

TRACING THE EVOLUTION FROM THE ANTIQUITIES: THE HINDU TENETS ON THE LAW OF WAR

*Param Pandya**

ABSTRACT

An individualistic insight to the very underpinning of Social Contract reveals as per Hobbes a persisting state of war among individuals which according to him is the state of nature. While Rousseau, acknowledging the light of reason as the quintessential factor presupposes that the state of nature of human beings is essentially of peace and concord. He goes a degree further than Locke to contend that beyond the natural capacity for pity, there is no innate human nature. Human nature is itself a social product. This forms the core of various modern social and political philosophies and its magnification to a macro level, in connotation of states lead to the development of International Law, concluding that the innate nature of state is also of peace and harmony.

The Law of War is a species of this genesis of governance of statal behaviour. However, it needs to be borne in mind while we trace its development; Western 'Eurocentric' thinkers decline to recognize Ancient Hindu Jurisprudence which enunciated principles on Ethics of War far from the conception of those modern thinkers, both in terms of time and conceptual clarity. This paper attempts to highlight the contribution of ancient Hindu philosophers to relook at various dimensions of war ethics. This paper being an historical analysis shall deal with the definition of war in the Hindu parlance, the classification of war as per various Hindu scholars, the Hindu doctrine of bellum Justum, Hindu doctrine of jus in bello, the status of war as last resort, ethics of warfare and conclude with how this learning from sages and seers would be an archetypal in order to have a rich confluence of intelligentsia from the past to positively influence the present of International Humanitarian Law and its enforcement.

PROLOGUE:

The development of human civilization from nomadic and semi-nomadic human congregations to that of permanent inhabitation gave rise to the element of 'territorial suzerainty' which was also a

* Param Pandya, Fifth Year Undergraduate Student, B.Com LL. B (Hons.), Gujarat National Law University (GNLU), Gandhinagar, Ph. No – 091 7405243424, E mail – paramp10@gnlu.ac.in, Postal Address: FF – 46, First Floor, GNLU Halls of Residence, Gujarat National Law University, Atalika Avenue, Knowledge Corridor, Koba, Gandhinagar, Gujarat, INDIA. The author is indebted to acknowledge the immense contribution of Prof. Patrick Olivelle, Jacob and Frances Sanger Mossiker Chair in the Humanities, University of Texas, Prof. Dr. Bimal N Patel, Director, GNLU & Prof. Dr. Shobhalata Udupudi, Professor of Law for their valuable guidance & insightful comments. My mentors at GNLU viz. Dr. K. Parameswaran, Associate Prof. of Law & Dean, Academic Affairs, Dr. Ranita Nagar, Associate Prof. of Economics & Dr. Vikas Gandhi, Assistant Prof. of Law were constant source of inspiration and motivation. Their best wishes were instrumental in the successful completion of this paper.

phenomenon replicated in the tribes of Indo-Aryans who dwelled in the Indian sub-continent. Over-population fuelled expansionist tendencies thereby increasing the contact with alien tribes, which had to be resisted by defence mechanisms. Thus, these circumstances made those primitive nomadic tribes of Indo-Aryans who cultivated the habit of peace and not war to resort to hostilities for self – defence.¹ The 90th *Sukta* (Verse) of the 10th *Mandala* (Chapter) of the *Rig Veda*² known as the *Purusha Sukta*, elucidates the *Varna* System of Ancient India, distributing social functions for four classes of people viz. *Brahmins* - the priestly class, *Kshatriyas* - the warrior class, *Vaishyas* - the merchant/agricultural class and *Shudras* as the weaker section of the society. The king used to belong from this warrior class of *Kshatriyas* who had the duty to protect his populace from adversaries.³ Protection for the populace consisted in countering internal threats and external aggression to man's liberty.⁴ *Kshatriyas* are exhorted throughout ancient Indian literature to carry on righteous warfare because it is their duty to do so.⁵

Cicero said: "*Inter arma silent leges*," which may be translated as "In war there is no law." In the 19th century, Count Helmuth von Moltke wrote: "*In war, as in art, there is no general norm; in both cases talent cannot be replaced by rules. General dogmas or rules deduced from them or systems built upon them can therefore in no way have any practical value for strategy. Strategy is not like abstract science. Those have their fixed, defined truths on which one can construct arguments, from which one can make deductions.*"⁶ Sir Hersch Lauterpacht's famous statement was "*If international law is, in some ways, at the vanishing point of law, the law of war is, perhaps even more conspicuously, at the vanishing point of international law.*"⁷ These questions have time and again been

¹ V RAMCHANDRA DIKSHITAR, WAR IN ANCIENT INDIA, 4-6 (1st ed., 1944).

² *Rig Veda* is an ancient Indian sacred collection of Vedic Sanskrit hymns and is counted as one of the four canonical sacred texts of Hinduism which was composed roughly around 1700-1100 B.C. See EMMANUEL E. JAMES, THE STUDY OF RELIGIONS, 229 (Revised Edition, 2011).

³ Thus, Manu declares that a king should not retire from battle remembering the duty of a Kshatriya. *Manusmriti*, Chapter VII, 87.

⁴ PANDURANG VARMAN KALE, HISTORY OF DHARMASTRA, Vol. 3, 56 (2nd ed., 1973).

⁵ Hence, Lord Krishna tells Arjuna, 'Further looking to thine own duty, thou shall not tremble, for there is nothing more welcome to a Kshatriya than a righteous war. Happy are the Kshatriyas, Partha, who obtain a fight offered unsought as an open door to heaven. But if thou will not carry on this righteous warfare, then casting away thine own duty and thine honour, thou shall incur sin'. DANIEL THÜRE, INTERNATIONAL HUMANITARIAN LAW: THEORY, PRACTICE, CONTEXT, 210 (1st ed., 2011): "Heroism, dignity, firmness, skill, courage in battle, generosity, and a lordly nature characterize the actions to which those of the Kshatriya class are born."

