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PRINCIPLES OF LAW IN INDIC NARRATIVE LITERATURE
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HUMANITARIAN LAW AND MAHABHARATA: TRACING CONTEMPORARY PRINCIPLES OF LAW IN INDIC NARRATIVE LITERATURE

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Abstract:

The humanitarian law is as old as the concept of armed conflict, and the principles have been widely accepted in the clash of civilizations. Western jurisprudence ferrets out the genesis of humanitarian law from *temperamenta ac belli* which was formulated in the Battle of Solferino of 1859 and Henry Dunant's Red Cross movement. For many civilizations, 'war' was a redemptive power rather than as a last resort. The Just War tradition describes ethical codes and moral teachings associated with warfare that seek the moral justification of and the limitations to war. Just war is an extension of just recourse and just conduct. Vedic literature talks about war only as means to revolt against injustice and not for tyrannizing communities. Ancient Indian philosophy's contribution to the development of ethics of war and modern humanitarianism; and the dovetailing of International humanitarian jurisprudence with the ancient Indian philosophy of Mahabharata is yet to get its academic recognition. The article attempts to interlink the rules of righteous war (*Dharma Yuddha*) found in Mahabharata vis-à-vis conventional norms including the Hague Peace Conferences, Geneva Conventions and its relevance in the contemporary geopolitical realm.

1. INTRODUCTION

The jurisprudence of western international law and political theology is familiar with the relation of state and human law. Yet, comparatively little attention has been devoted to relative and third world questions on the development of the international legal regime. Much has been written on issues of ecology, the world economy, debt relief, developmental politics, refugee rights, the possibility of a global ethic, reconciliation after conflict and more, but far less on the history and approach of international law. The sources and norms of international law, its

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heritage, the responsibilities of major world religions for collaboration concerning particular issues in international law and such like, are a relatively unexplored area.¹

As humanitarian law is one of the oldest branches of law, traces of its development can be found in the development of ancient civilizations and religions.² Warfare and armed conflicts have since time immemorial been subject to certain customary principles and practices. The contemporary humanitarian laws date back to the mid-nineteenth century³ when the idea of universality and progressive codification of practical rules of warfare was agreed upon by states to harmonise humanitarian concerns and military requirements. Humanitarian law lays down proactive and reactive principles on sufferings of war during conflicts between nations and civilizations, drawing its sources from the wide spectrum of religious civilizations, including Hinduism, Christianity, Judaism, Confucianism and Islam. Contemporary international humanitarian law is formulated in the Geneva Conventions of 1949 and the Additional Protocols of 1977 relating to the protection of victims of armed conflicts. As Leon Trotsky wrote, that if you were not interested in war, it didn't matter; war was interested in you.⁴ With the liberal development of the international community, an increasing number of states have contributed to the development of these rules. Yet, the modern principles followed in practice has been substantially influenced by western jurisprudence. Hugo Grotius advocated for *temperamenta ac belli* i.e. humane moderation during the war in the early seventeenth century.⁵ It found its practical application in the Battle of Solferino of 1859 and formed the basis for Henry Dunant's Red Cross movement.

Interestingly, a bare reading of the history and jurisprudence of international law explicitly indicates that the voices of the subaltern were unheard. Considering the history of Indian land, it dates older than the age of enlightenment. It would be foolhardy to presume that the Indic civilization with a Vedic history of over 6000 years has nothing to contribute to modern law. The Indic narrative is one of the systematised and structured works of literature in terms of legal values and customary practices. Indic values are based on *Dharma*, which is a law that governs all actions of life. However, the concept of *Dharma* is obscure to put into definitional contours. From a philosophical point, just law is a facet of *Dharma* and traces of *Dharma* can

¹ E. D. REED, THEOLOGY FOR INTERNATIONAL LAW 1-2 (2013).

² T. V. Ananthavimayagan, *International Humanitarian Law*, Globalex - Hauser Global Law School Program, (May 20, 2020, 3:31 PM), https://www.nyulawglobal.org/globalex/International_Humanitarian_Law.html.

³ J. M. ROCHESTER, FUNDAMENTAL PRINCIPLES OF INTERNATIONAL RELATIONS 91 (2010).

⁴ A. FURST, NIGHT SOLDIERS: A NOVEL EPIGRAPH 14 (1988).

