Published in *The Journal of the Oriental Society of Australia* 43 (2011): 103–130.

The Idea of Hindu Law

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> Hindu Law has the oldest pedigree of any known system of jurisprudence, and even now it shows no sign of decrepitude (J. D. Mayne).[1]

The genealogy of 'Hindu law' is a complicated matter itself. Hindu law so understood in modern times is arguably an heir to the bifurcated system instigated during the British colonial period in the form of Anglo–Hindu law that preserved basically family law and certain other 'private', i.e. community, mores which presumably governed the Hindus. Was there any awareness on the part of the colonial masters that the parent law from which personal law of the Hindus had been split off could have had a longer and more substantive history? Apparently there was. The term 'Hindu law' was, in Davis' words, 'coined by British Orientalists and administrators in the later eighteenth century to refer to the general system of law prevailing among the Hindu majority *before* the British colonial encroachments, as opposed to the "Muhammadan law" of India's politically dominant Mughal dynasty'.[2] Hindu legal history accordingly comprises three general periods: classical Hindu law (ca 500 BCE–1772 CE), Anglo–Hindu law (1772–1947) and modern Hindu law (1947–present).[3] For the purposes of the present paper, Hindu law will be taken to fall within the pre-colonial, that is, classical or traditional, period and the discussion here will be confined to gaining an understanding of what this idea of Hindu law might look like today and whether it is deserving of the descriptor 'law' as *law* is understood in the modern and postmodern era. Is there such a thing as Hindu law? Or might we need to introduce a broader nuance, marked by *difference*, and a strongly sustainable variant to the currently privileged concept of 'law': thus Hindu *law*. We shall begin without the latter presumption but argue toward its desirability.

In pre-colonial traditional India, what could be referred to as the legal process of the Hindus is said to have been functioning in much the same way as it had done for millennia but, unlike post-Enlightenment European law, it was not a centralised institutional apparatus, formulated and administered by a 'state' independently of spiritual or religious and cultural practices. Rather, law was a concept inclusive of tradition, custom and religion, and represented a transcendental obedience to morality. Hindus have never been governed by a central church structure and hierarchy as Christians and Muslims have in their respective histories, or by a Pope who 'lays down the law' for all Hindus. Galanter observed that in 'traditional India, many groups (castes, guilds, villages, sects) enjoyed a broad sphere of legal autonomy, and where disputes involving them came before public authorities, the latter were obliged to apply the rules of that group. That is, the groups generated and carried their own law and enjoyed some assurance that it would be applied to them.'[4] There is some truth perhaps to this

1. John D. Mayne, *Treatise on Hindu Law and Usage* (Madras: Higginbotham, 1878), v.
2. Donald Davis, Jr, 'Traditional Hindu Law in the Guise of "Postmodernism": A Review Article', Review of *Hindu Law: Beyond Tradition and Modernity* by Werner F. Menski, *Michigan Journal of International Law*, 25, no. 3 (2004): 735–49. Dieter Conrad likewise notes: 'British courts, by systematically referring to *dharmaśāstras* as law books and further by introducing their own techniques of binding judicial precedent, virtually created a coherent structure of common Hindu law where before there had been 'a congeries of legally self-sufficient communities and sects.' Conrad, 'The Personal Law Question and Hindu Nationalism', in *Representing Hinduism: The Construction of Religious Tradition and National Identity*, ed. Vasudha Dalmia & H. von Stietencron (New Delhi: Sage Publications, 1995), 306–37.
3. I would have thought 1950 with the adoption of the Constitution, but I defer to Davis and Menski on this.
4. Marc Galanter, *Law and Society in Modern India* (Delhi: Oxford University Press, 1989, 1992), 237; however, Galanter has been criticised, by Menski among others, for seeing a gap, in his overall thesis, between law and society, between legal system and its historical rootedness in a society, and its possible incongruence with its

generalisation, but it does not tell us from where the groups obtained the legal principles that determined the rules, and how did they evolve new laws? In other words, what has been the *source* of law for the Hindus, whether in disparate groups or collectively?

The common belief is that traditional (and for that matter its heir in the colonial and modern personal law system) Hindu law is informed by three originary sources. The first of these is *Śruti* (or *shruti*), the 'divinely revealed' or, better, 'heard word' (being *apauruṣeya* or 'authorless'[5]) which forms the central *Vedic* corpus. The Vedas (or Veda) are a collection of ritual and liturgical hymns, *saṃhitās*, ceremonial guides, *brāhmaṇas*, forest-treatises, *Āraṇyakas* and philosophical expositions, *Upaniṣads*. These are collated under four canons: *Ṛgveda*, *Sāma-veda*, *Atharva-veda* and *Yajur-veda*. They can be dated anywhere between 1500 BCE to 600 BCE. One of the preeminent themes that motivates much of Vedic thinking is the consideration of a higher cosmic order (*ṛta*, superseded later by the term *dharma*), or transcendence, that regulates the universe and provides the basis for the growth, flourishing and sustenance of all the worlds—be that of the gods, human beings, animals and eco-formations. So conceived, *ṛta* could be seen as 'law'—the law of the natural world and of human beings. Hence, Satyajeet A. Desai in his reworking of *Mulla's Principles of Hindu Law* emphasises that for the ancient Hindu his 'law was revelation, immutable and eternal . . . Shruti [as Vedas] was the fountainhead of his law'.[6]

Next is *smr̥ti* (*smr̥ti*), the immemorialised or 'memorised' *tradition*[7]—inclusive of the commentaries and digests (*nibandhas*)—which as a corpus is transmitted through the sages and scribes and as such forms Hinduism's literary and religious canonical texts with implications for social and cultural, also political, practices.[8] The *smṛti* texts comprise, in particular, the six *Vedāṇgas* (the auxiliary sciences in the Vedas), the epics of the *Mahābhārata* and *Rāmāyana*, the *Dharmasūtras* and *Dharmaśāstras* (or *Smṛtiśāstras*), *Arthasaśāstras*, the *Purāṇas* and *kāvya* or poetical literature, which regulate Hindu social order. The third source is the unwritten *sadācāra*, meaning 'good conduct of the conscientious (*ātmatuṣṭī*)', or the exemplary behavior of those who understand and execute in their own lives the moral–legal teachings of the *śāstras*. *Sādācara* only marginally includes the customs and practices of the people.[9] *Śāstras* are, in Pollock's words, 'cultural grammars' that both reflect and regulate practice (*prayoga*).[10]

Now, these three foundational elements—scriptural authority, tradition, 'exemplary conduct' and only marginally custom—are said to underwrite the central principle of Hindu life, known as *dharma* (righteous order and obligations).[11] And it is further added that the legendary 'lawgivers', such as Manu and, after him, Yājñavalkya, formalised and codified the laws in *Manusmṛti* (also known as *Manusamhitā* or *Mānava-dharmaśāstra*), and in *Yājñavalkyasmṛti* (third–fourth centuries CE) and the

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social and cultural settings, lacking as it may also in an integrated purposiveness. See Davis, 'Traditional Hindu Law', n 7.

5. It is the scholastic system of the Mīmāṃsā that has gone to the greatest length to preserve the epistemological and moral autonomy of the Vedas, bereft of a supreme transcendent authority. See P. Bilimoria, 'The Idea of Authorless Revelation', in *Indian Philosophy of Religion*, ed. Roy W. Perrett (Dordrecht: Martinus Nijhoff/Kluwer Academic Publishers, 1989), 143–66.

6. Satyajeet A. Desai, ed., *Mulla's Principles of Hindu Law*, 17th edn (New Delhi: Butterworths, 1998), 3.

7. Flavia Agnes describes the *smr̥ti* as 'the memorised word', in her magnum opus *Women and Law in India* / with an introduction (Delhi: Oxford University Press, 1999), 12, while Robert Lingat's seminal work *The Classical Law of India* (New Delhi: Oxford University Press, 1998), 7–8, simply describes *smr̥ti* (or *smṛti*) as 'tradition'.