⁶ See, Cicero pleaded, '. . . silent enim leges inter arma (Laws are silent among those who use weapons)', cited in Cicero, Pro Milone, 4. 11. See MARCO SASSOLI & ANTOINE A. BOUVIER, HOW DOES LAW PROTECT IN WAR? CASES, DOCUMENTS AND TEACHING MATERIALS ON CONTEMPORARY PRACTICE IN INTERNATIONAL HUMANITARIAN LAW 68 (1st ed., 1999).

⁷ H. LAUTERPACHT, INTERNATIONAL LAW: THE COLLECTED PAPERS OF HERSCH LAUTERPACHT, 605 (1st ed., 2004).

raised on the very existence of the 'Law of war' or International Humanitarian Law which perhaps could be termed as the oldest and most evolved branch of International law. These contentions leads one to explore in gravest details, what determined the effective adherence to war ethics in Hindu Jurisprudence and how Inter-state relations were so governed that these principles found universality in application and effectiveness in its observance?

The dogmas that most of the Western scholars share is the misnomer that pre-British era lacked elements of strategic thinking and most importantly have constantly misinterpreted in some sporadic writings on the Hindu jurisprudence on Ethics of War.⁸ It is also argued by western scholars that since wars dominated the ancient world, it made impossible for any development of international law.⁹ *"Eurocentrism in law and thinking was not only prevalent in the colonial period during the 19th and the first half of the 20th centuries, but can be found to this day ... until yesterday, international law was wholly Eurocentric"*. Even today leaders of European States allow themselves such irresponsible, from the scientific point of view statements: *"only Christian nations were capable of distinguishing between justice and injustice, between wars that were forbidden and wars that were not"*.¹⁰ Another Eurocentric writer, without any sound research on the ancient code of war ethics from Asian Jurisprudence remarks that 'It is obvious that this period (Ancient) in the evolution of humanity played no part, or a very small and almost accidental part, in land warfare.'¹¹ Robert Hume makes a completely incomplete analysis without even upon touching the Shanti Parva of Mahabharata to conclude that Hinduism provided a religious sanction to war hereby completely disowning the ancient Hindu jurisprudence on ethics of war and warfare.¹² Prof. Derret also holds a similar opinion of disowning any principles of law of war within the ancient Indian domain on the basis of a compilation of Delhi Seminar and without substance on the said historical and legal standpoint.¹³

Eurocentrism in International Law has to be definitely criticized for, in the race for superiority, it has at various levels ignored the glorious achievements that people beyond European territories

⁸ KAUSHIK ROY, HINDUISM AND THE ETHICS OF WARFARE IN SOUTH ASIA: FROM ANTIQUITY TO THE PRESENT, 1 (1st ed., 2012).

⁹ A. MOLLER, INTERNATIONAL LAW IN PEACE AND WAR, 11 (1st ed., 1931).

¹⁰ R P ANAND, THE FUTURE OF INTERNATIONAL LAW IN A MULTICULTURAL WORLD, 107, 108, 114 (1st ed., 1984).

¹¹ Howard S. Levie, *History of the law of war on land*, INTERNATIONAL REVIEW OF THE RED CROSS, (30 June, 2000), <http://www.icrc.org/eng/resources/documents/article/other/57jqhg.htm>.

¹² Robert E. Hume, *Hinduism and War*, The American Journal of Theology, Vol. 20, No. 1, 31-44 (1916).

¹³ J. Duncan M. Derrett, *Indian Traditions and the Rule of Law among Nations*, 11 The International and Comparative Law Quarterly, 266-272 (1962).

made in the domain of international legal regulation. Prof. Alexandrowicz calls Eurocentrism as anachronistic.¹⁴ While Prof. Upendra Baxi goes a degree further to assert that 'persistent Eurocentrism in international legal scholarship as well as the sphere of social learning as a whole cannot but be pernicious both in terms of development in learning in general and in those of progress towards a more viable future world legal order. He goes on to say that the demise of Eurocentrism is not only inevitable to further the cause of academics or publicists but also it is essential that this 'vanguard in the procession of change' be replaced with the respect for political and cultural traditions of "new" nations which would only come by sharpening the awareness regarding this heritage.¹⁵ European jingoism is not a healthy construct and hence it's high time that colonial hangover is done away with to realize the fact that universalistic approach demands universalistic wisdom to be respected and be incorporated for the realization of the world legal order.

One scholar rightly remarks, 'when Britons roamed their forests clad in garments of skin and Teutonic tribes were concerned with little save war and tumult, the East had its own legal systems, which were at once the product and the proof of a high civilization'.¹⁶ Megasthenes, the Greek Ambassador of Seleucus Nicator at the court of Chandragupta Maurya at Pataliputra recorded which very effectively describes the highest ideals displayed by Indian warriors:¹⁷

"Whereas among other nations it is usual, in the contests of war, to ravage the soil, and thus to reduce it to an uncultivated waste, among Indians on the contrary, by whom husbandmen are regarded as a class that is sacred and inviolable, the tillers of the soil, even when the battle is raging in their neighbourhood, are undisturbed by any sense of danger, for the combatants of either side in waging the conflict make carnage of each other but allow those engaged in husbandry to remain quite unmolested. Besides, they neither ravage an enemy's land with fire, nor cut down its trees"

By tracing the origins of war and the deep-seated principles governing conduct of hostilities in war from Hindu texts, silencing Eurocentric authors, hereby shall culminate in presenting to the world

¹⁴ C. H Alexandrowicz, *Kautilian Principles and the Law of Nations*, 41 Brit. Y.B. Int'l L., 301 (1965-1966).

¹⁵ Upendra Baxi, *Kautilian Principles and the Law of Nations – A Comment*, Indian Year Book of International Affairs, 230 (1967).

¹⁶ These consisted of the Code of Hammurabi, the Levitical laws, and the Code of Manu. See, Albert Swindlehurst, *Hindu Law and Its Influence*, The Yale Law Journal, Vol. 27, No. 7, 857 (1918).

¹⁷ JW MCCRINDLE, ANCIENT INDIA AS DESCRIBED BY MEGASTHANES AND ARRIAN, 33 (1st ed., 1926).

the immense potential that the Ancient Hindu jurisprudence encompasses within itself which still holds relevance even after the contemporary evolution of International Humanitarian Law.