⁵ J. Miller, *Hugo Grotius*, The Stanford Encyclopaedia of Philosophy (Edward N. Zalta (ed.)), (May 20, 2020, 3:31 PM), <https://plato.stanford.edu/archives/spr2014/entries/grotius/>.

be found as an integral part of the administration of the state. From the Kautilyan perspective, State administration includes domestic governance and transnational relations.⁶ This concept of Dharma-oriented governance encompasses the principles of humanity and justness. This idea of righteousness is reflected in both the foundational functions of the traditional state: ‘law and order’ and ‘war’.

Laws relating to war is as old as the concept of war. History has enough evidence to prove that people have used and relied on violence to settle disputes. And it has always been a cultural call to find ideas and develop norms to limit violence and to prevent wars from descending into state-sponsored barbarity. In the Indic civilization, this call to introduce ethical dimensions into armed conflicts were answered through the development of righteous war (*Dharmayuddha*) philosophy and related principles. These concepts like *Dharmayuddha* and *Adharmayuddha*, declaration of war, use of weapons, special immunities to diplomats and cross-border relations, etc., find several mentions in the Indian history and Vedic philosophies.⁷ Many ancient texts such as the Ramayana, the Mahabharata, the Agni Purana, and the Manu Smriti embody several ethical precepts that emerged in ancient India.⁸ Many of these core ethical norms are reflected in Part II of the Geneva Convention.

As the global order is moving towards an era where sovereignty is being projected as a disposition of strength, the liberal order is also witnessing the geo-politics and geo-economics of military and defence as a form of diplomacy. The nature of warfare is changing unrecognizably with time. The present paper is an effort to trace the relevance of International Humanitarian Law in the present world vis-à-vis Indian civilization through the philosophy of Mahabharata.

2. REFLECTIONS OF INTERNATIONAL HUMANITARIAN LAW IN THE ANCIENT PHILOSOPHY OF MAHABHARATA

In the first half of the twentieth century, man’s fate was caught up in disruptions, conflict and war.⁹ When viewed through a legal spectrum, “war” has been traditionally associated with a

⁶ M. Juutinen, *Emerging powers and new global politics? An Indian perspective on the BRICS paradox*, 4 THIRD WORLD THEMATICS: A TWQ JOURNAL 489-99 (2019).

⁷ G. Arora, et al., *International Humanitarian Law and Concept of Hinduism*, 2 INTERNATIONAL JOURNAL OF MULTIDISCIPLINARY RESEARCH 2 (2012).

⁸ V. S. Mani, *International humanitarian law: an Indo-Asian perspective*, 842 INTERNATIONAL REVIEW OF THE RED CROSS (2001).

⁹ SHASHI THAROOR & SAMIR SARAN, THE NEW WORLD DISORDER AND THE INDIAN IMPERATIVE 1-2 (2020).

State's use of force to vindicate its rights under the law. The development of modern International Humanitarian law is a reactive effort by the global community to limit the horrors of war. For instance, there are rules on the conduct of war as well as rules protecting non-participants, prisoners and the injured. As the State develops, functions and abilities of state also change, and methods of war are no exception. Law as a social device has the responsibility to minimise and control the drastic devastations of ferity and maintain stability in the global order. International law as a method of global governance requires it to transform and progress to accommodate the ever-evolving developments. The relevance of history lies in its potential to guide the future. The success of international law lies in learning from history for developing in future. Principles of International humanitarian law too, need to evolve and develop over time. And to be inclusive, it is fundamental that the modern law encompasses the civilizational history of the subaltern in its future development. Indic philosophies like Mahabharata, Ramayana and other Indic narrative literature prospects progressionist reforms in laws relating to armed conflicts and war.

While institutional incapacity to put a blanket ban on the use of force is obvious, the civil order has developed the idea of 'just war' to justify and rationalise the power to use force.¹⁰ This idea of just war and its connection of righteousness and chivalry can be traced in the Rig Veda, Manusmriti and Arthashastra, although it was considered initially that "the source of the 'Hindu law of armed forces' was only Upanishads."¹¹ However, Raj Dharma requires the king to resort an attack against those who threaten the life of his subjects. *Kshaatra Dharma*, *Sukranitisara*, *Agni Purana* and other Vedic literature crystallises this position. However, for moral and economic reasons, the policy of exhausting peaceful remedies before resorting to war was advocated by most of the ancient writers.¹² The philosophy of *Dharmayuddha* as one of the strongest threads that connect *Sanatana Dharma* and other the ethical aspects of war are evident in Mahabharata. Several other customary practices of war in Mahabharata also find a similar reflection in the modern humanitarian order.