8. A. M. Bhattacharjee, *Hindu Law and Constitution* (Delhi: Eastern Law House, 1994) cites several modern scholars and writers on Hindu Law who appear to be committed to this characterisation, notably *Mulla's Principles*, 77; Mayne, *Treatise*, 19. Werner F. Menski also takes them and a few others to task on this score. And Asaf A. A. Fyzee repeats the stereotype, introducing God in connection with dharma for the Hindus, in *Outlines of Muhammadan Law*, 4th edn (Delhi: Oxford University Press, 1998), 15.

9. Mulla for his part lists 'Custom' as the third source; Mayne offers (1) the *smṛti* 'or the *Dharmaśāstras*'; (2) Commentaries and Digests, and (3) Custom.

10. Sheldon Pollock, 'Playing by the Rules: Śāstras and Sanskrit Literature', in *The Śāstric Tradition in Indian Arts*, ed. A. L. Dallapiccola et al. (Weisbaden: Steiner, 1989), 301–12, 301.

11. See also Lingat, *Classical Law*, 7–8. Derrett includes *śruti* and *smṛti* under *Dharmaśāstras*, which is the only category he otherwise notes as the sources of 'Anglo–Hindu Law'. Paras Diwan lists (1) *śruti*, (2) *smṛti* (3) Digests and Commentaries and (4) Custom, whereas Tahir Mahmood describes Hindu Law as 'that body of law in its entirety which *originated* from *religious scriptures* of various indigenous communities of this century'. All cited in Bhattacharjee, *Hindu Law*, 13. There are thus permutations and variations to the same theme.

various *nibhandas*, which gradually became the dominant sources of Hindu law and governance of all aspects of Hindu life under the patronage of Brahmins and *kṣatriya* rulers in cohort. Manu himself endorsed the three foundational sources, adding 'conscience' as the fourth source, as this verse (12) states:

> The four marks of *dharma*, they say, are (1) the Vedas, (2) the *smṛti* (tradition) (3) the conduct of good people and (4) what is pleasing to oneself (*Vedāḥ smṛti | sadācāra | svasya ca priyamātmāna*); (the good people know the Veda); 'Scriptures' should be recognised as Veda, *smṛti and dharmaśāstras.* These two (as the highest authority) should never be called into question.[12]

The view represented above, however, is probably a product of medieval scholasticism and is contestable. It has recently come under severe criticism and qualification by scholars of Hindu legal history and certain Indian feminist writers also, as we shall discuss in developing an understanding of the complexity and variegated pastiche that is often characterised to be a homogenous or univocal structure under the rubric of Hindu law.

There are doubtless a good number of scholars who have written on Hindu law—Mulla, J. D. Mayne, Paras Diwan, J. Duncan M. Derrett, P. V. Kane, Robert Lingat, A. M. Bhattacharjee, Donald Davis, Jr, Werner F. Menski. Menski's work is interesting,[13] as he challenges several distortions in the conceptualisation of Hindu law in modernist (colonial, Western and post-colonial) representations in respect of the origins and the development of the formalist legal system, that has as its background model the legal positivism and European (beginning with Roman) system of the 'rule of law', among other legalistic presuppositions, culminating in the Code Napoleon and (British) Black Letter Law. While we may not share all the assertions and scholastic reworking that Menski offers, for the purposes of this paper we find Menski's work to be instructive. In many ways Menski reinforces what Indian moral philosophers have been arguing for some time, namely that Hindu (and, for that matter, much of Indian) law cannot be separated from morality and culture-specific ethics in the broader sense of practices and social realities or relativities on the ground.[14] To do so is to impose the template of a much later development of the idea of 'law'—from the natural law tradition and the Roman secular version[15]—which is anathema and a misnomer that is best discarded in the interest of a more nuanced understanding and appreciation of whatever it is that we in the modern times—and Menski certainly does for heuristic reasons—retain the generic nomenclature 'Hindu law'.

Menski has his critics too, such as Donald R. Davis, Jr, who argues that Menski goes too far in sifting out the scholastic tradition from the dialectical impact on customary laws, both as a historical fact and as a hermeneutical reality, for otherwise what would be the essential 'Hindu-ness' of customary laws the Dharmaśāstras allegedly textualised?[16] This is a pertinent question. One might respond that, well, 'Hindu-ness' as a trope might itself be a suspect candidate here and, conversely, the suggestion that the formation—and not just the reiteration or reformulation—of law was supervenient upon the active agency of the textual or scholastic tradition. As we shall see, Kauṭilya could talk about *dharma* (better predicated as *svadharma*) as a virtuous and normative order of governance, or simply a

12. II.10–12, *Manu's Code of Law: A Critical Edition and Translation of the Mānava-Dharmaśāstras*, trans. Patrick Olivelle (Oxford University Press, 2005), 94, 405. II.12 is to be read in conjunction with surrounding verses II.6–II.13.

13. Werner F. Menski, *Hindu Law: Beyond Tradition and Modernity* (New Delhi: Oxford University Press, 2003).

14. This position is discussed in relation to general theory of morality or ethics in the Indian context within which the practices of law, jurisprudence as legal hermeneutics, the role of precedence, natural law disquisitions and judicial decision making were included: see P. Bilimoria, Renuka Sharma and J. Prabhu, eds, *Indian Ethics, Vol. 1: Classical and Contemporary Challenges* (Aldershot: Ashgate, 2006; New Delhi: Oxford University Press, 2008), especially 'General Introduction: Thinking Ethics, India and the West', Introduction to Part A, 'Vedas to the Gītā: *dharma*, Rites to Rights', chapter 1, J. N. Mohanty, '*Dharma*, Imperatives and Tradition: Toward an Indian Theory of Moral Action' (esp. 75–77, under 'Law'). Also P. Bilimoria, '*Being and Text*: Dialogic Fecundation of Western Hermeneutics and Hindu Mīmāṃsā in the Critical Era,' in *Hermeneutics and Hindu Thought Towards a Fusion of Horizons*, ed. R. Sherma and A. Sharma (Dordrecht: Springer), 43–76.

15. See Roger Scruton, *The West and The Rest: Globalization and the Terrorist Threat* (New York: Continuum, 2002), 21; also discussed by Galanter, *Law and Society*.

16. Personal communication and his review of Menski.

pervasive principle of justice, without needing to trace or reduce the ideal to some prior redaction of texts and extant scholastic formulations—though perhaps this much is arguably presupposed.[17]

So what is contestable about the view we started with in the second paragraph that has unleashed the controversy? First let us elaborate on what exactly are the view and the claim that it underpins. It is that, in the first instance, the Scriptures are the source of *dharma*. We shall begin with the first of the institutes or sources that supposedly prescribes *dharma*, namely, the Vedas, for in principle every rule of *dharma* must indeed locate its authority in the Vedas.

But before that a word on the conception of *dharma* in this juxtaposition. The common understanding equates *dharma* with duties and precepts or prescriptions. *Dharma*, however, is not simply a set of duties for it encompasses the moral law, not unlike the concept of natural law (but without the excessive transcendental or theological element).[18] This all-embracing conception is derived from the root *dhṛ*, meaning 'to form', 'uphold', 'support', 'sustain' or 'hold together'. More concretely, *dharma* may denote 'fixed principles', 'order', 'righteousness' and 'truth'. It connotes the idea of that which maintains, gives *order* and cohesion to any given reality, and ultimately to nature, society and the individual; and it is inclusive of the respective obligations, duties including social and individual duties, ethical living and discharging of debts needed to ground the human community and allow it to flourish, etc. It would seem to follow that on the basis of this rather abstract principle Hindu lawmakers and ethicists devised comprehensive systems of social and moral regulations for each of the different groups, subgroups (caste, rulers, monarchs, etc) within the Hindu social order. Certain universal virtues, duties and norms also come to be specified, such as non-injury or non-violence, non-coveting and not lying. Thus the end of *dharma* has to be fulfilled in terms of one's place in society and in nature, supplemented with the practice of the universal norms. Mohanty sums up the broader reach of *dharma* most aptly. Thus:

> According to the Hindu tradition, *dharma* in the strict sense (i.e., excluding the law codes and rules of policy) are expressed by injunctive (prohibitive) sentences of the Vedas. The later *dharmaśāstras* clarify, expound and explain them. These injunctions embody rules that are of various sorts: they may be obligatory or occasional; they may pertain to one's *varṇa* (rendered 'caste') or to one as a number of a family (*kula*), or they may be for all humans (*sādhāraṇa*). Of many of them, it is true to say that they pertain to a person's role and status in society—but this is not true of all of them: the so-called *sādhāraṇa* or common *dharma*s are not so. What is common to them all is that they are all expressed in imperatives.[19]

So far so good. But here is the rub, as we wish to argue.

