

JURISPRUDENCE IN AND AS *MAHABHARATA*: AN EDIFYING EPIC

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Unfortunately, the rise of Hindu right wing fundamentalist politics has ensured that a number of people are diffident about dealing with ancient texts such as *Mahabharata*. A close scrutiny of the text, however, shows that it is not necessarily religious.¹ *Mahabharata* offers plenty of instances to grapple with moral dilemmas. The characters in the epic are, like lesser mortals akin to us, fallible. They grapple with moral choices that have to be made in day-to-day life. There is a wide array of congruence between legal philosophy (jurisprudence) and *Mahabharata*. The aim of this opinion is to delineate the jurisprudential learning from *Mahabharata* in the backdrop of recently published book on *dharma* by India Unbound author Gurcharan Das.²

Are black-letter law arguments sufficient? Or, should law bother about moral nuances? After being dragged in the assembly hall when Yudhishtira loses Draupadi in a game of dice, she utilizes law in the first instance: whom did you lose first, yourself or me.³ Her legal question goes unanswered. Draupadi, then raises a moral query - what is left of the *dharma* ("righteousness") of the kings? Even the elder statesman Bhishma avoids the question by stating that *dharma* is subtle and hence there is no clear answer.

Society, nevertheless, constantly faces such dilemmas and cannot afford to take a Bhishma like approach. Even if *dharma* is subtle, legal reasoning and judicial decision-making is inevitable. Whether a mentally challenged woman has the right of abortion may involve subtleties of *dharma*, but the Supreme Court cannot wash its hands off it.⁴ What is lawful may not necessarily be right and vice-

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¹ This is perhaps true of most so-called religious texts.

² GURCHARAN DAS, *THE DIFFICULTY OF BEING GOOD: ON THE SUBTLE ART OF DHARMA* (2009) [hereinafter "Das"].

³ *Id.*, at 34.

⁴ *Suchita Srivastava v. Chandigarh Administration*, AIR 2010 SC 235 (Supreme Court of India).

versa. In this sense *dharma* is akin to “morality” when Natural Law Theory asserts that there is a necessary connection between law and “morality”.

The classical Natural Law Theory was for a long time associated with God. In order to expand the reach of the theory, Hugo Grotius, the father of international law, was the first to delink Natural Law Theory from God by suggesting that: “What we have been saying would have a degree of validity even if we should concede that which cannot be conceded without the utmost wickedness, that there is no God, or that the affairs of men are of no concern to Him.”

Interestingly, *Mahabharata* does not place the agency of *dharma* on God. As noted above, Draupadi in her desperation appeals to *dharma* of the kings. None of the participants in the assembly invoke God to answer the query on *dharma*. Indeed, in the famous Krishna-Arjuna dialogue moments before the war, though the most famous verse is to “be intent on the action, not on the fruits of action,”⁵ it is not the compelling argument. Arjuna remains unfazed. Krishna’s ultimate argument is that of destiny where Arjuna realizes that he is merely a tool for what has already been ordained. Reliance upon the argument of destiny may indicate entry of God through the backdoor. However, the final words of Krishna to Arjuna are instructive – invoking the criticality of human agency he says: “This knowledge I have taught is more arcane than any mystery - consider it completely then act as you choose.”⁶ The ball is back in Arjuna’s court.

The philosophy of *Mahabharata*, like Natural Law theory is acutely empowering. It places the agency on humans. Unlike the formalist Exclusive Legal Positivism, it does not believe that law has an authority and hence there is an obligation to obey law qua law. It does not argue that a norm would lose its authoritativeness if it requires norm subjects to decide what the norm is.⁷ Clearly, *Mahabharata* does not reflect a black and white worldview. It takes cognizance of the shades of grey. Indeed, grey is ubiquitous. *Mahabharata* does not intend to fully settle the disputes of *dharma*. The opening verse in *Bhagavad Gita* is “*dharmakshetre kurushetre*” indicating that it is not mere war but “just war” with humongous moral connotation. However, competing claims to the throne on behalf of the Kauravas and the Pandavas are dubious. Duryodhana refuses to grant the Pandavas “even five villages” though King Dhritrashtra had already divided the

⁵ DAS, *supra* note 2, at 95.

⁶ DAS, *supra* note 2, at 99.

⁷ See generally Andrei Marmor, *Exclusive Legal Positivism*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 117 (Jules Coleman & Scott Shapiro eds., 2002).

kingdom. The Pandavas' postulation as heirs apparent to the throne is equally unfair as their father Pandu was younger to Dhritrashtra. As in life so in law there is a constant struggle between competing evils. The jurisprudence in *Mahabharata* grapples with choosing between the lesser of the two evils. Should the Kauravas representing what is wrong with the world be defeated through impure means?

Krishna's answer is in affirmative owing to the choice of lesser evil. This is similar to Professor H.L.A. Hart's remark in the celebrated Hart-Fuller debate that the choice of lesser evil could be in certain circumstances be preferable.⁸

The upshot of *dharma* in *Mahabharata* is complex. Like Kaushika who chose the *dharma* of *satya* (truth) over *ahimsa* (non-violence) but was condemned to hell,⁹ merely because the agency of interpretation lies with human beings, it does not necessarily guarantee accurate understanding of critical morality. Perhaps *Mahabharata* had *dharma* in mind when it somewhat hubristically stated: "what is here is found elsewhere; what is not here is nowhere."¹⁰ Nevertheless, what is clear from the Natural Law Theory as well as *Mahabharata* is that human reason is capable of exploring the truth called *dharma*. Slavery and *sati* may have been part of conventional morality in the past. However, it is arguable whether they ever constituted critical morality or *dharma*. *Sati* and slavery were abolished not because of a Bhishma like approach of avoidance but owing to society's ability and willingness to come to grips with reasonableness. The Lady Justice Justitia may be blindfolded but the voyage of *dharma* ought to continue.

⁸ Dealing with the case of a German woman who sought to get her husband indicted under a Nazi law during Second World War, Professor H.L.A. Hart said, "There were, of course, two other choices. One was to let the woman go unpunished; one can sympathize with and endorse the view that this might have been a bad thing to do. The other was to face the fact that if the woman were to be punished it must be pursuant to the introduction of a frankly retrospective law and with a full consciousness of what was sacrificed in securing her punishment in this way," H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 619 (1958).

⁹ "...Kaushika, an ascetic without much learning... is accosted one day by a group of thieving cut-throats who are seeking the man who had witnessed their crime. Kaushika had seen the witness run into the forest and he knows that if he reveals it, he is issuing a death sentence. He must choose between the *dharma* of *satya*, telling the truth, or of *ahimsa*, saving a life". See *supra* note 3, at 71.

¹⁰ DAS, *supra* note 2, at xli.