2.1. Methods of warfare and Protection of heritage sites

¹⁰ UNITED NATIONS CHARTER, art. 2, para. 4.

¹¹ Francois Bugnion, *Customary International Humanitarian Law*, 7 ISIL YEARBOOK OF INTERNATIONAL HUMANITARIAN AND REFUGEE LAW 1 (2004).

¹² M. K. Sinha, *Hinduism and international humanitarian law*, 87 INTERNATIONAL REVIEW OF THE RED CROSS 285 (2005).

In the *Rajdharm prakaran* of the Shanti Parva of the Mahabharata, which extensively talks about ethics and justness, it is narrated:

No one is discoursing on righteousness can indicate inaccurately. Dharma was declared for the advancement of growth in all creatures. Therefore, that which leads to advancement and growth is Dharma. Dharma was declared for restraining creatures from injuring on another therefore, that is Dharma which prevents injury to creatures. Therefore, that is Dharma, which is capable of upholding all creatures.¹³

Present-day humanitarian law distinguishes between persons who are *hors de combat* (outside of combat), and those who are not taking part in hostilities in a situation of armed conflict (e.g., neutral nationals),¹⁴ and the law mandates that the civilians shall be protected in all circumstances. It also implies that attacks shall be directed solely against legitimate military targets. The rules where the principle of ‘distinction’ is set out relates to Article 48 and 52 of Additional Protocol 1 to the Geneva Conventions.¹⁵ Any direct attack against a civilian or civilian object is not only a violation of humanitarian law but also a grave breach of the ethical code of conduct. The Indic principles of warfare also give a great deal of importance to the separation of actors of war from civilians.

A war for a righteous cause must be righteously conducted. This was possible by pre-determining the place of war so that the civilians remain unaffected by the means of warfare. This principle has an identical reflection in Mahabharata. The decision of Pandavas and *Kauravas* choosing a specific land for the battle is an effort to avoid civilian damage. Land of Kurukshetra chosen as the battlefield is considered as an abandoned land with hardly any population. It took six days for Pandavas to march to the land.¹⁶ The considerable delay also shows that the routes adopted by the army were strategically planned to circumvent passing through villages, to avoid unnecessary damages to civilians. The exercise symbolises the concentrated effort not only to distinguish between the combatants and civilians but also cause minimum loss to the civilian infrastructure of the kingdom. It saved the kingdom from

¹³ A. CHAKRABARTI & S. BANDYOPADHYAY, MAHABHARATA NOW: NARRATION, AESTHETICS, ETHICS, 48 (2017).

¹⁴ See M. Gandhi, *Notes and Comments: Common Article 3 Of Geneva Conventions, 1949 In the Era of International Criminal Tribunals*, 11 ISIL YEAR BOOK OF INTERNATIONAL HUMANITARIAN AND REFUGEE LAW (2001).

¹⁵ See N. MELZER, THE PRINCIPLE OF DISTINCTION UNDER INTERNATIONAL HUMANITARIAN LAW 221 (2008).

¹⁶ K. DHARMA, MAHABHARATA: THE GREATEST SPIRITUAL EPIC OF ALL TIME 55 (1999).

unnecessary loss due to the use of weapons. The war was to gain sovereignty over the kingdom and not for causing excessive damage to the other state.

The protection of cultural property during armed conflict is based on the principle that damage to the cultural property of any means, in the words of the 1954 Hague Convention, is a “damage to the cultural heritage of all mankind”.¹⁷ The *Uluka Dutagamana Parva, Udyog Parva*,¹⁸ narrates, on the way to Kurukshetra, when the army passed near villages and colonies, they carefully avoided religious institutions like temples, cultural locations and heritage sites so as not to defile any holy places.¹⁹ Customarily, disrupting religious sanctity and cultural heritage of places was also believed to bring misfortune upon the army. Choosing a separate place for combat and avoiding the temples and heritages while marching towards the battlefield was an effort to preserve heritage sites and places of worships as well as protect civilians. This also signifies the principle of minimal damage. Jus ad Bellum, which deals with the rules governing legitimacy of war can see a ubiquitous reflection in the Indic value of righteousness.²⁰