Vedamūlatva: Are Vedas the Touchstone of Hindu Law?

The Vedas certainly ordain injunctions and moral responsibility toward performance of sacrifice (*yajña*); and rules are set down for the correct recitations and incantation of *mantras* accompanying this performative act. There are even exhortations to certain 'alterity' virtues, such as gift giving (*dāna*), welcoming the guest (*atithi*) and care for the ancestors.[20] Disregarding the distinction between mandatory (deontological) and optional or hypothetical (consequentionalist) imperatives, the question arises could injunctions or imperatives possibly exhaust the scope of *dharma* where *Dharma* is to serve as 'law' and rules in matters of policy? Secondly, what we have is a seemingly motley collection of codes, but no attempt is made to unify them in a system or under a single moral theory, *or deduce them from a principle*. Without such a process, the function of law is not feasible. Third, they appear not to be grounded in matters of fact, but are rather about what ought to be the case ('ought' is conflated with 'is' or the distinction is not clearly made).[21] By and large, the 'ought' precepts or prescriptions seem

17. *Arthaśāstra*, 1:iv; *q.v.* P Bilimoria, 'Kauṭilya', in *Routledge Encyclopedia of Philosophy*, ed. Edward Craig (London: Francis & Taylor, 1998), 220–22.

18. Discussed in 'General Introduction', in *Indian Ethics, Vol. 1*.

19. Mohanty, '*Dharma,* Imperative and Tradition', 76.

20. Laurie L. Patton, 'The Fires of Strangers: A Levinasian Approach to Vedic Ethics', in *Indian Ethics, Vol. 1*, 119–47; and Maria Heim in chapter 9 in the same volume.

21. I owe these insights to Mohanty, '*Dharma,* Imperative and Tradition'. See also Matthew Kapstein's discussion in the chapter 'Indra's Search for the Self and the Beginnings of Philosophical Perplexity in India', in his *Reason's Traces* (Boston: Wisdom Publications, 2001), 53–76.

hardly to go beyond the immediate calling to the sacrificial pit and the eulogies to the gods. So understood, *dharma* fits uncomfortably into the rubric of law contrary to the received wisdom, although it may provide a 'limit concept' for such a legal trajectory were the society to avail itself of this. As Lingat also acknowledges, there is little in the way of rules of *dharma* in the Vedic texts. 'Strictly speaking, the Vedas (*samhitās*) do not even include a single positive precept which could be used directly as a rule of conduct. By contrast the *brāhmaṇas*, the *āraṇyakas* and the *upaniṣads* contain numerous precepts which propound rules governing behaviour.'[22] And as Rocher reminds us there are even fewer rules of law in the *śruti*.[23] Laurie Patton too comments that '[A]s compendia of explicit statements about *dharma*, early Vedic texts are woefully inadequate. The Vedic world is usually placed low on the list of sources for Hindu ethics for similar reasons.'[24]

So why does a Hindu affirm that *dharma* rests entirely upon the Veda? Lingat has a persuasive explanation, which is worth citing at some length:

> [T]he word Veda does not mean in that connection the Vedic texts, but rather the totality of Knowledge, the sum of all understanding, of all religious and moral truths, whether revealed or not. These truths are not human entities; they are imposed upon man [sic] who must simply submit to them; they exist by themselves and have always existed. They form a kind of code with infinite prescriptions of which only the Supreme Being can have perfect knowledge. The eternal code was revealed by him to certain chosen ones, and that is what is called *śruti*. But only part of that Revelation could be communicated to mankind; a good deal of it has been lost, moreover, due to the weakness of human memory. Therefore the Vedic texts are far from representing all the Veda. When a rule of *dharma* has no source we must conclude that it rests upon a part of the Veda which is lost or somehow hidden from our view. It is this hypothetical or symbolic code, rather than the surviving Vedic texts, which the most ancient authors, the writers of the *dharmasūtras*, have in mind when they proclaim that the Veda is the primary source of *dharma*. They hardly do more thereby than express their adherence to common belief, without attaching any particular value to that source.[25]

The point is taken. Apart from the qualm one may have about the postulation of a Supreme Being (God) in the Vedic worldview—which the Mīmāṃsaka and possibly an Advaitin also will be inclined to vehemently take exception to—as well as the claim about the 'lost, or hidden, Vedas', or that even the Abrahmanic term 'Revelation' is appropriate here,[26] Lingat is basically correct in his assessment that the Vedas are only in a perfunctory sense regarded as the inexorable foundation and source of the rules of *dharma*. Furthermore, it is because *śruti* has exhibited—contrary to the later *smṛti* and the law books—a plasticity of meaning, an inexhaustible reservoir of meaning which is not exhausted by any system, that it enables variable interpretations and appropriation.[27] Mayne was even more emphatic, disregarding the devotional sentiment with which Hindus look upon the Vedas as the paramount source of knowledge in all aspects of their lives, by declaring that the '*Śruti, however, has little, or no, legal value. It contains no statements of law as such*, though its statements of facts are occasionally referred to in the *Smr̥ti*s and the Commentaries as conclusive evidence of a *legal usage*.'[28] Other scholars such as Olivelle and Wezler reinforce the marginality of the term *dharma* in the Vedas, which in any case comes to mean something quite different in the Dharmśāstra.[29] Training in the Vedas might at best

22. Lingat, *Classical Law*, 8.

23. Ludo Rocher, 'Indian Reactions to Anglo-Hindu Law', *Journal of the American Oriental Society* 92, no. 3 (1972): 419–24. Also Ludo Rocher, 'Hindu Conceptions of Law', *Hastings Law Journal* 29, no. 6 (1978): 1293.

24. Patton, 'The Fires of Strangers', 121.

25. Lingat, *Classical Law*, 8.

26. See Bilimoria, 'The Idea of Authorless Revelation'.

27. Mohanty, '*Dharma*, Imperatives and Tradition', 13; while what Mohanty goes on to say may well be true to ethics or morality, this insight cannot be extended to *dharma* as *law*. Thus: 'The Hindu understanding of *dharma* as embodied in the imperatives laid down in the *śruti* preserves the idea of ethics as rooted solidly in that tradition which was founded by those texts, but which those texts have permitted us to reinterpret ever anew.' Mohanty, '*Dharma*, Imperatives and Tradition', 13.

28. Cited in A. M. Bhattacharjee, *Hindu Law*, 15 (Mayne, *Treatise*, 11th edn [1953], 19, emphasis added by Bhattacharjee).

29. Discussed in Donald Davis, Jr, 'A Realist View of Hindu Law', *Ratio Juris* 19, no. 3 (2006): 292, n 11, citing Patrick Olivelle, 'The Semantic History of Dharma: The Middle and Late Vedic Periods', *Journal of Indian Philosophy* 32 (2004): 491–511, and Albrecht Wezler, 'Dharma in the Veda and the Dharmaśāstras', *Journal of Indian Philosophy* 32, no. 5 (2004): 629–54. Curiously, Davis traces the characterisation of *dharma* as 'positive

invest in the individual the *adhikāra*, that is to say, the entitlement to pronounce on the constitutive formalism of *dharma,* and thereby proffer decisions on a matter at law, without recourse necessarily to the substantive contents of the Vedas at the risk of transgressing the orthodoxy as well. 'The theological connection of the Vedas and Hindu law is primarily a distant backdrop against which legal philosophy develops and the actual business of law is conducted'.[30]

Reflecting here from a different quarter, the famous Lacanian political theorist Slavoj Zîzêk would suspiciously discern in the erstwhile discourse that underscores the Vedas as the founding source of Hindu law (*vedamūlatva*) an implicit and unstated *underside*. He would argue that, not unlike most 'mega-legal' and superstructure discourses in other major traditions, it is a product of an 'ideological fantasy'. What Zîzêk means is that each system has its own defining story in terms of its foundations that gets re-narrated retrospectively, even as it conceals or 'represses' the *violence* of these foundations; further to that, it is this ideological frame as *doxa* (received wisdom) that determines how the subject ought to interpret the laws' frozen and forbidding letters.[31] The Mīmāṃsā's ahistoricisation of the Vedas (through its doctrine of *apūrvāpaurṣeyatva* of *śruti*) is charged by Pollock to underpin just such a move, its immense contribution to the growth of Hindu jurisprudence notwithstanding (which is a separate philosophical function of the Mīmāṃsā).[32] That hermeneutic of postmodern suspicion and an echo of the Zîzêkian tone is certainly detectable in current scholarly dismissal of the discourse that is being contested here.