The primary source of Hindu jurisprudence is the *Shrutis* and the *Smrutis*. *Shrutis* literary means what is heard and *Smrutis* means what is remembered. *Shrutis* consist of four Vedas – *Rig Veda*, *Sam Veda*, *Yajur Veda* and *Atharva Veda*. The *Ramayana*, describes the battle between the Demon King Ravana of Lanka and Lord Rama, the Prince of Ayodhya and the *Mahabharata*, the longest poem epic of the world which is composed of 1, 00,000 stanzas, narrates the battle between *Kauravas* and *Pandavas* which also encompasses in itself the *Bhagwad Gita* ('The Song of the Lord' c. 200 B.C), which is the most influential Hindu text. These are sources of law for governing the behaviour of individuals. Eighteen *Smrutis* are existant which form the foundation of Hindu jurisprudence. However, prominent among them are *Manusmriti* and *Yagnavalkya Smriti*. The *Shrutis*, *Smrutis* and various other scholarly writings like Kautiliya's Arthshastra, Shukra Niti, Kamandaka's Nitisara, and Vidur Niti etc exist as an integral part of the Hindu jurisprudence; consequently of which law of war is also a part of.¹⁸

THE HINDU DEFINITION OF WAR:

The laws of armed conflict were founded in Ancient India on the cardinal principle of humanity.¹⁹ Despite the fact that a warrior clan called *Kshatriyas* had the sole duty to protect the state from internal and external aggression and was seen as a laudable profession, war in no sense was a frequently resorted means of conflict resolution. Prof. B. C Nirmal has held the opinion that in a society in which the reduction of enemy territory and the protection of one's own is considered paramount and the sacred duty of the king, the recognition of the legitimacy of the institution of war should not come as a surprise at all, especially when war was seen as a natural feature of human

¹⁸ See, L. R Penna, *Traditional Asian approaches: An Indian View*, 9 Aust. YBIL 168, 174 (1980). See generally, J. DUNCAN DERRETT, INTRODUCTION TO MODERN HINDU LAW (1st ed., 1963); J. CHINNA DURAI, HINDU LAW IN A NUTSHELL (1st ed., 1933); *Bharuci's Commentary on the Manusmriti, Vol.11: The Translation and Notes* by J. Duncan Derrett (1975); NARESH CHANDRA SEN-GUPTA, EVOLUTION OF ANCIENT INDIAN LAW: TAGORE LAW LECTURES, 1950 (1953); RADHABINOD PAL, THE HISTORY OF HINDU LAW IN THE VEDIC AGE AND IN POST-VEDIC TIMES DOWN TO THE INSTITUTES OF MANU, TAGORE LAW LECTURES, 1930 (1958).

¹⁹ Manoj Kumar Sinha, *Hinduism and International Humanitarian Law*, in INTERNATIONAL HUMANITARIAN LAW – A READER FOR SOUTH ASIA, 123 (1st ed., 2008).

society in all the major ancient civilizations.²⁰ However the first part of this statement definitely holds relevance but the second conclusion regarding the obvious nature of war and the comparison of Ancient Indian civilization with that of other civilizations, in its historical parlance itself is erroneous. Prof. Derrett in a similar fashion holds that 'peace was a rare feature in India' which he concludes from the fact that there lies a high significance of topics of war in Indian literature than that of peace.²¹ Prof. L. R. Penna contradicting these views maintains that Ancient Hindu jurisprudence especially in terms of war gives out a very clear and distinct message that resort to war was by far only when all attempts of conciliation fail and no other substitute then war, could cure the mischief. Even the conduct during war was regulated.²²

It is beyond doubt concurred that the psychology of emulation of excelling over the enemy was in fact the most powerful urge of fighting in those days, and various literary scholars have also opined regarding the theories of heaven, transitory nature of material body, *swadharma* (duty of oneself) and *deshdharma*²³ (duty towards one's own country), immortality of soul, *nishkama karma* (selfless duty) and huge praise for the bravery and valour of these warriors, which formed a part of the literary tradition and heritage, this as well by no sense shows that war as a political institution was most recurrently resorted to. *Kshatriyas* were not just responsible to crush external aggression but also maintain internal peace and tranquillity. It formed a part of the *bala* (army) of the state, which regulated and ensured obedience of law and order. Merely putting in forefront the ancillary deviant acts committed by them, it cannot be concurred that they were a bunch of people with violent instincts committed to ensure destruction through war.²⁴ Another inherent contradiction that these authors maintain is that despite their notion that war was a 'natural feature of the human society' they also conclude in their respective works that in India, war was seen as a last resort.²⁵

²⁰ B C Nirmal, *International Humanitarian Law in Ancient India*, in HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW IN SOUTH ASIA, 26 (V S Mani ed., 2007).

²¹ J.D.M. Derrett, *The Maintenance of Peace in the Indo World: Practice and Theory*, 8 Indian Year Book of International Affairs 362, (1958).

²² L. R. Penna, *Humanitarian Law in Ancient India*, 23 Mil. L. & L. War Rev., 235, 235 (1984).

²³ The word *Desha Dharma* combines two words of Sanskrit, *Desha*, which means land, and *Dharma*, which means duty; See also, C. J. Chacko, *India's contribution to the field of International Law concepts*, 93 Recueil des Cours, 121-221 (1958).

²⁴ V RAMCHANDRA DIKSHITAR, WAR IN ANCIENT INDIA, 13 – 19 (1st ed., 1944).

²⁵ B C Nirmal, *International Humanitarian Law in Ancient India*, in HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW IN SOUTH ASIA, 28 (V S Mani ed., 2007); V RAMCHANDRA DIKSHITAR, WAR IN ANCIENT INDIA, 62 (1st ed., 1944); S. V. VISHWANATHA, INTERNATIONAL LAW IN ANCIENT INDIA, 118-122 (1st ed., 1925).