2.2. Principle of necessity and Diplomatic immunity

The “military necessity” doctrine permits the use of necessary measures to accomplish a legitimate military purpose. For example, Article 52 of Addition Protocol I of the Geneva Convention lists those objects that can be subject to lawful attacks.²¹ The provision cannot be applied to override specific protections or create exceptions in case of ambiguities. Similarly, according to Indian philosophy, war is always seen as the last option and a notion of necessity. Similarly, in Mahabharata when the *Kauravas* irrationally refused to give the due kingdom to the *Pandavas*, the war was seen as the only necessary option for a righteous cause. The *Pandavas* even offered to settle with the five villages in place of fighting for the whole kingdom. After a set of unsuccessful diplomatic meetings to settle the matter, the war became a necessity. The war between the *Pandavas* and the *Kauravas* is said to be ‘*Dharmayuddha*’ because of its inevitable nature and inherent principle behind the war being an attempt to uphold righteousness.

¹⁷ See Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention 1954.

¹⁸ See Part 5 of Mahabharata: Udyog Parva.

¹⁹ K. DHARMA, MAHABHARATA: THE GREATEST SPIRITUAL EPIC OF ALL TIME 48 (1999).

²⁰ See J. C. Chacko, *India's contribution to the field of international law concepts*, 93 RECUEIL DES COURS ACADEMIE DE DROIT INTERNATIONAL 121-218 (1958).

²¹ *Practice Relating to Rule 7. The Principle of Distinction between Civilian Objects and Military Objectives*, ICRC, (May 20, 2020, 3.31 PM), https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule7_sectionc.

In chapter 49 of *Sanat Sujata Parva* of Udyog Parva of Mahabharata, before the war broke out, Krishna and Bhishma, both tried to have diplomatic accord between the parties and make peace.²² War was always seen as an exception, and not a norm. The diplomatic meetings that commenced to resolve the squabble, ended with no amicable resolution. However, this set of negotiations also played a vital role in establishing the rules of warfare, which even included time as to when the war would begin, when it would end, etc. It is also interesting to note that during the war of Kurukshetra, after the specified time of war, both the parties would visit the camps of one another for further negotiations. Many of the humanitarian aspects of the warfare rules put forth in the Shanti Parva of the Mahabharata have a noticeable similarity with the rules of the present international system, for instance, Chapter II and Chapter III dealing with prisoners of War, Articles 30 and 31 regarding medical prerequisites.²³

2.3. Protection of prisoners and rule against torture

The most underpinning principle of international humanitarian law is that the wounded and the sick shall be cared for and protected by the parties to the conflict. The principle also implies that captured persons must be protected against acts of violence and reprisals. War was to be waged according to the rules, fairly and not deceitfully. Bhishma lays down the principle of the fair fight: “One should fight one and abandon the opponent when the latter becomes disabled and to fight an army clad in armour by putting an armour.”²⁴

The *Shanti Parva* of the Mahabharata narrates, one who surrendered or one fleeing from the fight should never be struck down. During the war, many servants on the battlefield, carrying weapons and other paraphernalia, were not harmed.²⁵ The principles of not inflicting unnecessary suffering were another rule of war in Mahabharata. If any of the fighters surrender his weapons i.e. disarms himself, the combating fighter should not strike him. The war narrates about the presence of doctors and servants on the field of war, they were never to be harmed in any manner. This is a reflection of the contemporary rule that no one shall be subjected to torture or cruel, inhuman, or degrading treatment or punishment.

2.4. Principle of proportionality

²² *Mahabharata Udyoga Parva Chapter 49*, Krishnakosh, (May 20, 2020, 3.31 PM), http://en.krishnakosh.org/krishna/Mahabharata_Udyoga_Parva_Chapter_49.

²³ R. V. Radhika, *Revisiting the Ancient Indian Laws of Warfare and Humanitarian Laws*, 3 INDRASTRA GLOBAL 1-4 (2017), <https://pdfs.semanticscholar.org/af8f/503f170e827ee57b2f7791db174dbda8dea6.pdf>.

²⁴ K. DHARMA, MAHABHARATA: THE GREATEST SPIRITUAL EPIC OF ALL TIME, 27-29 (1999).

²⁵ See K. DHARMA, MAHABHARATA: THE GREATEST SPIRITUAL EPIC OF ALL TIME, Ch. 2 (1999).

The principle of proportionality finds a direct reflection concerning the use of weapons. Mahabharata highlights the restraint shown by Arjuna who initially denied using the *Pasupastra*, a “hyper destructive” weapon granted to him by Lord Shiva, the God of destruction.²⁶ Such use of unconventional weapons was immoral, let alone in conformity with religion or the recognized laws of warfare. Bhishma, Krishna, Arjuna and many others had many *Divyastras* or the weapons of mass destruction using of which were against the codes of combat. Thus, there was a strict prohibition on the infliction of unnecessary suffering and using weapons of mass destruction.