Are *Smṛti*s the Source?

As described above, the *smṛti*s represent a variegated assortment of literary corpus whose knowledge base is said to have been derived from or inspired by the *memory* of the rules of *dharma:* a sort of consensual recollection to which Tradition commits its adherence. But this suggests at best a kind of temporal imaginary: long back there was this pristine and perfect knowledge about the moral order and rules governing the same, but we seem to have become distanced from the source; however, we are still able to recollect the traces and rudimentary principles for deriving rules that are incumbent upon us in our present situation. (It is not unlike Plato's use of *mimesis* in the *Theaetetus.*[33]) The precise relation between *śruti* and *smṛti* has been a matter of much scholastic debate, and we need not go into that here for our purposes, suffice it to say that for 'daily practices' (*gṛhya*), and in the extra-sacrificial context, *smṛti* are no less authoritative than *śruti* (because *smṛti* simply immemorialise the precepts already inscribed in the Vedas,[34] or they iterate in lieu of the Vedas where the Vedas are silent).

If we take *dharmasūtras* to belong to the corpus of *smṛti* as well, as Manu for one would urge us to, then the *dharmasūtras* have to be taken seriously as the next likely candidate for the source of Hindu law.

Robert Lingat begins with a focus on certain major *dharma-sūtras,* such as Baudhayāna, Āpastamba and Vasiṣṭha, and argues for their importance in tracing the 'birth of law' in Indian antiquity because of their reworking of the rules of ritual performance into an appreciation of *dharma* as 'duty' underlying all that liturgical formality. Particularly in the post-Vedic period, the *ācāryas* of the Brāhmanical schools 'completed their teaching of rituals by speculations which brought out the moral and religious aspects of the rite, and explained its significance and obligations which flowed from it'.[35] And so one finds in tandem 'numerous rules tending to define social relationships and to regulate man's activities within their group—and from this time onwards there is the appearance of something resembling

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law' to the arguments of Paul Hacker, Wilhelm Halbfass and Jim Fitzgerald, in the sense that the eternal, transcendental—natural law-like—character of the Vedas provides empirical and historically situational framework for positive law (*dharma/ācāra*). This view is being set aside here.

30. Davis, 'A Realist View of Hindu Law', 292–93.

31. Matthew Sharpe, 'The Philosopher's Courtly Love? Leo Strauss, Eros, and the Law', *Law and Critique* 17, no. 3 (2006): 357–88; see n 7 where he draws on two of Zîzêk's works.

32. See Bilimoria, 'The Idea of Authorless Revelation'.

33. Where x tells us that knowledge of the truth of 5 + 7 = 12 is not something we gain from the world ('facts') but through a recollection of what we have known in our previous celestial lives.

34. This is the view of the Mīmāṃsakas, Śabara and Kumārila. Various exegetical devices were formulated to make this strong connection.

35. Lingat, *Classical Law*, 28.

legislation'.[36] And this processural move clinched an emergent bond between *dharma* and law. The theories of *varṇa* (caste) and *āśrama* (stages of life) are given as examples of the ways in which the *dharmasūtras* avail themselves of a framework or two within which to lay down duties of individuals according to their caste and 'station' in life. And, of course, much energetic ink is expanded by the authors of these texts in reasoning through and providing justification for the hierarchical ordering of the caste (*genea, mer-*) and the diverse 'mixed caste' groups (*jātis*, to be more specific) in more temporal terms than upon the sacramental basis afforded in the Veda (with its *tri-varṇa* arrangement), however irrational and discriminatory this might all appear to be in hindsight. The intricacies and complexity of the caste system and particularly the question of its origins are matters that should not distract us here, but it needs to be said, as Lingat reminds us, that neither the priestly-aspiring Brahmins nor the authors of the *sūtras* 'invented' the caste classification, much less the system itself. They were confronted by a society that through various historical permutations (partly due to the contact of Ārya-Brahmanic tradition with non-Āryan cultures) had come to be splintered and diversified into a plethora of groupings and racial mixtures and classes of which caste (*jāti*) was just one practising the most diverse range of customs. They needed a theory to help simplify and reduce the innumerable castes, etc. of their day into a more workable system: the schematics of *varṇa*, the four main groups known to the tradition, provided such a 'handy' conduit and prototype of the castes. Apart from codifying custom, their major task was to articulate the rules of living that would help secure the individual's destiny; and they take care to ensure that these rules are not repugnant to *dharma*. Here the edict of Gautama is invoked: 'The customs of countries, of caste (*jāti*), and of families, are equally authoritative, provided they are not contrary to the [sacred] texts' [XI.20].[37] Even the monarch—who is not invested with any power to make laws as such—is cautioned to restrain the four *varṇas* and take into account the customs of his citizens in administering law and due justice.[38] It is because laws in the ancient period, as Altekar points out, were either sacred or secular: 'if the former, they were based upon the sacred texts; if the latter, upon the customs and traditions.'[39] A state that attempted to engender change in custom forcibly faced the danger of being overthrown. It did, however, change over time, but not by moving the noisy wand of legislation, but rather imperceptibly by the silent shifts within custom itself. With the development of administrative systems and growing complexity of society, the state assumed increasing onus for enacting rules and regulations, and the king could now decree administrative and normative ordinances which it was the duty of the subject to obey at the risk of being questioned or arrested by order of the royal court. But still these powers were not as extensive and enforceable as those of the modern power of legislation.

The other mark of the linking of law to the margins of *dharma* in the *dharma-sūtra* period is their move toward furnishing principles for determining punishments and penalties for a range of misdemeanors. A separation is made between religious and penal sanctions (although the language continues to be one of 'expiation of sin' upon undergoing the decreed punishment, etc.). The process is rather secular; the rules of procedure, however, appear not to have made a clear distinction between the civil and criminal, except in areas such as the admission of witnesses and whose counsel the king should take before making a decision on the case before him. Their preoccupation is mostly with family (marriage, in particular) and succession law.

Coming to the *dharmaśāstras* proper, proximately attached to *smṛti* as to the *dharmasūtras*,[40] we find that they are more extensive, expansive in scope and mandate a much larger role to rules of a judicial character, which bring them close to the 'legislative' function.[41] The methodically classified rules in the *dharmaśāstras* are intended to guide the king in his sovereign functions as well as to assist in the administration of justice. 'There we find a branch of science of *dharma* which is tending to disengage itself from others [notably the ritual predilections of the Veda], and to be envisaged as an

36. *Ibid*.
37. *Ibid*., 38.
38. *Ibid.*, and Mohanty, '*Dharma,* Imperatives and Tradition'.
39. A. S. Altekar, *State and Government in Ancient India* (Banaras: Motilal Banarsidass, 1949), 110.
40. The distinction is not so clear-cut, and the *dharmaśāstras* in some accounts encompass the *sūtra*s, since both are concerned with discipline in *dharma*.
41. Lingat, *Classical Law*, 73.

autonomous discipline.'[42] The preeminent authority is enjoyed by the oldest among these, namely, Manu, Kauṭilya, Yājñavalkya and Nārada; the commentaries on these continue into the ninth century CE. The *Mānava-dharmaśāstras* (ca second century CE) is perhaps the most celebrated among these, but equally infamous in view of its excessive bias towards the Brahmanic and ruling elites and its oppressive injunctions in respect of women and the *śūdras*, who are considered in much of the *dharmaśāstras* to belong to the lower rungs of the caste hierarchy. The rules and regulations that Manu tries to embrace comprise many 'paths' (*mārgas*) that people live by in their private and public lives, be that of relation between partners, commercial transactions, disputes related to property and disposition towards animals as well as inhabitants and rulers in neighbouring territories. And a caveat was issued, namely that of *janaganamana*: scripturally sanctioned acts are to be set aside if they appear to be offensive or abhorrent to the people; whereas Kātyāyana decreed that the accepted customs of a country should not run counter to the rules of *śruti* and *smṛti* and that customs repugnant to reason should be abolished forthwith (*Śrauta-sūtra*, III.7; 42); and Nārada would agree that unreasonable laws should be reformed (*Nāradasmṛti*, XVIII.9).