Kautiliya says '*apakaro vighrah*'²⁶ or an offensive operation which in the common parlance can be termed as a premeditated or an overt act of armed conflict.²⁷ According to Sukracharya in Sukra Niti, 'war is affairs between two parties who have inimical relations, undertake by means of arms to satisfy their rival interests and by which the enemy is oppressed and subjugated.'²⁸ *Agni Purana* defines war "as the direct result of injuries done to each other by two hostile monarchs".²⁹ Thus, construing wholly the scholarly writings of Indian authorities, it could very well be gathered that war is an interaction between states and not individuals, which is probably the nearest epoch to the concept of modern International Law.³⁰ Sukracharya makes a clear distinction between '*kalaha*' (a mere quarrel which is characterized by an exclusive demand of something) and '*vighrah*' or war and termed '*kalaha*' as a cause of war but *kalaha* in itself felt short of warfare.³¹

In Kamandaka's definition, the most significant description is '*parasparapakarena*' that is to say 'the mutual intention to harm' is an essential of war.³² Reading it with the contemporary practice as well, contest and intention must co-exist as and when the parties of war must substitute 'peaceful relations' with that of 'hostilities' regarding the legal incidents thereof.³³ Kautiliya says, '*arisampadyuktah samantra satruh*', means, that hostile character or characteristics of an ari (enemy) will turn even a samnta (feudatory) into an enemy.³⁴ This enemy character is the measuring scale whether or not a parson is an enemy or friend and it needs to be judged thereby chiefly determining the possibility of waging a war.³⁵ It is pertinent to take cognizance of this concept as possessing such a character (by the state) would make people (of the enemy states) susceptible to death, capture,

²⁶ Kautiliya, ARTHSHAstra 7-1.

²⁷ Patrick Olivelle, *War and Peace: Semantics of Samdhi and Vighraha in the Arthashastra*, in PŪRVĀPARAPRAJÑĀBHINANDANAM, EAST AND WEST, PAST AND PRESENT INDOLOGICAL AND OTHER ESSAYS IN HONOUR OF KLAUS KARTTUNEN 140 (Bertil Tikkanen ed., 2011).

²⁸ B. K SARKAR, THE POLITICAL INSTITUTIONS AND THEORIES OF THE HINDUS, 4-7, 468-69 (1st ed., 1922).

²⁹ AGNI PURANA, CCXL, 15, 860.

³⁰ S. V. VISHWANATHA, INTERNATIONAL LAW IN ANCIENT INDIA, 110 (1st ed., 1925); PRAMATHANATH BANDHOPADHYAY, INTERNATIONAL LAW AND CUSTOM IN ANCIENT INDIA, 90 (1st ed., 1920).

³¹ SUKRANITI, IV, VII, 252; See also Kautiliya, ARTHSHAstra: VII, 3.

³² Kamandaka, NITISARA: 10, 15, 1.

³³ T. J. LAWRENCE, THE PRINCIPLES OF INTERNATIONAL LAW, 309 (6th ed., 1917).

³⁴ Kautiliya, ARTHSHAstra: 6-2.

³⁵ HIRALAL CHATTERJEE, INTERNATIONAL LAW AND INTER- STATE RELATIONS IN ANCIENT INDIA, 76 (1st ed., 1958).

detention or any other form of punishment and property to seizure, destruction, appropriation or confiscation in any lawful combat during the time of war.³⁶

THE HINDU CLASSIFICATION OF WAR:

Different basis of the segregation of war in ancient Hindu literature can be traced. Sukracharya classifies war based on the weapons used in the war. He describes it into three forms – *daivika* as wars fought by *mantras*, *asura* where mechanical instruments were used, and *manusa* where *sastras* and hands were used as weapons.³⁷ Kautiliya, severs war in to three forms on the justness of warfare – Open battle, treacherous battle and silent battle.³⁸ Out of these *Dharamayudh* (Open battle or *prakasayudh*) and *adharmayudh* (treacherous war) forms a part of the present day warfare whereas those types like *mantrayudh* and *kutayudh* (silent modes of warfare) does not form the part of the current definition of war as bloodshed or violence is not involved. However it could be interpreted to be the causes of the contemporary development of internationalized armed conflict. *Indra* one of the traditional writers of Arthshastra, divides war into four – wars caused by the invasion of one's territory, wars caused by something done by others prejudicial to the exercise of regal powers, wars resulting from some dispute about boundaries and wars caused by some disturbance in the *Mandala* (union).³⁹ Whereas Kamandaka divides war into sixteen classes according to their results, causes and parties engaged.⁴⁰

THE HINDU DOCTRINE OF JUST WAR: BELLUM JUSTUM:

It would not be any hyperbole in saying that the doctrine of *Bellum Justum* paved the way for the evolution of *jus ad bellum* or the right to wage war and served as a prerequisite to enter into war and also formed the corner stone for *jus in bello* - the humanitarian principles or the ethics of war. According to *Sukra Niti*, *Mahabharata*, *Manav Dharmasastra*, and Kautilya, war was righteous or *dharmayudha* when it was resorted to:-

- As a last method when all other alternatives had failed;

³⁶HIRALAL CHATTERJEE, INTERNATIONAL LAW AND INTER- STATE RELATIONS IN ANCIENT INDIA, 77 (1st ed., 1958).

³⁷SHUKRA NITI, VV, VII.

³⁸ Kautiliya, ARTHSHAstra, VII, 6; See also, Roger Boesche, *Kautiliya's Arthshastra on War and Diplomacy in Ancient India*, 67 J. MIL. HIST. 9-37, 22 (2003).

³⁹ Kamandaka, NITISARA, X, 16-17.

⁴⁰ Kamandaka, NITISARA , X., 18 – 22.

