ocean.
5. Spices were declared as Portuguese monopoly
6. Cartazes of a later date required trading ships to call on Portuguese ports to trade.

The system of Cartazes was used to not merely as safe conducts but to reinforce the control of the sea. Cartazes once accepted meant as per their Portuguese view an acceptance of their legal system, the conditions imposed, and agreement on the sanctions to be imposed for violation of the conditions. Thus the Portuguese looked on Cartazes as giving them a right of intervention for violations, a right to regulation, acknowledgement of their Sovereignty and so on over the sea.

Titles:

One of the steps used by the Portugal to legitimize their control was the assuming of titles by the Kings of Portugal to demonstrate their possession to the sea on basis of discovery. King Manuel assumed the titles of Lord of Navigation of Ethiopia, Arabia, Persia and India³¹. The Portuguese Kings used these titles in correspondence with the other sovereigns and in the peace treaties. Thus the Portuguese claimed their rights on their titles.

³⁰ Malekandathil, Pius, and Mohamed, Jamal, *The Portuguese, Indian Ocean and European Brigheads (1500-1800)*, Institute for Research in Social Sciences and Humanities of MESHAR, 2001, pg.64. See also for *System of Cartazes*, D'Souza, Carmo, *Legal System in Goa, Vol II, Laws and Legal Trends (1510-1969)*, Publisher Agnelo D'Souza, 1995, pg. 14-15

³¹ See Boxer, C.R., *The Portuguese Seaborne Empire, 1415-1852*, , 57-58

The question of the validity of such step, leads to several complications. It is to be noted that the Legal System in those days largely depended on National Sovereignty, where concepts of war, conquest were recognized as legitimating their claim to a territory. Under such circumstances, on the lack of international institutions, it is difficult to objectively evaluate the Portuguese behaviour. From the view of East , the behvaiour of the Portuguese at sea amounted to plunder . The above is important to understand international law for new formulation, taking into account the Portuguese experience.

Possession or Quasi Occupation of Seas³².

The Portuguese claimed possession or quasi occupation of the Seas based on several arguments like Discovery, right to Navigation, Peace treaties, as successors of the Arab Trade and so on. The Dutch refuted the Portuguese claim for Mare Clausum with respect to Indian Ocean . The doctrine of Mare Liberum was propounded in very clear terms by Hugo Grotius, who is called by some as the Father of International Law. On the other hand Seraphim de Freitas in *De Justo Imperio Lusitanorum Asiatico* put up the arguments for possession or quasi Occupation of the Seas. It is interesting to go through the approach as to understand how the West was able to jurisprudentially justify its actions in the East .The big debate can serve today to understand the approaches that are noticed in modern international relations. The following points may be noted about the concepts propounded by Grotius³³:

1. He denied to the Portuguese rights based on discovery or res nullius.
2. He felt that it was not permissible to deprive the infidels of his possessory rights on the basis of his religious beliefs.
3. He pointed that there were places in the maritime zone , such as Jawa , Ceylon , which had their own kings, government , laws and legal system, ruling out the possibility of acquisition of territorial rights by European powers through discovery or occupation.
4. Grotius regarded unilateral act carried out in disregard to sovereign authorities governing those countries, as wrong and of no legal effect.
5. He admitted the possibility of acquiring right by conquest or cession as per the law of nations, which Portugal could not claim with respect to the Indies except for places like Goa.
6. Grotius refuted possession of the seas as res extra commercium.
7. He ruled out papal donations, as Pope's authority did not extend to Moors and gentiles.
8. Further , he claimed that the right of spreading the faith was also defective as Portugal was amassing wealth neglecting their religious duties.

Following may be noted about the arguments of Freitas³⁴ .

³² See , D'Souza , Carmo, Legal System in Goa ,Vol II ,Laws and Legal Trends (1510-1969),Publisher Agnelo D'souza , 1995, pgs.12-14..

³³ See D'Souza , Carmo, Legal System in Goa ,Vol II ,Laws and Legal Trends (1510-1969),Publisher Agnelo D'souza , 1995, Pgs.12-13

³⁴ Mathew , K.S. Portuguese Trade with India in the Sixteenth Century , pp66-68 .

1. He spoke of possession or quasi-occupation of seas.
2. He defended Portugal's right of access to the East Indies, on the basis of freedom for propagating the Christian faith in Non-Christian lands.
3. Even though Pope had no direct jurisdiction on infidels, he had right and duty to send missionaries. This right included the right to wage war in case the infidel ruler prevented the preaching of faith. Further he spoke of delegation by the Pope of this power to any particular nation.
4. As missionary activity was carried through navigation, the Pope was empowered to regulate it. Similarly the Pope could assign monopoly of trade to a particular nation to the exclusion of others since missionary activities needed money for survival.

It is interesting to note the liberal approach of Grotius,³⁵ as well as the pro-Portuguese approach of Freitas clad in his national psyche, as the title referred to a *Justo Imperio*. However the approaches can be explained by factual positions that the two powers adopted in the East. However in the process of colonialisation, both neglected the right of the eastern men. It was like Europe did not find any repugnancy in the process of colonialisation. It is also important to note that Hugo Grotius conceded that it was possible to acquire rights by conquest. Perhaps considering the times, one could expect such an attitude. But conquest as means of acquiring proprietary rights helped the Dutch policy in the East.

Denial of Right to the Moors.

The Portuguese claimed possessory or quasi-occupation rights to the Indian Ocean and on its basis promulgated legal provisions to control the maritime trade. The Portuguese never did admit the factual position that they had snatched this trade from the Moors and Arabs who were in control of the same prior to the Portuguese take over. However they denied such rights to the moors. It is to be noted that the Portuguese postulated that as the moors were infidels, they could not claim rights recognized among Christian Kings. The heathen character of the moors made them ineligible to acquire rights over the sea.

The behaviour of the Portuguese in denying rights to the moors is not surprising. Such policies are witnessed even in the twenty-first century. While countries are eager to get their rights recognized, they are reluctant to set up independent systems to which they will be bound themselves that will recognize the rights of the political rivals. The experience with Human Rights institutions and Amnesty International on this point are too clear

³⁵ For more details on Grotius, see, Kapoor, S.K. *International Law and Human Rights*, Central Law Agency, Allahabad, 2002.

Conclusions

The following conclusions can be drawn from the international regime that the Portuguese attempted to develop in sixteenth and seventeenth centuries in order to provide solutions to the present day problems facing the international law :

1. The History of the Portuguese in India in the sixteenth and seventeenth centuries provides valuable information for the development of International Law today.
2. The bases of treaties³⁶ need to be deeply researched in order to understand the multilateral treaty system accepted today in International law. It is to be noticed that the Portuguese system based on treaties collapsed on loss of power to control over the Indian Ocean
3. The virus of religious , and civilization biases in international has to be carefully scanned in adopting an international regime.
4. Binding Authorities like an International Court with compulsory jurisdiction must evolve out, which will have power over both States as well as other groups and persons.
5. Just as Papal Authority was not sufficient to safeguard rights of the Eastern infidel, so today there is a need to analyse the role of the UN and other such institutions and make them independent and capable of controlling the International action of all States .
6. There is a need to reform the UN, or develop other bodies that can cater to the protection of international interests.
7. Finally there is a need to develop the theme of World Constitutionalism, evolving suitable jurisprudence and theories to safeguard and respect to international community .

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³⁶ Friedman says “The principal legal form of important international decision is the Treaty”. Friedman , Wolfgang, *The Changing Structure of International Law* ,An adaptation, Vakils , Feffer and Simons Private Ltd. , Bombay , 1964,pg.6.

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