Likewise, if one looks at the *Arthaśāstra*, there Kauṭilya (ca 321–296 BCE) is quite conscious of the diversity from ancient days of the Indian regions and accordingly allows for a degree of flexibility in matters of law and justice (*dharmasthya*). Kauṭilya, at a superficial reading, appears to justify the rigid reign of the 'rod' (*daṇḍa*) wielded by the king. One plausible ground for this edict is that, unless there are calculated controls, the (natural) law of the small fish being swallowed by the big fish would prevail. Jurisprudence, ordinances for regulating civil life and the governance and security of the state are the monarch's chief objectives.[43] Indeed, the king is expected to attend each morning to pleas and petitions from subjects who may come from all walks of life and different caste or subregional groups, including women, the sick, aged and handicapped. When meting out justice, the king or the state is not in a position to make laws; rather the sovereign court's jurisdiction is to negotiate between *dharma* (law), custom or settled community law (*vyavahāra*), transactions or commercial and personal practices and written edicts (*śāstras*). The king may overrule the latter two sources of law, but he cannot put himself above *dharma*, in accordance with which all instances of disputes and contradictory judgments are to be decided (3.1.40–44). This precept entails that the king maintains detailed codes of law and precedents and judges each case by its merit or otherwise in law, and he metes out punishment proportionate to the offence of violation of the codes, but not in whimsical excess. His ministers (*amātyas* or *mantrins*), the *purohita*, the ascetics, even the queen and prince, the gods and above all *dharma* maintain a check and are witness to any possible deviation.[44] Kauṭilya is also credited with having been among the first to set down codes of law (which comes close to the secular codification towards which Hindu Code Bills have been moving this century), as distinct from re-inscripting desirable prescriptions and diverse customary rules, regardless of their moral or philosophical merits, etc.

Thus law compilers such as Manu and Kauṭilya bring the notion of dharma down to earth, as it were, by devising a comprehensive system of social and moral regulations for each of the different groups, sub-groups (caste, rulers, etc.) within the Hindu social system, as well as specifying certain universal duties incumbent on all. Vocational niches, duties, norms and even punishments are differently arranged for different groups, and the roles and requirements also vary in the different *āśrama* stages for the different groups. Before the advent of the *śāstras* (Artha- Dharma- and the Smṛtis) these normative tracts, or law if you will, were preserved in the respective customs of the groups and in the cumulative tradition. Dharmaśāstra describe them as *samayācārika dharmas*, customary rules. The law

42. *Ibid.*

43. P. V. Kane, *Dharmaśāstra ka itihāsa* (Lakhanaū: Uttara Pradeśa Hindī Saṃsthāna Hindī Samiti Prabhāga, 1969–1975), 1:225; *Kauṭilya's Arthaśāstra*, trans. R. Shamasastry (Mysore: Mysore Printing and Publishing House,1960); R. P. Kangle, *The Kauṭiliya Arthaśāstra* (Delhi: Motilal Banarsidass, 1922), Part 2; see also Bilimoria, 'The Idea of Authorless Revelation'.

44. The king's obligation to administer justice in accordance with the principles of legal science (*dharmaśāstrānusāreṇa*; also in *Manu's Code of Law*, VII.128) is the very first verse on injunction in the Second Book (on *vyavahāra*, translated here as 'positive law') in *Yājñavalkyasmṛti* reinforced in the commentary *Mitākṣ arā*. Yājñavalkya maintains that 'a custom which is not opposed to law should be carefully maintained, as also the precedent established by the king's judgments. The learned that assist the king should be versed in the scriptures and study Mīmāṃsā, knowing dharma (religion) as well, and dispassionate toward friends and foes alike.'

courts under the control of the chief justice (*prāḍvivāka*) were responsible for administering such of these rules as pertained to family and social life and personal laws, and created civil and criminal rights, which were enforceable. In time, particularly *varṇāśrama* or caste rules and rules of personal and family law were inscribed into the Smṛtis in which the chief justice therefore had to be well versed.[45] Guided by these rules the judges (*dharmādhyakṣas*, *nyāyakaraṇikas*) sitting in these civil courts enforced *jātidharma* (sub-caste rules), *śreṇīdharma* (by-laws of guilds), *kuladharma* (family traditions) and *deśadharma* (customs of the country, or *jānapadadharma*, as well as *svadharma* (*cf.* Manu I.118 and VIII.14) insofar as they engendered civil and legal rights which may have come under dispute or contestation. Liberal allowances were made for changes in the civil, criminal and customary law, as sanctioned by popular usage and moulded by state guilds. Altekar goes on to observe that '[I]t was the duty of one of the ministers, *viz* the *paṇḍita* [the minister in charge of religion and morality], to find out which practices had become antiquated and to discourage and not enforce them. He was also to advise the government about suitable changes that could be introduced in consonance with the spirit of *dharma* and culture.'[46] Dharma, whether understood as morality, i.e. normative practices and customary rules, or as law (administered by the king and the courts), was never a static, stagnant pond that could not be moved by appeal to conscience (*ātmatuṣṭi*), conciliation (*sāma*), appeasement (*dāma*), difference and dissension (*bheda*), or shifts in the self-understanding of the tradition, or variations between groups and regions.[47] The spirit of the prevailing dharma and culture more often than not dictated the terms of reference of legal deliberations as well as their inscription and re-thinking in matters of policy. And yet a critically informed genealogy of this process is lacking in the reconstruction of Indian legal history. So where does one turn for a more informed and definitive mapping?

P. V. Kane's monumental work the *History of Dharmaśāstras* has been deemed by scholars to be unhelpful on this problematic as also on the sorts of questions I have been addressing in this paper.[48] Rajeev Dhavan complains that Kane's gigantic work failed to develop sociological insights into the development of Hindu law and questions his motive of wishing to raise the stakes of classical India's jurisprudence on a par with that of any system that may bear comparison.[49] But to his immense credit, Kane has provided an unsurpassable compendia of the wide-ranging textual tapestry, records of codification and the internal (inter-textual as well) *śāstric* reasoning and disputes that informed the moral, social and juridical reiteration of the extant normative structures of the society of those times. The *śāstras* were making every attempt to hold together an otherwise self-regulating social order that periodically came under threat of fissure and challenges due to its sheer diversity and changes that historians are only too well aware of. Kane looks, albeit uncritically, for sanguine intentions in the *śāstras* and their defined purpose of bringing happiness to the members of the society who submit to the governance of their edicts and regulative norms.

Likewise, underscoring the 'purposive approach' as against the 'literal approach' (in modern jurisprudence), A. M. Bhattacharjee suggests that the *dharmaśāstras* realised that unless one performs one's duties there can be no protection for corresponding rights vested in another; thus if everyone performs his rightful obligations, 'the rights of everyone else would also be secured thereby and that without any acrimony of friction.'[50]

For all its apparent effort to distance itself from the overwhelming religious and ritual imperatives of the earlier Vedic worldview, and instill a more juridical character to the rules, the collective spirit of the *dharmaśāstras* are never too far off from that soteriological and cosmic end to which the Scriptural tradition harkens back, time and again. The king likewise is all too conscious of the risk of committing sin or de-merit if he applies a rule improperly. Juridical consequences aside, the institution of marriage too is fraught with warnings about the dangers of slighting a god if one marries into a wrong or forbidden caste and fails to fulfil the obligations (ritual, family and social) incumbent upon the

45. Altekar, *State and Government*, 151–53.
46. *Ibid.*, 124.
47. *Ibid.*, 123.
48. P. V. Kane, *History of Dharmaśāstra*, 5v. (Poona: Bhandarkar Oriental Institut, 1962–1996), 3: 21–26, 51.
49. Rajeev Dhavan, 'Dharmasastra and Modern Indian Society: A Preliminary Exploration', *Journal of the Indian Law Institute* 34, no. 4 (1992): 518.
50. Bhattacharjee, *Hindu Law*, 6.

householder. If the regulation is 'sacred' in its originary character, then the law expressed by that rule is *vyāvahākarika* (worldly, profane) only in a derivative sense.