- When the object was righteous, and
- When the exchange of hostilities was in accordance with recognised rules of warfare and the belligerent had refrained from the use of prohibited weapons and illegal practices.⁴¹

Surya P. Subedi notes that the concept of *dharmayuddha*, essentially a form of war as given by Kautiliya, in Hinduism is directed against the evil, whether they are nationals or aliens and never on the grounds of religion.⁴² Valmiki's *Ramayana* which describes battle that ensued between Ram, the warrior king of Ayodhya and Ravana, the *Asura* King of Ceylon is set to meet all the criteria's of Just War that is to say (1) Just Cause, (2) Right Intent, (3) Net Benefit, (4) Legitimate Authority, (5) Last Resort, (6) Proportionality of Means, and (7) Right Conduct. After thorough examination of this ancient epic it is concluded that this ancient Indian epic exhibits a remarkable adherence to both the spirit and criteria of the modern Just War model.⁴³

The scholarly writings of St. Augustine's concept of just war and the writings of Vitoria, Ayala, Suarez, and Grotius on justness and unjustness of war which only served as mere positive constraints on the conduct of war in Europe, the ancient sages only permitted righteous wars by righteous means.⁴⁴ It becomes crystal clear from the list of causes of war that *Agni Purana* lists down⁴⁵:

- Stealing away of wife,
- Encroachment upon capital, the territory, the kingdom or the sovereign right of a king by his adversary,
- For pride,
- The death of an ally,
- Loss of fortune,
- The accretion to the domain of a foreign prince,
- Over sensitiveness to the point of honour,
- Humiliation suffered by an ally or a friendly monarch,
- a disturbance of the balance of power among monarchs of a Mandala and

⁴¹ L. R. Penna, *Humanitarian Law in Ancient India*, 23 *Mil. L. & L. War Rev.* 235, 236 (1984).

⁴² Surya P. Subedi, *The Concept in Hinduism of "Just War"*, 8 *J. Conflict & Sec. L.*, 339 (2003).

⁴³ Raj Balkaran & A. Walter Dorn, *Violence in the Valmiki Ramayana: Just War Criteria in an Ancient Indian Epic*, *J Am Acad Relig* 80 (3), 1 – 32 (2012).

⁴⁴ MAHABHARATA, XII, 140.

⁴⁵ AGNI PURANA, CCXL.

- Humanitarian Intervention.⁴⁶

However, it is to be noted that the concept of just war was so embedded that contradiction from the said principles encouraged sanctions and was regarded a sin. Despite so there were violations of the said principles but in miniscule. It needs to be noted that war on the grounds of religion as in various other civilizations was not a ground for war in Ancient India and no evidence is seen that war was waged on the basis of religion of contending parties. Unlike the Christian concept of 'crusade' or '*bellum justissimum*'⁴⁷ and its counterpart '*Jihad*'⁴⁸ in Islam, there is no justification in Hinduism for any war against foreigners of other faiths since Hinduism is based on a universalistic approach to the world.⁴⁹

⁴⁶ It was the only extra ground for war recognized by Kamandaka, NITISARA, X., 2 – 6.

⁴⁷ C.H. Alexandrowicz, *The Afro-Asian World and the Law of Nations (Historical Aspects)*, I *Recueil des Cours* 123–125, 147 (1968).

⁴⁸ M.K. Nawaz, *The Doctrine of Jihad*, Indian Yearbook of International Affairs, 8 (1959).

⁴⁹ Surya P. Subedi, *The Concept In Hinduism Of 'Just War'*, 8 J. Conflict & Sec. L., 339 (2003).

WAR – THE NECESSARY EVIL: THE FINAL WAY OUT ONLY

The restrictions on waging of a war is the most promising feature of the Ancient Indian society as it makes it mandatory to exhaust all other remedies before resorting to war. The call for preliminary peaceful settlement is typical of the ancient Indian international law.⁵⁰ “*If thy endeavours after peace fail, then mayest thou engage in battle. The victory that one acquires by battle is very inferior*”. Such was the advice to Yudhisthir, the eldest brother among the *Pandavas* by the dying Bhishma, the *pitamaha*, who is regarded to be an expert in state policy and wisdom.⁵¹

Hindu tenets were clear in the fundamental that war is undesirable because it involves killing of human and destruction of other resources hence, should be avoided as means of settling disputes.⁵² The *Manusmriti*, Manu's code of law, highlights avoidance of war as far as possible. A king should first try to conquer his foes by conciliation, by gift and by causing dissension if possible: if all these fail then and then only should he wage war.⁵³ The policy of conciliation and making gifts should be tried first before engaging in war.⁵⁴ Even Bhishma says that ‘the collision of battle is not at all desirable as long as it can be avoided. The policy of conciliation (*Sama*), of producing disunion (*Bheda*) and making gifts (*Dana*) should be first tried; battle (*danda*), it is said, should come after those’.⁵⁵

The *Arthashastra* is one of the greatest political works of Ancient India by Kautiliya.⁵⁶ He was a great advocate of the policy of state interest and yet looked upon the establishment and continuation of peace as the only means of achieving national prosperity.⁵⁷ Kautiliya advocates political persuasion in preference to war. He states that the powerful sovereign 'should subjugate the weak by means of

⁵⁰ Olga V. Butkevych, *History of Ancient International Law: Challenges and Prospects*, 5 J. Hist. Int'l L. 189, 207 (2003).

⁵¹ MAHABHARATA, Shanti Parva, Rajdharama, CII, 16-17.

⁵² See generally, A.L BASHAM, *THE WONDER THAT WAS INDIA*, (1st ed., 1954); PERCIVAL SPEAR, *A HISTORY OF INDIA*, (1st ed., 1956); ROMILLA THAPAR, *A HISTORY OF INDIA*, (1st ed., 1966).

⁵³ Ancient India developed a method in four successive stages for the settlement of disputes between States: the first stage is called peaceful negotiation (*Sama*); the second stage consists of offering gifts (*dana*) to appease the enemy; the third is a veiled threat (*bheda*); and the last stage allows the use of force (*danda*) by the King (*Dandadhara*) MANU SAMHITA, VII, 198 - 200.

⁵⁴ K. R. R. Sastry, *Hinduism and International Law, Recueil des Cours*, 117 ACADEMIE DE DROITE INT'L 503, 507 - 617 (1966).

⁵⁵ MAHABHARATA, Shanti Parva, Rajdharama, CII.

⁵⁶ C. H Alexandrowicz, *Kautilian Principles and the Law of Nations*, 41 Brit. Y.B. Int'l L. 301, 302, 304 (1965-1966).