During the war of Kurukshetra, it was agreed by both the sides that warriors should only fight with equals and with equal weapons. It was a fundamental rule of war that a person of a particular rank can only challenge the person of the same rank. None should strike another without warning the other by challenging him.²⁷ There were different ranks and hierarchies in the final war of Mahabharata like *padatik* (infantrymen), *gaja* (soldier on an elephant), *ardharathi* (a soldier on a chariot who is considered equal to one *Gaja*), *rathi* (a warrior who is considered equal to 12 *ardharathis*), *atirathi* (a soldier who is considered equal to 12 *rathis*), *maharathi* (a warrior who is considered equal to 12 *atirathis*) and *atimaharathi* (a warrior who is considered equal to 12 *maharathis*)²⁸. It is a modern precept that there should be no deception in methods of warfare. Fighting with concealed weapons amounted to treachery and was condemned.

In Mahabharata, Abhimanyu, the son of Arjuna was unjustly killed by the Kauravas by creating a military labyrinth formation or *chakra vyuha*²⁹ (wheel or disc formation). This act of brutality committed by the Kauravas was looked down upon in terms of morality as it was totally against the code of combat. When Abhimanyu was dropped lifeless on the ground, all the *Rishis* and *Siddhas* looked down on the prince from the sky and condemned the killing, who seemed to them like the moon dropped from the heavens. Thus, even if there was killing by giving unnecessary suffering it was highly criticized in the text. In Mahabharata, Ashwatthama is considered to commit the cruellest act. When the army of *Pandavas* was sleeping at night, they were killed without mercy. Ashwatthama beheaded the five sons of the *Pandavas*. Fearing his

²⁶ NAGENDRA SINGH, INDIA AND INTERNATIONAL LAW ANCIENT AND MEDIAEVAL: PART 1, 6 (Vo. 1, 1973).

²⁷ See K. DHARMA, MAHABHARATA: THE GREATEST SPIRITUAL EPIC OF ALL TIME, Ch. 1 (1999).

²⁸ *Krishna-Dwaipayana Vyasa, The Mahabharata, translated by Kisari Mohan Ganguli, Bhishma Parva*, (May 20, 2020, 3.31 PM), www.sacred-texts.com/hin/m06/index.html.

²⁹ *Advanced war techniques of Mahabharata period*, Mahabharata Research, (May 20, 2020, 3.31 PM) <http://mahabharata-research.com/military%20academy/the%20mysterious%20chakravyuha.html>.

death, he tried using the *Brahmastra*, which is considered as the weapon of the mass destruction. Ashwatthama was considered as an aggressor, he was doomed and was given exemplary punishment.³⁰

3. CONCLUSION

Hinduism as a way of life believes that war is undesirable and must be avoided because it involves the killing of fellow human beings. A war waged in the contravention of the rules of warfare or aimed to satisfy greed was never considered a *Dharma Yuddha*. The contemporary world is built on the pillar of the globalised legal order in which dimensions of warfare are witnessing fundamental changes. The concept of warfare and the paradigm for its evaluation has changed from conventional to unconventional. In the case of modern international law, there is no central political authority above the sovereign states. Due to this asymmetry, it is not possible to impose an absolute prohibition on the States from resorting to war. International Humanitarian law plays a pivotal role in preserving the order and humanity and it is of academic scholarship to find the roots of principles of humanitarian law in the great Indian civilization.

Today, global economies are facing the problem of balancing national security and legal obligations with humanitarian crises related policy responses. The changing dimensions of the world order demand a change in the dimensions of law. India's foreign policy outlook is changing with the developments in the South Asian region. The vitality of a nation also depends on what the nation has to offer to the world. India is focusing on strengthening its soft power by promoting Indic values at the global level. It would be of exemplary importance if India engages in humanitarian law and diplomacy with practicality, keeping in essence, the ideas propounded in its Vedic philosophy, like Mahabharata. As the world is witnessing a change in the balance of power, from 'Global North' to 'Global South', the time has come to put the subaltern Vedic history in the global arena.

³⁰ K. DHARMA, MAHABHARATA: THE GREATEST SPIRITUAL EPIC OF ALL TIME, Ch. 29 (1999).