So this leads even one such as Lingat who tried to anchor the origins of Hindu law in the (*dharma-*)*śāstras* to pause and wonder 'in what measure the rules of law, which we meet in the *dharma-śāstras*—presuming that they do really belong to *dharma*—actually express juridical solutions[?]. They are enunciated in order that spiritual merit may be gained or secured. It is unquestionably a religious duty to conform to them, and in this respect they are certainly amongst the origins of law.' Given that legal sources would comprise, at the least, codified rules, legislation, precedent, custom and agreement or equity, this then is the critical question:

> But what is their [the *śāstras*] exact significance? Are they the direct sources of law (*fons juris*), i.e., have they quality of legislation, the authority of which bears directly upon the judge? Or are they sources of law only in the sense that religion and morality and prudence are amongst the sources of law in Europe—that is, have they managed to exert an influence upon the law development of social institutions as an historical or explanatory cause of law rather than a true *source*?[51]

Lingat does not really provide a decisive answer to his own quandary. For a somewhat different perspective or approach to this question it is time to turn elsewhere. First, a qualification from A. M. Bhattacharjee may pave the way for this direction. Bhattacharjee rejects the views of Mayne, Mulla, Derrett and others and argues instead that well before the arrival of the British in India

> . . . the *Śrutis* and the *Smṛtis* ceased to be the principal sources of Hindu Law having been replaced by the *Nibandha*, i.e. the Commentaries and Digests[,] and it was not at all necessary or even permissible to enquire as to whether a particular principle of law enunciated in the *Nibandha* was in fact supported by the *Smṛtis* and it was binding without their support and even in spite of their contrary mandate.[52]

Hence, Bhattacharjee sets aside the *lex scripta* of *smṛti* also as a viable source, or even one amongst the sources, of Hindu law. But whether he is right in turning our gaze almost exclusively toward the *nibandhas* may itself be open to question, for the bulk of evidence that Bhattacharjee brings to his own contentions is based on the proceedings of the Privy Council, from as far back as 1868, where the judges deferred to the Commentaries (most especially the Mitākṣarā) prevalent in a particular province as the authority that has been given due recognition and not any other texts.[53] Nevertheless, what is common to both the *smṛti* texts and the *nibhandas* or Commentaries and Digests is that they are records of usages and customs commonly accepted by the people. While *smṛti* recorded these as imperative precepts without elucidating reasons for their justification (except for the desirable practices of more recent origin which awaited acceptance by society), the *smṛtikāras* (commentators on *smṛti*) and the *nibandhas* (Digests) are more forthcoming in explaining, consolidating, modifying and even enlarging their rules in actual usage and customs then prevalent among the different groups, often with utter disregard for the totalising rules in the *smṛti* itself.[54] This is tension that has inflected itself to the present-day debate on the basis of the authority of personal law and the codification of Hindu law in the statutory Acts of 1955–56.

Menski's Forays

Menski begins by rejecting three suppositions that have bedeviled much of modern scholarship on the question of Hindu law. First of these is that ancient Indians did not have anything that we would nowadays recognise as 'law'. For if indeed all human societies have law, 'why should ancient Hindus be any different?'[55] This retort may not cut much ice. H. L. A. Hart (whose lectures the present author

51. Lingat, *Classical Law*, 136.
52. Bhattacharjee, *Hindu Law*, 13.
53. Menski takes up Paras Diwan and Peeyushi Diwan [*Modern Hindu Law: Codified and Uncodified*, 9th edn (Allahabad: Allahabad Law Agency, 1993), 39] and Satyajeet A. Desai [*Mulla's Principles*, 59] for exactly the same over-determination. Menski, *Hindu Law*, 147.
54. Derrett also notes this; cited in Bhattacharjee, *Hindu Law*, 36.
55. Werner F. Menski, *Hindu Law: Beyond Tradition and Modernity* (New Delhi: Oxford University Press, 2003), 43.

once had the privilege of attending at a law school) for one might relegate Hindu law under the rubric of those 'primitive societies' whose 'laws' or customary ways bear no comparison to either the natural law tradition or positive law as it has evolved in the past few centuries in the modern West.[56] Nevertheless, Menski questions, on the one hand, the classical positivist theories and Austinian notions of formalistic, state-made 'rule of law' (or positive law as command of the sovereign) or Western 'model jurisprudence', as the only ways to conceive of *law*, and on the other hand what he calls 'the loaded assumption of the basic "revelation" of Hindu law from some divine authority.'[57] His simple answer is that 'the ancient Hindus conceived of law differently from Western cultures.' Hindu law for him 'represents a culture-specific form of natural law. In that sense, too, it is an ancient chthonic legal system.'[58] Menski's strategy is to underscore the traditional relativity of *dharma*—what scholars find in the notion of *adhikāra-bheda*[59]—and its constant emphasis on situational specificity, which allows for difference in accordance with circumstances. To that end he dismisses the representation of Hindu law by fundamentalist *Hindutva* types and by Orientalists who believe that, for example, Manu had the last word on Hindu law! Rather, he argues that Hindu law is a branch of *dharma* but that its contours cannot be reconstructed from mere textual sources, much less the *śruti* and *smṛti*s.[60] This was the mistake made by European Orientalist scholars and an emerging literate Hindu elite, who, while welcoming the recognition of their moral system as embedding a 'legal' process, were blinded by the equation of *dharma* with law, which in fact 'secularised the understanding of Hindu legal processes and marginalised the inherent link of all individual actions with the "cosmic" system of righteousness as the ultimate arbiter of what was "the right thing to do" at any given moment.'[61] (Menski is referring to the *ṛta/dharma* complex embodied in the concept of the macrocosmic order as the 'the higher power' and therefore the foreground for any discourse to ensue on human ends and positive human rule making.) The British administrators and judges missed seeing the connection and thus exacerbated this process in the reconstruction of Anglo–Hindu law.

The story that Menski provides is a rather complicated, and in some ways convoluted, one, as it moves through various stages, each stage accounting for the peculiarity of its handling and development of Hindu law as it shuttles through the lanes and by-ways of history. While rejecting the prominent view that we began with—which all too readily locates the source of Hindu law in *śruti, smṛ ti* and *sadācāra*—he takes as his own starting point for pre-classical law the Vedic concept (though not necessarily the written word) of cosmic order (*ṛta*) which metamorphosed into *dharma* (microcosmic order or duty). Similarly, when he turns attention to the next phase of the development of Hindu law—the classical period which is marked by the *dharmaśāstras*, or *smṛti* more generally (along with the commentaries and digests)—he is less interested in what the texts have to say than in the broader anthropology of the differently nuanced and lived realities and people's customs and local ways of doing things that enabled Hindus to negotiate, modify and retain control over their religious, moral and legal processes. The four stages of development within 'traditional' Hindu law is summarised by Menski in his own words, starting from the macrocosmic universal order system (*ṛta*) of the pre-classical Vedic age:

> This gradually metamorphosed (but we do not quite know when) into properly 'classical' Hindu law, the idealised system of self-controlled order (dharma), focused on microcosmic order and encompassing every Hindu individual. Third, because of the admitted limits of self-controlled order, we soon find the deterrence-based stage of punishment (*daṇḍa*), which is a typically Hindu form of 'assisted self-control,' still relying on the individual's sense of *dharma*, but now explicitly recognizing that some external pressure is necessary to

56. H. L. A. Hart, *The Concept of Law* (Oxford University Press, 1961), 20.
57. Menski, *Hindu Law*, 44.
58. *Ibid.* Menski rejects all theological definitions that dwell on the law being something revealed, presumably including the Mīmāṃsā qualification of authorless revelation. Note 18 on page 43 seems to suggest this qualification.
59. This doctrine within orthodox Hinduism gives recognition to differences, eligibility appropriate to an individual's and group's identity and constitution, as well as capabilities and preferences that are marked for fulfilment. It applies at all levels: spiritual, social, political, educational, and in the administration of rights, duties and justice.
60. Menski, *Hindu Law*, 73.
61. *Ibid.*, 75.