⁵⁷ Kautiliya, ARTHSHAstra, VII, 12.

conciliation'.⁵⁸ Even when the advantages of peace and war are equal one should prefer peace, for war causes loss of wealth and power and is troublesome and sinful. A solvent treasury and sage advice, declared *Kamandaka*, were much better expedients than mere display of power; he therefore recommended lavish use of gifts.⁵⁹ There were conciliations (*Sama*) and gifts (*Dana*) of five kinds and three forms of separation (*Bheda*) prevalent in ancient India.⁶⁰ The result of war was unsure and hence it must be seldom resorted to. Sukracharya holds this view from the utilitarian principle while the Dharmashastras advised absenteeism from hostilities from a moral angle.⁶¹ Vishwarupa suggests a framework for using modes of settlement of dispute, that a king should use conciliation for the ally and an indifferent king, division for the supporters of the enemy and *danda* for the adjacent enemy.⁶² It is a predominant view among scholars of ancient India that preference must exist for battle of wits rather than battle of weapons.⁶³

DECLARATION OF WAR AND IMMEDIATE CONSEQUENCES:

It can be clearly deduced that that there was no need of a formal notification to the effect of war in ancient India as war was a result of prolonged ill feel and used as a last resort when all other attempts of peace and harmony were futile. But as per the general rules of antiquity, before the final outbreak of hostilities, it was customary to declare a war. However, some kind of declaration which could be formal or informal preceded the war. Evidences in terms of Ram sending Hanuman and Angadh are available as to proclaim war against Ravana, if he declined to accept the final terms of comity in the battle. In Mahabharata, the Pandavas sent Uluka and Shri Krishna as messengers to proclaim war before hostilities could take place in case of non – acceptance of terms. The final clarion call of war is depicted by the blowing of the trumpet or *shankha* (conch) which is quite evident from both the battles of Ramayana and Mahabharata.⁶⁴

The immediate consequences of war are the same as to what modern nations react today. Diplomatic intercourses cease between the warring nations. The armed forces of rival nations were

⁵⁸ R. Bhaskaran, *The Four Upayas of Hindu Diplomacy*, Indian Year Book of International Affairs, 3, 126 (1954).

⁵⁹ Kamandaka, NITISARA, XVII. 2-3.

⁶⁰ PRAMATHANATH BANDHOPADHYAY, INTERNATIONAL LAW AND CUSTOM IN ANCIENT INDIA, 88 (1st ed., 1920).

⁶¹ SHUKRA NITI, IV. vii, 189.

⁶² Commentary on YAGNAVALKYA SMRUTI. I, 342.

⁶³ Bhojdeva, YUKTI KALPATRA, 14; See also B C Nirmal, *International Humanitarian Law in Ancient India*, in HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW IN SOUTH ASIA, 28 (V S Mani ed., 2007).

⁶⁴ See also, S. V. VISHWANATHA, INTERNATIONAL LAW IN ANCIENT INDIA, 128 - 129 (1st ed., 1925).

authorized to commit hostilities. The accepted rules of fighting now come to force. There lie certain restrictions in terms of maintaining business relations with the enemy state i.e. there was not to be the relation of debtor and creditor between the fighters".⁶⁵

RULES OF WARFARE – JUS IN BELLO:

'Means justify the ends' – is a western construct, Indian scholars since time immemorial have advocated the use of rightful means for rightful purposes. Even in warfare, the sages have concluded that a code of conduct must prevail which is mutually agreed upon by the warring states. Henceforth, alongwith recognizing the *yodhadharma* and the *kshatriyadharma* it also recognized the *samyakdharma* (conventional rules) which are formally proclaimed before the war. There again are certain contrary interpretations that a weak prince is permitted by Hindu law gives to destroy enemies even when they are sleeping, tired or unconscious⁶⁶ or he could resort to poisoning of tanks, wells, other water reservoirs, bathing water, oil, murdering by bribing servants and dependants of the enemy and by magical incantation to destroy the enemies.⁶⁷ The above interpretation that a weak king can resort to treacherous means of warfare is not well founded as it doesn't seem to narrate the true picture for various sources resound that a king which resorts to unfair means shall be condemned as a weak king and shall have social sanctions in terms of loss of repute in the Mandala or consortium of rulers.⁶⁸

ETHICS OF WARFARE:

Hinduism did not only develop rules solely for *jus ad bellum*, but also established detailed laws on the methods of warfare, on the weapons that may be used, on the treatment of prisoners of war, and on the persons to be protected. Professor H. H. Wilson calls the ancient Indian laws of war to be very

⁶⁵ SUKRA NITI, iv. 7. 379.

⁶⁶ Interpretation of NITI MAYUKHA, p. 62. See, B C Nirmal, *International Humanitarian Law in Ancient India*, in HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW IN SOUTH ASIA, 30 (V S Mani ed., 2007).

⁶⁷ Interpretation of Someshwara, Shamah Shastry, *Manasollasa*, Mysore Oriental Library. See, B C Nirmal, *International Humanitarian Law in Ancient India*, in HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW IN SOUTH ASIA, 30 (V S Mani ed., 2007).