> ensure that cosmic order is being maintained as much as possible. Here we find evidence of greater importance given to the Hindu ruler (*rāja*) who operates at various levels, from head of family to clan chief, village head, and real King. Fourth, the more or less formal methods of negotiation or dispute processing (*vyavahāra*) should also be counted as a separate stage of Hindu legal development now recognizing the scope for formal settlement of contested matters, which may culminate in a royal pronouncement as some kind of final word. A Hindu royal edict does not represent positive law, but constitutes a visible manifestation of the superiority of the *ṛta*/dharma complex, according to which the Hindu ruler is supposed to position himself and his activities.[62]

If there are texts that are aligned to these shifts and changes, and present accounts of the same rather than deviate into some abstractions of their own (possibly for elite consumption), then Menski is all too happy to consider their wisdom, as when he turns to a claim made by some scholars that the *Mitākṣarā* (probably the most extensive commentary on the *Yājñavalkyasmṛti*) marks the fountainhead of the secularisation of Hindu law.

Summing up this discussion of ancient Hindu law, when all is said and done, the *śāstras* have not been able to survive, sustain and flourish as anchoring Hindu law *simpliciter* in as authoritative a manner as believed, and certainly not effectively into the modern century, as indeed the turmoil experienced in the area of family law since 1955 manifests.[63] The unreformed Hindu law has proved resistant to change in the area least imagined, not unlike Islamic and Jewish law. The nineteenth century evinced some remnants of *śāstric* law in penal and contract laws, but not as effectively applied in respect of civil law, and the courts experienced difficulties in discerning the correct rules and application of *śāstric* codes. In their quest for uniformity and certainty the British administrators gave vent to the *śāstrīs* (especially of Bengal) to re-fashion the formerly (per)suasive authority as self-consciously normative and positive law of the Hindus. But in effect, as time would tell, it wasn't so much that Hindu law was being restructured, but rather that aspects of modern law that were considered germane to a civil society, such as (for our purposes) family law, were being reformulated along traditional Hindu lines: there lies the difference. That dialectic and the tensions therein is neither a curse nor a gift of the modern (or postmodern), as Derrett, cited approvingly by Menski, points out:

> In tackling Hindu law the first thing to remember is the tension between the past and present, the desire to be traditional and the desire to be up-to-date. It is too readily forgotten that the tensions to which we allude were present centuries ago, though not always in the same form, and the conflict between 'foreign' manners and ancient ways is endemic in India and has been going on since the Vedic age. Far too few critics of the present order realise that their ancestors were engaged in corresponding if not actually similar complaints centuries ago.[64]

Hence, again in Derrett's astute words, '[H]istorians of law are at a disadvantage in that neither the *smṛtis*, nor digests or commentaries, undertake to give a full picture of law-in-action, since their work—as that of Kane's—is devoid of anthropological or sociological awareness.'[65] Hindu law is then a textualised form of customary law, dispensed by religious elders in interaction with royal rulers, from what have earlier been established customs in that society, built up through precedents, digests of rulings and intellectual re-workings, such as those of Kauṭilya and to an extent Manu. This is not unlike the common law tradition that developed over a number of centuries in Britain, which is one reason why the British legates in the nineteenth century could recognise elements of their own system of law in Hindu law, but were overwhelmed by the diversity of practices—customs as well as jurisprudence—and representations across Hindu society in the subcontinent.

Nevertheless, a Mīmāṃsaka cannot fully countenance the suggestion that Indian jurisprudence itself, particularly during the medieval period, had no deep connections with the textual or scholastic tradition. The Mīmāṃsā has had a long history of influence precisely via its interpretative intervention—for this is the reasoning skill the Mīmāṃsakas brought from their ritual hermeneutics to resolve apparently

62. *Ibid.*, 81.
63. J. D. M. Derrett makes this observation in *Dharmaśāstras and Juridical Literature* (Wiesbaden: Otto Harrossowitz, 1973), 7.
64. Menski, *Hindu Law*, 63, from J. D. M. Derrett, *A Critique of Modern Hindu Law* (Bombay: N. M. Tripathi, 1970), 1.
65. Derrett, *Dharmaśāstra*, 63–64.

conflicting injunctions or other textual prescription on the performance of *yajñas* or sacrifices.[66] Their source is mostly the Brāhmaṇas. Scholastic forays have therefore always inflected themselves in what could be regarded as the domain of customary law. In a similar vein, the jurisprudence of Dharmaśāstra recognises that all rules of dharma, at the more abstract level, are derived from the Vedas; however, in the more practical context another discourse adverting to 'the related concepts of *ācāra*, *caritra*, *maryādā*, *samaya*, *saṁvid*, etc. all referring to rules of a particular locality, community, merchant group, etc.,' come into focus.[67] Donald R. Davis, Jr, demonstrates through the use of the concept of *paribhāṣā*, technical or supplementary law that reflects and shapes the discourses (including the 'meta-discourse' of the Dharmaśāstra) and 'actual practices of community or group rules in great variety of local contexts.'[68] These conventional rules refine rather than revise rules of the *śāstra*: they specify how primary rules of Dharmaśāstra will or will not apply to a particular group's legal affairs; and they provide a device by means of which two rules of recognition can be legally reconciled, even as they continue to function in largely separate domains.[69] Through a long and complicated analysis that involves recourse to medieval (including South Indian digests of Dharmaśāstra, such as *Smr̥ticandrika* (SC) of Devannabhaṭṭa), contemporaneous inscriptional and epigraphical sources and commentaries, Davis develops what he calls a 'realist theory of Hindu law', which exudes strong elements of positive law (in H. L. A. Hart's non-Austinian sense) precisely through the *pāribhāṣic*-explanatory gloss, or reconciliatory stratagem, on legislated dharma[70] (where conflict between rules might arise, or conventions are violated, or the *śāstras* remain silent) that cumulates towards Hindu jurisprudence, and which is also mitigated by the prevailing discourses of theology, philosophy and politics even as the winds of change sweep through social and political realities. In another forceful submission, lamenting that the 'legal side of Hindu *dharma* has been lost' (which echoes my own lament in regard to the legal-jurisprudential side of the Mīmāṃsā), Davis has gone as far as to suggest that Hinduism at large could be viewed as 'a Legal Tradition'; that its theology (perhaps we might correct this to 'metaphysic') lends itself in more ways than one to the extraction of a robust legal ideology.[71] Of course, some of us have been deeply concerned to free perceptions of Hinduism as a religion overlaid with rituals, mythologies, sexo-tantric indulgences and other remnants of Orientalist biases, and argue instead for its deeply ethical or moral philosophical basis (as those familiar with the project *Indian Ethics: Classical and Contemporary Challenges* would be aware[72]). Law and ethics are intricately connected, as in Islamic Law—and Davis has indeed acknowledged as much:

> A relationship of connection and semantic concomitance exists between *dharma* and law, and not merely a relationship of encompassment, in which *dharma* equals law plus religion plus morality, each of the subcategories isolatable from the other. In this way, law is not merely an isolatable subset of *dharma* in *Dharmaśāstra*, but rather an integral and essential part of all dharma, even when part of the point of invoking *dharma* is to remake it along new theological lines.[73]

66. See Ganganath Jha, *Pūrva Mīmāṃsā in Its Sources* (Varanasi: Banaras Hindu University, 1964), chapter 33; Markandeya Katju, *Mimamsa Rules of Interpretation* (Allahabad: Modern Law Books, 2008), which is a reworking of Kishor Lal Sarkar, *The Mīmāṃsā Rules of Interpretation* (1909). Justice Katju with Justice H. K. Sema on the Supreme Court Bench as recently as March 2008 invoked the *guṇapradhāna* axiom of the Mīmāṃsā in a case involving a conflict between two legislations applicable to a modern industrial situation and the disputation thereto brought before the court. *The Indian Express*, 14 March 2008.

67. Donald R Davis, Jr, 'Intermediate Realms of Law: Corporate Groups and Rulers in Medieval India', *Journal of the Economic and Social History of the Orient* 48, no. 1 (2005): 92–117, 98.

68. *Ibid.*, 99; 'meta-discourse' is taken from Olivelle, 'The Semantic History of Dharma'.