⁶⁸ MAHABHARATA, Shanti Parva, 96 – 1; 95-17; Karna Parva – 90 – 111/ 112, SUKRA NITI 7, 4: 16- 726; Kautiliya, ARTHSHASTRA - 13- 4; RAMAYANA: Kiskindhya Kanda, II – 36; Uttarkanda - 32, 27 – 29. See, HIRALAL CHATTERJEE, INTERNATIONAL LAW AND INTER- STATE RELATIONS IN ANCIENT INDIA, 88 (1st ed., 1958).

chivalrous and humane, and prohibit the slaying of the unarmed, women and old.⁶⁹ Some examples are as follows:-

- Ancient India recognized the principle of distinction between combatants and non-combatants.⁷⁰
- The means of destruction were required to be proportional to their ends thereby recognizing the doctrine of proportionality.⁷¹
- Weapons that caused unnecessary suffering were forbidden, as were those that caused destruction on a large scale.⁷² There was express prohibition to use fire kindled arrows, poison stricken arrows which could cause indiscriminate harm about which parallelism can be drawn with the Declaration of St Petersburg, 1868, prohibiting the use of the Dum Dum bullets, and the 1899 Hague Declaration (IV,3), and Article 23(a), (c), (e) of the 1899 and 1907 Hague Conventions.
- Only when warriors who were equally armed fought one another was fighting regarded as virtuous.⁷³
- Medical assistance should be given to the wounded soldiers of the enemy.⁷⁴ On the treatment of sick and wounded the ancient practices were similar to those of the provisions of Articles 12, 6, 9, 15, 18, 19, 33 and 36 of the First Geneva Convention, and Articles 12, 6, 10, 12, 18, 21, 30, 28 and 47 of the Second Convention.
- Aged men, women, children and those in retreat should not be killed.⁷⁵ The right to kill was conditioned by many restraints, and many categories of persons have been protected from being killed. This is identical to the requirement of Article 35.1 in the First Protocol, and Article 12 of the First and Second Geneva Conventions and Articles 32 and 68 of the Fourth

⁶⁹ H. H. WILSON, *ESSAYS AND LECTURES ON THE RELIGIONS OF THE HINDUS*, Vol. II, 302 (1st ed., 1861).

⁷⁰ P. OLIVELLE, *MANU'S CODE OF LAW*, Chapter 7, Verse 90, 159 (1st ed., 2005).

⁷¹ "When a fort can be captured by other means, no attempt should be made to set to it; for fire cannot be trusted; it not only offends gods, but also destroys the people, grains, cattle, gold, raw materials and the like. Also the acquisition of a fort with its property all destroyed is a source of further loss." translated by R. SHAMASASTRY, *KAUTILYA'S ARTHASASTRA*, Book XIII, Chapter IV, 434 (9th ed., 1988).

⁷² P. OLIVELLE, *MANU'S CODE OF LAW*, Chapter 7, Verse 90, 159 (1st ed., 2005).

⁷³ Manu's Code of Law contains this rule in its negative form in chapter 7 verses 92 - 93: "A man engaged in battle must never slay a man without his armour, a naked man, a man without his weapons (...) a man with damaged weapons (...)".. P. OLIVELLE, *MANU'S CODE OF LAW*, Chapter 7, Verse 92 - 93, 159 (1st ed., 2005). See also Article 48 and Article 51 of Additional Protocol I.

⁷⁴ AGNI PURANA, CC XL, 15-8, See, B C Nirmal, *International Humanitarian Law in Ancient India*, in *HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW IN SOUTH ASIA*, 37 (V S Mani ed., 2007).

⁷⁵ K.R.R. SASTRY, *HINDUISM IN INTERNATIONAL LAW*, 569 (1st ed., 1966).

Convention, and Article 22 of the 1899 and 1907 Hague Conventions. Article 41 of Protocol I requires the sparing of persons who are placed *hors de combat*, a principle that is found in ancient India.

- According to *Agni Purana* the concept of just war ordained the parties to leave the temples and other places of worship as well as the fruit and flower garden unmolested.⁷⁶ Manu holds that the victorious king should worship in the temples, honour the priests and proclaim peoples' safety in the conquered country.⁷⁷ Fruits, flower gardens, temples and other places of public worship should be left unmolested - cultural property must be protected.⁷⁸
- A conqueror may not strike any of the following: a person who joins the palms of his hands in supplication, someone who is sitting, and anyone who says, "I am thine".⁷⁹

The above principles show that the law of war in ancient India was very well developed and these principles are comparable to the present provisions of the Geneva and Hague Conventions. The basis of these rules and its enforcement lies in the law of *karma* in its truest form which recognizes the dignity of every individual being along with the effective adherence to '*Dharma*' or duty.

CONCLUSION:

There are no twin thoughts in accepting the fact that Ancient Hindu Jurisprudence was itself rich in its vision of perceiving the law of war, far ahead from the founding fathers of International Humanitarian Law. However the decline of these principles needs to be examined critically. The advent of non – Aryans who were most importantly alien to organized methods of warfare and far to say that they were 'alien' to these codes of conduct during warfare at least in practice.⁸⁰ The advent of the Afghans, Turks, Mongols and other foreign tribes attacking native Indian rulers did not follow the same principles of warfare, while the native Indians resorted to such ethical behaviour which put them to a disadvantageous position. Also the said principle as per a dominant view then,

⁷⁶ AGNI PURANA 236, 61-65; See, L.R. Penna, *Written and Customary Provisions Relating to the Conduct of Hostilities and Treatment of Victims of Armed Conflicts in Ancient India*, International Review of the Red Cross, 333-347 (1989).

⁷⁷ MANU SMRITI, VII, 201; KATYAYANA 21; See M. RAMA JOIS, LEGAL AND CONSTITUTIONAL HISTORY OF INDIA, 664-665 (N.M. Tripathi ed., 1984).

⁷⁸ V.S. Mani, *International Humanitarian law: An Indo-Asian Perspective*, International Review of the Red Cross, (31st March, 2001) <http://www.icrc.org/eng/resources/documents/article/other/57jqzm.htm>.

⁷⁹ P. OLIVELLE, MANU'S CODE OF LAW, Chapter 7, Verse 91 – 93, 159 (2005).

⁸⁰ R. C. MAJUMDAR, A. C. RAYCHAUDRI AND KALIKINOW DATTA, AN ADVANCED HISTORY OF INDIA, 298 (Reprint, 1988).

which was practicable as well, was to apply these principles only against those who abided by the *Dharma*. Thus, even Vidhura puts it as that one's conduct should vary according to the treatment meted out to him and the deceitful should be treated deceitfully and virtuous in a corresponding way.⁸¹ In the same manner, these violations led even native rulers sidetrack from ethical conduct during war to safeguard their interests. European colonizers further ensured the non – application of 'a little international law they had developed in Europe' in terms of war ethics and refused to abide by the native version as well. Save as for some silver linings, which were few and far between, the colonization period was indeed the Dark Age in terms of India's cultural and civilizational continuity.⁸²

Whatever may be the fate of war ethics of Hindu Jurisprudence, it is certain that its evolution has definitely shaped the modern legal framework and its contribution in 'humanization of warfare' as Prof. B C Nirmal acknowledges, these principles are immensely important and unforgettable. Talking about the practical and contemporary relevance of the ancient Hindu principles of war ethics, the dissenting opinion of Judge Weeramantry, Judge of the International Court of Justice holds a mention to the extent of it being seen as a 'probably a postcolonial moment of cultural and epistemic resurrection of the ancient international law of India'.⁸³ The argument against the legality of nuclear weapons rests principally not upon treaties, but upon such other sources of international law (mainly humanitarian law), whose principles are universally accepted. The said opinion took reference from 'other sources of International Law' thereby making *Bhagwad Gita* as a source of International Law and the principles of Hindu code on law of war as universally acceptable⁸⁴. This reference was made in regard to the conversation of between Shri Krishna, the incarnation of Lord Vishnu and Arjuna on the use of nuclear weapons viz. *divyastra e.g. Brahmastra and Pashupatiastra* to be largely used as a '*threat weapon*' and not meant for actual use as its use would lead to disastrous consequences of destruction of the peace and ecology of the whole world. Even certain scholars

⁸¹ Vidhura Niti Part 4, (1 June, 2009), <http://hinduismonline.wordpress.com/2009/06/01/vidura-niti-part-4/>. It is also seen in Mahabharata that after the brutal killing of *Abhimanyu*, the son of *Arjuna* the said battle also took to violent killings leading to flagrant violations of the code of conduct during war since it was agreed that a breach by any party of the said rules of warfare would allow the other to resort to unfair means in the said battle.

⁸² V.S. Mani, *International Humanitarian law: An Indo-Asian Perspective*, International Review of the Red Cross, (31st March, 2001) <http://www.icrc.org/eng/resources/documents/article/other/57jqzm.htm>.

⁸³ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 LC.J. 226 (July 8) (dissenting opinion of Judge C.G. Weeramantry), <http://www.icj-cij.org/docket/files/95/7521.pdf>, See also M. Siddharth, *Post colonialism, International Law and the Nuclear Question*, 37 Int'L STUD. 129-142 (2000).

⁸⁴ C.G. Weeramantry, *International Law and the Developing World: A Millennial Analysis*, 41 HARV. INT'L L.J., 277-86 (2000).

note that 'the world would be a better place to live in, if certain elementary principles of the Hindu conception of the law of war can be incorporated in the modern Geneva Conventions.⁸⁵

The modern laws of war were developed mainly by The Hague Peace Conferences of 1899 and 1907, and in the four Geneva Conventions of 1949 and the two 1977 Additional Protocols thereto. India is party to the four Geneva Conventions of 1949 and has incorporated them into its municipal law. The fact lies that if the modern laws of war were to require that when war breaks out fighting must be conducted on the basis of 'like with like' or by using like weapons, it would not only minimize the impact of war but would also deter aggression and make war more humane.⁸⁶

India stands tall among members of the world community that it has never waged a war but has merely defended itself in case of Indo – Pakistan war in 1948, Indo- China war in 1962, Indo-Pakistan war of 1971 and in the last war with Pakistan in 1999. In 1971 India went for a 'humanitarian intervention' in Bangladesh on account of huge influx of refugees into Indian soil and resorting peace, tranquility and democratic values in Bangladesh. India has also followed *samyak dharma* as it has been honoring the mutual agreement between Bangladesh – India – Pakistan on the Reparation of Prisoners of War and Civilian Internees signed by India on April, 9, 1974.

The existence of these traditional rules on warfare may amount to custom and may indicate a source of humanitarian law other than the Conventions and the Protocols. Even if such custom may not give rise to universally applicable principles, they may constitute regional principles of international law.⁸⁷ This might still be the western way of undermining the universality of Hindu and other regional principles of conduct of war, for it may be beyond their competence to comprehend the same. It can definitely be concluded that these principles of warfare are genuine evidence of ancient Indian chivalry and of priestly influence and teachings.⁸⁸ Use of these principles by humanitarian lawyers will greatly enhance the progress of the law in this field.⁸⁹

⁸⁵ K. R. R. Sastry, *Hinduism and International Law, Recueil des Cours*, 117 ACADEMIE DE DROITE INT'L 503, 567 (1966); Surya Subedi, *The Concept In Hinduism Of Just War*, 8 J. CONFLICT & SEC. L., 339 – 361, 339 (2003).

⁸⁶ K. R. R. Sastry, *Hinduism and International Law, Recueil des Cours*, 117 ACADEMIE DE DROITE INT'L 503, 507- 614 (1966).

⁸⁷ Asylum Case, ICJ Rep 1950, 266.

⁸⁸ Bimal N. Patel, *Chapter XXI - India*, in OXFORD HANDBOOK OF HISTORY OF INTERNATIONAL LAW, 534 (Bardo Fassbender, Anne Peters, Simone Peter & Daniel Högger eds., 2012).

⁸⁹ M. Somarajah, *An Overview of the Asian Approaches to International Humanitarian Law*, 9 Aust. YBIL 238, 244 (1980).

Hinduism, as rightly interpreted by the Hon. Supreme Court of India as a 'way of life'⁹⁰, will continue to show light to modern thinkers to revisit, relook and reshape the scope, application and effectiveness of the 'Law of War' more broadly put as the domain of International Humanitarian Law Regime.

Om Sarve Bhavantu Sukhinah

Sarve Santu Nir-Aamayaah |

Sarve Bhadraanni Pashyantu

Maa Kashcid-Duhkha-Bhaag-Bhavet |

Om Shaantih Shaantih Shaantih | |

Om, May All become Happy,

May all be Free from Illness,

May All See what is Auspicious,

May no one suffer,

Om Peace, Peace, Peace.

⁹⁰ Yeshwant Prabhoo .v. Prabhakar Kashinath Kunte 1996 (1) SCC 130.