69. Davis, 'Intermediate Realms', 99.

70. This is not to accord preeminence to the functionally autonomous power of legislations, though Davis is quite partial to the legislative power of Hindu kings over and above the administrative governance via royal decrees and directives (*rajasasana*).

71. Donald R. Davis, Jr. acknowledges the 'Mīmāṃsā rhetoric' on a par with Dharmaśāstra rhetoric as 'the legal rhetoric', around the concept of *dharma*, providing as it did the hermeneutic rules for proper interpretation of the Vedas, that compare to legal reasoning: 'Hinduism as a Legal Tradition', *Journal of the American Academy of Religion* 75, no. 2 (June 2007): 254–55. See also Bilimoria, '*Being and Text*'.

72. Bilimoria, Sharma and Prabhu, eds, *Indian Ethics, Vol. 1: Classical and Contemporary Challenge.*

73. Davis, 'Hinduism as a Legal Tradition', 244.

Davis, unlike his Indological counterparts, comes to his own novel theory not from a scholarly concern as such with Dharmaśāstra texts specializing in a scholarly theology as from his substantive quest for a concept of Hindu law in or through the texts.[74]

So our respective projects could be seen as complementary rather than at odds; either way, the immense intellectual fabric of the Hindu tradition, and its intermingling discourses of morality and prudence and ethics that finds a common denominator or connecting link in the limit concept of *dharma*, represented in the texts from the Upaniṣads to Yājñavalkyasmṛti to various redactions in the Dharmaśāstras, cannot be more forcefully underscored. On the legal side, Davis approaches the thesis he puts forward through a deep exploration of the scholastic nuances of *dharma*, which he argues yields—besides its earlier ritualistic rules (*vidhi, codanā*)—empirical sources for rules that differentiate ordinary acts (*karma*) from legal acts (*karaṇatva, itikartavyatā*), and the 'means for effecting' the same (*kārakahetu*). And this is the argument:

> The concern for correct or proper procedure also takes into account the inevitability of mistakes, intentional or not, that might nullify a mortgage, unfairly distribute an inheritance, or make an ancestral rite ineffective. *Dharma* in Dharmaśāstra provides for both punishment (*daṇḍa*) and penances (*prāyaścitta*) that ameliorate or rectify legal mistakes or transgressions. Punishment and penance, although conceptually distinct, nevertheless overlap in, for example, descriptions of thieves begging rulers for punishment (as a form of penance) or judges declaring both a punishment and a penance for adultery (Jolly 1928: 263–267).[75]

Davis' is a refreshingly new voice in the debate and I believe, until shown otherwise by critics, it is rather more persuasive than any of the views considered above, and it supplements—some significant qualifications notwithstanding and incorporation of certain of Derrett, Lingat and Menski's invaluable insights—the position towards which I have been moving in this paper, which I summarise now.

Pivotal to the emergence of a new theory of Hindu law is a careful review of methodological shifts in approaching the Dharmaśāstra texts and the historiography of law in India; *pari pasu* this desiderata can be extended to and applied to the whole debate over the textual sources versus non-textual residually local customs and practices as the basis of Hindu law. The emergent theory eschews the historiography of law that relies heavily, on the one hand, on technical, often overly legalistic, readings of Dharmaśāstra and, on the other hand, on supposed village customs bequeathed for court records by British officials during the late nineteenth and early twentieth centuries. There is a middle or intermediate ground that remains unexamined in the study of Hindu law, but for the passing acknowledgements of the validity of rules governing corporate associations in the Dharmaśāstra. What the corporate conventions in the *Smṛticandrika* provide are a standardised digest of śāstric ideas regarding this title of law. But a further argument can be made that in medieval India the rules of Dharmaśāstra influenced levels of law from the regional and community-based conventions to special localised standards.

However, the task of teasing out the various levels is hampered by the lack of adequate historical data and deficiencies in the available materials for study. Nevertheless, invoking a phrase introduced in this discourse by Olivelle,[76] Dharmaśāstra could be said to be a 'meta-discourse' (what Derrida elsewhere has called the 'meta-narrative' of the Force of Law). While the Dharmaśāstras contain some legal codes, they are nowhere near what we in modern times understand as 'legislations' or legalistic regulative statutes or episteme of substantive law; rather the *śāstras* are predominantly manuals utilised in the training on the operative dimensions of legal discourse, and in the dissemination of helpful resources or what Davis terms 'theologically motivated jurisprudence'.[77] As we have observed in the various critiques offered in this paper, *dharma* was understood as substantive law when it relied for its sources on local culture (certain preeminent customary practices), alongside the normative ethos of

74. Donald R. Davis, Jr, 'Recovering the Indigenous Legal Traditions of India: Classical Hindu Law in Practice in Late Medieval Kerala', *Journal of Indian Philosophy* 27 (1999): 159–213.

75. Davis, 'Hinduism as a Legal Tradition', 245.

76. Olivelle, 'The Semantic History of Dharma'.

77. Davis, 'Recovering the Indigenous Legal Traditions of India', 197–99. Similarly in Richard W. Lariviere, 'Dharmaśāstra, Custom, 'Real Law' and 'Apocryphal' Smṛtis', in *Recht, Staat und Verwaltung im klassischen Indien = The State, the Law, and Administration in Classical India*, ed. Bernhard Kölver (Munich: R. Oldenbourg, 1997), 97–110, 109.

good people (*sadācārā*) and the voice of conscience of Dasein (authentic personal being), rather than on some transcendent Divine Being (*atmatuṣṭi*).

Generally speaking, Hindu law is the personal law applying to the great majority of the population and constituting the main juridical product of Indian civilization. The word Hindu does not imply a strict religious orthodoxy and is more ethnic than creedal in its emphasis. Nevertheless, since independence India has aimed at abolishing the personal laws in favour of a civil code (constitution, article 44), which would unify, as far as practicable, the diverse Hindu schools and customs applicable to the various communities. Modern Hindu law is the creation of the Hindu Marriage Act (1955), and (i) Dharma (ii) Sources of Hindu Law or Dharma (iii) Dharmashastra 3. Anglo-Hindu Law (i) The First Phase (1772-1864) (ii) The Secon Phase (1864-1947) 4. Modern Hindu Law 5. Islamic Law 6. Excerice 7. Activity 8. References. Chapter 2: Administration of Justice in British India. 1. Establishment of Mayor's Courts 2. Regulating Act of 1773.Â This section begins with the idea of Hindu law and traces its origin through the ancient legal literature. The section also describes the evolution of Hindu law during the British rule as well as the modern times, to conceptualize ancient Indian law in relation with modern law. Islamic law became relevant in India only during the medieval period or the middle ages, especially with the advent of the Mughal Empire in the mid-16th century CE. Unfortunately, Hindu law studies have, by and large, been confined to listing the differences and striving to establish that Hindu law is just as sophisticated as any other legal system. Delving deep into the history of Hindu religious traditions has not been a fashionable venture with scholars. By way of explanation, Davis says that â€œthe need to know the details of Hindu law for the sake of a â€˜non-intrusive' colonial administration has put us in the habit of only learning about Hindu law, and not from itâ€. His effort, therefore, has been to know the Hindu thinking on law by looking at th Does Daughter inherit under Hindu law? Now the answer depends on the definition of inheritance. now if we look at the widely used definition then the inheritance is; Inheritance is the practice of passing on private property, titles, debts, rights, and obligations upon the death of an individual. Now, according to this definition, yes daughters get the property of their father but with some condition. The first condition is daughter shall not get the property if there is any person before me according to the list. that means if there any person from order 1 to order 4A daughter/s shall not get Hindu law so understand in modern times s surely an heir of the bifurcated system instigated during the British colonial period in the form of Anglo-Hindu law that preserved basically family law and certain other â€˜privateâ€™, i.e. community mores that presumably governed the Hindus. Was there any awareness on the part of the colonial masters that the parent law from which personal law of the Hindus had been split off could have had a longer and more substantive history? Apparently there was.Â confined to gaining an understanding of what this idea of Hindu law might look like today and whether it is deserving of the descriptor â€˜lawâ€™ as law is understood in modern and postmodern era. Discover the world's research. 17+ million members.